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[1] From December 2, 1997.

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COURT OF APPEALS CASES

MICHIGAN STATE AFL-CIO v SECRETARY OF STATE

Docket Nos. 206522, 206620. Submitted March 3, 1998, at Lansing. Decided May 22, 1998, at 9:10 A.M.

Michigan State AFL-CIO and its president, Franklin D. Garrison, brought an action in the Ingham Circuit Court against the Secretary of State, seeking declaratory and injunctive relief against the enforcement of a declaratory ruling and interpretative statement issued by the Secretary of State relative to what constitutes annual affirmative consent by a contributor under § 55(6) of the Michigan Campaign Finance Act (MCFA), MCL 169.255(6); MSA 4.1703(55)(6). Section 55(6) provides that certain entities, including labor organizations, may solicit or obtain contributions for a separate segregated fund on an automatic basis, including a payroll deduction plan, if the individuals who contribute affirmatively consent to their contribution at least once in every calendar year. The Secretary of State's declaratory ruling and interpretative statement, issued in response to a request by the Michigan Chamber of Commerce, provided that an affirmative consent must be in writing and signed by the contributor and that such consent remains effective until December 31 of the year in which it is given. The court, William E. Collette, J., allowed the Michigan Chamber of Commerce to intervene as a defendant, allowed the Michigan Education Association to intervene as a plaintiff, and preliminarily enjoined the Secretary of State from applying her declaratory ruling and interpretative statement to the Michigan State AFL-CIO, its political committee, its affiliated organizations, and their political committees. The court noted that the express language of § 55(6) did not include either a signed writing or a December 31 expiration requirement and that annual affirmative consent requirements have to be promulgated as a rule under the Administrative Procedures Act (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*

The Secretary of State adopted emergency rules pursuant to § 48 of the APA to mandate the same requirements that were preliminarily enjoined. The plaintiffs moved for a preliminary injunction against the enforcement of the emergency rules. The court granted the requested preliminary injunction, determining that no emergency had existed, that the emergency rules were not supported by the express language of § 55(6), that the plaintiffs would be irrepa-

rably harmed if the injunction was not issued, that issuing the injunction would maintain the status quo and thus would not cause harm to the Secretary of State, and that the injunction was in the public interest. The Secretary of State and the Chamber of Commerce appealed by leave granted, and their appeals were consolidated.

The Court of Appeals *held*:

The trial court did not abuse its discretion in preliminarily enjoining the enforcement of the emergency rules.

1. The emergency rules are presumptively valid inasmuch as they are within the subject matter of the MCFA, they comply with the legislative intent underlying the MCFA, and they are not arbitrary or capricious. The trial court therefore misjudged the strength of the plaintiffs' demonstration that they are likely to prevail on the merits of their claim for declaratory relief that the emergency rules are substantively invalid. However, if and when this matter comes to trial, the actual determination of this claim is for the trial court in the first instance.

2. The emergency rules are procedurally invalid. The basis for the finding of emergency was the trial court's injunction against enforcement of the declaratory ruling and interpretative statement. However, because that injunction applied to enforcement against Michigan State AFL-CIO and its affiliates only, the welfare of the public at large was unaffected. No emergency affecting the public existed, inasmuch as the Secretary of State remained free to enforce its declaratory ruling and interpretative statement against other organizations.

Affirmed.

O'CONNELL, J., concurring in part and dissenting in part, agreed with the majority's conclusions that the plaintiffs will not prevail on the merits of their claim and that the emergency rules are substantively valid, but disagreed with the majority's conclusion that the emergency rules are procedurally invalid for lack of the requisite emergency. The Legislature delegated the power to determine that an emergency exists for purposes of § 48 of the APA to the Governor and inferior executive officers, and the constitutional doctrine of separation of powers precludes the judiciary from overseeing or second-guessing such finding of emergency. Moreover, the plaintiffs' action should have been dismissed on the basis of their failure to exhaust administrative remedies afforded by the MCFA.

1. INJUNCTIONS — PRELIMINARY INJUNCTIONS.

A court, in determining whether to issue a preliminary injunction, must consider harm to the public interest if the injunction issues,

whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted, the likelihood that the applicant will prevail on the merits, and a demonstration that the applicant will suffer irreparable injury if the relief is not granted; other considerations are whether a preliminary injunction will preserve the status quo so that a final hearing can be held without either party having been injured and whether it will grant one of the parties final relief before a hearing on the merits; the court's decision must not be arbitrary and must be based on the facts of the particular case.

2. ADMINISTRATIVE LAW — ADMINISTRATIVE PROCEDURES ACT — EMERGENCY RULES.

Emergency rules adopted by an administrative agency in accordance with the Administrative Procedures Act are legislative rules that have the force and effect of law (MCL 24.248; MSA 3.560[148]).

3. ADMINISTRATIVE LAW — RULES — SUBSTANTIVE VALIDITY.

The validity of a rule adopted by an administrative agency is determined by a three-part test: whether the rule is within the subject matter of the enabling statute; whether it complies with the legislative intent underlying the enabling statute; and whether it is arbitrary or capricious (MCL 24.201 *et seq.*; MSA 3.560[101] *et seq.*).

4. ADMINISTRATIVE LAW — EMERGENCY RULES.

An emergency rule must satisfy three conditions: the agency adopting the rule has to find that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice-and-participation procedures required by §§ 41 and 42 of the Administrative Procedures Act; the agency must state in the rule the reasons for its finding of emergency, and the Governor must concur in the finding of emergency (MCL 24.248[1]; MSA 3.560[148][1]).

5. ADMINISTRATIVE LAW — EMERGENCY RULES — PRESERVATION OF PUBLIC WELFARE.

"Public welfare," for purposes of the adoption under the Administrative Procedures Act of an emergency rule deemed necessary for the preservation of public welfare, means the prosperity, well-being, or convenience of the public at large, or of a whole community, as distinguished from the advantage of an individual or limited class (MCL 24.248; MSA 3.560[148]).

Sachs, Waldman, O'Hare, Helveston, Bogas & McIntosh, P.C. (by *Andrew Nickelhoff*), for Michigan State AFL-CIO and Franklin D. Garrison.

White, Przybylowicz, Schneider & Baird, P.C. (by *Thomas A. Baird*), for Michigan Education Association.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Gary P. Gordon* and *Katherine C. Galvin*, Assistant Attorneys General, for Secretary of State.

Honigman Miller Schwartz and Cohn (by *John D. Pirich* and *Timothy Sawyer Knowlton*), for Michigan Chamber of Commerce.

Before: MCDONALD, P.J., and O'CONNELL and SMOLENSKI, JJ.

SMOLENSKI, J. In these consolidated interlocutory appeals, defendant Secretary of State and intervening defendant Michigan Chamber of Commerce appeal by leave granted a September 24, 1997, preliminary injunction enjoining the secretary from enforcing emergency rules. We affirm.

This case concerns a preenforcement challenge to the validity of emergency rules promulgated by the secretary. This case arises out of the secretary's efforts to implement the annual affirmative consent requirement contained in § 55(6) of the Michigan Campaign Finance Act (MCFA), MCL 169.201 *et seq.*; MSA 4.1703(1) *et seq.* Specifically, § 55(6) provides that certain entities, including labor organizations, may solicit or obtain contributions for a separate segregated fund on an automatic basis, including a payroll deduction plan, "only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year." See

MCL 169.255(6); MSA 4.1703(55)(6).[1] A person who knowingly violates § 55(6) is guilty of a felony punishable by either a fine or up to three years' imprisonment. MCL 169.255(7); MSA 4.1703(55)(7).

The MCFA requires the secretary to "[p]romulgate rules and issue declaratory rulings[2] to implement this act" pursuant to the Administrative Procedures Act (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* See MCL 169.215(1)(e); MSA 4.1703(15)(1)(e). The MCFA also provides that when a person requests a declaratory ruling, the secretary "may issue an interpretative statement providing an informational response to the question presented." MCL 169.215(2); MSA 4.1703(15)(2). Finally, the MCFA provides that

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[1] Specifically, § 55(6) provides as follows:

> Contributions shall not be obtained for a separate segregated fund established under this section by use of coercion or physical force, by making a contribution a condition of employment or membership, or by using or threatening to use job discrimination or financial reprisals. A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization shall not solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection (2) , (3), (4), or (5) on an automatic or passive basis including but not limited to a payroll deduction plan or reverse checkoff method. A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization may solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection (2), (3), (4), or (5) on an automatic basis, including but not limited to a payroll deduction plan, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year. [MCL 169.255(6); MSA 4.1703(55)(6).]

[2] Unlike rules, "[a] declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court." MCL 24.263; MSA 3.560(163).

> [a] declaratory ruling or interpretative statement issued under this section shall not state a general rule of law, other than that which is stated in this act, until the general rule of law is promulgated by the secretary of state as a rule pursuant to the [APA], or pursuant to judicial order. [MCL 169.215(2); MSA 4.1703(15)(2).]

Ordinarily, agencies must follow the notice-and-participation rule-making procedures contained in the APA. *Blank v Dep't of Corrections*, 222 Mich App 385, 392; 564 NW2d 130 (1997). However, § 48 of the APA provides for the promulgation of emergency rules:

> (1) If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by sections 41 and 42 and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section 46 indorsed as an emergency rule, to 3 of which copies shall be attached the certificates prescribed by section 45 and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule. An emergency rule shall not be numbered and shall not be compiled in the Michigan administrative code, but shall be noted in the annual supplement to the code. The emergency rule shall be published in the Michigan register pursuant to section 8.
>
> (2) If the agency desires to promulgate an identical or similar rule with an effectiveness beyond the final effective date of an emergency rule, the agency shall comply with the procedures prescribed by this act for the processing of a

rule which is not an emergency rule. The rule shall be published in the Michigan register and in the code.

(3) The legislature by a concurrent resolution may rescind an emergency rule promulgated pursuant to this section. [MCL 24.248; MSA 3.560(148).]

In this case, the Chamber of Commerce, through its general counsel, Robert S. LaBrant, submitted to the secretary a request for a declaratory ruling and interpretative statement in April 1997.[3] The request for a declaratory ruling sought answers to questions concerning what constituted annual affirmative consent for purposes of § 55(6). The request for an interpreta-

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[3] The annual affirmative consent requirement was added by 1994 PA 117 and scheduled to take effect on April 1, 1995. However, because of proceedings in federal court, enforcement of the annual affirmative consent requirement was enjoined from March 31, 1995, until, as represented by the parties on appeal, May 19, 1997.

Specifically, on February 14, 1995, certain plaintiffs, including the instant plaintiffs Michigan State AFL-CIO and its president, Franklin D. Garrison, filed a complaint for declaratory and injunctive relief in federal district court against, among others, the secretary. See *Michigan State AFL-CIO v Miller*, 103 F3d 1240, 1244 (CA 6, 1997). The complaint contended that various sections of the MCFA, including the annual affirmative consent requirement, were unconstitutional. *Id.* at 1244, 1249-1253. On March 31, 1995, the district court issued an opinion holding that various sections of the MCFA were unconstitutional. *Id.* at 1244. In particular, the district court held that the annual affirmative consent requirement violated the First Amendment. *Id.* at 1253. The district court granted a preliminary injunction enjoining the enforcement of various sections of the MCFA, including the annual affirmative consent requirement. *Id.* at 1244. The secretary appealed the district court's grant of a preliminary injunction with respect to the annual affirmative consent requirement. *Id.* at 1244. On January 7, 1997, the federal appeals court reversed the district court's holding that the annual affirmative consent requirement violated the First Amendment and vacated the preliminary injunction to the extent that it enjoined the enforcement of this requirement. *Id.* at 1253. On March 19, 1997, the appeals court denied a rehearing. *Id.* at 1240. Although we find nothing in the record to support this contention, the parties on appeal represent that enforcement of the annual affirmative consent requirement was further enjoined until May 19, 1997, when the federal appeals court issued a mandate vacating the preliminary injunction.

tive statement sought answers to questions concerning the applicability of the annual affirmative consent requirement to certain contributions and elections.

On July, 11, 1997, the secretary issued the requested declaratory ruling and interpretative statement. The declaratory ruling outlined the secretary's interpretation of what constituted annual affirmative consent for purposes of § 55(6). In particular, the declaratory ruling provided that beginning July 20, 1997, affirmative consent was required to be evidenced by a writing signed by the contributor (the signed writing requirement) and would be effective only until the end of the calendar year for which it was given (the December 31 expiration requirement). On both July 11 and 14, 1997, the secretary issued memorandums summarizing how separate segregated funds obtaining contributions on an automatic basis, including payroll deduction plans, would be affected by the declaratory ruling.

On July 31, 1997, plaintiffs Michigan State AFL-CIO and its president, Franklin D. Garrison (collectively referred to as the union), filed a complaint in the Ingham Circuit Court against the secretary. The complaint contained three counts and was entitled "Verified Complaint For Declaratory Judgment And Injunction And/Or Petition For Review." In count one, the union asserted that the secretary's declaratory ruling concerning the requirements for annual affirmative consent, particularly the signed writing and December 31 expiration requirements, constituted "a general rule of law, other than that which is stated in the [MCFA]" and therefore was required by § 15(2) of the MCFA to be promulgated by the secretary as rules pursuant to the APA. The union requested that the circuit

court enter a declaratory judgment that the declaratory ruling and interpretative statement was "invalid and without effect." The union also sought preliminary and permanent injunctions enjoining the secretary from enforcing the declaratory ruling and interpretative statement against the political committees of the union and other labor organizations. In count two, the union sought judicial review of the declaratory ruling and interpretative statement for the reasons asserted in count one. Count two also requested declaratory and injunctive relief. Count three challenged certain actions taken by the secretary with respect to the affiliation requirements contained in § 52(10) of the MCFA, MCL 169.252(10); MSA 4.1703(52)(10).

On August 26, 1997, the chamber was permitted to intervene in this action as a defendant. Following oral argument on August 28, 1997, the circuit court issued a preliminary injunction that, in relevant part, enjoined the secretary from applying the declaratory ruling and interpretative statement to the "Plaintiff Michigan State AFL-CIO and its political committee and its affiliated organizations and their political committees." In so doing, the court noted that the express language of § 55(6) did not include either a signed writing or December 31 expiration requirement. The court also suggested that the secretary's interpretation of the annual affirmative consent requirements had to be promulgated as a rule under the APA.[4]

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[4] The secretary, on August 29, 1997, and the chamber, on September 3, 1997, applied for leave to appeal the August 28, 1997, preliminary injunction. This Court denied leave to appeal. *AFL-CIO v Secretary of State*, unpublished orders of the Court of Appeals, entered September 9, 1997 (Docket Nos. 205745, 205821).

That same day, the secretary filed the following emergency rules pursuant to § 48 of the APA:

FINDING OF EMERGENCY

Act No. 117 of the Public Acts of 1994 amended the Michigan campaign finance act, Act No. 388 of the Public Acts of 1976, as amended, being § 169.201 et seq. of the Michigan Compiled Laws, to prohibit corporations, joint stock companies, domestic dependent sovereign and labor organizations from soliciting or obtaining contributions for separate segregated funds from certain individuals on an automatic or passive basis including but not limited to payroll deductions or reverse checkoffs. The amendment permits contributions to be solicited or obtained on an automatic basis, including but not limited to payroll deductions, only if the contributing individual affirmatively consents to the contribution at least once in every calendar year.

In a declaratory ruling dated July 11, 1997, issued to Robert S. LaBrant, the secretary of state construed the Michigan campaign finance act to mean that the affirmative consent must be in writing and that the consent is effective only through December 31 of the year for which it is given.

In the case of *Michigan State AFL-CIO and Franklin D. Garrison v Candice Miller*, Case No. 97-86692 AZ, the Ingham county circuit court preliminarily enjoined the enforcement of the July 11, 1997 declaratory ruling because of the absence of administrative rules.

Therefore, the promulgation of administrative rules requiring written affirmative consent and establishing the effective length of that consent will eliminate this issue and will enable the policy of the state of Michigan, as embodied in Act No. 117 of the Public Acts of 1994, to be effectuated. The permanent rule-making process will take several months to complete. That delay could allow political contributions to be made in contravention of the current policy of the state of Michigan.

The governor has indicated that an injunction which frustrates state policy adversely affects the public welfare and justifies the promulgation of emergency rules under section 48 of Act No. 306 of the Public Acts of 1969, as amended,

being §24.248 of the Michigan Compiled Laws. The department of state finds that preservation of the public welfare requires the promulgation of these emergency rules.

Definitions.

Rule 1. (1) As used in these rules, "act" means Act No. 388 of the Public Acts of 1976, as amended being § 169.201 *et seq.* of the Michigan Compiled Laws.

(2) Unless the context requires otherwise, a term defined in the act has the same meaning when used in these rules.

Affirmative consent; effectiveness.

Rule 2. The affirmative consent required by section 55(6) of the act shall be effective only through December 31 of the year for which it is given.

Affirmative consent; form.

Rule 3. The affirmative consent required by section 55(6) of the act shall be given in writing in substantially the following form:

AFFIRMATIVE CONSENT TO POLITICAL CONTRIBUTION

Section 55(6) of the Michigan Campaign Finance Act provides that a corporation, a joint stock company, a domestic dependent sovereign, or a labor organization "may solicit or obtain contributions for a separate segregated fund established on an automatic basis, including but not limited to a payroll deduction plan, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year."

I, _____, authorize _____
First Name, Middle Name, Last Name, Name of Employer

to withhold $ _____ per: pay period/week/month from
Circle one

my earnings in order to make political contributions to _____.
Name of Committee

This consent is for calendar year [ ].

Signature: _____ Date: _____

On September 4, 1997, the union moved for a preliminary injunction to enjoin enforcement or applica-

tion of the emergency rules. The union argued that it was likely to prevail on the merits of its claim that the emergency rules were invalid, in part, because (1) no genuine emergency existed and the emergency rules were simply promulgated under § 48 of the APA in order to "evade and neutralize" the court's August 28, 1997, preliminary injunction, and (2) the signed writing and December 31 expiration rules exceeded the language and intent of the MCFA and were unreasonable, arbitrary, and unduly restrictive on political entities regulated by the MCFA. The union also contended that if a preliminary injunction were not issued, it would suffer irreparable injury, and that if a preliminary injunction were issued, the secretary would suffer no harm while the public interest would be served. In response, defendants contended that the emergency rules were valid.

Following oral argument on September 24, 1997, the trial court granted a preliminary injunction ordering the secretary,

> her officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, be and are hereby enjoined, pending further order of the Court, from applying, enforcing, publicizing or otherwise putting into effect the emergency rules promulgated on August 28, 1997.

In so doing, the court concluded that no emergency had existed. The court reasoned that the secretary had had "plenty of time" and "years" to promulgate rules pursuant to the general notice-and-participation procedures contained in the APA. When the secretary's counsel contended that the August 28, 1997, preliminary injunction—which enjoined the enforcement of

the declaratory ruling only with respect to the political committees of the union and its affiliated organizations but not the chamber or other entities—created an unequal enforcement scheme that constituted an emergency, the court expressed amazement that this argument could even be made where the secretary's counsel had participated in negotiating and drafting the August 28, 1997, preliminary injunction.

The court also concluded that the emergency rules, like the declaratory ruling, exceeded the statutory language contained in § 55(6) of the MCFA. The court reasoned that the union would be irreparably injured if a preliminary injunction did not issue in light of the criminal penalties for violation of § 55(6). The court reasoned that issuing a preliminary injunction would maintain the status quo and therefore cause the secretary no harm. Finally, the court reasoned that issuing a preliminary injunction was in the public interest.

On October 14, 1997, this Court entered orders granting defendants' applications for leave to appeal the September 24, 1997, preliminary injunction, denying defendants' motions for a stay of this preliminary injunction, and consolidating defendants' appeals. On November 17, 1997, the union filed a first supplemental complaint pursuant to a stipulation of the parties. The supplemental complaint reiterated the original complaint's first three counts and added a fourth count that challenged the validity of the secretary's emergency rules and requested declaratory and injunctive relief.

On appeal, the secretary and the chamber contend that the trial court erred in granting the Union's request to preliminarily enjoin enforcement of the emergency rules.

As explained in *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998):

> In determining whether to issue a preliminary injunction, a court must consider four factors: (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. Other considerations surrounding the issuance of a preliminary injunction are whether it will preserve the status quo so that a final hearing can be held without either party having been injured and whether it will grant one of the parties final relief prior to a hearing on the merits. The trial court's decision must not be arbitrary and must be based on the facts of the particular case. [Citations omitted.]

A trial court's decision to grant injunctive relief is reviewed under an abuse of discretion standard.

The secretary and the chamber primarily challenge the trial court's determination with regard to factor 3. They contend that the trial court erred in determining that the union is likely to prevail on the merits of its claim for declaratory relief that the emergency rules are invalid. We initially note that the parties disagree concerning the legal status of the emergency rules. The secretary and the chamber contend that the emergency rules are legislative rules that have the force and effect of law. See *Clonlara v State Bd of Ed*, 442 Mich 230, 239-240; 501 NW2d 88 (1993). The union contends that the emergency rules are simply nonbinding interpretative rules. *Id.* We agree with the secretary and the chamber. The MCFA requires the secretary to promulgate rules pursuant to the APA. Rules adopted by an agency in accordance with the APA are

legislative rules that have the force and effect of law. *Clonlara, supra.* In this case, the secretary adopted the emergency rules pursuant to § 48 of the APA. We conclude that the emergency rules are legislative rules that, if valid, have the force and effect of law.

The applicable test for determining the substantive validity of an agency's legislative rules is as follows:

> "Where as here, an agency is empowered to make rules, the validity of those rules is to be determined by a three-part test: (1) whether the rule is within the subject matter of the enabling statute; (2) whether it complies with the legislative intent underlying the enabling statute; and (3) whether it is arbitrary or capricious." [*Blank, supra* at 406, quoting *Dykstra v Dep't of Natural Resources*, 198 Mich App 482, 484; 499 NW2d 367 (1993), citing *Luttrell v Dep't of Corrections*, 421 Mich 93, 100; 365 NW2d 74 (1984).]

In *Thomas Bros, Inc v Secretary of State*, 90 Mich App 179, 185-186; 282 NW2d 273 (1979), after remand 107 Mich App 805; 310 NW2d 249 (1984), this Court utilized the three-part test stated in *Blank* to determine the substantive validity of emergency rules.

In this case, the enabling statute, § 15(1)(e) of the MCFA, specifically requires the secretary to promulgate rules under the APA for the purpose of implementing the MCFA. See MCL 169.215(1)(e); MSA 4.1703(15)(1)(e). The MCFA regulates campaign financing and contributions, including contributions to separate segregated funds and the manner in which certain entities can obtain automatic contributions for such funds. See, e.g., MCL 169.252; MSA 4.1703(52) and MCL 169.255; MSA 4.1703(55). The MCFA also contains reporting requirements and requires the secretary to develop a system for filing such reports. See, e.g., MCL 169.215(1)(b); MSA 4.1703(15)(1)(b) and

MCL 169.224; MSA 4.1703(24). It thus appears that the secretary's emergency rules are within the subject matter covered by the enabling statute.

Second, the rules must comply with the legislative intent underlying the enabling statute. In this case, § 55(6) of the MCFA provides that a labor organization may obtain contributions for a separate segregated fund on an automatic basis "only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year." It is true that § 55(6) does not specifically prescribe the form or expiration date for annual affirmative consent. However, the plain language of the enabling statute, § 15(1)(e) of the MCFA, "not only defines its scope and reveals its subject matter, but also manifests the legislative intent behind it." *Blank*, *supra* at 406. "It is clear from the general language used that the Legislature was aware of the great responsibility" placed on the secretary and intended to vest the secretary with wide discretion to implement and enforce the provisions of the MCFA. *Id.* It thus appears that promulgating rules that specify the form and expiration date for annual affirmative consent is consistent with the legislative intent underlying the enabling statute.

Finally, the rules must not be arbitrary or capricious. As explained in *Blank*, *supra* at 407 (citations omitted):

> A rule is arbitrary if it was fixed or arrived at through an exercise of will or by caprice, without giving consideration to principles, circumstances, or significance. A rule is capricious if it is apt to change suddenly or is freakish or whimsical. If a rule is rationally related to the purposes of the statute, it is neither arbitrary nor capricious. Further, if

> there is any doubt about the invalidity of a rule in this regard, the rule must be upheld.

It thus appears that the emergency rules, which specify the form and expiration date for annual affirmative consent, are rationally related to the requirement of annual affirmative consent for automatic contributions to separate segregated funds. The rules are presumed valid and no argument has been presented that persuades us that the challenged rules are substantively invalid. *Id.*

Accordingly, for purpose only of our preliminary injunction analysis, we conclude that the trial court apparently misjudged the strength of the union's demonstration that it is likely to prevail on the merits of its claim for declaratory relief that the secretary's emergency rules are substantively invalid. However, we emphasize that if and when this matter comes to trial, the actual determination of this claim is for the trial court in the first instance.

Next, the secretary and the chamber contend that the trial court erred in determining that no emergency existed.

In *Michigan Petroleum Ass'n v State Fire Safety Bd*, 124 Mich App 187; 333 NW2d 506 (1983), the State Fire Safety Board adopted proposed rules to establish hazardous-material inspection fees and, as required by the APA, submitted these rules for approval by the Legislature's Joint Committee on Administrative Rules (JCAR).[5] *Id.* at 189. When the JCAR reported that it had reached an impasse concerning the board's proposed

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[5] In *Blank, supra*, this Court held that the APA was unconstitutional to the extent that it required the JCAR to approve proposed administrative rules.

rules, the board adopted emergency rules substantially similar to the original proposed rules pursuant to the following finding of emergency:

> "Fees were established by the State Fire Safety Board after a time and cost study and were processed through the regular rule promulgation procedures established by [the APA]. These rules received an impasse certification from the joint committee on administrative rules. Without the funds which these rules will generate, the department will not be able to perform inspections of hazardous materials vehicles and facilities and will not be able to respond to assist local agencies with the handling of incidents, the result being a threat to the safety of the people of the state." [*Id.* at 189-190.]

The plaintiffs filed a complaint for declaratory relief in the circuit court, contending that the emergency rules were invalid, in part, because no emergency had existed. *Id.* at 188-190. The trial court disagreed and found that the emergency rules were validly enacted. *Id.* at 189. The plaintiffs appealed. *Id.*

This Court affirmed. *Id.* at 194. In response to the plaintiffs' argument that no emergency had existed to justify the issuance of the rules, this Court stated as follows, *id.* at 193-194:

> In holding that the board had a substantial basis for enacting emergency hazardous material inspection fee rules, the trial court reasoned:
>
> "Plaintiffs argue that the board's finding of emergency was 'merely a statement of motivation' and that the finding did not 'reflect a crisis situation emergent or actual.' They note that the Legislature created the inspection program and the Legislature, through its committee, held up the promulgation of the rules through its certification of an impasse. It is argued this adds credence to the position that no crisis situation existed. As previously noted, however,

the APA scheme is that the agency first determines whether 'the preservation of public health, safety and welfare requires promulgation of an emergency rule,' and if the Legislature is of the position that an emergency situation does not exist, it may rescind the emergency rules by concurrent resolution."

"Based on the record, this court cannot hold that the board lacked substantial basis for its finding that the public interest required promulgation of the Hazardous Materials Inspection Fees Emergency Rules for the 1979-1980 fiscal year. The inspection and certification program grew out of the passage of 1978 PA 3, amending the Fire Prevention Act, and provided for annual inspections and annual certifications of tank vehicles and storage locations. Inspection fees are authorized and must be paid annually to the fire marshal before the issuance of a certificate. The amount of fees was left to be determined by the board."

We are in agreement with the trial court's foregoing analysis. Furthermore, we do not find that the board abused its rule-making authority.[9]

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[9] For the standard applied by appellate courts in reviewing decisions rendered by administrative bodies, see *Mississippi Valley Barge Line Co v United States*, 292 US 282, 286-287; 54 S Ct 692; 78 L Ed 1260 (1934); *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582, 587-591; 50 NW2d 322 (1951). See, generally, Davis, Administrative Law Text (3d ed), §§ 29.01-29.02, pp 525-530.

Thus, it appears that the test adopted by *Michigan Petroleum* "was whether the adopting agency 'lacked a substantial basis for its finding that the public interest required promulgation' of the emergency rule." LeDuc, Michigan Administrative Law, § 4:37, ch 4, p 58. "The opinion also seemed to include an abuse of discretion aspect to the test." LeDuc, *supra*.

However, the "substantial basis" test used in *Michigan Petroleum* is not supported by any citation of authority. The "substantial basis" test does evoke the

"competent, material and substantial" evidence test used by reviewing courts. See Const 1963, art 6, § 28; MCL 24.306(d); MSA 3.560(206)(d). However, the "competent, material and substantial" evidence test is used by the courts for the purpose of reviewing judicial or quasi-judicial factual findings by an agency following a hearing. See Const 1963, art 6, § 28; MCL 24.271; MSA 3.560(171), MCL 24.301; MSA 3.560(201), MCL 24.306(d); MSA 3.560(206)(d). For the purpose of § 48 of the APA, an agency's finding of emergency is not made after a hearing and, made as it is in the context of rule-making, is quasi-legislative in nature. Moreover, the cases cited by *Michigan Petroleum* as authority for including an abuse of discretion aspect to the test for emergency are distinguishable. Specifically, *Coffman* applied the abuse of discretion test in the context of the review of the substantive validity of a rule.[6] *Mississippi Valley*, to the extent it even applies an abuse of discretion test, concerns the review of factual findings in a rate-making case. Thus, we are not convinced that the "substantial basis" or "abuse of discretion" tests are the appropriate tests.

We therefore turn to a consideration of the nature of and policies underlying the APA. The APA is not substantive. LeDuc, § 1:10, ch 1, p 14. Rather, the APA contains complex procedures governing, among other things, the development of rules. LeDuc, *supra*; see also *Blank*, *supra* at 402. As further explained by our Supreme Court:

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[6] We also note that after *Coffman* was decided, our Supreme Court subsequently adopted in *Luttrell* the three-part test we apply today to determine the substantive validity of the emergency rules.

> "[B]ecause the adoption of a rule by an agency has the force and effect of law and may have serious consequences for many people, the legislature prescribed an elaborate procedure for rule promulgation in Chapter 3 of the Michigan Administrative Procedures Act . . . . These provisions are calculated to invite public participation in the rule-making process, prevent precipitous action by the agency, prevent the adoption of rules that are illegal or that may be beyond the legislative intent, notify affected and interested persons of the existence of the rules and make the rules readily accessible after adoption." [*Detroit Base Coalition For The Human Rights Of The Handicapped v Dep't of Social Services*, 431 Mich 172, 189-190; 428 NW2d 335 (1988) (quoting Bienenfeld, Michigan Administrative Law, p 4-1).]

However, under § 48 of the APA, an agency can "short-cut" the notice and hearing provisions when there is "justification for the use of the emergency rulemaking procedures . . . ." LeDuc, § 4:37 and § 4:43. In this case, the trial court determined that there was no emergency to justify the filing of the emergency rules. Thus, we construe the secretary's and the chamber's argument to be that the trial court erred in determining that the emergency rules were procedurally invalid.

An emergency rule is justified if three conditions are satisfied: (1) the agency "finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by section 41 and 42;" (2) the agency "states in the rule the agency's reasons for that finding"; and (3) "the governor concurs in the finding of emergency." MCL 24.248(1); MSA 3.560(148)(1). In this case, we consider only the first two conditions. In so considering, we are mindful that rules have the force and effect of

law and may have serious consequences for many people. *Detroit Base Coalition, supra* at 189. We therefore examine the substantive meaning of the phrase "preservation of the public health, safety, or welfare" in order to determine exactly the standard or threshold intended by the Legislature before an agency can "short-cut" the general rule-making procedural protections intended by the APA.

Black's Law Dictionary (6th ed) defines "public welfare" as follows:

> The prosperity, well-being, or convenience of the public at large, or of a whole community, as distinguished from the advantage of an individual or limited class. It embraces the primary social interests of safety, order, morals, economic interest, and non-material and political interests. In the development of our civic life, the definition of "public welfare" has also developed until it has been held to bring within its purview regulations for the promotion of economic welfare and public convenience.

Thus, in order to bypass the general rule-making procedural protections contained in the APA, the secretary in this case was required to find that the preservation of the political interests "of the public at large, or of a whole community, as distinguished from the advantage of an individual or limited class" required promulgation of an emergency rule.

With this substantive standard in mind, we turn to the relevant portion of the secretary's finding of emergency:

> In a declaratory ruling dated July 11, 1997, issued to Robert S. LaBrant, the secretary of state construed the Michigan campaign finance act to mean that the affirmative consent must be in writing and that the consent is effective only through December 31 of the year for which it is given.

> In the case of *Michigan State AFL-CIO and Franklin D. Garrison v Candice Miller*, Case No. 97-86692 AZ, the Ingham county circuit court preliminarily enjoined the enforcement of the July 11, 1997 declaratory ruling because of the absence of administrative rules.
>
> Therefore, the promulgation of administrative rules requiring written affirmative consent and establishing the effective length of that consent will eliminate this issue and will enable the policy of the state of Michigan, as embodied in Act No. 117 of the Public Acts of 1994, to be effectuated. The permanent rule-making process will take several months to complete. That delay could allow political contributions to be made in contravention of the current policy of the state of Michigan.
>
> The governor has indicated that an injunction which frustrates state policy adversely affects the public welfare and justifies the promulgation of emergency rules under section 48 of Act No. 306 of the Public Acts of 1969, as amended, being §24.248 of the Michigan Compiled Laws. The department of state finds that preservation of the public welfare requires the promulgation of these emergency rules.

Thus, the basis for the secretary's finding of emergency was the August 28, 1997, injunction that enjoined the enforcement of the secretary's declaratory ruling. However, the August 28, 1997, injunction only enjoined the secretary from enforcing the declaratory ruling against the political committees of the union and its affiliated organizations. As recognized by the secretary in its "unequal enforcement" argument, the secretary was not prohibited during this litigation from attempting to enforce its interpretation of § 55(6) of the MCFA, as expressed in the declaratory ruling, against all other entities subject to this statute. In *Michigan Petroleum*, the preservation of the safety of the whole community was threatened by the agency's inability to conduct any hazardous-materials inspections because of a lack of funding. However,

we fail to perceive how preservation of the political interests of the whole community is threatened where the secretary is generally free to attempt to enforce its interpretation of § 55(6) of the MCFA except against the limited class of the political committees of the union and its affiliated organizations. It thus appears that the secretary's finding does not meet the statutory substantive standard of "preservation of the public . . . welfare," i.e., of the "public at large, or of a whole community." Rather, it appears that the secretary's finding relates only to "the advantage of a[] . . . limited class."

A rule is invalid and may be stricken by a court if the agency failed to follow proper procedure. *Clonlara, supra* at 240; *Detroit Base Coalition, supra* at 183; *Blank, supra.* Generally, this principle applies where the agency fails to promulgate a rule in accordance with the APA's notice-and-participation procedures. However, we see no reason why this principle should not apply to emergency rules should the agency fail to follow the procedures and standards enunciated in § 48 of the APA, particularly where these procedures and standards take the place of the general rule-making procedural protections contained in the APA. It thus appears that the secretary's emergency rules are procedurally invalid because the secretary's finding did not meet the statutory threshold imposed by the Legislature. We note that we have treated this issue as an issue of statutory construction, which is a question of law that we review de novo. *Dickerson v Raphael,* 222 Mich App 185, 190; 564 NW2d 85 (1997). However, we would arrive at the same conclusion even if the "substantial basis" and

"abuse of discretion" tests enunciated in *Michigan Petroleum* are the appropriate tests.

We conclude, therefore, albeit for different reasons, that the trial court did not err in determining that the union is likely to prevail on the merits of its claim for declaratory relief that the emergency rules are procedurally invalid.

We have considered the secretary's remaining challenges to the trial court's grant of the September 24, 1997, preliminary injunction and find them to be without merit.

In summary, we conclude that the trial court apparently misjudged the strength of the union's demonstration that it is likely to prevail on the merits of its claim for declaratory relief that the secretary's emergency rules are substantively invalid. However, we conclude that the trial court did not err in determining that the union is likely to prevail on the merits of its claim for declaratory relief that the emergency rules are procedurally invalid. No persuasive arguments have been made that the trial court erred in its consideration of the other preliminary injunction factors, and we will not, therefore, second-guess the trial court in this regard. The grant of a preliminary injunction with respect to the emergency rules preserved the status quo pending a final hearing and did not grant any of the parties final relief before a hearing on the merits. *Thermatool, supra* at 376. Accordingly, we conclude that on the facts of this particular case the trial court did not abuse its discretion in preliminarily enjoining the enforcement of the emergency rules.

Affirmed.

MCDONALD, P.J., concurred.

O'CONNELL, J. (*concurring in part and dissenting in part*). I concur with the majority's well-reasoned conclusion that the union will not prevail on the merits of this claim. I also agree with the majority's conclusion that the Secretary of State's emergency rules are substantively valid. For these reasons, I conclude that the lower court should not have issued injunctions against enforcement of the Secretary of State's declaratory rulings or properly promulgated emergency rules.

I respectfully dissent from the majority's conclusion that the emergency rules are procedurally invalid for lack of the prerequisite emergency. In so holding, the majority places its stamp of approval on a process that allows one of the largest political fundraising organizations in the state of Michigan, outside the major political parties, to ignore the law and operate by separate rules during an ongoing election cycle. This situation, in my view, is no different from allowing candidates favored by the AFL-CIO to stuff ballot boxes[1] while those supported by the Michigan Chamber of Commerce could not, or vice versa. The circuit court, by its rash issuance of a preliminary injunction that threatens irrevocably to skew the political process, vividly demonstrates why the people confided the duty to preserve the purity of elections

[1] Whether the ballot boxes are stuffed with improper votes, or honest votes are bought through expenditures of "soft money," the detrimental effect on the fairness of the democratic process is the same. Indeed, the Michigan Campaign Finance Act (MCFA), MCL 169.201 *et seq.*; MSA 4.1703(1) *et seq.*, has been recognized as serving, in this respect, a compelling state interest in protecting the integrity of the electoral process. *Austin v Michigan Chamber of Commerce*, 494 US 652, 660; 110 S Ct 1391; 108 L Ed 2d 652 (1990).

to the legislative, rather than the judicial, branch. The result constitutes a threat to the welfare of the community as a whole, because it represents a direct attack on the entire democratic process.

The primary shortcoming of the majority opinion is its conclusion that the circuit court had jurisdiction to review the determination of the executive branch that an emergency existed. The Legislature has delegated, with appropriate standards, that power to the Governor and has invited neither oversight nor second-guessing by the judiciary. The issuance of a preliminary injunction under these circumstances violates the principle of separation of powers by way of judicial intrusion into an area constitutionally reserved for the other branches of government.

I further observe that the union brought this cause of action to the circuit court in the first instance without having first exhausted available administrative remedies. The court accordingly should have dismissed the case and allowed the administrative process to play itself out. But for this initial error, the instant controversy need not have escalated to involve the promulgation of the emergency rules and related controversies.

I. INTRODUCTION

This case concerns a facial challenge to the validity of a declaratory ruling by the Secretary of State, and a challenge to emergency rules promulgated by the Secretary of State and approved by the Governor. In early 1997, the Michigan Chamber of Commerce requested a declaratory ruling and interpretative statement concerning the requirements of the Michigan Campaign Finance Act (MCFA), MCL 169.201 *et*

seq.; MSA 4.1703(1) *et seq.*, as amended. The requests concerned the timing, manner, and effect of the "affirmative consent" that is required to initiate payroll deductions for campaign contributions under § 55(6) of the MCFA. On July 11, 1997, the Secretary of State issued a final response to the Chamber of Commerce and made the ruling available to the public.

On July 31, 1997, the AFL-CIO brought this action, seeking, inter alia, a preliminary and permanent injunction against the Secretary of State's declaratory ruling. On August 28, 1997, a hearing on the union's request took place in the circuit court. There were no factual disputes, and no testimony was presented. Ruling purely as a matter of law, the court granted the union's motion, preliminarily enjoining the Secretary of State from applying and enforcing the declaratory ruling against "Plaintiff Michigan State AFL-CIO and its political committee and its affiliated organizations and their political committees." Significantly, the August 28 injunction does not apply to any other political organization or labor union in Michigan. The court further held that the Secretary of State could enforce such interpretations of the MCFA only through formal rules promulgated in accordance with the Administrative Procedures Act (APA).

The emergency rules at issue were adopted in response to this latter aspect of the circuit court's holding. The section of the rules entitled "Finding of Emergency" notes that the "governor has indicated that an injunction which frustrates state policy adversely affects the public welfare and justifies the promulgation of emergency rules" and that the "department of state finds that preservation of the public welfare requires [their] promulgation." This

section also states that the delay inherent in utilizing the permanent APA rule-making process "could allow political contributions to be made in contravention of the current policy of the state of Michigan." As required by § 48(1) of the APA, the Governor approved the rules and concurred "in the finding of the Michigan Department of State, that circumstances have created an emergency and the public interest requires the emergency promulgation of the rules pertaining to 'Campaign Financing.' "[2]

On September 4, 1997, the union moved for a temporary restraining order or preliminary injunction to prevent enforcement of the emergency rules. On September 19, 1997, the Secretary of State moved for dismissal of the union's complaint and requested that the August 28, 1997, preliminary injunction be vacated. On September 24, 1997, the circuit court heard arguments. The AFL-CIO argued that the court could review the declaration of emergency and that no emergency existed that would justify the Secretary of State's promulgation of the new rules under MCL 24.248; MSA 3.560(148). The Secretary of State argued that an emergency had been created by the court's previous injunction prohibiting the Secretary of State from enforcing its interpretations regarding § 55(6) of the MCFA against the union. The Secretary of State explained that because the injunction affected only the union, an unequal enforcement scheme had been

[2] The proper avenue to dispute the emergency rules is not through the courts but through the process set forth in the applicable legislation, which provides that the "Legislature by a concurrent resolution may rescind an emergency rule promulgated pursuant to this section." MCL 24.248(3); MSA 3.560(148)(3). That a method for checking the appropriateness of a finding of emergency is provided for in the statute by itself suggests that the role of the courts is limited.

created under which the union could exercise undue political influence.

The trial court enjoined the general application of the emergency rules, finding that the harm resulting from its refusal to issue the requested injunction would outweigh any harm resulting from its grant of the injunction, and that the union had a high likelihood of success on the merits of its claim that the rules were in violation of the APA. Because the emergency rules reflected the earlier declarations and interpretations that the trial court had made in conjunction with the August 28, 1997, injunction, the court "adopt[ed] [its] previous comments in this matter and [its] previous ruling." As a result, the concerns underlying the promulgation of emergency rules—namely, the unequal enforcement scheme—again became problematic.

II. THE EMERGENCY RULES

This is an issue of first impression in Michigan. Since this Court affirmed the finding of an emergency in *Michigan Petroleum Ass'n v State Fire Safety Bd*, 124 Mich App 187; 333 NW2d 506 (1983), it has had no occasion to consider seriously whether review of emergency rules lies within the sphere of judicial competence. However, now that the majority has opined in this case that no emergency has been factually established sufficient to invoke the rule-making powers conferred on the Secretary of State by § 48 of the APA, I believe it necessary to investigate the reasoning by which it purports to make that determination.

Section 48 of the APA requires that any finding of an emergency be endorsed by the Governor before emer-

gency rules can be promulgated. It has long been the rule in this state that when a statute confers such authority upon the Governor, "reasons of a conclusive nature must be presumed to have been found, requiring the particular authority to be confided to the chief executive as one properly and peculiarly, if not exclusively pertaining to the department which he represents." *People ex rel Sutherland v Governor*, 29 Mich 320, 329; 18 Am Rep 89 (1874). Under such circumstances, when a factual question is submitted to the Governor's judgment or discretion, such judgment or discretion cannot be judicially coerced, and the judicial branch is without jurisdiction or authority to review the executive actions of the Governor or the manner in which the Governor fulfills such duties. *Id.* at 322-323. See also *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422, 426; 4 NW 274 (1880) ("we cannot interfere with the discretion of the chief executive of the State or subordinate him to our process").

This conclusion is consistent with the principle of separation of powers, which forms "the fundamental framework of our system of government." *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 541-542; 273 NW2d 829 (1979). As a general rule, the principle recognizes the distinct provinces of the legislative, judicial, and executive branches of government, and mandates that no one branch attempt to "control, direct or restrain the action" of another. *Massachusetts v Mellon*, 262 US 447, 488; 43 S Ct 597; 67 L Ed 1078 (1923). This principle is expressly embedded into our state constitution: "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as

expressly provided in this constitution." Const 1963, art 3, § 2. As our Supreme Court has noted, a purpose of the separation of powers is "to make certain that the judiciary does not substitute its judgment for that of the Legislature as to what is best or what is wisest." *O'Donnell*, *supra* at 542. This principle is likewise offended when the judiciary attempts to substitute its judgment for that of the executive branch.

Separation of powers principles suggest that a gubernatorial declaration of emergency is conclusive on the judicial branch. See *Moyer v Peabody*, 212 US 78, 83; 29 S Ct 235; 53 L Ed 410 (1909). In *Baker v Carr*, 369 US 186, 217; 82 S Ct 691; 7 L Ed 2d 663 (1962), the United States Supreme Court observed as follows:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Several of these formulations are applicable in the instant case. First, courts are ill-equipped to make

such determinations as the one at issue. See *Idaho State AFL-CIO v Leroy*, 110 Idaho 691, 695; 718 P2d 1129 (1986) ("The decision that a legislative bill is so urgently and immediately needed as to justify a declaration of emergency is a decision-making function that is uniquely legislative. The courts are ill equipped to make such policy decisions."). There is a lack of judicially discoverable and manageable standards for resolving the problem of what events must exist to constitute a sufficient emergency such that legislation directed to alleviate that emergency can justifiably become immediately effective. For a court to undertake its own independent resolution of such policy determinations creates the potential for "embarrassment from multifarious pronouncements by different branches of government on one question." *Baker*, *supra* at 217. Additionally, although our state constitution does not commit the power to declare an emergency to any single branch of government, it does grant the Legislature the power to make all laws necessary to guarantee "the purity of elections" and to "guard against abuses of the elective franchise." Const 1963, art 2, § 4. As this Court has noted, "The judiciary must be careful to respect the principle of separation of powers in these election situations." *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 205; 452 NW2d 471 (1989).

Although in the instant case the Legislature has delegated certain rule-making powers to an administrative agency within the executive branch, that delegation does not obviate separation of powers concerns regarding the trial court's actions. First, the Legislature's power to delegate rule-making authority to an administrative agency for purposes of giving effect to

legislation is not a matter of dispute. *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582; 50 NW2d 322 (1951). Such a delegation is constitutionally valid if the Legislature prescribes "standards . . . as reasonably precise as the subject matter requires or permits." *Osius v St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956). The lawfulness of this delegation as concerns the instant case is not questioned by the parties or the majority opinion. Second, the Legislature has made the Governor's concurrence necessary for the promulgation of emergency rules. This provision undoubtedly recognizes the need for expediency in emergency situations—a need more easily fulfilled by requiring the consent of one individual than by requiring a vote in the House and Senate. Finally, the trial court's actions in this case effectively prevent the Legislature from enforcing § 55(6) of the MCFA. The actions condoned by the majority opinion ultimately prevent the Legislature from carrying out its constitutionally prescribed function of assuring "the purity of elections." Const 1963, art 2, § 4.

The case before us is "political" in much the same manner that *Baker v Carr* was a "political case." As *Baker* indicates, the decision to classify a situation as an "emergency" in order to get legislation put into immediate effect is a decision best left to the legislative and executive branches of government. *Baker*, *supra* at 217. If we allow the judiciary to second-guess this nonjusticiable political decision, the result could become largely dependent on the personal beliefs, understandings, and allegiances of particular trial court judges. In the interest of comity between the branches, such a result should be avoided.

In this respect, I take guidance from the analysis of the Idaho Supreme Court in *Diefendorf v Gallet*, 51 Idaho 619; 10 P2d 307 (1932) (later superseded by statute as stated in *John Hancock Mut Life Ins Co v Neill*, 79 Idaho 385; 319 P2d 195 [1957]). In *Diefendorf*, the court found that the judiciary could not second-guess the governor's determination that a sufficient emergency existed to justify convening an extraordinary session of the legislature.

> The determination as to whether facts exist such as to constitute "an extraordinary occasion" is for [the governor] alone to determine. The responsibility and the discretion are his, not to be interfered with by any other co-ordinate branch of the government.
>
> "It would be an unprecedented proceeding for the court to entertain a controversy wherein proof is offered to ascertain judicially whether an extraordinary occasion existed of sufficient gravity to authorize the governor to convene the legislature in extra session . . . . [A] review of such a discretionary act of the governor should not be done by the courts." [*Diefendorf*, *supra* at 638, quoting *Utah Power & Light Co v Pfost*, 52 F2d 226, 231 (CA DC, 1931).]

The court continued, " 'The motives which prompted the governor . . . to . . . make such determination are not proper subjects of judicial inquiry. Such inquiry would be opposed both to the plainest principles of public policy and the freedom of action by the executive within the constitutional authority of that department of government.' " *Diefendorf*, *supra* at 639, quoting *In re Moyer*, 12 Idaho 250, 257; 85 P 897 (1906). See also *Tenney v Brandhove*, 341 US 367, 372; 71 S Ct 783; 95 L Ed 1019 (1951).

I further note that current case law casts doubt upon the propriety of granting injunctive relief against the Governor and that the cases instead suggest that

the constitutional separation of powers precludes mandatory injunctive relief (mandamus) against the Governor. See, e.g., *Musselman v Governor*, 448 Mich 503, 524; 533 NW2d 237 (1995). As our Supreme Court recently recognized, declaratory relief generally will induce the legislative and executive branches to conform their actions to constitutional requirements or confine them within constitutional limits. *Durant v Michigan*, 456 Mich 175, 205; 566 NW2d 272 (1997). Only when declaratory relief has failed should courts consider more drastic forms of relief. *Id.* at 206. Indeed, Michigan case law over the past century recognizes the need for utmost delicacy on the part of the judiciary when the executive branch makes findings of fact or decides a "disputed question." See, e.g., *People ex rel Johnson v Coffey*, 237 Mich 591, 602; 213 NW 460 (1927); *Ayres*, *supra*.[3]

Whether an emergency exists is a manifestly political question, which accordingly lies beyond the power of the judiciary to reconsider. If the Governor has abused the power statutorily reposed in him—which I do not suggest is the case—the remedy is to be found in the political process. Those dissatisfied by the executive's actions may seek recall, Const 1963, art 2, § 8, campaign for impeachment, Const 1963, art 11, § 7, or propose legislation that would confer the power at issue on an inferior officer whose

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[3] Although the emergency in the present case is of a political nature, the situation may be compared to a declaration of emergency prompted by mass rioting. If the Governor declared a state of emergency and requested military assistance to quell the rioting, it would be absurd to suggest that a rioter could go to court and ask for an injunction in order to prevent military involvement. However, by allowing review of the declaration of emergency, the majority apparently approves of such maneuvering.

exercise of discretion may properly be subjected to judicial review. Gubernatorial action of the kind in question, however, does not lend itself to judicial review or interference.[4]

Here, not only has the Governor made a finding that an emergency exists, but the Secretary of State, an inferior constitutional officer, initially made the identical finding. Further, the Secretary of State's involvement does not itself invite judicial review of the finding at issue. "When the head of a department acts as the mere assistant or agent of the executive in the performance of a political or discretionary act, [s]he is no more subject to the control of the courts than the chief executive himself . . . ." *Sutherland, supra* at 327. Hence, because the Secretary of State must obtain the Governor's imprimatur before promulgating emergency rules, such action is that of the governor and is beyond the proper scope of judicial intermeddling.

In any event, even if the judiciary could review the factual basis for a gubernatorial declaration of emer-

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[4] Nor can it ever be said that any gubernatorial duty is merely ministerial:

> [I]t is not customary in our republican government to confer upon the governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever; and the presumption in all cases must be, where a duty is devolved upon the chief executive of the State rather than upon an inferior officer, that it is so because his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were devolved upon an officer chosen for inferior duties. And if we concede that cases may be pointed out in which it is manifest that the governor is left to no discretion, the present is certainly not among them, for here, by the law, he is required to . . . give his certificate on his own judgment, and not on that of any other person, officer or department. [*Sutherland, supra* at 323.]

gency, the facts amply support that determination. This conclusion may be reached under the majority's confabulated standard of review or any other. The majority opines that "we fail to perceive how preservation of the political interests of the whole community is threatened where the secretary is generally free to attempt to enforce its [sic, her] interpretation of § 55(6) of the MCFA except against the limited class of the political committees of the union and its affiliated organizations." *Ante* at 24. This statement fails to consider that the union and affiliated political action committees (PACs) benefiting from the first injunction compose one of the largest political fund-raising organizations in this state outside the major political parties. That the circuit court's preliminary injunction creates disparate classes of political players for the next election cycle—the AFL-CIO unfettered in cadging its employees for political donations, the Chamber of Commerce having to abide by the declaratory ruling of the Secretary of State, and other similar organizations remaining in limbo concerning how best to comply with the MCFA—presents a clear and present danger to the integrity of the political process.

The executive branch has determined that validly adopted public policy cannot be effectively carried out in the absence of administrative rules on the subject. That determination is supported by the facts and should not be revisited by this Court. As a result of the August 28, 1997, injunction, the Chamber of Commerce remains obliged to follow the dictates of § 55(6) of the MCFA as interpreted by the Secretary of State, and most unions and political organizations will likely feel obliged to comply as well; the AFL-CIO, however, has license from the circuit court to collect

funds from its members for political advocacy with less stringent safeguards in place to ensure compliance with the requirements of the MCFA. If the August 28, 1997, order remains in effect, and if the emergency rules are not enforced, the union and its affiliates will have the opportunity to purchase, through paid advertising in all media, a grossly disproportionate and unfair influence in the upcoming elections. Moreover, because of the lack of an effective enforcement mechanism for the statutory prohibition of passive contribution systems, the rights of many individuals who do not wish to contribute to political campaigns are not adequately protected. This result of the judiciary's intrusion into nonjusticiable subject matter does violence to the spirit and intent of the MCFA.

III. DECLARATORY RULING

This comedy of errors began when the circuit court allowed the AFL-CIO to present its case before it had exhausted available administrative remedies. It is only when a party has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision in a contested case, that the agency's decision is subject to review by the courts. MCL 24.301; MSA 3.560(201).[5] The exhaustion requirement enables the parties and the agency to develop the facts and produce a complete record for review, to allow the agency to apply its expertise and correct its

[5] Because there was no development of the question of exhaustion in the proceedings below, the record does not provide a conclusive basis on which to consider potential exceptions to the exhaustion requirement, e.g., futility, administrative delay, or inadequate relief. However, these facts appear to give rise to no legitimate claim of futility or inadequacy of relief, and, where the agency was given no opportunity to pass on the union's method, delay cannot be charged to the administrative process.

own errors, and to promote judicial economy by preventing unnecessary resort to the courts. See *Compton Sand & Gravel Co v Dryden Twp*, 125 Mich App 383, 397; 336 NW2d 810 (1983), citing 2 Am Jur 2d, Administrative Law, § 595, p 428; *Abbott Laboratories v Gardner*, 387 US 136, 149-152; 87 S Ct 1507; 18 L Ed 2d 681 (1967); *Toilet Goods Ass'n, Inc v Gardner*, 387 US 158, 165-166, 87 S Ct 1520; 18 L Ed 2d 697 (1967). When the union initially appeared in court to contest the validity of the declaratory ruling, it had neither exhausted administrative remedies nor been aggrieved by the Secretary of State's decision.

The Secretary of State maintained the posture that the declaratory rulings at issue simply put into words certain dictates inherent in the MCFA itself and that the general applicability of the declaratory rulings stemmed from the general applicability of the statute. The circuit court apparently believed that the declaratory rulings themselves could trigger sanctions against the union for failure to abide by them, citing the criminal penalties of § 55(7) of the MCFA. However, this concern was premature.

The Administrative Procedures Act and the MCFA itself prescribe the processes under which a party may object to the Secretary of State's decisions and under which sanctions may come to bear on a noncomplying party. MCL 24.263; MSA 3.560(163) establishes that declaratory rulings are binding only on the parties requesting them and the agencies issuing them. Because in the instant case neither plaintiff requested the rulings at issue, neither was bound. Although "[a] declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case," *id.*, a party who is

bound by neither a declaratory ruling nor a final decision presents no controversy for a court to entertain and resolve.

If the AFL-CIO believed its own procedures for obtaining its members' affirmative consent in each calendar year to the union's automatic extraction from its members of contributions for affiliated PACs to be fully in compliance with § 55(6) of the MCFA, the union was at liberty to present its schemes to the Secretary of State for its own declaratory ruling. Once a party to a declaratory ruling, by virtue of having requested it, MCL 24.263; MSA 3.560(163), the union would have satisfied the statutory criteria for seeking judicial review.

Alternatively, the union simply could have complied with § 55(6) of the MCFA according to its own judgment of the proper construction of the statute and waited for the Secretary of State to initiate proceedings. Section 15(5) of the act provides that where the Secretary of State has reason to believe that a violation has occurred, the Secretary of State should respond with informal methods to obtain compliance, including trying to reach conciliation agreements. That section further provides that if the Secretary of State fails to correct the violation through informal means, the Secretary of State may commence a hearing or refer the matter to the Attorney General for prosecution.

In the latter situation, the union would be free to urge its interpretations of § 55(6) on the trial court, which would rule on the matter de novo, affording the Secretary of State's interpretation only such persuasive sway as the underlying reasoning of the Secretary of State might be found to warrant.

In the event of an administrative hearing, § 15(6) of the MCFA provides for its conduct and decrees that if the Secretary of State determines afterward that a violation has occurred, the Secretary of State may assess a civil fine of up to $1,000 for each violation. Only then does the statute provide for recourse to the courts, providing that a "final decision and order" from the Secretary of State is subject to judicial review as provided by the APA.

Clearly, the AFL-CIO had not availed itself of all the available administrative procedures concerning its compliance with § 55(6) when it initially appeared before the circuit court seeking declaratory and injunctive relief. For these reasons, the court should have dismissed the cause of action. If the initial controversy in this case had been fully developed through proper administrative processes, the courts could have avoided the vexing problems that have arisen subsequently.

Had the circuit court recognized the union's failure to exhaust administrative remedies when considering the motion for the initial injunction, or had this Court granted leave to appeal the injunction and then taken that opportunity to reverse on that ground, this Court would have avoided the issue whether an emergency existed and the concomitant and colossal error of substituting its judgment for that of the executive branch of government. Finally, it would have avoided the absurd conclusion that it is acceptable to allow the stronger players in an election cycle to operate under rules more lenient than those under which the weaker players operate.

IV. CONCLUSION

The trial court should not have agreed to review the decision of the Governor concerning whether, given the circumstances, emergency rules were proper, let alone substituted its judgment for that of the executive branch regarding the existence of an emergency. Accordingly, I respectfully dissent from the majority's conclusions that the judiciary possesses the jurisdictional competence to review the Governor's finding of an emergency and that such finding is not supported by the acknowledged facts, as well as from the ultimate conclusion that the circuit court did not abuse its discretion in issuing a preliminary injunction. Given that the AFL-CIO did not exhaust administrative remedies before going to court, that the union is unlikely to succeed on the merits of its claim that the subsequent emergency rules are substantively invalid, and given that I believe not only that the trial court should not have reviewed the executive branch's finding of emergency, but also that the facts support a finding of emergency, I would reverse the decision of the trial court and dissolve both injunctions.

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION v WARE
DANIELS v WARE

Docket Nos. 193707, 193712. Submitted May 6, 1998, at Detroit. Decided May 22, 1998, at 9:15 A.M. Leave to appeal sought.

Michigan Basic Property Insurance Association brought an action in the Wayne Circuit Court against Mildred E. Ware, personal representative of the estate of James Ware, deceased, and Jerry E. and Harold Stehlik, seeking to recover, as subrogee of its insureds, for damages resulting from an explosion and fire that occurred in 1994 at residential property that James Ware had owned and the Stehliks had acquired through a tax deed. The incident occurred on the date that a notice to quit the premises served on Ware's daughter, who was inhabiting the premises, had directed her to vacate the premises. James Ware and others were injured in the explosion and fire. James Ware died intestate several days later and was survived by his wife and several children. James Ware had won a lottery jackpot in 1986 and was to receive installments each year for twenty years.

Willie Daniels, individually and as next friend of Terrance, Earl, and Ron Daniels, minors, and others also brought an action in the Wayne Circuit Court against the same defendants, seeking damages resulting from the fire and explosion. The court, John A. Murphy, J., consolidated the two cases for discovery and trial. The personal representative of Ware's estate sought a declaration regarding whether the continuing payments of Ware's lottery winnings would be subject to the plaintiffs' claims in the event that they prevailed in their suits against the estate. The court ruled that the remaining lottery payments would pass directly to Ware's surviving spouse and children and would not be subject to process by the judgment creditors of the estate. The Court of Appeals granted leave to file interlocutory appeals to Michigan Basic Property Insurance Association (Docket No. 193707) and the other plaintiffs (Docket No. 193712) and consolidated the appeals.

The Court of Appeals *held*:

1. The two exceptions to the general nonassignability of lottery prizes in effect before the amendment of MCL 432.25; MSA 18.969(25) by 1988 PA 243, whereby winnings could be paid to a

deceased prizewinner's estate or to a person pursuant to an appropriate judicial order, were increased to three by 1988 PA 243, which allowed payments directly to a deceased prizewinner's surviving spouse or living children or other designated beneficiaries.

2. The additional exception requires that the winnings of a deceased prizewinner should be paid to the decedent's estate only if the decedent has no surviving spouse or child and has designated no other beneficiary. Only when the estate stands to receive the winnings in this manner are those winnings subject to attachment by a person through an appropriate judicial order.

3. The administrative rule by the Bureau of State Lottery cited by the plaintiffs, 1979 AC, R 432.17(4), was promulgated before the amendment in 1988 and does not take the amendment into account. The rule affords no basis for circumscribing the provisions of the amended statute.

4. The legislation whereby the Legislature created an avenue through which lottery winnings may pass as nonprobate assets does not conflict with the Revised Probate Code.

5. Because 1988 PA 243 was well in place before any party to the instant dispute acquired an interest in the remaining payments of the decedent's winnings from the prize won in 1986, there is no retroactive application of 1988 PA 243 involved in these cases.

Affirmed.

1. LOTTERIES — ASSIGNMENT OF LOTTERY WINNINGS.

Section 25 of the Lottery Act provided before its amendment in 1988 two exceptions to the general nonassignability of lottery prizes: winnings could be paid to a deceased prizewinner's estate or to a person pursuant to an appropriate judicial order; the 1988 amendment established a third distinct exception by providing for payments directly to a deceased prizewinner's surviving spouse or living children or other designated beneficiaries; the amendment to allow prize money to bypass the decedent's estate as nonprobate assets and go directly to the survivors indicated requires that the winnings of a deceased prizewinner should be paid to the decedent's estate only if the decedent has no surviving spouse or child and has designated no other beneficiary; only when the estate stands to receive the winnings because of the lack of a surviving spouse, child, or other designated beneficiary are those winnings subject to attachment by a person through a judicial order as provided by § 25 (1988 PA 243, MCL 432.25[1], [2]; MSA 18.969[25][1], [2]).

2. STATUTES — JUDICIAL CONSTRUCTION — ADMINISTRATIVE AGENCY INTERPRETATIONS.

An administrative agency's interpretation of a statute may be afforded some deference by the Court of Appeals but is not binding on the Court and cannot be used to override the plain meaning of the statute.

Patrick, Johnson, King & Gilbert, P.C. (by *Paul H. Johnson, Jr.*, and *David G. Stobb*) and *Jon Shefferly & Associates, P.C.* (by *Jon B. Shefferly* and *Todd E. Briggs*), for Michigan Basic Property Insurance Association.

Leib, Leib and Kramer, P.C. (by *Lawrence J. Leib*), for Willie Daniels, individually and as next friend of Terrance, Earl, and Ron Daniels, minors, Barbara Daniels, Theresa and Rena McKinney, Cora and Marilyn LeFlore, Alan and Audrey Stone, Dorothy Zillner, Brenda and John Chavis, Lee B. Campbell, George Draughn, Martha Draughn, individually and as next friend of Rickey and Tamika Draughn, minors, Earl, Dorothy, and Tina Green, Theodore and Judith McDowell, Edward and Jane Mgee, Kevin and Jackie Harris, Warren Zott, Mary Fisher, First Baptist Church.

Baggett-Hayes & Bates, P.C. (by *Earlene R. Baggett-Hayes*), for Mildred E. Ware, Personal Representative of the estate of James Ware, deceased.

Before: NEFF, P.J., and O'CONNELL and YOUNG, JR., JJ.

O'CONNELL, J. The sole issue in these interlocutory appeals is whether judgment creditors of a decedent's estate may collect from continuing installments of prize money issuing from the decedent's participation in the state lottery. The trial court ruled that the proceeds are to be paid directly to the decedent's surviv-

ing spouse and children and are not subject to process by the estate's creditors. We affirm.

In November 1986, James Ware won $2,000,000 in the state Jackpot Super Lotto, the winnings to be paid in installments of $100,000 each year for twenty years.

Ware owned residential property at 19167 Gilchrist in Detroit, but failed to pay the property taxes, and defendants Jerry and Harold Stehlik acquired the property through a tax deed. On September 28, 1994, a notice to quit the premises was served on Ware's daughter, who was inhabiting the property, directing her to vacate the premises by October 29, 1994. On the latter date, an explosion and fire occurred on this property, resulting in extensive personal injury and property damage. Ware himself was severely injured in the incident, succumbing to the injuries several days afterward. Ware died intestate, survived by his wife and several children.

Several individuals injured in the explosion and fire, and the insurer of several property owners who suffered losses in the incident, commenced actions against Ware's estate, alleging that Ware had intentionally caused the conflagration. The cases were consolidated for discovery and trial.

The personal representative of Ware's estate asked the circuit court for a declaratory judgment concerning whether the continuing payments of Ware's lottery winnings would be subject to the claims of plaintiffs in the event that they prevailed in their suits against the estate. After hearing arguments regarding the motion, the court ruled that the remaining lottery payments would pass directly to Ware's immediate family members and outside the reach of Ware's judgment

creditors. After the court denied a motion for reconsideration, plaintiffs filed separate applications to this Court for leave to file interlocutory appeals of the court's ruling. This Court initially denied leave, but upon reconsideration granted leave and consolidated the appeals.

The question whether judgment creditors of the estate of a lottery prizewinner who died intestate leaving a spouse and children may collect from the continuing lottery payments is a matter of first impression. The legislation governing this controversy read at the time relevant to these appeals as follows:

> (1) The right of any person to a prize drawn from the state lottery is not assignable, except that payment of any prize drawn may be paid to the family members or to the estate of a deceased prizewinner as provided in subsection (2), to a person pursuant to an appropriate judicial order, or to the state pursuant to section 32 [if the prizewinner has a liability to the state, or a support arrearage]. The commissioner shall be discharged of all further liability upon payment of a prize pursuant to this section.
>
> (2) If a prizewinner dies before collecting the full amount of his or her prize drawn from the state lottery, the bureau shall continue to make the remaining prize payments to the prizewinner's surviving spouse and the prizewinner's living children, in equal proportions, unless otherwise directed by the prizewinner. If there is not a surviving spouse or living children or other designated beneficiaries, the remaining prize payments shall be made to the prizewinner's estate. [MCL 432.25; MSA 18.969(25).]

We review questions of statutory construction de novo. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995). Plaintiffs argue that the statute expressly permits creditors to reach the lottery winnings through an "appropriate judicial

order," that the administrative rules from the Bureau of State Lottery reflect a legislative intent to allow creditors to garnish such payments, that the statute should not be read to abrogate provisions of the Revised Probate Code that afford creditors access to a decedent's estate, and, alternatively, that because the statutory language providing for payments of lottery winnings directly to family members of a deceased prizewinner was added by 1988 PA 243, effective July 11, 1988, it should not be applied retroactively to cover proceeds from Ware's 1986 lottery jackpot.

Regarding the statutory language itself, plaintiffs emphasize the provision for payment to "a person pursuant to an appropriate judicial order" in subsection 25(1), arguing that this language expressly preserves plaintiffs' right to seek court orders attaching the continuing lottery payments. However, the trial court concluded that subsection 25(1) establishes three distinct exceptions to its general rule prohibiting assignments of lottery prizes and that where the facts call for exercise of the provision for payments directly to a deceased prizewinner's family, that provision must control. We agree.

The primary purpose of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Haworth, supra* at 227. To the extent possible, each provision of a statute should be given effect, and each should be read to harmonize with all others. *Gebhardt v O'Rourke,* 444 Mich 535, 542; 510 NW2d 900 (1994). Where a specific statutory provision differs from a related general provision, the specific one controls. *Id.* at 542-543. In the instant case, the plain wording of subsection 25(2) states that the winnings

of a deceased prizewinner should be paid to the decedent's estate only if the decedent has no surviving spouse or children and has designated no other beneficiary. Giving full effect to this specific and unambiguous language suggests that only when the estate stands to receive the winnings as provided by subsection 25(2), for lack of a surviving spouse, children, or other designated beneficiary, are those winnings subject to attachment by a person through a judicial order as provided by subsection 25(1). This construction recognizes the specificity of the provision for distributing a deceased lottery winner's prize money directly to the decedent's spouse and children, or named beneficiaries, where such exist, while recognizing also the provision for payment to a person pursuant to a judicial order where the winnings are instead paid directly into the estate.

Further, the conformity of this construction with legislative intent is apparent from the history of the legislation in question. Before the 1988 amendment, MCL 432.25; MSA 18.969(25) announced only two exceptions to the general nonassignability of lottery prizes—that winnings could be paid to a deceased prizewinner's estate or to a person pursuant to an appropriate judicial order. When the Legislature promulgates new legislation, it is presumed to do so with knowledge of related existing legislation and to have intended to effect a change. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). Thus, the Legislature's amendment covering distribution of lottery winnings due a prizewinner who has died leaving immediate family or a designated beneficiary should be understood as a manifestation of the specific legislative intent to alter existing law to allow

such prize money to bypass the decedent's estate and go directly to the survivors indicated. See *Webster v Rotary Electric Steel Co*, 321 Mich 526, 531; 33 NW2d 69 (1948) ("Every part of the amendatory act should be given effect, if possible."). As the trial court observed, "in so amending the statute the Legislature gave no hint that it intended the interests of the creditors to hold sway."

Nor does an administrative rule promulgated before the 1988 amendment undermine its effect. Plaintiffs rely on 1979 AC, R 432.17(4):

> Upon the death of a prize winner who has not yet collected the full amount of his prize, the bureau shall continue payment to the estate of the winner until the full amount is paid unless instructed by an appropriate court order to make payment to another recipient. Payment of prize money shall not be accelerated before its normal date of payment because of the death of a prize winner.

This rule clearly reflects MCL 432.25; MSA 18.969(25) as it read before the 1988 amendment. Although this Court may afford an administrative agency's interpretation of a statute some deference, the agency's interpretation is not binding on this Court and cannot be used to override the plain meaning of the statute. *Watson v Bureau of State Lottery*, 224 Mich App 639, 649; 569 NW2d 878 (1997), citing *Ludington Service Corp v Acting Comm'r of Ins*, 444 Mich 481, 505; 511 NW2d 661 (1994), amended 444 Mich 1240 (1994). This principle applies particularly where, as here, the rule cited does not take into account subsequent legislative enactments. Accordingly, 1979 AC, R 432.17(4) affords no basis for circumscribing the provisions now in place under MCL 432.25; MSA 18.969(25) for paying lottery proceeds directly to the

immediate family or named beneficiary of a deceased prizewinner.

Regarding plaintiffs' argument that the circuit court's interpretation of the statute creates conflict with the Revised Probate Code, plaintiffs' reliance on the latter in hopes of tapping Ware's lottery prize is misplaced. Plaintiffs cite MCL 700.117; MSA 27.5117, which provides for recovery of charges against an intestate estate, and MCL 700.192; MSA 27.5192, which establishes the priority of such claims. Although those provisions do provide judgment creditors with access to a decedent's estate, they do not apply in the instant case because Ware's continuing lottery payments will go directly to his family members and never be part of Ware's estate. The Legislature has created an avenue through which lottery winnings may pass as nonprobate assets. Thus, there is no conflict between the legislation at issue and the Revised Probate Code.[1]

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[1] Nor does this construction of the Lottery Act conflict with *Watson, supra,* or *B P 7 v Bureau of State Lottery,* 225 Mich App 811; 572 NW2d 663 (1977), vacated 225 Mich App 811 (1997). Both cases concerned prizewinners wishing to assign continuing lottery installments to a corporation in exchange for present cash value. In *Watson,* a panel of this Court affirmed a judicial order allowing the assignments, but in *B P 7* another panel affirmed such a judicial order only because it was obliged to follow *Watson.* Because both cases concerned voluntary assignments by the prizewinners of future lottery installments in exchange for present cash value, those cases, and the pending decision by the conflict panel, see *id.,* have no bearing on the instant case. Where, as here, the prizewinner dies before collecting all the prize, because the applicable statute specifically provides for the payment of the continuing installments directly to the prizewinner's immediate family members or designated beneficiary, the interest of such survivors in the remaining prize vests immediately upon the prizewinner's death. Thus, no "appropriate judicial order" will allow *potential* creditors, who have yet to prove their case against the estate, to claim an interest in winnings passing directly to those others as a nonprobate asset.

Finally, we find no merit in plaintiffs' argument that the 1988 amendment of MCL 432.25; MSA 18.969(25) should not be applied to a prize won in 1986. Generally, statutes are presumed to operate only prospectively. *Joe Dwyer, Inc v Jaguar Cars, Inc*, 167 Mich App 672, 680; 423 NW2d 311 (1988). However, applying the 1988 amendment to the facts of this case does not create a controversy concerning this principle. Although Ware won his lottery prize two years before the subsection 2 relevant to these appeals was added to MCL 432.25; MSA 18.969(25), that addition came several years before Ware's death and before plaintiffs made any claims against Ware's estate. Because the legislation governing the distribution of a decedent's lottery winnings was well in place before any party to the instant dispute acquired an interest in those winnings, there is no retroactive application of that legislation at work. Further, even if the application of MCL 432.25(2); MSA 18.969(25)(2) in this case were retroactive, that application would be appropriate. Statutes that operate in furtherance of existing remedies, and that neither create new rights nor destroy rights already existing, are held to operate retroactively unless a different intent is clear. *In re Certified Questions (Karl v Bryant Air Conditioning Co)*, 416 Mich 558, 572; 331 NW2d 456 (1982). Thus, because no party had a vested right in Ware's lottery proceeds when the 1988 amendment took effect, retroactive application of the distribution scheme of MCL 432.25(2); MSA 18.969(25)(2) would be appropriate.

Affirmed.

PLAMONDON v PLAMONDON

Docket No. 199858. Submitted March 17, 1998, at Lansing. Decided May 22, 1998, at 9:20 A.M.

Albert J. Plamondon brought an action in the Leelanau Circuit Court against Michael H. and Angelia M. Plamondon, seeking resolution of a property dispute. The trial court, Philip E. Rodgers, Jr., J., referred the dispute to mediation under the Community Dispute Resolution Act, MCL 691.1551 *et seq.*; MSA 27.15(51) *et seq.* The parties participated voluntarily in the mediation and, as a result of the mediation, entered into and signed a written agreement. The court entered a judgment consistent with the written agreement. The plaintiff appealed, alleging that the settlement agreement was void ab initio because the mediation did not comply with MCR 2.403 and 2.507(H) and because the plaintiff made a mistake or was ill-advised in his decision to forgo the presence of counsel or his son Arnold Plamondon at the mediation.

The Court of Appeals *held*:

1. Neither MCR 2.403 nor MCR 2.507(H) apply to the mediation conducted pursuant to the Community Dispute Resolution Act in this case.

2. As a result of the plaintiff's voluntary participation, the plaintiff is subject to the provisions of the act, notwithstanding the fact that his voluntary participation resulted from a referral to the dispute resolution process by the trial court in a pending case.

3. A signed, written agreement resulting from mediation conducted pursuant to the act is enforceable in the same manner as any other written contract. The plaintiff failed to demonstrate grounds to set aside the settlement agreement by a showing of mistake, fraud, or unconscionable advantage.

Affirmed.

1. COMPROMISE AND SETTLEMENT — COMMUNITY DISPUTE RESOLUTION ACT — MEDIATION.

The Community Dispute Resolution Act creates a procedure apart from court actions; the act requires participation in the dispute resolution process to be voluntary, and a person who voluntarily participates in mediation conducted pursuant to the act is subject to the provisions of the act, notwithstanding the fact that the person's

voluntary participation resulted from a referral to the dispute resolution process by the trial court in a pending case (MCL 691.1551 *et seq.*; MSA 27.15[51] *et seq.*).

2. COMPROMISE AND SETTLEMENT — COMMUNITY DISPUTE RESOLUTION ACT — SETTLEMENT AGREEMENTS — CONTRACTS.

A written agreement embodying a settlement reached in a dispute resolution process conducted pursuant to the Community Dispute Resolution Act is enforceable in the same manner as any other written contract and is binding on the parties absent a showing of mistake, fraud, or unconscionable advantage (MCL 691.1556a; MSA 27.15[56a]).

Bay Area Legal Services, P.C. (by *Edward M. Czuprynski*), for the plaintiff.

Robert A. Steadman, P.C. (by *Robert A. Steadman*), for the defendants.

Before: BANDSTRA, P.J., and MACKENZIE and N. O. HOLOWKA*, JJ.

PER CURIAM. Plaintiff appeals as of right from a judgment entered on a settlement agreement reached during mediation pursuant to the Community Dispute Resolution Act, MCL 691.1551 *et seq.*; MSA 27.15(51) *et seq.* We affirm.

Plaintiff argues that the settlement agreement was void ab initio because there was no enforceable underlying agreement between the parties to submit to community dispute resolution mediation, there being no agreement made on the record in open court or evidence of the agreement in writing subscribed by plaintiff as required by MCR 2.507(H). We disagree because this court rule is inapplicable to this community dispute resolution mediation.[1] The Community

* Circuit judge, sitting on the Court of Appeals by assignment.

[1] Even if MCR 2.507(H) were applicable here, it would only mean that the agreement between the parties to submit to community dispute reso-

Dispute Resolution Act sets up a procedure apart from court actions; participants in mediation may or may not be litigants in a pending lawsuit. The act requires only that "[p]articipation in the dispute resolution process shall be voluntary," MCL 691.1556(1); MSA 27.15(56)(1), and the trial court here found, without dispute from plaintiff, that the parties did, in fact, participate voluntarily. As a result of his voluntary participation, plaintiff is subject to the provisions of the act, notwithstanding the fact that his voluntary participation resulted from a referral to the dispute resolution process by the trial court in a pending case.

As a result of the mediation, the parties entered into and signed a written agreement. The act specifies that this agreement "is enforceable in the same manner as any other written contract." MCL 691.1556a; MSA 27.15(56a). Under usual contract principles, plaintiff is bound by the settlement agreement absent a showing of mistake, fraud, or unconscionable advantage. *Prichard v Sharp*, 51 Mich 432, 435; 16 NW 798 (1883); *Marvin v Marvin*, 203 Mich App 154, 157; 511 NW2d 708 (1993); *Meyer v Rosenbaum*, 71 Mich App 388, 393-394; 248 NW2d 558 (1976). Plaintiff does not advance any claim on appeal that the settlement agreement was the result of mistake, fraud, or unconscionable advantage. Instead, plaintiff seeks to upset the validity of the settlement agreement on the ground that the mediation did not comply with MCR 2.403, a rule that is inapplicable to this community

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lution mediation was not binding. However, that agreement is not at issue in this case, the parties having fulfilled it by proceeding through the mediation process. The agreement at issue here is a separate agreement entered into after and as a result of mediation.

dispute resolution mediation. Additionally, plaintiff asserts that the settlement agreement should be upset because, in hindsight, plaintiff made a mistake or was ill-advised in his decision to forgo the presence of counsel and his son Arnold Plamondon at the mediation. Absent a showing of mistake, fraud, or unconscionable advantage, plaintiff has failed to demonstrate grounds to set aside the settlement agreement.

We affirm.

FARM BUREAU MUTUAL INSURANCE COMPANY v BLOOD

Docket Nos. 197772, 197779. Submitted September 3, 1997, at Grand Rapids. Decided May 22, 1998, at 9:25 A.M.

Farm Bureau Mutual Insurance Company brought two actions in the Ionia Circuit Court against the parties in two underlying circuit court actions, Sterling K. Blood; Wayne M. Martin; Donald R. Martin; David E. Fennell, as next friend of Mandy Fennell, a minor; Mary Perry, as next friend of Gordon Nummer, Jr., a minor; Mandy Fennell; and Gordon Nummer, Jr., seeking a determination regarding its liability for any personal injury damages that Blood owed Mandy Fennell and Gordon Nummer, Jr., following the entry of default judgments against Blood in the underlying actions. Fennell and Nummer, who were minors at the time the underlying actions were brought through their next friends, had alleged that Wayne M. Martin, the driver of an automobile owned by Donald R. Martin that was involved in an accident while Fennell and Nummer were passengers, had been served alcohol by Blood before the accident. Blood, a minor at the time of the accident, was residing with his mother and stepfather, Joy and Eddie Ingvartsen, when the accident occurred, and Farm Bureau had issued the Ingvartsens a farm owners' insurance policy. Farm Bureau sought summary disposition in its actions on the basis of an exclusion in the policy regarding damages arising out of criminal acts of the insured and alleging that Blood's serving of alcohol to Martin was a criminal act. The court, Charles W. Simon, Jr., J., granted summary disposition in favor of Farm Bureau in both actions, finding that it did not have any liability for the damages judgments against Blood. Gordon Nummer, Jr., appealed. (Docket No. 197772). Mandy Fennell appealed. (Docket No. 197779). The appeals were consolidated.

The Court of Appeals *held*:

1. The exclusions section of the policy at issue is ambiguous. The policy fails to specify exactly what type of loss the policy purports to exclude if the loss arises out of a criminal act of the insured. Because ambiguities are to be construed against the insurer and exclusionary clauses are to be strictly construed against the insurer, the court erred in granting Farm Bureau summary disposition on the basis of the purported exclusion for criminal acts of the insured.

2. A court may rely on affidavits, depositions, or any other documentary evidence, including the pleadings, in deciding whether a genuine issue of material fact exists. The court had sufficient documentation to decide the motion for summary disposition because, although the plaintiff did not attach supporting affidavits or other documents to its motion, the court had before it the plaintiff's complaint for declaratory relief that included as exhibits the complaints in the underlying actions and a copy of the insurance policy.

Reversed and remanded.

O'CONNELL, P.J., concurring in the result only, stated that the trial court erred in relying on the holding in *Allstate Ins Co v Keillor (On Remand)*, 203 Mich App 36 (1993), as being dispositive of the plaintiff's declaratory judgment actions. The *Allstate* Court held, in part, that the act of serving alcohol to a minor constitutes a criminal act causing an exclusionary clause in an insurance policy excluding liability for intentional or criminal acts of an insured person to apply. The Supreme Court affirmed in part *(After Remand)*, 450 Mich 412 (1995), only insofar as the Court of Appeals had determined that coverage was precluded by a motor vehicle exclusion in the policy. The Supreme Court specifically declined to consider the criminal acts exclusion. Therefore, because the portion of the Court of Appeals opinion in *Allstate* relating to the criminal acts exclusion does not constitute precedent, the trial court erred in relying on it. On remand, the trial court should not rely on *Allstate*.

1. INSURANCE — CONTRACTS — JUDICIAL CONSTRUCTION.

The Court of Appeals, in determining whether an insurance policy applies in an action, first determines whether the policy is clear and unambiguous on its face; the Court reads and interprets the contract as a whole; the contract is clear if it fairly admits of but one interpretation, but is ambiguous if, after the entire contract has been read, the language reasonably can be understood in different ways; ambiguities in a policy drafted by the insurer are construed against the insurer and in favor of the insured and a finding of coverage; exclusions are read with the insuring agreement and independent of other exclusions; exclusionary clauses are strictly construed against the insurer.

2. MOTIONS AND ORDERS — EVIDENCE — SUMMARY DISPOSITION — ISSUES OF MATERIAL FACT.

A court considering a motion for summary disposition in which it is alleged that no genuine issue of material fact exists may rely on affidavits, depositions, or any other documentary evidence, includ-

ing the pleadings, in deciding whether a genuine issue of material fact exists (MCR 2.116[C][10]).

Jonathan Shove Damon Attorneys and Counselors (by *Jonathan Shove Damon*), for Farm Bureau Mutual Insurance Company.

Boyden, Waddell, Timmons & Dilley (by *Frederick D. Dilley* and *Andrea D. Crumback*), for Mandy Fennell.

Sawyer Law Offices (by *Keary W. Sawyer*), for Gordon Nummer, Jr.

Before: O'CONNELL, P.J., and MACKENZIE and GAGE, JJ.

PER CURIAM. In these appeals as of right from orders granting plaintiff Farm Bureau Mutual Insurance Company summary disposition pursuant to MCR 2.116(C)(10) in actions for a declaratory judgment, which have been consolidated pursuant to this Court's order, minor defendants Mandy Fennell and Gordon Nummer, Jr., through their respective next friends, David Fennell and Mary Perry (hereafter defendants), appeal. We reverse.

Mandy Fennell and Gordon Nummer, Jr., were severely injured when an automobile in which they were passengers veered from the road and crashed. Fennell and Nummer, through their next friends, individually sued the driver of the automobile involved in the accident, Wayne M. Martin; the owner of the automobile, Donald R. Martin; and Sterling K. Blood, who they alleged served alcohol to the underaged driver before the accident. During discovery, Fennell and Nummer learned that Blood, a minor, was residing with his mother and stepfather, Joy and Eddie

Ingvartsen, when he served the alcohol to Martin and when the accident occurred. The Ingvartsens held a farm owners' insurance policy issued by plaintiff. Blood did not answer the complaints and default judgments were entered against him in both lawsuits.

Plaintiff filed these declaratory judgment actions, alleging on several grounds that it had no liability for any personal injury damages Blood owed to Fennell and Nummer. Eventually, plaintiff sought summary disposition on the single ground that the insurance policy contained an exclusion for damages arising out of criminal acts of the insured and Blood's serving of alcohol to Martin was a criminal act. The circuit court granted plaintiff summary disposition on this ground. On appeal, defendants contend that the circuit court erred in granting summary disposition pursuant to MCR 2.116(C)(10) because, in their view, a genuine issue of material fact existed concerning whether plaintiff owed insurance coverage to its insured, Sterling Blood.

We review a circuit court's grant of summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 223 Mich App 264, 270; 565 NW2d 877 (1997). In determining whether an insurance policy applies, this Court must first determine whether the policy is clear and unambiguous on its face. In doing so, the insurance contract should be read and interpreted as a whole. *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 649; 517 NW2d 864 (1994). An insurance contract is clear if it fairly admits of but one interpretation. *Id.* An insurance contract is ambiguous if, after reading the entire contract, its language reasonably can be understood in

differing ways. *Id.* Ambiguities in an insurance policy drafted by the insurer are to be construed against the insurer and in favor of the insured and a finding of coverage. *State Farm Mut Automobile Ins Co v Enterprise Leasing Co*, 452 Mich 25, 38; 549 NW2d 345 (1996). Exclusions are to be read with the insuring agreement and independent of other exclusions. *Taylor*, *supra* at 649. Exclusionary clauses are to be strictly construed against the insurer. *Fire Ins Exchange v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996).

The insurance policy in dispute has several exclusions, including a clause that plaintiff contends excludes coverage for all damages arising out of criminal acts of the insured. Plaintiff successfully argued to the circuit court that Blood's violation of MCL 436.33; MSA 18.1004, which provides that a person who knowingly furnishes alcohol to a minor is guilty of a misdemeanor, precluded coverage under the criminal acts exclusion of the policy. The circuit court granted summary disposition to plaintiff on this ground. Plaintiff contends that this Court's opinion in *Allstate Ins Co v Keillor (On Remand)*, 203 Mich App 36; 511 NW2d 702 (1993), aff'd in part (*After Remand*), 450 Mich 412; 537 NW2d 589 (1995), is dispositive of its declaratory judgment actions. In that case, a panel of this Court found that for purposes of an exclusionary clause, it is a criminal act to serve alcohol to a minor. That decision was affirmed in part by the Supreme Court on other grounds. The Supreme Court expressly declined to consider the issue before us.

Nor do we need to consider this issue to resolve the present matter. Defendants argue that the exclu-

sions section of the policy is ambiguous. We agree. Section II, part 1, subsection a, which is the "Insuring Agreement" states: "We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies." Section II, part 2 is labeled "Exclusions" and states as a preliminary matter: "This insurance does not apply to: . . . ." Section II, part 2, subsection u reads in its entirety "arising out of a criminal act of an insured."[3] The policy fails to specify, with regard to subsection u, exactly what type of loss the policy purports to exclude if it arises out of a criminal act of the insured. By contrast, in most of the other subsections of the "Exclusions" section, the policy delineates what types of damages will not be covered. In subsections a, b, c, d, e, f, g, h, i, j, k, s, and v, for example, the policy clearly excludes coverage for loss in the form of "bodily injury or property damage." In subsections l, m, and n the policy excludes coverage for loss in the form of "bodily injury" only. Finally, in subsections o, p, q, r, and x the policy excludes coverage for "property damage" only.

Plaintiff's omission in subsection u presents the logical inquiry whether the policy excludes coverage for bodily injury arising out of a criminal act of an insured, whether it excludes coverage for property damages arising out of a criminal act of an insured, or whether it excludes coverage for both. Most of the other exclusions in the policy, which are precisely written, leave no doubt in the mind of the policy-

[3] The policy defines a criminal act as "any act or number of actions which are criminal in nature whether or not the act or actions lead to successful prosecution or conviction."

holder regarding the level of protection.[4] Yet, § II, part 2, subsection u is susceptible to more than one interpretation by a reasonable reader. Moreover, were it not for the rule of construction that exclusionary clauses are to be read with the insuring agreement and separate from each other, *Taylor*, *supra* at 649, it would be possible for the average reasonable person to read subsection u as an extension of subsection t.[5] We find therefore that the "Exclusions" section of this insurance policy contains an ambiguity regarding what types of damages are excluded if they arise out of criminal acts of the insured. See *id.* at 649. Because ambiguities are to be construed against the insurer, *State Farm*, *supra* at 38, and exclusionary clauses are to be strictly construed against the insurer, *Fire Ins Exchange*, *supra* at 687, the circuit court erred in granting plaintiff summary disposition on the basis of the purported exclusion for criminal acts of the insured.

Plaintiff now argues that the policy must be read in its entirety to determine if an ambiguity exists and that the exclusions in § II, part 2 clearly refer to bodily injury and property damage liability coverage.

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[4] We note that other ambiguities exist within the "Exclusions" section of the policy. Two other subsections under part 2 of § II do not clearly delineate the types of damages being excluded. Subsection t excludes coverage for "damages" to "your product; your work; or impaired property" under certain conditions. A paragraph that presumably falls between subsections t and u states that "Exclusions c. through u. do not apply to damage by fire to premises rented to you." Although subsection v clearly excludes bodily injury or property damage if an insured "is also an insured under a nuclear energy liability policy," subsection w when read alone appears to be ambiguous in that it reads simply, "from any: 1) nuclear reaction; 2) nuclear radiation; or 3) radioactive contamination. . . ."

[5] Were it not for the same rule of construction, it would also be possible to read subsection w as an extension of subsection v.

However, we reject this argument because some of the subsections in § II, part 2 clearly delineate exclusions for either bodily injury or property damage but not both. Plaintiff further contends that grammatical errors are not necessarily ambiguous and will not automatically defeat the intent of the parties to a contract. Plaintiff points to two Michigan Supreme Court cases in making this argument. In *Beadle v Sage Land & Improvement Co*, 140 Mich 199, 202; 103 NW 554 (1905), the Supreme Court noted: "While courts, in construing writings, give due force to the grammatical arrangement of clauses, nothing is better settled than that they will disregard that construction if it is at variance with the intent of the parties as indicated in the whole writing." In *Mondou v Lincoln Mut Casualty Co*, 283 Mich 353; 278 NW 94 (1938), the Supreme Court noted that the word "by" had been omitted from the pertinent exclusion but held that the error could be corrected because the meaning intended by the parties was certain. *Id.* at 358. However, the Court also noted that "[h]ad there been any doubtful meaning or ambiguity with the word omitted, there is no question but that the word could not have been supplied." *Id.* at 359. We again reject plaintiff's argument because neither of these Supreme Court opinions mandate the conclusion that the contract in question is unambiguous or require this Court to supply additional language to make sense of the exclusion in question.

In a separate argument, defendants contend that the circuit court erred in granting plaintiff's motion for summary disposition because plaintiff did not attach supporting affidavits or other documents as required by MCR 2.116(G)(3). As we pointed out in

Michigan Nat'l Bank-Oakland v Wheeling, 165 Mich App 738, 742-743; 419 NW2d 746 (1988), a court may rely on affidavits, depositions, or any other documentary evidence in deciding whether a genuine issue of material fact exists. The documentary evidence to be considered includes the pleadings. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Because the trial court had before it plaintiff's complaint for declaratory relief, which included as exhibits both Fennell's and Nummer's complaints as well as a copy of the subject insurance policy, the court had sufficient documentation to decide the issue.

We reverse the circuit court's grant of summary disposition to plaintiff and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

O'CONNELL, P.J. (*concurring in the result only*). The trial court concluded that this Court's opinion in *Allstate Ins Co v Keillor (On Remand)*, 203 Mich App 36; 511 NW2d 702 (1993), aff'd in part (*After Remand*), 450 Mich 412; 537 NW2d 589 (1995), is dispositive of plaintiff's declaratory judgment actions.[1] I respectfully disagree.

In *Allstate*, *supra*, a panel of this Court considered an exclusionary clause in the insurance contract that excluded liability for "intentional or criminal acts of an insured person . . . ." 203 Mich App at 39-40. This Court held that the act of serving alcohol to a minor constitutes a criminal act causing the exclusion to apply. *Id.* at 40. The Court then concluded that

[1] The trial court found this Court's opinion in *Allstate*, *supra*, to be dispositive of this case. However, the majority opinion, *ante* at 62, concludes that it need not "consider this issue to resolve the present matter."

because the defendant served alcohol to a minor, i.e., committed a criminal act, the exclusion precluded coverage.[2] *Id.* at 41. On appeal after remand, the Supreme Court declined to consider the criminal acts exclusion, instead basing its opinion on a motor vehicle exclusion in the contract. 450 Mich 420-421. The Court specifically noted that it was affirming the opinions of this Court and the trial court "only insofar as they hold that coverage is precluded by the motor vehicle exclusion." *Id.*

When the Michigan Supreme Court reviews a decision of this Court, it occasionally decides to address less than all the issues presented to this Court. This was the case in *Allstate, supra.* With regard to the issues the Supreme Court decides to address, the Court reviews the matter in the first instance, not merely considering the correctness of this Court's decision. Once the Supreme Court announces its decision, that opinion is determinative of the legal question or questions involved and becomes binding precedent on intermediate appellate and trial courts. *Riley v Northland Geriatric Center*, 425 Mich 668, 680; 391 NW2d 331 (1986). Points of law not discussed in the Supreme Court's opinion or ruled upon by that Court are not authoritative and are not to be considered as having been so decided as to constitute precedents. See *Dist of Columbia v Sierra Club*, 670

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[2] I am troubled by a determination that the criminal acts exclusion applies to preclude insurance coverage. Consider the following hypothetical situations: (1) the insured is charged with drunk driving, a criminal act that would preclude coverage; (2) the insured violates a city ordinance by failing to shovel the snow from his sidewalk, a criminal act that would preclude coverage. Such an interpretation could greatly restrict the insured's ability to get insurance coverage in situations where coverage becomes vitally important.

A2d 354, 360 (DC App, 1996). See also *Bostrom v Jennings*, 326 Mich 146, 156-157; 40 NW2d 97 (1949), not followed on other grounds by *Sexton v Ryder Truck Rental, Inc*, 413 Mich 406; 320 NW2d 843 (1982) (noting that where "a question necessarily involved in a case and answered by our holding was neither considered by the Court nor discussed in our opinion, the answer thus arrived at is not binding as a precedent").[3]

When, after reviewing the issues in any particular case on appeal from this Court, the Supreme Court enters an order affirming or reversing a final order issued by a panel of this Court, that order becomes the law of the case. While this Court's opinion may provide guidance to those attempting to interpret the Supreme Court's holding, the intermediate opinion no longer has precedential value and may not be relied upon unless the Supreme Court has specifically approved or adopted the Court's opinion or holding. Similarly, when a case is appealed to the Supreme Court and the Court does not accept the reasoning or analysis of the lower court, or limits its acceptance of the lower court's opinion, the rejected analysis cannot be relied on.

A contrary conclusion would inevitably leave us with the uncertainty of two tiers of jurisprudence in Michigan. The first would be that part of a decision of this Court that has been appealed to the Supreme Court but does not constitute part of that Court's opinion. The second would be the decision of the

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[3] This is an issue of first impression in Michigan. Because neither party has briefed this issue on appeal, I would remand this case to the trial court to allow the parties to file briefs and to present this matter to the trial court before an appellate decision.

Supreme Court insofar as the decision resolves the issues presented to that Court on appeal. Such a situation would inevitably create difficulties in Michigan law. In some cases, for example, it may be difficult to determine the extent of the Supreme Court's opinion —i.e., whether the Court approved of specific language in an opinion or merely a specific holding or rationale. In other cases, the Supreme Court may, in fact, have implicitly adopted the rationale of this Court, but declined to expressly state its intentions. By determining that the decision of the Court of Appeals has limited precedential value, my conclusion avoids such difficulties.

In any event, with respect to *Allstate*, *supra*, the Supreme Court noted that it was affirming the opinions of this Court and the trial court "only insofar as they hold that coverage is precluded by the motor vehicle exclusion." 450 Mich 420-421. Such an express statement of the Court's intentions should not be read as an implicit acceptance of the remainder of this Court's opinion. To the contrary, the Court appears to have specifically rejected those parts of the opinion not relating to the motor vehicle exclusion. This conclusion is supported by the fact that Justice RILEY wrote a separate concurring opinion in *Allstate* simply to "signal" her "concerns with the result of the Court of Appeals regarding the intentional/criminal acts exclusion." *Id.* at 421 (RILEY, J., concurring). Justice RILEY agreed, however, that the Court did not need to consider that exclusion because its decision was based on the automobile exception. *Id.* Were we to read the majority's opinion in *Allstate* as an approval of this Court's analysis regarding the intentional/criminal acts exclusion, Justice RILEY's opinion

should be read as a dissent rather than a concurrence.

Insofar as I believe that the portion of this Court's opinion in *Allstate*, *supra*, that relates to the intentional/criminal acts exclusion is not good law in Michigan, I disagree with the majority's apparent approval of *Allstate*. Therefore, because I conclude that the trial court erred in relying on *Allstate*, I would reverse and remand for further proceedings consistent with this opinion.

WHITE v BUSUITO

Docket No. 197081. Submitted February 4, 1998, at Detroit. Decided May 26, 1998, at 9:00 A.M. Leave to appeal sought.

Carol J. White brought an action in the Wayne Circuit Court against Michael J. Busuito, alleging medical malpractice. On motions by the plaintiff, the court, Carole F. Youngblood, J., entered a default and a default judgment after the defendant did not file an answer to the complaint. The court thereafter denied a motion by the defendant to set aside the default and the default judgment, rejecting the defendant's contention that he did not have to file an answer because the plaintiff failed to file either security for costs or an affidavit of meritorious claim. The defendant appealed.

The Court of Appeals *held*:

MCL 600.2912d; MSA 27A.2912(4) and MCR 2.109(B), at the time this action was brought, required a medical malpractice plaintiff to file either security for costs or an affidavit of meritorious claim with the complaint. MCL 600.219e(1); MSA 27A.2912(5)(1) and MCR 2.108(A)(6), at the time this action was brought, required a medical malpractice defendant to file an answer to the complaint within twenty-one days of being served with a notice of filing of security for costs or an affidavit of meritorious claim. Accordingly, a plaintiff's filing of security for costs or an affidavit of meritorious claim was an absolute prerequisite to a defendant's obligation to answer or otherwise defend the action, and the twenty-one-day period for answering began with the filing of security for costs or an affidavit of meritorious claim.

In this case, no answer to the plaintiff's complaint was due in the absence of a filing by the plaintiff of security for costs or an affidavit of meritorious claim, and the default and the default judgment should not have been entered.

Default and default judgment vacated; case remanded for further proceedings.

NEGLIGENCE — MEDICAL MALPRACTICE ACTIONS — SECURITY FOR COSTS — AFFIDAVITS OF MERITORIOUS CLAIM.

A defendant in a medical malpractice action brought when a statute and a court rule required the plaintiff to file either security for costs or an affidavit of meritorious claim with the complaint was

obligated to file an answer within twenty-one days of being served notice of the filing of security or an affidavit; in the absence of a filing of security or an affidavit, the defendant was not obligated to answer and a default or default judgment could not be entered on the basis of a failure to answer (MCL 600.2912d, 600.2912e[1]; MSA 27A.2912[4], 27A.2912[5][1]; MCR 2.108[A][6], 2.109[B]).

Law Offices of Alan H. Broad, P.C. (by *Alan H. Broad*), for the plaintiff.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Brian J. Doren*), for the defendant.

Before: CAVANAGH, P.J., and WHITE and YOUNG, JR., JJ.

YOUNG, JR., J. The trial court entered a default judgment in favor of plaintiff in the amount of $750,000 after defendant failed to respond to plaintiff's complaint alleging medical malpractice. The court also denied defendant's motion to set aside the default and resulting default judgment. Defendant now appeals as of right. While defendant asserts several alternative bases for reversal, we find one to be dispositive. We conclude that, because plaintiff failed to file either security for costs or an affidavit of meritorious claim as required by MCL 600.2912d; MSA 27A.2912(4), defendant had no obligation to answer plaintiff's complaint. We therefore vacate the default and default judgment entered against defendant and remand for further proceedings.

I. PROCEDURAL BACKGROUND

Plaintiff filed a spare one-page, four-paragraph, medical malpractice complaint against defendant on March 30, 1994. In her complaint, plaintiff alleged that defendant "provided medical treatment" to her which "failed to comply with the requisite standards of medical practice applicable to defendant," and that plain-

tiff "suffered damages as a proximate result of [defendant's] breach of the standards of medical care." Plaintiff failed to serve defendant in a timely fashion, so she obtained an order on June 30, 1994, authorizing the issuance of a second summons expiring on March 29, 1995.[1] Although subsequently repudiated under oath by the process server, the return of service indicated that defendant was personally served at his home on March 24, 1995, by Leland C. Spencer.[2] A default was entered against defendant on May 12, 1995, for his failure to answer or otherwise defend the action. On May 15, 1995, plaintiff filed a

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[1] Defendant asserts that the first summons had already expired and that plaintiff's cause of action was therefore dismissed by operation of MCR 2.102(E). Defendant argues in the alternative that the issuance of the second summons was improper because plaintiff failed to show good cause as required by MCR 2.102(D). The trial court ruled that the original summons was properly extended. In light of our conclusion that the default and resulting default judgment were void because defendant had no obligation to answer plaintiff's complaint, we do not reach or address these issues.

[2] Defendant disputes that he was ever served with plaintiff's complaint. Two hearings, on November 30, 1995, and December 6, 1995, were eventually conducted on this issue. Defendant testified that a process server came to his house on March 24, 1995, and spoke with defendant's wife, but that defendant did not come to the door because he was ill. Defendant further testified that the process server did not leave any papers. Spencer, the process server, testified that, to the best of his recollection, he did not leave the complaint with either defendant or his wife, which corroborates defendant's testimony. Spencer did testify that the notarized signature on the proof of service appeared to be his and that he would not have signed the proof of service it if it was not accurate and complete. However, Spencer also testified that he could not have signed the proof of service on April 3, 1995, the date it was notarized, because he was conducting other business that day. Moreover, the invoice sent to plaintiff's counsel was for an "attempted service" only. Notwithstanding, the trial court found by a "preponderance of the evidence" that defendant was in fact served. Again, in light of our decision to vacate the default and resulting default judgment on other grounds, we need not reach or address defendant's claim that the default judgment should have been set aside because of the obvious inconsistencies between the return of service and the testimony presented at the hearings.

motion for the entry of a default judgment in the amount of $750,000. Defendant failed to respond either to the notice that default had been entered or to the motion for default judgment.[3]

A hearing regarding plaintiff's request for a default judgment was held on June 2, 1995. Plaintiff testified at the hearing that she sought treatment from defendant, a plastic surgeon, for the following reasons:

> I was in a car accident. I have a herniated disc in my neck and my lower back. I had loss [sic] a considerable amount of weight. When I came off the steroids, I had a huge flap in front of me. I couldn't walk, big breasts. They wanted to do a breast reduction and abdominoplasty which was to remove the flap.

Plaintiff testified that defendant told her that the proposed surgery would remove sixty pounds of her abdominal and breast tissue, improve her capacity to perform the tasks of life, and that she would only have to spend one or two weeks in the hospital. Plaintiff testified that defendant removed the stitches within a week of her surgery despite plaintiff's concern that it was too soon to remove them, and that, as a result, her abdominal wound opened and became infected. Despite the fact that several subsequent surgeries were performed in an attempt to close the wound, as of the date of the hearing, plaintiff still required intravenous medication to fight infections and had calcified tumors on her hips as a result of prolonged bed rest.

Following plaintiff's testimony, the trial court ruled:

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[3] Defendant claimed that he was unaware of the lawsuit until June 3, 1995, when he opened his mail and saw the motion for entry of default judgment.

> I find that the injuries sustained by Ms. White are extraordinary and have changed her entire life and probably will for the remaining time that she lives. I think the sum of seven hundred and fifty thousand dollars is reasonable compensation for her pain and suffering. I will grant the [default] judgment.

Consequently, a $750,000 default judgment against defendant was entered on June 2, 1995. On July 16, 1996, the trial court denied defendant's request to set aside the default and resulting default judgment.

II. ANALYSIS

On appeal, defendant argues that the entry of a default and default judgment was improper because plaintiff's failure to file either security for costs or an affidavit of meritorious claim as required by MCL 600.2912d; MSA 27A.2912(4) relieved defendant of his obligation under MCL 600.2912e(1); MSA 27A.2912(5)(1) to serve and file an answer to plaintiff's complaint. We agree.[4] This Court construes statutory provisions according to their plain terms. *Grand Traverse Co v Michigan*, 450 Mich 457, 464; 538 NW2d 1 (1995). If the meaning of a statute is clear and unambiguous, there is no room for judicial construction or interpretation. *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993).

The statutory provision in effect at the time plaintiff's complaint was filed required all medical mal-

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[4] We note that although the trial court denied defendant's request for relief from the default judgment on this ground, the court failed to explain the basis for its decision. We also note plaintiff's argument that defendant waived this issue by failing to respond in a timely fashion to the motion for entry of default judgment. However, MCR 2.111(E), which plaintiff cites for this proposition, is inapposite, and plaintiff provides no other authority in support of her argument. Therefore, we decline to address it. *Winiemko v Valenti*, 203 Mich App 411, 419; 513 NW2d 181 (1994).

practice plaintiffs to file either security for costs or an affidavit of meritorious claim with their complaints. MCL 600.2912d; MSA 27A.2912(4); see also MCR 2.109(B). Even more important to our resolution of the instant appeal, however, is MCL 600.2912e(1); MSA 27A.2912(5)(1), which provided that, "[i]n an action alleging malpractice, within 21 days after the plaintiff has furnished security or filed an affidavit in compliance with section 2912d, the defendant shall file an answer." Likewise, MCR 2.108(A)(6) provides:

> In an action alleging medical malpractice filed on or after October 1, 1986, unless the defendant has responded as provided in subrule (A)(1) or (2), the defendant must serve and file an answer within 21 days after being served with the notice of filing the security for costs or the affidavit in lieu of such security required by MCL 600.2912d; MSA 27a.2912(4).[5]

Giving the language contained in both §2912e(1) and MCR 2.108(A)(6) its plain and ordinary meaning, we conclude that a plaintiff's filing of security for costs or an affidavit of meritorious claim is an absolute prerequisite to the defendant's obligation to answer or otherwise defend the action.

Here, it is undisputed that plaintiff never filed security for costs or an affidavit of merit as required by MCL 600.2912d; MSA 27A.2912(4).[6] Defendant cor-

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[5] MCL 600.2912d-e; MSA 27A.2912(4)-(5) were amended by 1993 PA 78. MCL 600.2912d; MSA 27A.2912(4), as amended, removed the requirement that plaintiffs in medical malpractice actions file security for costs. It still requires that an affidavit of merit be filed. We also note that MCR 2.109(B) and 2.108(A)(6) have not yet been amended to reflect the changes in the amended statutes.

[6] Defendant has consistently maintained that plaintiff never filed or served security for costs or an affidavit of merit—an assertion that plaintiff has never contested during the life of this case. However, almost three

rectly argued to the trial court that the default and resulting default judgment should not have been entered because his answer was not yet due. The relevant twenty-one-day period for filing defendant's answer never began to run because neither security for costs nor an affidavit of merit was ever filed. Consequently, the May 15, 1995, default and June 2, 1995, default judgment entered as a result of defendant's failure to answer were void ab initio and must be vacated. See *BCS Life Ins Co v Comm'r of Ins*, 152 Mich App 360, 371-372; 393 NW2d 636 (1986).

As noted previously, defendant raises various other issues as alternative grounds for reversing the trial court's decision, including arguments that plaintiff's complaint fails to state a valid claim for relief and that the $750,000 award for pain and suffering was not based on record evidence and violated MCL 600.1483; MSA 27A.1483. However, our disposition

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months after oral arguments before this Court, plaintiff submitted a motion entitled "Motion to Recognize Additional Fact in the Lower Court Record" to which was appended an alleged bond for security dated June 29, 1994, in the amount of $2,000. It purports to bear the June 30, 1994, time stamp of the Wayne County Clerk. Presumably plaintiff filed this motion and the bond in an attempt to establish that she complied with MCL 600.2912d; MSA 27A.2912(4) and MCR 2.109(B).

We note that the June 1994 bond belatedly submitted by plaintiff is not recorded in the docket entries of the lower court nor does the bond appear in the lower court record. We therefore regard plaintiff's motion as an improper attempt to enlarge the record on appeal. *Trail Clinic, PC v Bloch*, 114 Mich App 700, 713; 319 NW2d 638 (1982); see MCR 7.210. Moreover, even if the alleged bond had properly been made a part of the record, that fact would not alter our decision. Both the court rule and the statute require that a bond be filed *and served*. In her latest motion, not even plaintiff suggests that the reputed June 1994 bond was served on defendant.

renders it unnecessary to reach or address those issues.[7]

Vacated and remanded for further proceedings. We do not retain jurisdiction.

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[7] We do question in passing whether plaintiff's complaint, which contains only vague and conclusory allegations of negligence, violates MCR 2.111(B)(1). The facts necessary to constitute a cause of action must be alleged with "reasonable definiteness and certainty." *Simonelli v Cassidy*, 336 Mich 635, 644; 59 NW2d 28 (1953). *Simonelli* was recently reaffirmed in *Dacon v Transue*, 441 Mich 315, 332-333; 490 NW2d 369 (1992) ("Because *Simonelli* hinged on the importance of fair notice to the defendant and not some procedural quirk of 1950's civil practice, its lesson is neither obsolete nor anachronistic and is one we will continue to follow.") Here, plaintiff's complaint fails even to identify the "medical treatment" defendant performed, let alone delineate anything specific about how defendant "failed to comply with the requisite standards of medical practice" in performing that treatment. See also 1 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 186, and 1997 pocket part, pp 53-54. While the deficiencies in plaintiff's complaint did not relieve defendant of his obligation to file an answer had one become due, we note that manifest injustice requiring a default judgment to be set aside occurs where the plaintiff failed to state a claim upon which relief can be granted. *Lindsley v Burke*, 189 Mich App 700, 702-703; 474 NW2d 158 (1991).

CENTURY SURETY COMPANY v CHARRON

Docket No. 199523. Submitted March 3, 1998, at Detroit. Decided May 26, 1998, at 9:05 A.M.

Century Surety Company brought an action in the Oakland Circuit Court against Joan Charron, next friend of Jane Doe, an incompetent person; Hawk Security & Investigations, Inc.; and Hawkeye Security, Inc., seeking a declaration that it did not have a duty under a general liability insurance policy covering Hawk and Hawkeye to defend or indemnify them against an action brought by Charron. Hawk and Hawkeye had provided security at a public housing complex where the incompetent person resided and was raped by an intruder. In her action, Charron had alleged that Hawk and Hawkeye were negligent in failing to remove or monitor nonresidents not lawfully on the premises. The court, Robert L. Templin, J., granted summary disposition for Century, ruling that a policy exclusion applied to preclude coverage. Charron appealed.

The Court of Appeals *held*:

The exclusion at issue in part provides that "insurance does not apply to 'bodily injury' or 'property damage' arising out of: (a) the actual or threatened assault or battery or the failure to suppress or prevent such action by the insured or by anyone else for whom the insured is legally responsible . . . ."

Properly construed, the exclusion precludes coverage when bodily injury arises out of an actual or threatened assault or battery committed by the insured or by anyone else for whom the insured is legally responsible or when, as alleged in this case, bodily injury arises out of the failure of the insured, or one for whom the insured is responsible, to suppress or prevent an actual or threatened assault or battery committed by someone else.

Affirmed.

1. INSURANCE — POLICIES — JUDICIAL CONSTRUCTION.

A court, when construing an insurance policy, reads it as a whole and gives meaning to all the terms in the policy; language in the policy is given its plain and ordinary meaning to avoid technical and strained constructions; where policy language is clear and unambiguous, it is enforced as written.

2. INSURANCE — POLICIES — EXCLUSIONS — JUDICIAL CONSTRUCTION.

An exclusionary clause in an insurance policy is strictly construed in favor of the insured; coverage under the policy is lost if the exclusion applies to the insured's particular claim; a clear and specific exclusion must be given effect because the insurance company cannot be liable for a risk it did not assume.

Highland & Zanetti, P.C. (by *John N. Highland*), for the plaintiff.

Welch, MacAlpine, Bahorski, Bieglecki & Farrell, P.C. (by *Timothy A. Bahorski*), for the defendant.

Before: GRIBBS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM. Defendant Joan Charron, as next friend of Jane Doe,[1] an incompetent person, appeals as of right the trial court order granting plaintiff Century Surety Company's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Jane Doe resided in a public housing complex in Pontiac. Hawk Security and Investigations, Inc., (Hawk) and Hawkeye Security, Inc., (Hawkeye) provided security services on the premises. Kelvin Bell entered the building in which Doe's apartment was located, forced his way into the apartment, and raped her. As next friend of Doe, defendant filed suit against Hawk and Hawkeye, alleging that they were negligent in failing to either remove or monitor nonresidents who entered the building and were not lawfully on the premises.[2]

Plaintiff, Hawk and Hawkeye's general liability insurer, assumed Hawk and Hawkeye's defense while

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[1] Because of this Court's policy against revealing the identities of rape victims, Jane Doe's real name is not being used in this opinion.

[2] Defendant also filed suit against Bell, the city of Pontiac, the Pontiac Housing Commission, and the commission's manager, Patricia Williams.

reserving its rights. After examining the policy, plaintiff denied coverage. Plaintiff then filed this action, seeking a declaration that it did not have a duty to defend or indemnify Hawk and Hawkeye in connection with the Bell incident.

Among the bases for plaintiff's assertion that coverage was precluded was the following exclusion in the policy:

> 1. This insurance does not apply to "bodily injury" or "property damage" arising out of:
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> (a) the actual or threatened assault or battery or the failure to suppress or prevent such action by the insured or by anyone else for whom the insured is legally responsible, or
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> (b) the negligent:
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> (i) employment;
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> (ii) investigation;
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> (iii) supervision;
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> (iv) training;
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> (v) retention;
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> of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by (a) above.

Both plaintiff and defendant filed motions for summary disposition. Following oral argument, the trial court granted plaintiff's motion for summary disposition. The court construed the above exclusion as excluding coverage when the insured or one for whom it was responsible threatened or committed the assault or battery and when the insured or anyone for whom the insured was responsible failed to suppress or prevent an assault or battery threatened or committed by another. The order incorporating this decision was entered on November 8, 1996. Thereafter,

defendant dismissed the underlying action without prejudice.

On appeal, defendant argues that the trial court erred in granting plaintiff's motion for summary disposition. On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Mahaffey v Attorney General*, 222 Mich App 325, 340; 564 NW2d 104 (1997).

An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566-567; 489 NW2d 431 (1992). When determining what the parties' agreement is, the court should read the contract as a whole and give meaning to all the terms contained the policy. The court must give the language contained in the policy its plain and ordinary meaning so that technical and strained constructions are avoided. *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). If an insurance contract sets forth definitions, the policy language must be interpreted according to those definitions. *Cavalier Mfg Co v Employers Ins of Wausau (On Remand)*, 222 Mich App 89, 94; 564 NW2d 68 (1997). Where the language of an insurance policy is clear and unambiguous, it

must be enforced as written. Courts must be careful not to read an ambiguity into a policy where none exists. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

Exclusionary clauses in insurance policies are strictly construed in favor of the insured. Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume. *Churchman*, *supra* at 567; *Frankenmuth Mut Ins Co v Masters*, 225 Mich App 51, 62; 570 NW2d 134 (1997).

On appeal, defendant argues that the trial court erred in finding that the above exclusion applied. Defendant contends that the exclusion does not apply to the failure to prevent an assault and battery, without regard to who committed it. Rather, defendant contends, the exclusion is relevant only to the failure to prevent an assault and battery by the insured or by anyone else for whom the insured is legally responsible. Under defendant's interpretation of the exclusion, subsection b defines the scope of the phrase "legally responsible" as used in subsection a and thus limits "anyone else for whom the insured is legally responsible" to assailants whom the insured employed, investigated, supervised, trained, or retained.

We do not find defendant's interpretation of the exclusion persuasive. Subsections a and b are phrased in the disjunctive. Coverage is excluded if the injury arose out of the circumstances described in subsection a *or* if the injury arose out of the circumstances described in subsection b. Therefore, subsection a stands independently of subsection b. Moreo-

ver, the policy defines the insured as the corporation named in the declaration, its executive officers and directors with respect to their duties as officers and directors, its stockholders with respect to their liability as stockholders, and its employees for acts within the scope of their employment. If the phrase "anyone else for whom the insured is legally responsible" were interpreted as referring to an employee of the insured, the entire phrase would be redundant or mere surplusage because, under the policy, an employee *is* the insured.

Defendant also asserts that subsection a excludes coverage when the bodily injury arises out of (1) an actual or threatened assault or battery committed by the insured or by anyone else for whom the insured is legally responsible, or (2) the failure to suppress or prevent an actual or threatened assault or battery committed by the insured or by anyone else for whom the insured is legally responsible. Therefore, defendant maintains, because the sexual assault in the instant case was committed by Bell, a person with no connection to Hawk or Hawkeye, the exclusion does not apply.

We conclude that defendant's interpretation is flawed because it does not indicate who has the obligation to suppress or prevent the assault or battery committed by the insured or by one for whom the insured is responsible. If it is the insured, then the policy excludes coverage when the insured fails to stop itself or one for whom it is responsible from committing the offense. However, that is the same as saying that the insured or one for whom it is responsible committed the offense, and because that is already part of the exclusion, defendant's proposed

interpretation is redundant. If it is a third person who is obligated to suppress or prevent the assault or battery, then the insurer is specifically declining to provide coverage to someone other than the insured. However, the insurer does not have any obligation to provide coverage to third persons and thus had no reason to specify under what conditions it would not provide such coverage.

Plaintiff contends that subsection a excludes coverage when the bodily injury arises out of (1) an actual or threatened assault or battery committed by the insured or by anyone else for whom the insured is legally responsible, or (2) the failure of the insured or one for whom the insured is responsible to suppress or prevent an actual or threatened assault or battery committed by someone else. We agree. This construction comports with the policy language, which refers to the commission of an assault or battery *or* the failure to suppress or prevent such action, and then follows both by the phrase "by the insured or by anyone else for whom the insured is legally responsible," making that phrase applicable to both antecedents. Thus, coverage is precluded if the insured or the one for whom it is responsible commits the offense *or* fails to suppress or prevent the offense.

We note that most other courts construing identical policy language have reached the same conclusion. See *Century Surety Co v Glen Willows, Inc*, 924 F Supp 76 (SD Tex, 1996), aff'd 100 F3d 952 (CA 5, 1996); *Kabanuk Diversified Investments, Inc v Credit General Ins Co*, 553 NW2d 65 (Minn App, 1996); *Dick v Stein & Pitcher*, No L-96-303, 1997 WL 256664 (Ohio App, May 16, 1997); *Vasquez v Campos*, No L-96-064, 1996 WL 612438 (Ohio App, October 25,

1996). The lone exception occurred in *Lock v Oney's Pub*, No 15577, 1996 WL 648357 (Ohio App, November 8, 1996). The *Lock* court read the provision as excluding coverage only when the insured or one for whom it was responsible committed the assault or battery or when the insured failed to prevent itself or one for whom it was responsible from committing an assault or battery. However, because such a reading makes the provision redundant, as discussed above, we reject the *Lock* court's reasoning.

In sum, the exclusion at issue provides that the insurance does not apply to an assault or battery based on "the failure to prevent such action by the insured." The entire suit against Hawk and Hawkeye is premised on the failure of Hawk and Hawkeye to prevent Bell's sexual assault on Doe. Accordingly, under the plain language of the insurance policy, coverage is precluded. The trial court therefore did not err in granting plaintiff's motion for summary disposition.

Affirmed.

FRANCIOSI v PAROLE BOARD

Franciosi v Parole Board, Docket No. 195864, originally published on pages 87-94 of the advance sheets has been vacated. An amended opinion will be published at 231 Mich App 607 (1998).

PEOPLE v WARD

Docket No. 203408. Submitted February 10, 1998, at Detroit. Decided May 26, 1998, at 9:15 A.M.

Michael Ward, while represented by counsel, pleaded guilty in the 52-1 District Court of operating a motor vehicle while under the influence of liquor, second offense (OUIL 2d), and of operating a motor vehicle while his driver's license was suspended or revoked. The defendant was sentenced to two years of probation, with six months in jail, and ordered to pay fines and fees. A year later, the defendant was charged with OUIL 3d and with operating a motor vehicle while his license was suspended or revoked, second offense. The defendant filed a motion for postjudgment relief from his plea-based conviction of OUIL 2d, arguing in part that the district court had failed to comply with the plea-taking procedures specified in MCR 6.610(E). The court, Brian MacKenzie, J., granted the defendant's motion to set aside the conviction, rejecting the prosecution's argument that the defendant's attack on his conviction could not be sustained because it was collateral, not direct. The Oakland Circuit Court, Deborah G. Tyner, J., and the Court of Appeals denied the prosecution leave to appeal. The Supreme Court, in lieu of granting leave, remanded the case to the Court of Appeals for consideration as on leave granted. 454 Mich 894 (1997).

The Court of Appeals *held*:

1. The defendant's attack on his conviction was direct because it was made within the case instituted for prosecuting that charge and it was, under MCR 6.610(E)(7)(a), a necessary step in the process of filing an appeal to the circuit court.

2. MCR 6.610(E)(7)(a), which governs criminal procedure in the district court, in providing that "[a] defendant may not challenge a plea on appeal unless the defendant moved in the trial court to withdraw the plea for noncompliance with these rules," does not specify a time limit by which a postsentencing motion to withdraw a plea must be made. Accordingly, the defendant's motion for postjudgment relief cannot be deemed collateral on the basis that is was long delayed.

Affirmed.

DOCTOROFF, P.J., dissenting, stated that a long-delayed direct attack on a plea-based conviction obtained in the district court while the defendant was represented by counsel should be deemed collateral in the interests of finality and fairness.

1. CRIMINAL LAW — GUILTY PLEAS — DISTRICT COURT.

A motion in the district court for postjudgment relief from a plea-based conviction on the ground that the conviction is invalid because the district court failed to comply with the plea-taking procedures required by the court rules is a direct, not a collateral, attack on the conviction (MCR 6.610[E]).

2. CRIMINAL LAW — GUILTY PLEAS — DISTRICT COURT.

The court rule that requires the filing of a motion in the district court to withdraw a plea before the plea can be challenged on appeal does not set a time limit by which such a motion must be made (MCR 6.610[E][7][a]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Richard Thompson*, Prosecuting Attorney, and *Marilyn J. Day*, Assistant Prosecuting Attorney, for the people.

John D. Lazar, for the defendant.

Before: DOCTOROFF, P.J., and REILLY and G. S. ALLEN*, JJ.

REILLY, J. On February 1, 1995, defendant, Michael Ward, pleaded guilty in the district court of operating a motor vehicle while under the influence of liquor, second offense (OUIL 2d), MCL 257.625(7)(b); MSA 9.2325(7)(b), and of operating a motor vehicle while his driver's license was suspended or revoked, MCL 257.904(1)(a); MSA 9.2604(1)(a). The district court sentenced defendant to two years' probation, with six months in jail. The district court also fined defendant $500 for the OUIL 2d conviction and $200 for the con-

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

viction of driving with a suspended license and ordered him to pay probationary oversight fees and to get treatment for his alcoholism.

Defendant was subsequently charged with OUIL, third offense (OUIL 3d), MCL 257.625(7)(d); MSA 9.2325(7)(d), and driving with a suspended or revoked license, second offense, MCL 257.904(1)(b); MSA 9.2604(1)(b). This charge was based on an unrelated incident, which was alleged to have occurred on February 3, 1996. On March 29, 1996, defendant moved in the district court to set aside his February 1, 1995, plea-based conviction of OUIL 2d on the grounds that the plea lacked a factual basis and that the court had failed to comply with the prerequisites for accepting a plea as articulated in MCR 6.610(E). The district court granted defendant's motion to set aside his conviction. In so ruling, the district court held that defendant's motion was a direct attack on the conviction, rather than a collateral attack, and that the record contained no factual basis for defendant's plea.

The prosecution then unsuccessfully sought leave to appeal in the circuit court. In denying the prosecution's application for leave, the circuit court reasoned that defendant's motion to set aside his plea-based conviction was a direct attack on the conviction because defendant was required to make the motion in order to preserve the argument for appeal to the circuit court. The prosecution's subsequent application for leave to appeal to this Court was then denied for lack of merit. This case is before us now on remand from the Michigan Supreme Court for consideration, as on leave granted, of the issue whether the district court properly set aside the defendant's February 1, 1995, guilty plea conviction of OUIL 2d. 454

Mich 894 (1997). We now conclude that it did, and we affirm.

On appeal, the prosecution argues that defendant's motion to set aside his plea-based conviction was a collateral attack on a plea taken while defendant was represented by counsel and that, as such, it should have been denied. We reluctantly disagree. When a motion to set aside a guilty plea is first made after sentencing, it is addressed to the sound discretion of the trial court, and the trial court's decision will not be disturbed unless there is a clear abuse of discretion resulting in a miscarriage of justice. *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 147 (1997); *People v Kadadu*, 169 Mich App 278, 281; 425 NW2d 784 (1988). The question whether an attack on a conviction was direct or collateral is a question of law. Questions of law are reviewed de novo. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

The Michigan Supreme Court, in *People v Ingram*, 439 Mich 288, 294-295; 484 NW2d 241 (1992), held:

> [The] failure of a plea-taking court to adhere to applicable plea-taking requirements during the plea proceeding does not provide a defendant the opportunity to challenge by collateral attack. The validity of such a plea, where the defendant was represented by an attorney when entering the plea or when the defendant intelligently waived the right to counsel, including the right to court-appointed counsel if indigent, is unassailable.

Accordingly, if defendant's attack on his February 1, 1995, plea-based conviction was collateral, as opposed to direct, defendant was not entitled to have it set aside.

Black's Law Dictionary (6th ed) defines "direct attack" as follows:

> A direct attack on a judgment or decree is an attempt, for sufficient cause, to have it annulled, reversed, vacated, corrected, declared void, or enjoined, in a proceeding instituted for that specific purpose, such as an appeal, writ of error, bill of review, or injunction to restrain its execution; distinguished from a collateral attack, which is an attempt to impeach the validity or binding force of the judgment or decree as a side issue or in a proceeding instituted for some other purpose.

In a footnote, the *Ingram* Court defined "collateral attacks" as "those challenges raised other than by initial appeal of the conviction in question." *Ingram, supra* at 291, n 1; see also *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995) ("[W]e believe a collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal."). In this case, the prosecution argues that because defendant's motion to set aside his plea-based conviction was not made in the context of a direct appeal of his conviction, it should have been deemed collateral. The prosecution also relies on *People v Erwin*, 212 Mich App 55, 66; 536 NW2d 818 (1995), in which a panel of this Court, relying solely on the *Ingram* footnote, reported as dictum that long-delayed direct attacks are "deemed collateral."[1]

The defendant in *Ingram* was charged with OUIL 3d (Case 5) based on four underlying plea-based OUIL convictions (Cases 1-4). After the circuit court ruled that two of the underlying convictions (Cases 1 & 2) were infirm because of the defendant's lack of counsel, the defendant entered a conditional plea of guilty to the charge of OUIL 3d in Case 5, preserving his right

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[1] Neither the body of the *Ingram* opinion nor its footnote supports this proposition.

to challenge on appeal the validity of one of the other underlying convictions (Case 3). Before appealing his OUIL 3d conviction in Case 5, the defendant made a separate motion in Case 3 to have his plea-based conviction set aside. After this motion was granted, the defendant moved in the circuit court to withdraw his plea in Case 5, and this motion was denied. On appeal in Case 5, the Michigan Supreme Court affirmed the defendant's conviction of OUIL 3d, reasoning that the defendant's attempt *in Case 5* to challenge the validity of the plea-based conviction obtained *in Case 3*, was a collateral attack on a plea taken while represented by counsel. As such, it was foreclosed.[2] *Ingram*, *supra* at 291-302. Similarly, in *Howard*, *supra* at 369, a panel of this Court, relying on *Ingram*, held that a defendant's challenge to the use of a prior plea-based conviction for enhancement purposes in an OUIL 3d prosecution was a collateral attack. However, unlike *Ingram* and *Howard*, the challenge at issue in this case was not made in a proceeding instituted for the purpose of prosecuting a separate charge.

Although defendant's challenge to his plea-based conviction was made through a motion for postjudgment relief rather than in a direct appeal, we are constrained to conclude that it was a direct attack on the conviction because (1) it was made in the case instituted for the specific purpose of prosecuting the

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[2] The validity of the defendant's successful challenge to his conviction in Case 3, for purposes of Case 3, was not before the *Ingram* Court. Accordingly, the Court's holding that the defendant could not challenge the validity of Case 3 for purposes of Case 5, did not effect the dismissal of Case 3. As a result, the defendant's conviction of OUIL 3d in Case 5 was upheld despite the fact that there was only one prior conviction of record (Case 4). See *Ingram*, *supra* at 304-309 (CAVANAGH, C.J., dissenting).

charge at issue, compare *Ingram*, *supra*, and *Howard*, *supra*, and (2) it was a necessary step in the process of filing an appeal to the circuit court. The procedures for taking a plea in the district court, and for challenging such a plea, are addressed in MCR 6.610(E). Pursuant to subsection 7(a) of that rule,

> [a] defendant may not challenge a plea on appeal unless the defendant moved in the trial court to withdraw the plea for noncompliance with these rules. Such a motion may be made either before or after sentence has been imposed.

The rules applicable to the district court provide no time limit by which such a motion must be made, and we are not persuaded that we should look to the circuit court rules[3] to establish a time limit for moving to withdraw a plea in the district court. Because the language of the court rule is clear, we should apply it as written. There being no time restrictions specified in MCR 6.610(E), we decline to construe this court rule as containing one. See *People v Harris*, 224 Mich App 597, 601; 569 NW2d 525 (1997). Moreover, we cannot assume that the drafters inadvertently omitted from one court rule the language placed in another court rule, and then, on the basis of that assumption, apply what is not there. Cf. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

While there is no time limit for filing a postjudgment motion to set aside a plea-based conviction, MCR 7.101(B)(1) provides a twenty-one-day period from the time of the entry of the order or judgment appealed from for (1) taking an appeal by right from

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[3] For pleas taken in the circuit court, MCR 6.311(A) provides that a defendant may file a motion to withdraw within the time for filing an application for leave to appeal.

the district court to the circuit court or (2) filing a motion for postjudgment relief in order to preserve an appeal by right. In this case, defendant's motion to set aside his plea-based conviction was not filed within that period. However, under MCR 7.103(A)(2), a circuit court may grant leave to appeal from the district court after the time for taking an appeal under MCR 7.101(B)(1) has expired. Accordingly, if defendant had lost his motion in the district court, he may still have been able to take a direct appeal. To hold that a defendant may challenge his plea-based conviction only on direct appeal, and then to prevent him from taking one of the steps necessary to do so, would defy logic. Because we conclude that defendant's challenge to his plea-based conviction was a direct attack, and the prosecution does not otherwise contest the merits of the district court's decision to grant defendant's motion, we hold that the district court did not abuse its discretion in granting defendant's motion to set aside his plea-based conviction.

In so holding, we are mindful of the potential for manipulation of the system allowed by a rule permitting such challenges. This Court, in *People v Nydam*, 165 Mich App 476, 479; 419 NW2d 417 (1987), explained that permitting a defendant charged with OUIL 3d to collaterally attack a prior plea-based OUIL conviction several years later "would in effect grant to a defendant a license to lie in the weeds, voluntarily enter a guilty plea, accept the consequences thereof, and then (when once again convicted of driving while intoxicated) attempt to avoid the effect of his prior conviction through a legal artifice." Although defendant's challenge in this case was direct rather than collateral, and therefore not precluded, the cir-

cumstances of its timing raise similar concerns. While the tactics employed by defendant's enthusiastic trial counsel might offend certain notions of fair play, if any criticism is to be assigned in this case, it should fall most squarely on the district court that took the defective plea in the first place. As this Court has observed:

> OUIL offenses are exceptional inasmuch as the Legislature has provided for augmented punishment of a simple misdemeanor for repeat offenders up to and including felony treatment. It is therefore of special importance that courts follow regular procedures in accepting misdemeanor pleas to these offenses and carefully consider the potential consequences of such pleas for subsequent felony offenses. [*Erwin, supra* at 65-66.]

We once again remind the district courts of the importance of following the established procedures for taking pleas in OUIL cases.

Affirmed.

G. S. ALLEN, J., concurred.

DOCTOROFF, P.J. (*dissenting*). I respectfully dissent. Although MCR 6.610(E) does not provide a time limit for challenging a plea-based conviction, the particular circumstances of this case highlight the need for this Court to impose some restrictions. Here, defendant was represented by counsel when he pleaded guilty in February 1995 of operating a motor vehicle while under the influence of liquor, second offense (OUIL 2d). He did not challenge his plea until over a year later when he was charged with OUIL 3d and faced revocation of his probation, which would result in jail time. Although defendant is challenging his conviction by direct appeal rather than collateral attack, this

appeal never would have been brought had defendant not been subsequently charged as a third offender. This Court has previously suggested that long-delayed direct attacks on plea-based district court convictions will be deemed collateral and therefore must surmount a high threshold before judicial relief will be considered. *People v Erwin*, 212 Mich App 55, 66; 536 NW2d 818 (1995). The present case involves precisely the sort of delayed direct attack that should be deemed collateral in the interest of "considerations of finality and administrative consequences [which] must become part of the process with which we assure the achievement of proceedings that are consistent with the rudimentary demands of fair procedure." *People v Ingram*, 439 Mich 288, 293-294; 484 NW2d 241 (1992).

I agree with the majority that the district court should be mindful of the established procedures for taking pleas in OUIL cases. However, I am even more concerned with allowing a defendant who is represented by counsel an unlimited period during which to challenge an apparently voluntary guilty plea. If this is in fact permitted by the court rules, then I respectfully suggest that the Supreme Court consider amending the court rules to impose a time limit on direct challenges to plea-based convictions in the district court.

ENGLE v ZURICH-AMERICAN INSURANCE GROUP (ON REMAND)

Docket No. 174552. Submitted March 17, 1998, at Detroit. Decided May 26, 1998, at 9:20 A.M. Leave to appeal sought.

Paul E. Engle brought an action in the Wayne Circuit Court against Zurich-American Insurance Group, Liberty Mutual Insurance Company, and Beverly McConnell, seeking a declaration concerning which of the defendant insurers' automobile insurance policies provided coverage against McConnell's personal injury action against the plaintiff. McConnell's action had arisen from a collision between the plaintiff's truck tractor and McConnell's automobile. The plaintiff had leased the tractor, complete with driver, to B & W Cartage Company and had insured the tractor with Zurich-American under a bobtail policy. B & W also had insured the tractor with Liberty Mutual. At the time of the accident, which occurred when B & W's offices were closed, the plaintiff was headed back to B & W's yard after delivering a loaded trailer. Although not required to do so, plaintiff routinely parked his tractor at the B & W yard and checked with B & W's dispatcher for messages during B & W's office hours. The court, Michael L. Stacey, J., on cross-motions for summary disposition, granted summary disposition against Zurich-American and for Liberty Mutual after ruling inapplicable a provision in the Zurich-American policy excluding coverage "[w]hile the automobile is being used in the business of any person or organization to whom the automobile is rented." Zurich-American appealed. The plaintiff cross appealed the grant of summary disposition for Liberty Mutual, arguing that if the Zurich policy did not provide coverage, then the policy issued by Liberty did. The Court affirmed the decision of the trial court, with the majority declining to review the issue whether Liberty's policy provided coverage. 216 Mich App 482 (1996). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals to consider whether Liberty's policy provided coverage. 455 Mich 865 (1997).

On remand, the Court of Appeals *held*:

1. The prior holding of the Court of Appeals that the policy issued by Zurich affords coverage does not preclude a determination that the policy issued by Liberty affords coverage as well.

2. Engle was covered under the policy issued by Liberty as a permissive user. Liberty's policy includes a clause extending coverage to permissive users and Engle was a permissive user at the time of the accident.

3. The like insurance clause in Liberty's policy, when strictly construed against Liberty, does not exclude Engle from coverage as a permissive user.

4. Because Engle is entitled to coverage under both insurance policies, the portions of the trial court's order granting Liberty's motion for summary disposition and denying Engle's motion for summary disposition with regard to Liberty must be reversed. The remainder of the court's order must be affirmed and the matter must be remanded for entry of an order of summary disposition in favor of Engle against Liberty. The Court of Appeals declined to address issues relating to the respective rights of Zurich and Liberty as against each other because they were not in an adversarial posture in the trial court and the trial court did not address those issues.

Affirmed in part, reversed in part, and remanded.

1. INSURANCE — JUDICIAL CONSTRUCTION — MULTIPLE INSURERS.

A court's determination that an insurance policy provides coverage for an insured does not preclude a determination by the court that a second policy, issued by a different insurer, affords coverage as well where the two policies by their own terms provide coverage for the insured.

2. INSURANCE — JUDICIAL CONSTRUCTION — EXCLUSIONARY CLAUSES.

Exclusionary clauses in insurance contracts are strictly construed against the insurer.

Plunkett & Cooney, P.C. (by *Robert G. Kamenec*), for Zurich-American Insurance Group.

Beresh, Prokopp & Sekerak (by *David G. Sekerak*) (*Garan, Lucow, Miller & Seward, P.C.*, by *Robert D. Goldstein*, of Counsel), for Liberty Mutual Insurance Company.

ON REMAND

Before: WAHLS, P.J., and REILLY and O'CONNELL, JJ.

PER CURIAM. Plaintiff brought this action seeking a declaration of his rights under insurance policies issued by defendants Zurich-American Insurance Group and Liberty Mutual Insurance Company. The trial court ruled that the policy issued by Zurich, but not the policy issued by Liberty, provided coverage. Accordingly, the trial court granted summary disposition in favor of plaintiff against Zurich and in favor of Liberty against plaintiff. Zurich appealed, arguing that its policy did not provide coverage. Plaintiff cross appealed, arguing that if the policy issued by Zurich did not provide coverage, then the policy issued by Liberty did provide coverage. In a majority opinion, this Court affirmed the decision of the trial court and declined to review the issue whether Liberty's policy provided coverage. See *Engle v Zurich American Ins Group*, 216 Mich App 482; 549 NW2d 589 (1996). Zurich then sought leave to appeal. In lieu of granting leave, the Michigan Supreme Court remanded the case to this Court for consideration of whether Liberty's policy provided coverage. 455 Mich 865 (1997). We now answer that question in the affirmative, affirm in part, reverse in part, and remand.

The facts of this case have been adequately set forth in our previous opinion. Much like any other contract, an insurance policy is an agreement between the parties. When presented with a dispute, a court must determine the parties' agreement and enforce it. *Zurich-American Ins Co v Amerisure Ins Co*, 215 Mich App 526, 530-531; 547 NW2d 52 (1996). An insurance contract is clear if it fairly admits of but one interpretation. *Raska v Farm Bureau Mut Ins Co*, 412 Mich 355, 361-362; 314 NW2d 440 (1982). If an insurance contract is clear, it will be enforced as writ-

ten no matter how inartfully worded or clumsily arranged. *Id.* In this case, because the insurance obligations of Zurich and Liberty are governed by the terms of each of their individual policies, our holding that the policy issued by Zurich affords coverage does not preclude a determination that the policy issued by Liberty affords coverage as well. See *Amerisure*, *supra* at 531.

Zurich argues in its supplemental brief on remand that plaintiff was covered under the policy issued by Liberty as a permissive user. We agree. Liberty's policy includes a clause extending coverage to permissive users that is identical to the "permissive user clause" construed by this Court in *Amerisure*, *supra* at 531-534. In that case, we held that the owner and driver of a truck tractor leased to a carrier was covered under the carrier's truck liability insurance as a permissive user when he was involved in an accident while driving his tractor to a facility in Ohio for repair of the heater motor. *Id.* at 528-529, 531-534. Because the facts of this case are similar in all relevant respects, we conclude that, at the time of the accident, plaintiff was a permissive user entitled to coverage under the permissive user clause contained in Liberty's policy.

In response to Zurich's argument, Liberty argues that, although plaintiff may have been a permissive user at the time of the accident, he was specifically excluded from coverage by a separate provision of its policy that was either not included or not addressed in the truck liability insurance policy construed in the *Amerisure* case. After listing five classes of persons insured under its policy (including permissive users such as plaintiff), Liberty's policy provides as follows:

> None of the following is an insured:
>
> 1. Any trucker, or his or her agents or employees, other than you and your employees:
>
> * * *
>
> b. If the trucker is insured for hired autos under an auto liability insurance policy which does not insure on a primary basis the owners of the autos and their agents and employees while the autos are being used exclusively in the trucker's business and over a route or territory the trucker is authorized to serve by public authority.

Liberty argues that this "like insurance clause" excludes plaintiff from coverage because it describes plaintiff and the insurance policy issued to him by Zurich. We disagree with the construction urged by Liberty.[1]

Exclusionary clauses in insurance contracts are to be strictly construed against the insurer. *Fire Ins Exchange v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996); *Amerisure*, *supra* at 533. Liberty's policy defines "trucker" as meaning "any person or organization engaged in the business of transporting property by auto for hire." This definition could arguably refer to plaintiff. However, if we read the word "trucker" in Liberty's like insurance clause as applying to plaintiff, the clause would not exclude plaintiff from coverage, because the sort of "like insurance" described therein as triggering an exclusion from coverage under Liberty's policy would not describe plaintiff's policy with Zurich. This is so because plaintiff's policy with Zurich is not the type of policy that, as described in Liberty's like insurance clause, "does not insure on a

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[1] Zurich does not address Liberty's like insurance clause in its supplemental brief on remand.

primary basis the owners of the autos and their agents and employees while the autos are being used exclusively in the trucker's [in this case, plaintiff's] business and over a route or territory the trucker [plaintiff] is authorized to serve by public authority." Although plaintiff's policy with Zurich excludes plaintiff from coverage when his truck tractor is used in "the business of any person or organization to whom the automobile [truck tractor] is rented" (such as the carrier insured by Liberty), it does not purport to exclude plaintiff from coverage when his truck tractor is used exclusively in *his own* business. For Liberty's like insurance clause to have the effect urged by Liberty in this appeal, we would have to read the word "trucker" as referring to *plaintiff* the first time it is used in part "b" of Liberty's like insurance clause, and as referring to *the carrier insured by Liberty* the second and third times it is used in the clause. Considering the rule of strict construction, we cannot accept Liberty's strained interpretation. Accordingly, we hold that the like insurance clause contained in the policy issued by Liberty does not exclude plaintiff from coverage as a permissive user.

Because plaintiff is entitled to coverage under both insurance policies, we (1) reverse the portion of the trial court's order granting Liberty's motion for summary disposition, (2) reverse the portion of the trial court's order denying plaintiff's motion for summary disposition with regard to Liberty, (3) affirm the remainder of the trial court's order, and (4) remand for entry of an order of summary disposition in favor of plaintiff against Liberty. In their supplemental briefs on remand, both Zurich and Liberty address issues relating to their respective rights as against

each other. Because Zurich and Liberty were not in an adversarial posture below, cf. *Amerisure*, *supra* at 528, 531, and these issues were not addressed by the trial court, we decline to address them on appeal. See *McCready v Hoffius*, 222 Mich App 210, 218; 564 NW2d 493 (1997).

Affirmed in part, reversed in part, and remanded.

BAITINGER v BRISSON

Docket No. 195420. Submitted March 10, 1998, at Detroit. Decided May 26, 1998, at 9:25 A.M.

Ronald and Lynn Baitinger brought an action in the Oakland Circuit Court against G. Victor Brisson and Thomas P. Wujczyk, principal owners and officers of Oakland Ridge Associates, Inc., alleging breach of contract and misrepresentation and seeking a declaration that the corporate veil should be pierced so that recovery could be had against Brisson and Wujczyk. A consent judgment was entered against Wujczyk only. Following a bench trial, the court, Robert L. Templin, J., entered a judgment of no cause of action, finding that the corporate existence of Oakland Ridge Associates should be not disregarded. The plaintiffs appealed, and the Court of Appeals reversed the trial court's decision and remanded for a trial with respect to the question of damages, finding that the corporation was a sham and that Victor Brisson was personally liable for any damages that arose out of the corporation's breach of contract. *Baitinger v Brisson*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 1994 (Docket No. 150634). On remand, the plaintiffs moved for summary disposition, arguing that there was no genuine issue of material fact concerning the issue of damages and that a judgment in this action should be entered in the amount of a consent judgment entered in favor of the plaintiffs and against Oakland Ridge Associates in a prior separate proceeding. The trial court, John J. McDonald, J., entered an order on April 20, 1996, granting summary disposition for the plaintiffs, finding that Victor Brisson stood in the shoes of the corporation and that damages had already been determined in the prior action against the corporation. On May 10, 1996, the plaintiffs filed a motion for mediation sanctions, which was granted by the trial court on June 1, 1996. Victor Brisson filed a claim of appeal in the Court of Appeals on June 10, 1996. During the pendency of this appeal Victor Brisson died, and Margaret Brisson, personal representative of the estate of G. Victor Brisson, was substituted as the defendant.

The Court of Appeals *held*:

MCR 7.204(A)(1) provides that an appeal of right in a civil action must be taken within twenty-one days after entry of the judgment or order being appealed from, within twenty-one days after entry of

an order denying a motion for a new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief if such motion had been filed within the twenty-one-day appeal period, within such additional time as the trial court may have allowed during that twenty-one-day period, or within another time allowed by law. Because the order being appealed from is the April 20, 1996, order granting summary disposition for the plaintiffs and because the defendant neither filed a claim of appeal nor filed a motion for postjudgment relief within the twenty-one-day appeal period following entry of that final judgment, the defendant's appeal is not properly before the Court of Appeals.

Appeal dismissed.

John J. Kraus, Jr., for the plaintiff.

R. Reid Krinock, for the defendant.

Before: YOUNG, JR., P.J., and KELLY and DOCTOROFF, JJ.

PER CURIAM. Defendant[1] appeals as of right from an order granting summary disposition in favor of plaintiffs. We dismiss defendant's appeal for lack of jurisdiction under MCR 7.203 because it was not filed within the period provided in MCR 7.204(A)(1).

This case arose out of a contract between plaintiffs and Oakland Ridge Associates, Inc., (Oakland Ridge) for the construction of a residential home. During construction, plaintiffs discovered defects that Oakland Ridge would not correct. As a result of the dispute, Oakland Ridge filed a complaint against plaintiffs, seeking to foreclose on liens against the property. Plaintiffs filed a counterclaim for injunctive relief, arguing that the liens were improper. The matter went to arbitration, and on April 27, 1990, the

[1] G. Victor Brisson, hereinafter defendant, the original defendant in this case, is now deceased. Margaret Brisson, personal representative of his estate, substituted as defendant during this appeal.

court entered a consent judgment in favor of plaintiffs in the amount of $70,000. All liens against the home were discharged.

In August 1989, before the settlement of the original action, plaintiffs filed the present action against G. Victor Brisson and Thomas P. Wujczyk as the principal owners and officers of Oakland Ridge, alleging breach of contract and misrepresentation. Plaintiffs argued that the court should disregard the Oakland Ridge corporation and allow plaintiffs to seek recovery against Brisson and Wujczyk individually. On April 27, 1990, a consent judgment was entered against Wujczyk only. On February 14, 1992, following a bench trial, the court ruled that the corporate existence of Oakland Ridge should not be disregarded and that defendant was not to be held personally liable for the debts of or breach of contract by Oakland Ridge. The court entered a judgment of no cause of action in favor of defendant.

This Court reversed the trial court's decision, holding that the court clearly erred in failing to disregard the corporate entity and hold defendant personally liable for the corporation's breach. *Baitinger v Brisson*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 1994 (Docket No. 150634). This Court found that the corporation was a sham and was formed for the unlawful purpose of building residential homes without the required builder's license. The case was remanded for trial on the issue of damages.

On remand, plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs argued that, because defendant was personally liable for the consent judgment previously entered against

Oakland Ridge, there was no genuine issue of material fact regarding the amount of damages. On April 20, 1996, the trial court entered an order granting plaintiffs' motion, stating that, on the basis of this Court's ruling, defendant stood in the shoes of the corporation and that damages had already been determined in plaintiffs' prior action against Oakland Ridge.

On May 10, 1996, plaintiffs filed a motion for mediation sanctions, which the court granted in a June 1, 1996, order. Defendant filed a claim of appeal with this Court on June 10, 1996. On July 22, 1996, plaintiffs filed a motion to dismiss defendant's appeal because it was filed more than twenty-one days after the entry of the order appealed from. This Court denied the motion without prejudice to arguing in the jurisdictional statement of the appellee's brief that this Court lacks jurisdiction. In their brief on appeal, plaintiffs renewed their motion to dismiss defendant's appeal for lack of jurisdiction of this Court. We agree with plaintiffs that defendant's appeal was not timely filed.

MCR 7.204(A)(1) provides:

> An appeal of right in a civil action must be taken within
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> (a) 21 days after entry of the judgment or order appealed from;
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> (b) 21 days after the entry of an order denying a motion for a new trial, a motion for rehearing or reconsideration, or motion for other postjudgment relief, if the motion was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period; or
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> (c) another time provided by law.

The time limit for an appeal by right is jurisdictional. MCR 7.204(A). A final judgment or order in a civil case means "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order." MCR 7.202(8)(a)(i).

In the present case, the order granting summary disposition for plaintiffs was entered on April 20, 1996. Defendant filed a claim of appeal with this Court on June 10, 1996, more than twenty-one days after the order of summary disposition was entered. Defendant contended that he did not appeal the order of summary disposition until after the court's ruling with respect to plaintiff's motion for mediation sanctions because he was waiting until he knew the exact amount of sanctions to appeal. The question before this Court, therefore, is whether plaintiffs' motion for mediation sanctions affected the rights and liabilities of the parties such that the summary disposition order was not a "final order" under MCR 7.202(8). We find that it did not.

Here, the first judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all the parties was the order granting summary disposition in favor of plaintiffs. Defendant did not file any motions for postjudgment relief within twenty-one days of the entry of the order granting summary disposition. A motion for sanctions against a defendant cannot be characterized as a motion for relief from a judgment against that same defendant. Accordingly, defendant's appeal is not properly before this Court.[2]

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[2] Even if we were to hear defendant's appeal, we would find that summary disposition in favor of plaintiffs was proper. The trial court did not

Defendant's appeal is dismissed.

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err in using the consent judgment between plaintiffs and Oakland Ridge as proof of the amount of damages against defendant after this Court held that the corporate form should be disregarded and that defendant and the corporation were one and the same. The consent judgment addressed the same claims for damages arising out of the construction contract as the present action. Defendant did not dispute the amount of damages or provide any other evidence indicating that damages against him in the amount of $70,000 was improper. Therefore, there was no genuine issue of material fact with regard to plaintiffs' damages.

COBURN v COBURN

Docket No. 197116. Submitted January 29, 1998, at Lansing. Decided May 26, 1998, at 9:30 A.M. In lieu of granting leave to appeal, the Court of Appeals order imposing sanctions is reversed because the Supreme Court agrees with the dissent that the record does not justify imposition of actual and punitive damages. 459 Mich ___.

Dennis W. Coburn obtained a divorce from Lorraine M. Coburn in the Livingston Circuit Court. The parties were awarded joint physical and legal custody of their only minor child. Both parties subsequently petitioned for sole physical custody and agreed to binding arbitration to resolve the competing claims for physical custody. The arbitrator awarded sole physical custody to the plaintiff, and the circuit court, Stanley J. Latreille, J., confirmed the arbitration award. The defendant appealed. The plaintiff moved to strike the defendant's appellate brief for failure to comply with the content requirements of MCR 7.212(C). The chief judge pro tempore granted the motion, determining that the brief lacked a statement of the basis of the jurisdiction of the Court of Appeals, which is required by MCR 7.212(C)(4), lacked a statement of facts that provides specific page references to the record, which is required by MCR 7.212(C)(4), and lacked specific page references to the record when facts were stated in the argument portion of the brief, which is required by MCR 7.212(C)(7). After the defendant filed her second brief, the plaintiff moved to strike that brief. The chief judge granted the motion, directing the defendant to limit her brief to documents filed and hearings held in the circuit court before her claim of appeal. After the defendant filed her third brief, the plaintiff filed a motion to strike that brief or to dismiss the appeal. The Court of Appeals, Markey, P.J., and Bandstra and Hoekstra, JJ., granted the motion to dismiss, finding the same deficiencies in the third brief that were in the first or second brief. The plaintiff then moved for actual and punitive damages pursuant to MCR 7.216(C), which the Court of Appeals, Markey, P.J., and Bandstra, J. (Hoekstra, J., dissenting), granted. The Court of Appeals remanded the case to the circuit court for a determination of damages. The Supreme Court, in lieu of granting leave and while retaining jurisdiction, remanded the case to the Court of Appeals for an explanation of the reasons for its conclusion that the defendant's failure to

pursue her appeal in conformity with the court rules was vexatious. 456 Mich 918 (1998).

The Court of Appeals *held*:

1. The defendant's appeal was vexatious because it was taken for purposes of hindrance or delay without any reasonable basis for belief that there was a meritorious issue to be determined on appeal, MCR 7.216(C)(1)(a). Given that the defendant consistently relied on matters not of record as her basis for appellate relief, she could not have entertained a reasonable belief that she had raised meritorious issues.

2. MCR 7.216(C)(1)(b) allows an award of sanctions when a brief is grossly lacking in the requirements of propriety, violates court rules, or grossly disregards the requirements of a fair presentation of the issues. In this case, the award of actual and punitive damages to the plaintiff is justified by the repetitive nature of the defendant's conduct and deliberate attempts to circumvent the court rules and the orders of the Court of Appeals directing the defendant to comply with the court rules and limit her appeal to the record generated in the circuit court.

Motion for damages granted as modified.

HOEKSTRA, J., dissenting, stated that an award of actual and punitive damages under MCR 7.216(C)(1) is discretionary, not mandatory, and that the totality of the facts and circumstances of this case does not require the imposition of sanctions.

COURTS — COURT OF APPEALS — VEXATIOUS PROCEEDINGS — ACTUAL AND PUNITIVE DAMAGES.

An appellant's repeated failure to comply with court rules governing the content of appellate briefs and repeated failure to limit the appellant's appellate brief to matters of record may support a determination by the Court of Appeals that the appeal was taken for purposes of hindrance or delay or without any reasonable belief that there was a meritorious issue to be determined on appeal, thereby making the appellant subject to an award of actual and punitive damages in favor of the appellee (MCR 7.212[C], 7.216[C][1][a]).

Cross Wrock, P.C. (by *Phillip J. Holman* and *Russ E. Boltz*), for the plaintiff.

Kathleen Solomon, for the defendant.

Before: MARKEY, P.J., and BANDSTRA and HOEKSTRA, JJ.

MARKEY, P.J. While retaining jurisdiction over a pending delayed application for leave to appeal, the Supreme Court has remanded this case to us with instructions to provide "an explanation of the reasons for concluding that defendant's failure to pursue her appeal in conformity with the court rules was vexatious." *Coburn v Coburn*, 456 Mich 918 (1998). Our task is thus to explain in detail the egregious behavior of defendant and her counsel that required our previous order.

The parties were divorced pursuant to a consent judgment on October 23, 1991. That decree provided in pertinent part that the parties would begin with joint physical and legal custody of their only minor child. Subsequently, both parties petitioned for sole physical custody. Plaintiff had remarried and moved to another state. The parties submitted their custody dispute to binding arbitration. *Dick v Dick*, 210 Mich App 576, 588; 534 NW2d 185 (1995). The arbitrator awarded sole physical custody to plaintiff. After the circuit court confirmed that award by order of August 16, 1996, the matter came to this Court as an appeal of right.

After defendant filed her first brief as appellant, plaintiff filed a motion to strike for failure to conform to the requirements of the court rules. A motion to strike a brief as nonconforming is one of the types of motions that can be adjudicated by the chief judge, or another designated judge, acting alone. MCR 7.211(E)(2)(c). The chief judge pro tempore granted the motion to strike, MCR 7.201(A)(2), in an order that specified the following deficiencies:

> The brief as submitted does not comply with MCR 7.212(C)(4), (6) and (7). Appellant shall within 21 days of

> this order submit an appellant's brief that complies with all those rules.

The referenced subrules require a statement of the basis of the jurisdiction of the Court of Appeals, MCR 7.212(C)(4), a statement of facts that, inter alia, provides "specific page references to the record," MCR 7.212(C)(6), and, correlatively, that when facts are stated in the argument portion of the brief, such assertions likewise "be supported by specific page references to the record," MCR 7.212(C)(7). Defendant's original brief on appeal contained no jurisdictional statement whatsoever, and absolutely no page references to the record either in the statement of facts section of the brief or in the argument portion of the brief as facts were iterated.

Defendant's substitute brief was then timely filed and again met with a motion to strike. Again, the motion to strike pursuant to MCR 7.211(E)(2)(c) was granted, this time by the chief judge with the following directive:

> Appellant shall within 21 days of this order file an appellant's brief that is limited to documents filed and hearings held in the trial court prior to the claim of appeal being filed on August 16, 1996. Any documents filed, hearings held, or factual allegations made after August 16, 1996 are not properly before the Court in this appeal.

Examination of this second attempt to submit the appellant's brief reflects, among other patent defects, that defendant had appended to the proposed brief, as exhibits, affidavits that were not part of the lower court record, and orders and transcripts that related to matters that occurred in the trial court *after* the order from which appeal of right had been claimed.

Because this was already defendant's second opportunity to comply with the court rules, it is worth listing the improprieties facially evident within the defect specifications noted in the chief judge's order:

1. Neither affidavits nor depositions may be presented in this fashion as a means of enlarging the appellate record. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 18; 527 NW2d 13 (1994).

2. Even by stipulation, in the absence of a motion to enlarge the record and the granting of such motion by this Court, MCR 7.216(A)(4), the parties cannot add to the record on appeal anything not considered by the court below in rendering the decision that is the subject of appeal. *Lorland Civic Ass'n v DiMatteo*, 10 Mich App 129, 137-138; 157 NW2d 1 (1968).

3. Exhibits offered on appeal that were either not offered to the court below or that were excluded by the lower court from the settled record on appeal are not properly part of the record on appeal. *Dora v Lesinski*, 351 Mich 579, 581; 88 NW2d 592 (1958); *Singer v Hoffman Cake Co*, 281 Mich 371, 375; 275 NW 177 (1937).

4. Facts not appearing from the record *cannot* be considered on appeal. *Associates Discount Corp v Gear*, 334 Mich 360, 367-368; 54 NW2d 687 (1952). This is a limitation on the power of the appellate court, which is confined to the record in conducting its review. *Sims v Sims*, 298 Mich 491, 496; 299 NW 158 (1941). The record to be considered on appeal must be made in the trial court. *Stephenson v Golden*, 279 Mich 710, 732-733; 276 NW 849 (1937).

5. Nothing arising after the order from which appeal has been taken can be considered on appeal.[1] *Sandusky Grain Co v Borden's Condensed Milk Co*, 214 Mich 306, 323-324; 183 NW 218 (1921); *Monyhan v Detroit & Saline Plank Road Co*, 129 Mich 549, 552; 89 NW 372 (1902). This is true even of official proceedings subsequently occurring. See *Klotz v Chatfield*, 163 Mich 86, 87-88; 127 NW 774 (1910).

Defendant's third effort to file her appellant's brief generated yet another motion to strike, as well as a motion to dismiss and a motion to affirm. Those motions were submitted to this three-judge panel, MCR 7.211(E)(1), which granted the motion to dismiss, MCR 7.211(C)(2)(b), MCR 7.216(A)(10), and denied the other motions as moot.

Again, the numerous defects in this third brief merit iteration:

1. Although there were some references to the record in the statement of facts, numerous crucial factual assertions therein, and within the argument portion of the brief, had no affiliated record references. The rule in this state is that assertions of fact in a brief that are not supported by references to the record represent an improper attempt to enlarge the record. *In re Marx's Estate*, 201 Mich 504, 507; 167 NW 976 (1918). Because this was defendant's third effort, and because the first brief was stricken for precisely the same defect, among others, this Court had reasonable grounds for concluding that such repeated flouting of the court rules and of a fair pres-

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[1] Again, on proper motion pursuant to MCR 7.216(A)(4), subsequent events, particularly those rendering an appeal moot or otherwise directly affecting the viability of the appeal, may and assuredly should be promptly brought to the attention of the appellate court.

entation was intentional and deliberate, rather than accidental or negligent.

2. Various factual assertions concerned matters previously stricken as outside the record. These included statements of fact that had, in the stricken second appellant's brief, been supported by the affidavit of defendant's former attorney and were stricken because they were never part of the record below or were derived from psychological reports also stricken from the second brief as being matters not of record.[2] Ironically, although the nonrecord material was no longer attached to the brief as exhibits, it was now incorporated into the body of the brief and constituted a significant part of it. Again, this Court reasonably inferred that defendant's pleadings were designed to circumvent the requirements of the court rules and the prior rulings of the chief judge and chief judge pro tempore, and that this effort was in no way a good-faith mistake.

3. Such record references as were provided did not support the assertions of fact to which they pertained. Rather, the references often were to defense counsel's arguments before the trial court for which no supporting evidence was ever adduced or properly proffered, MRE 103(a)(2). Other references may have related generally to the point at issue but did not ver-

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[2] At most, very limited portions of these documents had been submitted to the trial court, but defendant in her second brief attached the whole of such documents, and in her third brief made factual assertions excerpted from the nonrecord portions of these materials. It may usefully be noted here that the motion for rehearing of the order dismissing the appeal argued at length that these materials were not privileged, as asserted in the plaintiff's objections. Breach of confidentiality, however, was in no way referenced as a basis, in whole or in part, for granting the motion to dismiss.

ify the essential details that were the basis of the argument for reversal. Once again, this Court could derive no other impression from this method than that defendant was attempting to manufacture the requisite factual support for appellate relief in the absence of the necessary record. See *Lemanski v Ford Motor Co*, 82 Mich App 244, 250-252; 266 NW2d 775 (1978).

After the appeal was dismissed and a motion for rehearing was denied, plaintiff moved for actual and punitive damages pursuant to MCR 7.216(C). That motion was also granted by this panel, Judge HOEKSTRA dissenting. The order provided:

> Plaintiff-Appellee's motion for actual and punitive damages is GRANTED. MCR 7.216(C)(1)(a), (b).
>
> This matter is hereby remanded to the trial court for a determination of damages as set forth in MCR 7.216(C)(2). These damages are to be assessed jointly and severally against both defendant-appellant and her counsel.[3]

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[3] Defense counsel has incorrectly complained that this Court awarded sanctions of more than $126,000. Obviously, this Court left the determination of damages, both actual and punitive, to the trial court, as authorized by MCR 7.216(C)(2). We note that, in conjunction with the motion, counsel for plaintiff-appellee did submit an undifferentiated claim for attorney fees of more than $63,000, which, if proper, could indeed be doubled. Without prejudging the issue for the trial court, we note that plaintiff's counsel carries the burden of proving damages, and that any award is limited to *reasonable* attorney fees and costs, which must be a product of the identified improprieties to be recoverable under the rule.

We acknowledge that our previous order may be subject to understandable misinterpretation. The motion for damages relied only on improprieties in the three appellant's briefs filed by counsel Solomon and identified nothing in the motion for rehearing, which cocounsel Bassett filed, as a basis for seeking sanctions. Hence, our order was not drafted as clearly as it should have been. Because cocounsel's actions were not at issue, the order should have specified that the award of sanctions did not extend to him. Instead, the order merely implied that result; the trial court could only determine damages under MCR 7.216(C)(2) to the extent that expenses were incurred by plaintiff because of defendant's improprieties,

In awarding damages pursuant to MCR 7.216(C)(1)(a), this Court found that the appeal was taken for the purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal. Given that appellant's presentation consistently relied on matters not of record as a basis for appellate relief, not once, or twice, but three times, we concluded that where the only basis asserted for appellate relief is outside the record, an appellant cannot entertain a reasonable belief that any issue depending on such nonrecord matters is even arguably meritorious. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 269; 548 NW2d 698 (1996). On further review, we adhere to this conclusion. As noted earlier, Michigan jurisprudence bars argument predicated on matters outside the record and deems such tactics "inappropriate." *Wiand v Wiand*, 178 Mich App 137, 142-143; 443 NW2d 464 (1989). Moreover, appellant's counsel was repeatedly warned of this requirement yet persisted in disregarding it. No authority to support an exception to these rules attributable to any unique aspect of this individual case was ever cited by appellant's counsel.

MCR 7.216(C)(1)(b) allows an award of sanctions when a brief is grossly lacking in the requirements of propriety, violates court rules, or grossly disregards the requirements of a fair presentation of the issues to the court. The adverb "grossly" modifies only the

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none of which were the fault of cocounsel Bassett. Accordingly, the joint and several provision of the order only referenced counsel, not cocounsel. In any event, we trust that, whatever else it does with the application now pending before it, the Supreme Court will see the justice of modifying the order as necessary to conform it to this intent.

first and third types of impropriety; hence, sanctions for violation of the court rules may be granted even where the violation is less than "gross." See, generally, *Kales v City of Oak Park*, 315 Mich 266, 271-272; 23 NW2d 658 (1946) Nonetheless, it has never been the practice of this Court to invoke MCR 7.216(C) for any but the most egregious and repeated court rule violations. We do not view our decision in this case as changing that practice. On the basis of the particular facts of this case and the unequivocal history of improper briefing by defendant-appellant's counsel, we harbor no doubt that her violation of the court rules may properly be described as "gross." The repetitive nature of that conduct, combined with the apparent deliberate attempts at circumvention of the rules and the orders of this Court enforcing those rules and calling such defects to counsel's attention, fully justifies an award of both actual and punitive damages. Defense counsel was apparently determined that we either rely on or be influenced by improper, extraneous, nonrecord information.

The award of damages will compensate plaintiff, in whole or in part, for his costs in defending the appeal and troubling himself, through counsel, to bring these court rule violations to our attention. The award also serves an institutional function: the deterrence of like tactics by others. Although written in a different context entirely, the following sentiments are particularly apposite here:

> Unless we enforce the rules we encourage their violation and add to the burden of the appellate courts. Our frequent strictures against this kind of argument mean little unless we are prepared to reverse and require a new trial. A prosecutor who crosses a clearly defined line, and a trial judge

> who makes no effort to stop him, have only themselves, not the appellate courts, to blame if a judgment of conviction is reversed and the case must be retried because of improper argument. [*People v Farrar*, 36 Mich App 294, 299-300; 193 NW2d 363 (1971).]

We would paraphrase the final two sentences to state that our frequent strictures against ignoring the requirements of the court rules[4] mean little unless we are prepared to dismiss an appeal and impose sanctions on attorneys who choose to give our warnings no heed. Because the client properly may be burdened with the consequences of counsel's improprieties short of abandoning the representation, *White v Sadler*, 350 Mich 511, 522-523; 87 NW2d 192 (1957), adversely affected parties and their attorneys have no one to blame but themselves if an appeal is dismissed on this basis.

Nonetheless, decisions to sanction are not made easily, lightly, or often, and we do not wish to travel this path again soon. Our order requires defendant-appellant's counsel to pay plaintiff-appellee actual and punitive damages. We might well be justified in both referring the matter to the Attorney Grievance Administrator for investigation and assessing defense counsel for the needless costs and expenses this Court has incurred in dealing with this misconduct. *In re Thurston*, 226 Mich App 205, 207-208; 574 NW2d 374 (1997). Just as those whose wrongdoing puts the federal government to expense must reimburse the gov-

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[4] As reported in the *Michigan Bar Journal*, the newsletter of the Appellate Practice Section, and various legal publications, the Chief Clerk of this Court, pursuant to a policy approved by all the judges of this Court, MCR 7.201(G), advised the bar generally that this Court would begin enforcing the court rules more strictly, well before the three briefs proffered on behalf of the defendant in this case were stricken.

ernment for all consequential costs, e.g., 14 USC 88(c)(3); see *United States v James*, 986 F2d 441, 442, 444 (CA 11, 1993), appellate litigants and attorneys who drain tax-funded judicial resources by flouting the requirements of the court rules should realize that they too may be properly called upon to make full recompense.

We therefore conclude that our original order granting the motion for sanctions was generally correct, and we would simply modify it as set forth in this opinion.

BANDSTRA, J., concurred.

HOEKSTRA, J. (*dissenting*). I respectfully dissent. MCR 7.216(C)(1), the court rule authorizing damages in this case, states that this Court "may . . . assess actual or punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious." The term "may" designates a permissive provision. *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993). Thus, this Court may assess damages but is not required to do so. Sanctions are authorized in a court's "discretion, on final review, as the totality of facts and circumstances may require." *In re Mathers*, 371 Mich 516, 538; 124 NW2d 878 (1963) (discussing a prior version of the court rule).

In my opinion, the totality of the facts and circumstances of this case does not require this Court to impose sanctions. Defendant has already suffered harm by losing the opportunity to have her case reviewed. See, e.g., *In re Dihle Estate*, 161 Mich App 150, 160-161; 410 NW2d 303 (1987). Moreover, I perceive no benefit in prolonging this acrimonious litiga-

tion by remanding the matter to the trial court for a determination of damages. See, e.g., *Mathers*, *supra* at 538-539 (declining to assess damages in the child custody case).

BOULAHANIS v PREVO'S FAMILY MARKET, INC

SOWERBY v PREVO'S FAMILY MARKET, INC

Docket Nos. 197343, 197344. Submitted January 13, 1998, at Lansing. Decided June 2, 1998, at 9:00 A.M. Leave to appeal sought.

Karen Boulahanis and George Boulahanis, for himself and as next friend of minors Bridgit, Kara, and Brian Boulahanis, brought an action in the Mason Circuit Court against Prevo's Family Market, Inc., IBP, Inc., and Spartan Stores, Inc., alleging breach of an implied warranty and negligence after the Boulahanises contracted a disease from eating ground beef contaminated with E. Coli. The meat had been processed by IBP, distributed by Spartan Stores, and sold by Prevo's Family Market.

Janis Sowerby, as personal representative of the estate of Scott M. Hinkley, brought a similar action in the same court against the same defendants after the decedent died from the same disease.

The actions were consolidated, and the court, Richard I. Cooper, J., granted summary disposition for the defendants. The court ruled that the actions are preempted by the Federal Meat Inspection Act, as amended by the Wholesome Meat Act, 21 USC 601 *et seq.* The plaintiffs appealed, and their appeals were consolidated.

The Court of Appeals *held*:

The Federal Meat Inspection Act provides for meat inspections by the United States Department of Agriculture and requires that meat found not to be adulterated be marked, stamped, tagged, or labeled as "Inspected and passed." Before 1994, which is before the date when the plaintiffs' actions arose, the USDA did not consider meat and poultry bearing pathogens such as E. Coli or salmonella to be adulterated and did not require meat producers to test for the presence of bacteria. Nor did the federal act require inspection or investigation to detect the presence of the pathogens.

When a federal regulatory agency has deliberately concluded that regulation is not appropriate in a given area, federal inaction will preempt state law not identical to it. Here, the plaintiffs' state common-law actions seek to hold the defendants liable for failing to detect the presence of E. Coli in meat at a time when they were not required to do so by federal law. Because such liability would

be in conflict with federal law, the plaintiffs' actions are preempted by federal law.

Affirmed.

1. CONFLICT OF LAWS — PREEMPTION — FEDERAL LAW — STATE LAW.

Federal preemption is either express or implied; if express, the intent of Congress to preempt state law must be stated clearly in the language of the federal statute; implied preemption may be in the form of field preemption or conflict preemption; field preemption may be found where the state law at issue regulates conduct in a field that Congress intended the federal government to occupy exclusively; conflict preemption exists when it is impossible to comply with both state law and federal law, or where the state law stands as an obstacle to the accomplishment of the objectives of Congress.

2. CONFLICT OF LAWS — PREEMPTION — FEDERAL LAW — STATE LAW.

Conflict preemption is compelled not only when a state law is in conflict with a federal statute, but also when it conflicts with a valid federal regulation; conflict preemption is also compelled when a state law is in conflict with a federal regulatory agency's intentional decision not to regulate.

3. CONFLICT OF LAWS — PREEMPTION — FEDERAL LAW — STATE LAW.

State law, for purposes of federal preemption, need not be a state statute; a state common-law cause of action may constitute state regulation subject to preemption if the cause of action would impose, through an award of damages, a requirement not found in federal law.

Christopher Pencak (*Sommers, Schwartz, Silver & Schwartz, P.C.*, by *Patrick Burkett*, of Counsel), for the plaintiffs.

Smith, Haughey, Rice & Roegge (by *Lance R. Mather*), for Prevo's Family Market, Inc.

Cross Wrock, P.C. (by *Jack O. Kalmink*), for IBP, Inc.

Charles H. Worsfold, for Spartan Stores, Inc.

Before: MACKENZIE, P.J., and HOLBROOK, JR., and SAAD, JJ.

MACKENZIE, P.J.

I

NATURE OF THE CASE AND BACKGROUND

These consolidated cases involve breach of implied warranty and negligence claims that plaintiffs brought after consuming ground beef contaminated with Escherichia Coli 0157:H7 (E. Coli), a pathogen found in the fecal matter of cattle that can be spread when it is intermixed with ground meat products. The contaminated meat was produced by defendant IBP, Inc., distributed by defendant Spartan Stores, and sold by defendant Prevo's Family Market, Inc., in mid-July 1993. After consuming the meat, plaintiffs Kara and Brian Boulahanis, who are minor children of plaintiffs Karen and George Boulahanis, became seriously ill with hemolytic uremic syndrome (HUS) caused by E. Coli bacteria. Plaintiffs Bridgit and Karen Boulahanis became less seriously ill. Three-year-old Scott Michael Hinkley, the son of plaintiff Janice Sowerby, died from E. Coli associated HUS. Plaintiffs appeal as of right from an order granting summary disposition to defendants on the basis that plaintiffs' claims are preempted by the Federal Meat Inspection Act, as amended by the Wholesome Meat Act, 21 USC 601 *et seq.* (FMIA), and its regulations. We affirm.

II

ANALYSIS

A. THE FEDERAL MEAT INSPECTION ACT

The purpose of the FMIA is to assure that meat distributed to consumers is wholesome, not adulterated, and properly marked, labeled, and packaged. 21 USC 602. Generally, the act sets standards for acceptable

meat and meat products, provides for inspections by the United States Department of Agriculture (USDA), and requires that meat "found to be not adulterated shall be marked, stamped, tagged, or labeled as 'Inspected and passed.'" 21 USC 604. The term "adulterated" is defined at 21 USC 601(m), which provides:

> The term "adulterated" shall apply to any . . . meat . . .
>
> (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health.

Before 1994, which is before the date these plaintiffs' actions arose, the USDA did not consider meat and poultry bearing pathogens such as E. Coli or salmonella to be "adulterated" and did not require meat producers to test for the presence of these bacteria. *Texas Food Industry Ass'n v Espy*, 870 F Supp 143, 145 (WD Tex, 1994). Nor did the FMIA require inspection or investigation to detect the presence of the pathogens.

On October 17, 1994, the USDA announced its decision to treat E. Coli as an adulterant and gave notice of a new E. Coli sampling program. *Texas Food Industry*, *supra*, p 145. In 1996, 9 CFR 310.25 was promulgated. That regulation recognizes E. Coli and salmonella as adulterants, requires sampling of livestock carcasses for E. Coli testing, and sets criteria for evaluation of test results.

B. FEDERAL PREEMPTION

Federal preemption is either express or implied. *Ryan v Brunswick Corp*, 454 Mich 20, 28; 557 NW2d 541 (1997). If express, the intent of Congress to preempt state law must be stated clearly in the language of the statute or impliedly contained in the structure and purpose of the statute. *Id.* In the absence of express preemption, implied preemption may exist in the form of field or conflict preemption. *Id.* Field preemption may be found where the state law at issue regulates conduct in a field that Congress intended the federal government to occupy exclusively. See *Martinez v Ford Motor Co*, 224 Mich App 247, 252; 568 NW2d 396 (1997). Conflict preemption exists when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of Congress' objectives. *Kircos v Holiday Food Center, Inc*, 191 Mich App 82, 86; 477 NW2d 130 (1991); *Martinez, supra.* Conflict preemption is compelled not only when a state law is in conflict with a federal statute, but also when it conflicts with a valid federal regulation. *Kircos, supra*, p 86. Conflict preemption is also compelled when a state law is in conflict with a federal regulatory agency's intentional decision *not* to regulate. *Ryan, supra*, pp 35-36. Furthermore, the state "law" in conflict with a federal statute or regulation need not be a state statute; state common-law causes of action may constitute state regulation subject to preemption if the cause of action would impose, through an award of damages, a requirement not found in federal law. *Id.*, p 34.

The FMIA includes an express federal preemption provision. 21 USC 678 reads in pertinent part:

> Requirements within the scope of this chapter with respect to . . . any establishment at which inspection is provided . . . which are in addition to, or different than those made under this chapter may not be imposed by any State . . . . Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State . . . but any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary [of Agriculture] over articles required to be inspected . . . for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment.

On the basis of this language, it is clear that Congress has expressly preempted states from placing any additional or different requirements on meat producers other than those of the federal government. See, e.g., *Armour & Co v Ball*, 468 F2d 76 (CA 6, 1972). Under *Ryan* and *Martinez*, *supra*, any state tort action based on a theory that adulterated meat was distributed must therefore be based on standards that are identical to federal standards.

Plaintiffs contend that their tort claims are not preempted by federal law because neither Congress nor the USDA adopted regulations concerning the presence of E. Coli bacteria in meat products until 1994, the year after plaintiffs purchased the tainted meat in this case. They reason that because there were no regulations explicitly allowing the sale of meat contaminated with pathogens such as E. Coli or salmonella at the time of their injuries, state law claims based on the sale of E. Coli-contaminated meat do not conflict with then-existing federal law and should be allowed. We disagree.

In *Ryan, supra*, p 35, the Supreme Court made it clear that when a federal agency "has deliberately concluded that regulation is not appropriate in a given area, federal inaction will preempt state law not identical to it." That principle applies here. As previously noted, until 1994, the USDA did not consider E. Coli to be an "adulterant." Therefore, the USDA did not consider it necessary to inspect for E. Coli and allowed the distribution of E. Coli-contaminated meat. The justification was that the painstaking microscopic inspection of meat for pathogens such as E. Coli and salmonella was not feasible and not warranted when any bacteria would eventually be destroyed by the consumer upon proper preparation and cooking of the meat. See *American Public Health Ass'n v Butz*, 167 US App DC 93, 94, 96; 511 F2d 331 (1974). This intentional decision not to regulate the presence of E. Coli because it was not considered an adulterant carries the force of a positive enactment. *Ryan, supra.* Holding defendants liable for failing to detect the presence of E. Coli bacteria in the meat purchased by plaintiffs in 1993 would run contrary to the USDA's then-existing determination that inspection for E. Coli bacteria was not required. The trial court therefore properly concluded that plaintiffs' claims were preempted by federal law.

Affirmed.

BRAUN v YORK PROPERTIES, INC

Docket Nos. 184796, 190771, 190956. Submitted December 10, 1997, at Detroit. Decided June 2, 1998, at 9:05 A.M.

Kathy, Thomas, Bryan P., and Nicholas J. Braun brought an action in the St. Clair Circuit Court against York Properties, Inc., and others, seeking damages as a result of Nicholas having been attacked and severely injured by a dog owned by Annette and Robert Holmes, the Brauns' next-door neighbors at a mobile-home park owned and managed by York Properties, Inc., and others. The Brauns settled their claims against the Holmeses, but proceeded to trial with respect to their claims against the owners and manager of the mobile-home park on the basis that those defendants were liable as the result of their failure to enforce the park's rules and regulations regarding dogs in the park. The court, Daniel J. Kelly, J., directed a verdict for the mobile-home park defendants with respect to the claims of Kathy, Thomas, and Bryan Braun, Nicholas' mother, father, and brother, respectively, and the jury returned a verdict in favor of Nicholas for past and future noneconomic damages and for future medical expenses. The court denied the various motions for posttrial relief made by the mobile-home park defendants, and subsequently denied their motion for mediation sanctions against Kathy, Thomas, and Bryan Braun. The mobile-home park defendants appealed both from the judgment on the jury verdict and from the denial of their motion for mediation sanctions. The appeals were consolidated.

The Court of Appeals *held*:

1. The adoption by the mobile-home park of rules and regulations relating to the size of a dog that could be kept by a tenant of the park did not create a duty of care on the part of the mobile-home park to protect its tenants from injury from dogs owned by other tenants. Although the restriction concerning the size of a dog that might be kept by a tenant might in some way protect other tenants from harm, the primary purpose of that regulation was to protect the premises. Because the size of a dog is not necessarily related to its propensity to bite, and because the mobile-home park defendants had no reason to know or suspect that the dog would attack a child, the failure to enforce the size regulation cannot be said to be a breach of duty of care owed by the mobile-home park

defendants to the injured child. Accordingly, the trial court erred in refusing to grant a directed verdict in favor of the mobile-home park defendants with respect to the claim of the injured child.

2. MCR 2.403(O)(8) provides that a motion for mediation sanctions must be filed within twenty-eight days "after the entry of judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment." Judgment was entered for the defendants with respect to the claims of Kathy, Thomas, and Bryan Braun on February 1, 1995. Although the mobile-home park defendants filed timely motions for posttrial relief with respect to the judgment entered in favor of Nicholas Braun, no such motions for posttrial relief were filed with respect to the judgment that was entered in favor of the mobile-home park defendants with respect to the claims of Kathy, Thomas, and Bryan Braun. Accordingly, the defendants' April 6, 1995, motion for mediation sanctions against those plaintiffs was not timely, and the trial court properly denied the motion for sanctions as untimely.

Affirmed in part and vacated in part.

1. NEGLIGENCE — CONTRACTS.

A person who undertakes, gratuitously or for consideration, to render services to another that the person should recognize as necessary for the protection of a third person or that person's property is subject to liability to the third person for physical harm resulting from the failure to exercise reasonable care to protect the undertaking if the person's failure to exercise reasonable care increases the risk of such harm, the person has undertaken to perform a duty owed by the other to the third person, or the harm is suffered because of reliance of the other or the third person upon the undertaking.

2. COMMON LAW — RESTATEMENT — STATUTES.

The application of a common-law rule found in the Restatement of the Law to a particular set of facts does not turn upon whether those facts can be characterized in the language of the Restatement; unlike a statute, which expresses a legislative directive for the treatment of future cases, the Restatement seeks primarily to distill the teachings of decided cases and is descriptive.

3. COMMON LAW — RESTATEMENT.

The influence of the Restatement of the Law depends upon its persuasiveness, and even where a particular section of the Restatement has received specific judicial endorsements, cases where that section is invoked must be decided by reference to the policies and precedents underlying the rule restated; textual analysis of the Restatement is useful only to the extent that it illuminates these fundamental considerations.

Bator Roualet & Berlin (by *Nancy J. Roualet* and *Daniel A. Gwinn*), for the plaintiffs.

Thomas D. Rinehart, P.C. (by *Thomas D. Rinehart*) (*Gross, Nemeth & Silverman, P.L.C.*, by *James G. Gross*, *Mary T. Nemeth*, and *Steven G. Silverman*, of Counsel), for the defendants.

Before: SAWYER, P.J., and WAHLS and REILLY, JJ.

REILLY, J. In these consolidated cases, York Properties, Inc., the owners and manager of the mobile-home park at which the underlying events took place (hereinafter defendants) appeal as of right the judgment for plaintiff Nicholas Braun on his negligence claim and the order denying their motion for mediation sanctions against plaintiffs Kathy, Thomas, and Bryan Braun. We vacate the judgment in Docket No. 184796 because defendants did not owe plaintiff Nicholas Braun a duty of care. In Docket Nos. 190771 and 190956, however, we affirm the denial of mediation sanctions.

Plaintiff Nicholas Braun, a twelve-year-old child, was seriously injured when bitten by his neighbors' dog, a Labrador, while playing inside the neighbors' mobile home. Nicholas, along with his mother, father, and brother, commenced this action against his neighbors and defendants, for injuries arising out of the dog bite. Nicholas settled his claims against his neighbors for $100,000. The trial court granted a directed verdict with respect to the claims of plaintiffs Kathy, Thomas, and Bryan Braun. The jury, however, found for Nicholas with respect to his claim against defendants for negligently failing to enforce rules and regulations regarding dogs in the mobile-home park. The court entered judgment for Nicholas in the amount of

$50,000 for past noneconomic damages, $100,000 for future medical expenses, and $123,904.95 for future noneconomic damages. The trial court subsequently denied defendants' motions for judgment notwithstanding the verdict, a new trial, and remittitur. The court also denied defendants' motion for mediation sanctions against Kathy, Thomas, and Bryan Braun.

DOCKET NO. 184796

Defendants first argue that the trial court erred in denying their motion for a directed verdict because plaintiff Nicholas Braun failed to show that they owed him a duty of care. We agree. This Court reviews de novo the trial court's decision on a motion for a directed verdict. *Berryman v K mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992). This Court considers the evidence presented at trial in a light most favorable to the nonmoving party to determine whether the plaintiff established a prima facie case. *Id.* A directed verdict should be granted only if reasonable jurors could not reach different conclusions. *Id.*

The question presented is whether under the circumstances of this case a landlord who promulgates rules and regulations regarding tenants' dogs owes a third party a duty to use reasonable care to enforce those rules. Generally, the existence of a duty is a question of law for the court to decide, but where certain factual circumstances give rise to a duty, and there are disputed facts, a jury must determine whether those factual circumstances exist. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996). "[T]he jury decides the question of duty only in the sense that it determines whether the

proofs establish the elements of a relationship which the court has already concluded give rise to a duty as a matter of law." *Smith v Allendale Mut Ins Co*, 410 Mich 685, 714-715; 303 NW2d 702 (1981). This Court has considered a landlord's duty to protect others from attacks by tenants' animals on two occasions, in *Szkodzinski v Griffin*, 171 Mich App 711; 431 NW2d 51 (1988), and *Feister v Bosack*, 198 Mich App 19; 497 NW2d 522 (1993).

In *Szkodzinski*, the plaintiff sought to recover from a landlord under a local ordinance, a strict liability theory, and the common law for injuries sustained when a tenant's dog attacked him. The plaintiff's local ordinance claim was rejected because the ordinance did not create a cause of action. The strict liability claim was rejected because the Michigan dog-bite statute, MCL 287.351; MSA 12.544, applies only to the dog's owner. The landlord was not an "owner" for purposes of the statute because he did not own, keep, or control the dog. *Szkodzinski*, *supra* at 714. Finally, this Court rejected the plaintiff's common-law claim because no factual question existed whether the landlord knew of the dog's vicious nature. The Court remarked that "the only possible way that [the landlord] could be held liable on a common law theory would be if he knew of the dog's vicious nature." *Id.* at 714.

In *Feister*, this Court considered the question whether a landlord could be held liable for injuries inflicted by a tenant's dog off the leased premises. The Court held that a landlord had no duty to protect third parties under those circumstances. The *Feister* Court declined to construe *Szkodzinski* as establishing a landlord's duty to protect all potential victims

from a dog once the landlord learns of the dog's dangerous proclivities. *Feister*, *supra* at 23. The Court noted that where the tenant comes into possession of the dog after the premises have been leased, courts in other jurisdictions have held a landlord liable only when he had knowledge of the dog's vicious propensities and had control of the premises or the capability to remove or confine the animal. The *Feister* Court further noted that other courts have been reluctant to impose liability for attacks that take place off the premises. After reviewing the decisions of other courts, this Court determined that a landlord's power to evict a tenant does not establish "control" over the dog, even if the landlord could have evicted the tenant before the date of the injury. *Id.* at 25-26. Accordingly, this Court held that a landlord owes "no duty to protect third parties from attacks by his tenants' dog taking place off the leased premises where the dog was acquired after the premises were leased." *Id.* at 26.

In this case, plaintiff Nicholas Braun admits that he, his parents, or the dog's owners, much less defendants, did not know of the dog's dangerous proclivities. Accordingly, Nicholas rightly concedes that he cannot recover under the common-law theory identified in *Szkodzinski*, *supra* at 714. See also *McCullough v Bozarth*, 232 Neb 714; 442 NW2d 201 (1989) (cases collected).[1] Nicholas instead argues that

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[1] In *McCullough*, *supra* at 724-725, the Supreme Court of Nebraska succinctly summarized a landlord's common-law liability:

> We hold that as a general rule, a landlord is liable for injuries caused by the attack of a tenant's dog only where the landlord had actual knowledge of the dangerous propensities of the dog and where the landlord, having that knowledge, nevertheless leased the

by promulgating rules and regulations governing their tenants' possession of dogs, including breed and size restrictions, defendants voluntarily assumed a duty to use reasonable care to enforce their rules to protect third parties from tenants' dogs that do not satisfy the criteria. We reject Nicholas' argument.

Nicholas relies primarily on the Supreme Court of Alaska's decision in *Alaskan Village, Inc v Smalley*, 720 P2d 945 (Alaska, 1986), to support his assertion of a duty in this case. In *Alaskan Village*, the plaintiff, a six-year-old child, was bitten by her neighbor's pit bull while playing on a swingset in the neighbor's yard. The plaintiff and her neighbor both lived in defendant's mobile-home park. The defendant inserted a comprehensive set of rules and regulations in its standard lease agreement, including a prohibition on tenants possessing "vicious dogs." On appeal from the judgment for plaintiff, the Alaska court held that the defendant landlord had a duty to exercise reasonable care to enforce its rules and regulations because it undertook the obligation to control vicious dogs in its trailer park. *Alaskan Village*, *supra* at 948.

The Alaska court noted that under § 323 of the Second Restatement of Torts a defendant who undertakes to render services owes a duty of care. The court then reviewed seven analytical factors[2] to deter-

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premises to the dog's owner or, by the terms of the lease, had the power to control the harboring of a dog by the tenant and neglected to exercise that power.

Thus, under the common-law theory, defendants' rules and regulations would support a finding that they had the power to control their tenants' harboring of dogs.

[2] The seven factors that the Alaska court considered were: "(1) the foreseeability of harm to plaintiff, (2) the degree of certainty that plaintiff suffered injury, (3) the connection between defendant's conduct and

mine whether an actionable duty of care existed under the circumstances presented in *Alaskan Village*. The court determined that a duty existed, reasoning as follows:

> Applying these principles to the instant case, we conclude that Village had a duty to exercise reasonable care to enforce its rules and regulations. (1) There was ample evidence that Village had actual knowledge of prior incidents involving [the neighbor's] dogs, and therefore it was clearly foreseeable that a person such as Smalley might be harmed; (2) Smalley suffered injury; (3) her injuries are closely related to Village's failure to take any action to enforce its rules; (4) Village's blatant disregard of its tenants' safety is morally blameworthy; (5) our policy is to encourage owners to enforce their rules to prevent harm to others lawfully on the premises; (6) the burden on owners of enforcing their own rules is not onerous; and (7) owners may obtain insurance or require tenants who own vicious animals to do so.
>
> Village undertook to control pets on the trailer park premises by the lease provision prohibiting tenants from keeping vicious dogs and requiring [the neighbor] to immediately remove annoying pets. One of the trailer park managers agreed that he had "an obligation to enforce the rules . . . concerning pets for the safety and well-being of the tenants in that park." . . . Smalley was entitled to rely on Village to perform its duty. [*Alaskan Village*, *supra* at 948.]

This Court has similarly accepted § 324A of the Second Restatements of Torts as correctly stating the law regarding a duty arising out of the rendering of services. *Courtright v Design Irrigation, Inc*, 210

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plaintiff's injury, (4) the moral blame attached to defendant's conduct, (5) the policy of preventing future harm, (6) the burden on the defendant and consequences to the community of imposing the duty, and (7) the availability, cost and prevalence of insurance for the risk." *Alaskan Village*, *supra* at 947-948.

Mich App 528, 531; 534 NW2d 181 (1995). That section provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. [2 Restatement Torts, 2d, § 324A, p 142.]

Nicholas correctly notes that defendants' failure to enforce their rules arguably falls within § 324A because their actions could have increased the risk of harm to him. This fact, however, does not answer the duty question. In considering § 324A, our Supreme Court explained the role of the Restatement in the duty analysis:

> [W]e note that the application of a common-law rule to a particular set of facts does not turn upon whether those facts can be characterized in the language of the Restatement section corresponding to the common-law rule. Unlike a statute, which expresses a legislative directive for the treatment of future cases, the Restatement seeks primarily to distill the teachings of decided cases and is descriptive. While its drafters may sometimes strive to choose "the better rule" or to predict or shape the development of the law, its influence depends upon its persuasiveness. Even where a particular Restatement section has received specific judicial endorsement, cases where that section is invoked must be decided by reference to the policies and precedents underlying the rule restated. Textual analysis of the Restate-

> ment is useful only to the extent that it illuminates these fundamental considerations. [*Smith*, *supra* at 712-713.]

Duty is a question "whether the defendant is under any obligation for the benefit of the particular plaintiff and concerns the problem of the relationship between individuals that imposes upon one a legal obligation for the benefit of the other." *Premo v General Motors Corp*, 210 Mich App 121, 124; 533 NW2d 332 (1995). This Court's decision to impose a duty involves a determination of public policy. *Smith*, *supra* at 716, n 24. In making this determination, this Court considers many variables. *Buczkowski v McKay*, 441 Mich 96, 101; 490 NW2d 330 (1992). In *Buczkowski*, *supra* at 101, n 4, our Supreme Court cited Dean Prosser's description of these variables in Prosser & Keeton, Torts (5th ed), § 53, p 359, n 24:

> Dean Prosser described the several variables that consistently go to the heart of a court's determination of duty as including: foreseeability of harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and, finally, the burdens and consequences of imposing a duty and the resulting liability for breach.

Applying these principles, we conclude that defendants did not have a duty to exercise reasonable care to enforce its rules and regulations under the circumstances of this case. (1) Unlike in *Alaskan Village*, defendants did not know of the dog's dangerous proclivities, and therefore, it was no more foreseeable that plaintiff would be harmed by his neighbor's dog than any other dog; (2) Nicholas suffered injury; (3) Nicholas' injuries were related to defendants' failure

to enforce their rules and regulations only in the sense that if defendants had enforced them, the dog would not have been in the mobile-home park, because the dog violated defendants' size restrictions, not their prohibition of "dangerous breeds"; (4) defendants' failure to enforce the size restrictions does not demonstrate the blatant disregard of its tenants' safety exhibited in *Alaskan Village* because defendants did not know of the dog's dangerous nature and the size of a dog is not necessarily related to its propensity to bite; (5) our policy is to encourage owners to enforce their rules to prevent harm to others lawfully on the premises; and (6) the burden on the owners to enforce their regulations is not particularly onerous and they could insure against the risk of liability.

Upon consideration of these factors, we conclude that defendants did not owe Nicholas a duty of care in this case because they did not undertake to render services to another within the meaning of § 324A. Although the size restrictions may in some way protect others from harm, their purpose is primarily to protect against harm to the premises. The Maryland Court of Special Appeals' discussion of a "no pets" lease provision in this context is instructive in this regard:

> The landlords were not in breach of the "no pets" provision; the tenant was in breach. Clauses in lease contracts creating a duty on the part of tenant to the landlord, unless specifically designed to do so, do not create obligations on the part of landlords to third parties. Contract law provides that the beneficiary of a clause has no obligation to enforce the contract provision, but could waive the provision by his conduct. . . . In this case, the landlords, who were the beneficiaries of the "no pets" clause, had no duty to third parties

> to enforce the rule. [*Amberwood Associates Ltd Partnership, Inc v Matthews*, 115 Md App 510, 521; 694 A2d 131 (1997), cert gtd 347 Md 155 (1997).]

Under the circumstances of this case, we conclude that defendants did not owe Nicholas a duty of care. Accordingly, the trial court erred in denying defendants' motion for a directed verdict. We therefore vacate the judgment in Docket No. 184796.[3]

DOCKET NOS. 190771 & 190956

Defendants argue that the trial court erred in denying their motion for mediation sanctions against plaintiffs Kathy, Thomas, and Bryan Braun. We disagree. This Court reviews de novo a trial court's decision whether to grant mediation sanctions. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129-131; 573 NW2d 61 (1997). Here, the trial court denied defendants' motion because they filed it more than twenty-eight days after the court entered judgment on Kathy, Thomas, and Bryan Braun's claims.

Defendants argue that the trial court erred in denying their motion because they timely filed it within twenty-eight days of the order denying their motion for judgment notwithstanding the verdict, a new trial, or remittitur. MCR 2.403(O)(8) establishes the period for filing a motion for mediation sanctions, stating as follows:

> A request for costs under this subrule must be filed and served within 28 days after the entry of judgment or entry

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[3] In light of our determination that defendants did not owe Nicholas a duty of care, we need not address defendants' other assertions of error.

> of an order denying a timely motion for a new trial or to set aside the judgment.

This Court must apply the clear language of the court rule as written. *Great Lakes*, *supra* at 130. In unambiguous terms, MCR 2.403(O)(8) provides that the period for requesting costs begins on the date the court enters judgment or the date the court enters an order denying a timely motion for a new trial or to set aside the judgment. For purposes of the court rule, the *judgment* is the judgment adjudicating the rights and liabilities of particular parties, regardless of whether that judgment is the final judgment from which the parties may appeal. See MCR 2.604(A). The court rule includes a provision allowing twenty-eight days after the order disposing of a motion for a new trial or to set aside the judgment in which to request sanctions because these motions may affect whether a party is entitled to the sanctions. When these motions do not pertain to the parties involved in the request for sanctions, extending the period for filing a motion for sanctions would serve no purpose.

In this case, the trial court entered judgment for defendants on plaintiffs Kathy, Thomas, and Bryan Braun's claims on February 1, 1995, and judgment for plaintiff Nicholas Braun on February 6, 1995. Defendants' motions for a new trial, judgment notwithstanding the verdict, and remittitur were denied in an order entered March 16, 1995. However, those motions concerned only Nicholas' claims. Therefore, under MCR 2.403(O)(8), the twenty-eight day period for defendants to request mediation sanctions against Kathy, Thomas, and Bryan Braun commenced on February 1, 1995. Defendants filed their motion for mediation sanctions on April 6, 1995. Accordingly, the trial court

properly denied defendants' motion as untimely. We therefore affirm in Docket Nos. 190771 and 190956.

Affirmed in part and vacated in part.

PEOPLE v MOREY

Docket No. 193900. Submitted February 10, 1998, at Grand Rapids. Decided June 2, 1998, at 9:10 A.M. Leave to appeal sought.

Sherry A. Morey was convicted by a jury in the Kent Circuit Court, H. David Soet, J., of pandering and of accepting the earnings of a prostitute after two women from the defendant's massage service agreed with an undercover police officer to perform sexual acts in exchange for money and gave to the defendant her share of money paid to them by the officer and by previous customers. The defendant appealed.

The Court of Appeals *held*:

1. Sufficient evidence supports the conviction of accepting the earnings of a prostitute. One of the women, by initiating fellatio on the undercover officer, performed a sexual act for money, and both women handed over to the defendant money from the officer and from previous customers.

2. The pandering statute applies to individuals who induce, persuade, encourage, inveigle, or entice women who are not prostitutes into becoming prostitutes. A person cannot be convicted of pandering if the woman at issue is already a prostitute or the person reasonably believes that the woman is already a prostitute. In this case, the defendant's conviction of pandering must be reversed because the prosecution failed to produce evidence demonstrating beyond a reasonable doubt that the women in question were not prostitutes before their employment by the defendant and that the defendant induced, persuaded, encouraged, inveigled, or enticed them into becoming prostitutes.

3. Under the facts presented by this case, the prosecutor did not abuse his discretion in charging the defendant with pandering and accepting the earnings of a prostitute, even if he could have charged other offenses instead.

4. The pandering statute and the statute proscribing the acceptance of earnings of a prostitute are not unconstitutionally vague or overbroad. The statutes provide fair notice of conduct proscribed, do not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, and do not prohibit constitutionally protected conduct.

Affirmed in part and reversed in part.

1. CRIMINAL LAW — PROSTITUTION — FELLATIO.

An act of prostitution occurs when a person agrees to perform fellatio in exchange for money and initiates physical contact with the customer's penis; the person need not complete the act of fellatio to be deemed to have engaged in prostitution.

2. CRIMINAL LAW — PANDERING.

A person commits pandering by inducing, persuading, encouraging, inveigling, or enticing a woman who is not a prostitute into becoming one; pandering is not committed where the woman at issue is already a prostitute or is reasonably believed to already be a prostitute (MCL 750.455; MSA 28.710).

3. CRIMINAL LAW — PANDERING — ACCEPTING EARNINGS OF A PROSTITUTE — CONSTITUTIONAL LAW — VAGUENESS — OVERBREADTH.

The pandering statute and the statute proscribing the acceptance of earnings of a prostitute are not unconstitutionally vague or overbroad; they provide fair notice of conduct proscribed, do not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, and do not prohibit constitutionally protected conduct (MCL 750.455; 750.457; MSA 28.710, 28.712).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, *Timothy K. McMorrow*, Chief Appellate Attorney, and *Vicki L. Seidl*, Assistant Prosecuting Attorney, for the people.

Jeanice Dagher-Margosian, for the defendant.

Before: GRIFFIN, P.J., and HOLBROOK, JR., and NEFF, JJ.

NEFF, J. Following a jury trial, defendant was convicted of pandering, MCL 750.455; MSA 28.710, and accepting the earnings of a prostitute, MCL 750.457; MSA 28.712. She was sentenced to three years' probation, the first four months to be spent in jail. She now appeals as of right. We affirm in part and reverse in part.

I

A Grand Rapids police officer, taking part in an undercover operation designed to curtail prostitution, called defendant's massage service from a hotel room and made an appointment for a massage at a cost of $75 an hour. Defendant agreed to send over a blonde in her mid-twenties with a nice figure. Shortly thereafter, a masseuse calling herself "Heather" and later identified as Christine Hanlon arrived at the hotel room. Hanlon had the officer disrobe and proceeded to give him a nonsexual massage. After twenty minutes, the officer asked if there were any "extras" available; after negotiations, Hanlon agreed to have sexual intercourse with him for an additional $100. When Hanlon completely undressed and crawled into bed with him, he gave a signal and his fellow officers rushed in from an adjoining room and arrested Hanlon for soliciting for prostitution.

Hanlon agreed to cooperate with the police by telephoning defendant and asking her to send a second masseuse to the room under the pretext that the officer wished to have sex with two women. Hanlon specifically used the word "sex" twice in her conversations with defendant, making it clear that the customer was interested in sex for money. Defendant replied that she would send a masseuse named Patti Jo Carlton.[1]

When Carlton arrived, she had the officer lie on the bed and gave him a brief massage. She then reached for his penis as if to masturbate him. He stopped her by asking what else was available. Carlton stated that she would perform oral sex on him for $100. He

[1] Carlton was deceased at the time of defendant's trial.

agreed, and Carlton started to perform the act. She was then arrested. Shortly thereafter, a female police officer drove Hanlon and Carlton to a local restaurant parking lot to meet with defendant. Hanlon handed defendant $300, of which $150 was for time she and Carlton spent in the hotel room, and $150 was attributable to other "calls" the two had made.[2] Defendant was then arrested.

II

Defendant first argues that the prosecution presented insufficient evidence to establish beyond a reasonable doubt that defendant was guilty of accepting the earnings of a prostitute and of pandering. We find that sufficient evidence exists to support defendant's conviction of accepting the earnings of a prostitute, but not of pandering.

A

MCL 750.457; MSA 28.712, prohibiting one from accepting the earnings of a prostitute, states:

> Any person who shall knowingly accept, receive, levy or appropriate any money or valuable thing without consideration from the proceeds of the earnings of any woman engaged in prostitution, or any person, knowing a female to be a prostitute, shall live or derive support or maintenance, in whole or in part, from the earnings or proceeds of the prostitution of said prostitute, or from moneys loaned or advanced to or charged against her by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, shall be guilty of a felony, punishable by imprisonment in the state prison not more than

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[2] Defendant received $50 of the $75 initial charge for a massage, with the remaining $25 going to the individual masseuse. In addition, each masseuse was permitted to keep all tips for any "extras" she performed.

> twenty years. And such acceptance, receipt, levy or appropriation of such money or valuable thing, shall, upon any proceeding or trial for violation of this section, be presumptive evidence of lack of consideration.

Defendant insists that her conviction under this statute must be reversed because no "sex act" actually took place in the hotel room, and because the money that she received from Carlton and Hanlon at the time of her arrest did not represent proceeds or earnings of prostitution. We disagree.

Contrary to defendant's argument, an actual act of prostitution occurred when Carlton agreed to perform fellatio for $100, and, in preparing to do so, actually initiated physical contact with the officer's "private areas." See *People v Warren*, 449 Mich 341, 347; 535 NW2d 173 (1995) ("sexual stimulation of a customer's penis by direct manual contact, in exchange for money, is prostitution"). Although the act of fellatio was not completed, we find that it was an act of prostitution.

We also reject defendant's claim that the actual currency received by defendant on the night in question was not the proceeds or earnings of a prostitute. Viewing the evidence in a light most favorable to the prosecution, we find that the officer gave both Hanlon and Carlton money in exchange for the massages and the interrupted act of fellatio. Hanlon subsequently gave defendant $300, which represented defendant's share for the time spent by Hanlon and Carlton not only with the officer, but also with previous customers. Defendant's challenge is without merit.

Sufficient evidence was presented to sustain the jury's determination that defendant was guilty of accepting the earnings of a prostitute.

B

Defendant also challenges the sufficiency of the evidence supporting her conviction for pandering. Specifically, defendant argues that because both Carlton and Hanlon were allegedly prostitutes before their encounter with the officer, defendant could not be convicted of inducing, persuading, inveigling, or enticing Carlton and Hanlon to become prostitutes as proscribed by MCL 750.455; MSA 28.710. We agree.

MCL 750.455; MSA 28.710 provides in pertinent part as follows:

> Any person who shall procure a female inmate for a house of prostitution; or who shall induce, persuade, encourage, inveigle or entice a female person to become a prostitute; or who by promises, threats, violence or by any device or scheme, shall cause, induce, persuade, encourage, take, place, harbor, inveigle or entice a female person to become an inmate of a house of prostitution or assignation place, or any place where prostitution is practiced, encouraged or allowed; or any person who shall, by promises, threats, violence or by any device or scheme, cause, induce, persuade, encourage, inveigle or entice an inmate of a house of prostitution or place of assignation to remain therein as such inmate; or any person who by promises, threats, violence, by any device or scheme, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, shall take, place, harbor, inveigle, entice, persuade, encourage or procure any female person to enter any place within this state in which prostitution is practiced, encouraged or allowed, for the purpose of prostitution . . . shall be guilty of a felony, punishable by imprisonment in the state prison for not more than twenty years.

The pandering statute is designed to penalize individuals who induce, persuade, encourage, or entice women who are not prostitutes into becoming prostitutes. In *People v Cook*, 96 Mich 368, 370; 55 NW 980 (1893), our Supreme Court reversed the defendant's conviction under a statute that made it a felony to "solicit or in any manner induce a female to enter such a house for the purpose of becoming a prostitute." The Court explained:

> Some force must be given to the word "become"; and it is evident that the legislature did not intend to make the offense complete by the mere soliciting of a female who was already a prostitute, and in a house of ill fame, to go from that place into another house of like character. [*Id.* at 373.]

This reasoning was applied to the current pandering statute in *People v Slipson*, 154 Mich App 134, 137; 397 NW2d 250 (1986), where this Court held that a defendant cannot be convicted of violating MCL 750.455; MSA 28.710 if the victim is already a prostitute or the defendant reasonably believes that the person is already a prostitute. Indeed, any other interpretation would render meaningless the phrase "to become a prostitute." *People v Rocha*, 110 Mich App 1, 15; 312 NW2d 657 (1981).

In the present case, the record reveals that both Carlton and Hanlon had engaged in prostitution before their encounter with the officer.[3] The prosecu-

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[3] When Hanlon telephoned defendant from the hotel room and asked that a second "masseuse" be sent to the room for sexual purposes, defendant advised that she would send Carlton because her other employees "wouldn't do it, you know." Hanlon herself testified that previous clients had asked her for "extras" and that she complied in exchange for money.

tion failed to produce evidence demonstrating beyond a reasonable doubt that the women were not prostitutes before their employment by defendant, and that defendant actually induced, persuaded, or encouraged them to become prostitutes. Consequently, defendant's conviction for pandering must be reversed.

III

Next, defendant challenges the instructions given to the jury regarding the pandering charge. Because defendant did not object to the instruction at trial, relief can be granted only if manifest injustice would result. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Moreover, this issue is rendered moot by our decision that the evidence was legally insufficient to support the pandering charge. However, because the instructions were erroneous and we believe our comments here will be of benefit to the bench and bar, we will address the claims of error raised.

A

In its final instructions to the jury, the court stated:

> The defendant is also charged with the crime of pandering. To prove this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:
>
> First, that the defendant persuaded or encouraged . . . Christine Marie Hanlon and/or Patti Jo Carlton, to be prostitutes. A prostitute, again, is a person who does sexual acts for money.
>
> Second, that the defendant did this knowingly and intentionally. This, again, is a specific intent crime, which means that the prosecution must prove not only that the defendant did the acts but that she did the acts with the intent to cause a particular result.

> In this case, for this crime, it's necessary that they prove that the defendant intended to persuade or encourage Christine Hanlon or [Patti Jo Carlton] to be a prostitute.

B

Defendant first argues that that the court erred in using the phrase "to be prostitutes" instead of "to become a prostitute" when it instructed the jury on the elements of pandering. We agree.

As we have previously stated, there exists in this context a significant difference between the word "be" and the phrase "to become." The latter embodies the statute's apparent purpose: to protect women from being forced to engage in prostitution where they did not engage in it before. Here, the trial court's final instruction permitted the jury to find defendant guilty of pandering even if she had nothing to do with Hanlon's and Carlton's becoming prostitutes.[4]

The trial court's error in using the word "be" in its instruction regarding the elements of pandering may be attributable to the fact that CJI2d 20.34, the pandering instruction, likewise misstates this element of the crime.[5] Insofar as the standard jury instruction

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[4] We note that in its initial instruction to the jury, the court advised the jury that in order to find defendant guilty of pandering, the prosecution must prove beyond a reasonable doubt that defendant "forced or persuaded or encouraged [Hanlon and Carlton] to become prostitutes." Although the initial instruction correctly stated this element, it is well settled that where a court gives both a correct and an incorrect instruction, this Court presumes that the jury followed the incorrect charge. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995).

[5] CJI2d 20.34 provides, in relevant part, as follows:

> (1) The defendant is charged with the crime of pandering. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> [*Choose (2) or (3):*]

uses the phrase "to be a prostitute" instead of the statutory language "to become a prostitute," we find it is erroneous.

C

Defendant also claims that the trial court's instructions broadened the scope of the information. Specifically, defendant notes that the pandering statute penalizes anyone "who shall induce, persuade, encourage, inveigle or entice a female person to become a prostitute . . . ." MCL 750.455; MSA 28.710. Count II of the amended information charged that defendant did "INDUCE, PERSUADE, INVEIGLE OR ENTICE A FEMALE . . . TO BECOME A PROSTITUTE . . . ." Although the statute includes the word "encourage," the information did not. The trial court's final instruction stated that the first element of the offense was "that the defendant persuaded or encouraged [Hanlon] and/or [Carlton] . . . to be prostitutes." By using the word "encourage," defendant argues, the jury instruction impermissibly broadened the scope of the information.

This issue was squarely addressed in *People v Springs*, 101 Mich App 118, 127-128; 300 NW2d 315 (1980):

> Although the statutory definition of pandering includes "encouraging" a female to become a prostitute, the informa-

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> (2) First, that the defendant [forced / persuaded / encouraged / tricked] [*state name*] to be a prostitute. A prostitute is a person who does sexual acts for money.
>
> * * *
>
> (4) Second, that the defendant did this knowingly and intentionally.

> tion did not so charge defendant. The prosecution argues that "encouraging" shares the same meaning as "inducing, inveigling, persuading or enticing" so that the variance between the information and the charge does not warrant reversal. We disagree. Inducing, inveigling, persuading, and enticing all imply an active [role] leading to a particular action. Encouraging indicates a less active role. It falls short of persuading. Supporting or reacting positively to a decision already reached by an individual constitutes a form of encouragement. While the information properly could have been amended, even during the trial, so long as defendant had sufficient notice and opportunity to defend against the new charge, it was impermissible for the trial judge to amend the information *sub silentio* by his instructions to the jury. Since it cannot be determined whether the jury's verdict was based on the encouraging or inducing, persuading, inveigling or enticing portion of the charge, reversal is required.
>
> A careful examination of the record leads to the inescapable conclusion that defendant was denied a fair trial. [Citations omitted.]

The trial court's final instruction to the jury in the present case, like that in *Springs*, was erroneous.

IV

Defendant next argues that the prosecutor abused his discretion when he charged defendant with the offenses of accepting the earnings of a prostitute and pandering. Defendant suggests that other offenses, such as attempt, conspiracy, or disorderly person, were more appropriate. Because defendant did not object on this basis before the trial court, she has failed to preserve this issue for appellate review. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Nonetheless, we find no abuse of prosecutorial discretion under the facts presented here. See *People v*

Yeoman, 218 Mich App 406, 413-414; 554 NW2d 577 (1996).

V

Finally, defendant contends that her convictions should be overturned because MCL 750.455; MSA 28.710 and MCL 750.457; MSA 28.712 are unconstitutionally vague and overbroad. These challenges have not been properly preserved. *Up & Out of Poverty Now Coalition v Michigan*, 210 Mich App 162, 167; 533 NW2d 339 (1995) ("[i]ssues raised for the first time on appeal, even those relating to constitutional claims, are not ordinarily subject to appellate review"). Nevertheless, this Court may still consider an important constitutional question absent a challenge in the trial court. *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507 NW2d 744 (1993).

Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *People v Hubbard (After Remand)*, 217 Mich App 459, 483-484; 552 NW2d 493 (1996). A statute may be void for vagueness if (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; and (3) its coverage is overly broad and impinges on First Amendment freedoms. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). When presented with a vagueness challenge, we examine the entire text of the statute and give the words of the statute their ordinary meanings. *Id.* at 646.

On the basis of these standards, we find that both the pandering statute, MCL 750.455; MSA 28.710, and the statute proscribing accepting earnings of a prostitute, MCL 750.457; MSA 28.712, are not unconstitutionally vague. The statutes provide, in clear and understandable terms, that anyone who induces, persuades, encourages, or entices a woman to become a prostitute, or who earns a living through others who engage in prostitution, shall be subject to criminal prosecution. The language used in the statutes provides fair notice of the proscribed conduct and is not so vague that persons of common intelligence must necessarily guess at its meaning. Further, the statutes do not confer unlimited discretion on the trier of fact to decide if defendant committed the offenses.

Neither are the statutes void for overbreadth. An overbroad statute is one that prohibits constitutionally protected conduct. *People v McCumby*, 130 Mich App 710, 714; 344 NW2d 338 (1983). The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the plainly legitimate sweep of the statute where, as here, conduct and not merely speech is involved. *People v Cavaiani*, 172 Mich App 706, 711; 432 NW2d 409 (1988).

Contrary to defendant's argument on appeal, the statutes at issue do not penalize constitutionally protected behavior; rather, they proscribe specific conduct relating to the inducing of others to become prostitutes and the receiving of proceeds of others' acts of prostitution. The statutes could not reasonably be applied to entirely innocent conduct, as defendant suggests in various hypothetical situations. The statutes are not overbroad.

VI

Defendant's conviction of accepting the earnings of a prostitute is affirmed. Her conviction of pandering is reversed.

PEOPLE v BORCHARD-RUHLAND

Docket No. 200048. Submitted April 21, 1998, at Lansing. Decided June 2, 1998, at 9:15 A.M. Leave to appeal sought.

Ann C. Borchard-Ruhland was charged in the 74th District Court with two counts of operating a motor vehicle while under the influence of liquor or while having an unlawful blood alcohol level, thereby causing serious injury. The court, John C. Leaming, J., suppressed evidence of a blood test that had been administered to the defendant. The test had been performed at a hospital, before the defendant was arrested, upon the request of a police officer, for the sole purpose of establishing blood alcohol level, and with the consent of the defendant. The court ruled that the evidence was inadmissible because the police officer had failed to advise the defendant of her chemical test rights as required by the implied consent statute. The Bay Circuit Court, Kenneth W. Schmidt, J., denied the prosecution's application for leave to appeal. The prosecution appealed to the Court of Appeals by leave granted.

The Court of Appeals *held*:

The blood test was administered under color of statutory authority. Test results obtained pursuant to the exercise of statutory authority are not admissible unless obtained in conformity with the statute.

Affirmed.

1. INTOXICATING LIQUORS — AUTOMOBILES — IMPLIED CONSENT — BLOOD TESTS.

A blood test administered to a motorist will be deemed to have been given under the implied consent statute unless express disclaimers of reliance on the statute are made to both the motorist and the health-care worker administering the test (MCL 257.625c; MSA 9.2325[3]).

2. INTOXICATING LIQUORS — AUTOMOBILES — IMPLIED CONSENT.

Test results obtained pursuant to the exercise of authority under the implied consent statute are not admissible in prosecutions for drunk driving unless they are obtained in conformity with the statute (MCL 257.625c; MSA 9.2325[3]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Joseph K. Sheeran*, Prosecuting Attorney, and *Timothy J. Kelly*, Chief Assistant Prosecuting Attorney, for the people.

Smith, Bovill, Fisher, Meyer & Borchard, P.C. (by *Fred L. Borchard* and *James F. Troester*), for the defendant.

Before: HOLBROOK, JR., P.J. and GRIBBS and R. J. DANHOF* , JJ.

GRIBBS, J. This is a prosecutor's appeal from a circuit court order denying the prosecutor's application for leave to appeal from the district court opinion and order suppressing evidence of a blood alcohol test administered to defendant pursuant to her consent and while she was not under arrest. The test was administered after defendant had been involved in an automobile accident and had been admitted to a hospital. Defendant was subsequently arrested and charged with two counts of operating a motor vehicle while under the influence of intoxicating liquor or while having a blood alcohol content greater than 0.10 grams per 100 milliliters of blood (OUIL/BAC), causing serious injury. MCL 257.625(5); MSA 9.2325(5). We affirm.

The prosecutor argues that the district court erred in suppressing the blood test results on the ground that defendant had not been advised of her chemical test rights. Although the police officer did not comply with the requirements of the implied consent statute, MCL 257.625c; MSA 9.2325(3), the prosecutor con-

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

tends that defendant was not protected by the statute because she was not under arrest and she voluntarily consented to the test. We disagree.

A blood test is deemed to have been given under the implied consent statute unless express disclaimers of reliance on the statute are made to both the defendant and the health-care worker administering the test. *People v McKinney*, 88 Mich App 715, 720; 278 NW2d 728 (1979). Test results obtained pursuant to the exercise of statutory authority are not admissible unless obtained in conformity with the statute. *McNitt v Citco Drilling Co*, 397 Mich 384, 393; 245 NW2d 18 (1976); *People v Weaver*, 74 Mich App 53, 58; 253 NW2d 359 (1977).

The question here is whether the blood test was administered "pursuant to the exercise of statutory authority." *Id.* We conclude that the test was administered "under color of statutory authority." *McNitt*, *supra* at 391-392, 394; *Weaver*, *supra* at 59-60. The blood sample was taken at the request of a police officer specifically to determine alcohol content and not for diagnostic purposes. The nurse who drew defendant's blood was not informed that the officer's request was made without statutory authority or that she could be acting without protection from civil and criminal liability. MCL 257.625a(6)(c); MSA 9.2325(1)(6)(c).

We are not persuaded by the prosecutor's argument that the previous law on this matter no longer applies because the statute was amended to include both criminal and civil proceedings. The language concerning implied consent has not undergone any substantive change. We do not agree that the amendment broadening the scope for introduction of blood test

results renders the previous case law on implied consent inapplicable. Further, because we find that the blood test was administered under authority of the statute, we need not consider whether authority existed outside the statute to administer the blood test. *Weaver*, *supra* at 61.

We are not unsympathetic to the prosecutor's urging that public policy dictates a different result. However, our primary goal is to ascertain and give effect to the intent of the Legislature. When promulgating new law, the Legislature is presumed to be familiar with existing law on the same subject and to have considered its effect on new legislation. *State Treasurer v Gardner*, 222 Mich App 62, 67; 564 NW2d 51 (1997). Here, where the amendments of the statute were not intended to alter the purpose underlying implied consent, we conclude that, when a person is asked to consent to the withdrawal of blood for chemical testing, express disclaimer is still required to preclude application of the implied consent provisions.

Affirmed.

DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES v HOFFMANN

Docket No. 201322. Submitted March 18, 1998, at Lansing. Decided June 5, 1998, at 9:00 A.M.

The Office of Health Services, Bureau of Occupational and Professional Regulation, Department of Consumer and Industry Services, issued a notice and order to Mark H. Hoffmann, a licensed chiropractor, that directed him to cease and desist from manipulating the spines of horses. A hearing referee proposed that the Board of Chiropractic Disciplinary Subcommittee issue a decision upholding the cease and desist order. The hearing referee decided that the manipulation of horses' spines is within the scope of veterinary medicine, not chiropractic, and that Hoffmann had not worked under the supervision of a veterinarian such that he could lawfully manipulate horses' spines. The disciplinary subcommittee invalidated the cease and desist order, accepting the factual findings of the hearing referee, but disagreeing with the hearing referee's conclusions of law. The disciplinary subcommittee determined that no statutory or administrative rule limits the practice of chiropractic to humans and that Hoffmann's manipulation of horses' spines is within the scope of chiropractic. The department appealed.

The Court of Appeals *held*:

1. The practice of chiropractic, as defined by the Public Health Code, MCL 333.16401(1)(b); MSA 14.15(16401)(1)(b), is limited to the diagnosis and adjustment of spinal misalignments in humans. Although § 16401(1)(b)(i) and (ii) do not expressly limit references to spinal sublaxations or misalignments to human spines, § 16401(1)(b)(iii) does so when referring to the use of x-ray machines. It would be illogical to interpret § 16401(1)(b)(i)-(iii) as allowing a chiropractor to diagnose and adjust spinal sublaxations and misalignments in humans and animals but limiting a chiropractor's use of x-ray machines to humans. Furthermore, prior statutory definitions of "chiropractic practice" limited chiropractic to treatment of humans.

2. The veterinary medicine provisions of the Public Health Code define "animal" to exclude humans, MCL 333.18802(2); MSA 14.15(18802)(2), and define the "practice of veterinary medicine" to

include performing an operation or manipulation on an animal, MCL 333.18805(2)(a); MSA 14.15(18805)(a), and diagnosing or prognosing a disease, deformity, or defect in an animal by manipulation, MCL 333.18805(2)(c); MSA 14.15(18805)(2)(c). Hoffmann's manipulation of horses' spines constitutes veterinary medicine.

3. A person licensed as a chiropractor, but not as a veterinarian, may manipulate animal spines under a licensed veterinarian's supervision. MCL 333.16215(1); MSA 14.15(16215)(1). The term "supervision," as defined by the Public Health Code, MCL 333.16109(2); MSA 14.15(16109)(2), does not encompass the kind of informal availability of a veterinarian through a pager that Hoffmann had in this case.

Reversed and remanded.

1. HEALTH — CHIROPRACTIC — SCOPE OF PRACTICE.

The practice of chiropractic is limited by statute to the diagnosis and adjustment of spinal misalignments in humans (MCL 333.16401[1][b]; MSA 14.15[16401][1][b]).

2. ANIMALS — VETERINARY MEDICINE — SPINAL MANIPULATIONS.

The diagnosis and adjustment of spinal misalignments in animals other than humans constitute the practice of veterinary medicine (MCL 333.18802[2]; MSA 14.15[18802][2]).

3. ANIMALS — SPINAL MANIPULATIONS — CHIROPRACTORS — VETERINARIANS.

A person licensed as a chiropractor, but not as a veterinarian, may, under the supervision of a licensed veterinarian, diagnose and adjust spinal misalignments in animals others than humans; such supervision must comply with the provision in Article 15 of the Public Health Code that defines "supervision" (MCL 333.16109[2], 333.16215[1]; MSA 14.15[16109][2], 14.15[16215][1]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Howard C. Marderosian*, Assistant Attorney General, for Department of Consumer and Industry Services.

Holly Glazier, for Mark H. Hoffman.

Before: HOEKSTRA, P.J., and JANSEN and GAGE, JJ.

JANSEN, J. The Department of Consumer and Industry Services appeals as of right from the Board of Chiropractic Disciplinary Subcommittee's dismissal of a

cease and desist order entered by the Office of Health Services (within the Bureau of Occupational and Professional Regulation) against Mark Hall Hoffmann, D.C. The cease and desist order required that appellee stop performing chiropractic manipulation on animals. We reverse the order of the disciplinary subcommittee and remand.

Appellee became a licensed chiropractor in 1990. As part of his practice, appellee, who does not have a veterinary license, provides chiropractic treatment to horses. On September 1, 1995, the department issued to appellee a notice and order to cease and desist. The notice alleged that appellee was in violation of the Public Health Code[1] because he was treating horses by manipulating their spines without having a veterinary license. On September 25, 1995, appellee requested a hearing, and the hearing was held on February 26, 1996. The hearing referee issued a proposal for decision on March 7, 1996. The hearing referee concluded that because the care and treatment of animals is not specifically included in the scope of chiropractic and is specifically included in the scope of practice for veterinarians, the practice of equine chiropractic by a chiropractor who is not a veterinarian is outside the scope of chiropractic and is illegal. The hearing referee also concluded that appellee was not being supervised by a veterinarian such that appellee's manipulation of horses' spines could be done pursuant to MCL 333.16109(2); MSA 14.15(16109)(2).

After the parties filed their responses to the hearing referee's proposal for decision, the disciplinary sub-

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[1] Specifically, the chiropractic statute is found at MCL 333.16401 *et seq.*; MSA 14.15(16401) *et seq.*

committee dismissed the cease and desist order on September 27, 1996. Although it accepted the hearing referee's factual findings, the disciplinary subcommittee disagreed with the hearing referee's reasoning. The disciplinary subcommittee ruled that there was no specific statutory or administrative rule limiting or including equine chiropractic care for either a chiropractor or a veterinarian. It also found that MCL 333.16401; MSA 14.15(16401) did not limit the practice of chiropractic to humans. Therefore, the disciplinary subcommittee found that there was no statutory violation by appellee because he was merely performing spinal manipulation, which is within the scope of chiropractic. The department moved for rehearing and reconsideration, but that motion was denied in an order dated January 27, 1997.

The sole issue on appeal is whether the scope of chiropractic as defined in MCL 333.16401; MSA 14.15(16401) authorizes chiropractors, who do not have veterinary licenses, to treat animals. We hold that the scope of chiropractic does not include the treatment of animals. We, therefore, reverse the decision of the disciplinary subcommittee because the decision is based on a substantial and material error of law. MCL 24.306(1)(f); MSA 3.560(206)(1)(f).

Because the scope of chiropractic is statutorily defined, the question whether a given activity is within the authorized scope of chiropractic is one of statutory construction to be decided by the court. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 67; 535 NW2d 529 (1995). "Practice of chiropractic" is defined in MCL 333.16401(1)(b); MSA 14.15(16401)(1)(b), which provides:

> "Practice of chiropractic" means that discipline within the healing arts which deals with the nervous system and its relationship to the spinal column and its interrelationship with other body systems. Practice of chiropractic includes:
>
> (i) Diagnosis, including spinal analysis to determine the existence of spinal subluxations or misalignments that produce nerve interference, indicating the necessity for chiropractic care.
>
> (ii) The adjustment of spinal subluxations or misalignments and related bones and tissues for the establishment of neural integrity utilizing the inherent recuperative powers of the body for restoration and maintenance of health.
>
> (iii) The use of analytical instruments, nutritional advice, rehabilitative exercise and adjustment apparatus regulated by rules promulgated by the board pursuant to section 16423, and the use of x-ray machines in the examination of patients for the purpose of locating spinal subluxations or misaligned vertebrae of the human spine. The practice of chiropractic does not include the performance of incisive surgical procedures, the performance of an invasive procedure requiring instrumentation, or the dispensing or prescribing of drugs or medicine.

The disciplinary subcommittee determined that the above statutory provision does not specifically limit the practice of chiropractic to humans, except for § 16401(1)(b)(iii) providing for the use of x-ray machines. The disciplinary subcommittee concluded that the definition of chiropractic was not limited to the human nervous system or spinal column.

This case requires us to construe a statutory provision. The "cardinal rule" of statutory construction is to identify and give effect to the intent of the Legislature. *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 611; 566 NW2d 571 (1997). The first step in determining intent is to examine the language of the statute itself. *Id.* The language is to be given its ordinary and generally accepted meaning. *Id.* Judicial

construction is authorized only where the language lends itself to more than one interpretation. *Id.*

Subsections 1(b)(i) and 1(b)(ii) authorize the diagnosis and adjustment of spinal subluxations and misalignments in terms not explicitly limited to human spines, while subsection 1(b)(iii) specifically authorizes the use of x-ray machines for the purpose of locating spinal subluxations or misaligned vertebrae of the human spine. The disciplinary subcommittee's interpretation of the statute would permit a chiropractor to diagnose and adjust spinal subluxations and misalignments in humans and animals, while limiting a chiropractor's use of x-ray machines to humans. We believe that this interpretation would lead to an illogical result, which is disfavored when construing statutes. *Gross v General Motors Corp*, 448 Mich 147, 164; 528 NW2d 707 (1995) (statutes must be construed to prevent absurd or illogical results and to give effect to their purposes). This is because it would be unreasonable or illogical to allow chiropractors to diagnose and adjust spinal misalignments in animals while allowing the use of x-rays only in the examination of humans.

Moreover, the disciplinary subcommittee's interpretation ignored all prior statutory definitions of chiropractic that explicitly limited all aspects of the practice of chiropractic to humans. As noted in the department's brief, the practice of medicine was first regulated by the Legislature with 1899 PA 237, which created the medical practice board. In 1913, the Legislature recognized drugless healers for the first time and granted the Board of Medicine the authority to certify and regulate such individuals. 1913 PA 368. The 1913 amendments provided "for licensing persons

desiring to practice a system of treatment of human ailments without resort to drugs, medicine, or surgery." *Locke v Ionia Circuit Judge*, 184 Mich 535, 538; 151 NW 623 (1915). The Board of Chiropractic was then created in 1933. Specifically, 1933 PA 145 defined the practice of chiropractic as:

> Sec. 6. The license provided for in this act shall entitle the holder thereof to practice chiropractic in the state of Michigan, and for the purpose of this act chiropractic is defined as "the locating of misaligned or displaced vertebrae of the human spine, the procedure preparatory to and the adjustment by hand of such misaligned or displaced vertebrae and surrounding bones or tissues".

In 1968, the Legislature amended the definition of chiropractic as:

> Sec. 6. The license provided for in this act shall entitle the holder thereof to practice chiropractic in the state of Michigan, and for the purpose of this act chiropractic is defined as "the locating of misaligned or displaced vertebrae of the human spine, the procedure preparatory to and the adjustment by hand of such misaligned or displaced vertebrae and surrounding bones or tissues, for the restoration and maintenance of health." A licensed doctor of chiropractic under this act may use x-ray and such analytical instruments as are approved by the Michigan board of chiropractic examiners in the examination of patients solely for the purpose of locating misaligned or displaced vertebrae of the human spine and for the procedures preparatory thereto. [1968 PA 73.]

The Public Health Code, the present statutory system, was enacted in 1978. See 1978 PA 368. Although the present definition of the practice of chiropractic was expanded by the 1978 amendments, there is nothing in the Public Health Code indicating that the prac-

tice of chiropractic includes animals other than humans. See *Attorney General v Beno*, 422 Mich 293, 317; 373 NW2d 544 (1985) ("There is nothing in this wording [of § 16401] which shows an intent to authorize the treatment of areas other than the human spine."). Rather, the Public Health Code expands the practice of chiropractic by including the nervous system, its relationship to the spinal column, and its interrelationship with other body systems. The expanded definition of practice of chiropractic also includes the use of analytical instruments, nutritional advice, rehabilitative exercise, and adjustment apparatus in the examination of patients to locate spinal subluxations or misaligned vertebrae of the *human spine*. See § 16401(1)(b)(iii).

Additionally, the legislative history indicates that the Legislature did not intend to expand the practice of chiropractic to include animals. Senate Fiscal Agency Analysis, HB 4070 (1978), states in relevant part:

> Following lengthly [sic] deliberation in the House which resulted in a compromise, the chiropractic scope of practice was expanded to include "the nervous system and its relationship to the spinal column and its interrelationship with other body systems;" diagnosis including spinal analysis; establishment of neural integrity utilizing the inherent recuperative powers of the body for restoration and maintenance of health; nutritional advice; and rehabilitative exercise. The new scope of practice specifically excludes "the performance of incisive surgical procedures, the performance of an invasive procedure requiring instrumentation, or the dispensing or prescribing of drugs or medicine."

Therefore, in light of the legislative history, and the wording of § 16401(1)(b), we find no legislative intent

to allow chiropractors to perform spinal diagnosis and adjustments on animals. The disciplinary subcommittee's finding to the contrary is a substantial and material error of law, and we concur with the hearing referee's conclusion that a chiropractor who is not a licensed veterinarian does not have the authority to practice chiropractic on horses or other animals.

In *Beno*, *supra*, p 303, our Supreme Court stated:

> [T]he purpose of the licensing statute is not to prohibit the doing of those acts that are excluded from the definition of chiropractic, but to make it unlawful to do without a license those things that are within the definition. In other words, appellant's activities are not automatically enjoinable merely because they are not within the scope of chiropractic practice. Rather, an injunction is only proper, under article 15 of the Health Code, upon a finding that the practices complained of constitute a "violation" of a statute or rule promulgated under article 15. MCL 333.16291(1); MSA 14.15(16291)(1). An obvious example of enjoinable activities are those that constitute the practice of medicine where the actor is without a medical license to do so. MCL 333.17001(c); MSA 14.15(17001)(c).

Veterinarians are also regulated under the Public Health Code. MCL 333.18801 *et seq.*; MSA 14.15(18801) *et seq.* "Animal" is specifically defined as an animal other than a human being. MCL 333.18802(2); MSA 14.15(18802)(2). Practice of veterinary medicine is defined as:

> (a) Prescribing or administering a drug, medicine, treatment, or method of procedure; performing an operation or *manipulation*; applying an apparatus or appliance; or giving an instruction or demonstration designed to alter an animal from its normal condition.

> (b) Curing, ameliorating, correcting, reducing, or modifying a disease, deformity, defect, wound, or injury in or to an animal.
>
> (c) Diagnosing or prognosing, or both, a disease, deformity, or defect in an animal by a test, procedure, *manipulation*, technique, autopsy, biopsy, or other examination. [MCL 333.18805(2); MSA 14.15(18805)(2) (emphasis added).]

Therefore, appellee's action of performing spinal adjustments on horses is contemplated by the statutes regulating veterinary medicine. This lends further support to finding that the Legislature did not intend for chiropractors to practice chiropractic on animals. Further, to this extent, the cease and desist order was properly entered to enjoin appellee from performing chiropractic manipulation on horses or other animals without having a license to practice veterinary medicine. MCL 333.16291(1); MSA 14.15(16291)(1).

We lastly address the issue whether appellee was properly under the supervision of a veterinarian such that he could lawfully perform chiropractic adjustments on horses. A veterinarian may delegate the authority to practice equine chiropractic to a chiropractor as long as the chiropractor is qualified by education, training, or experience where the act is done under the veterinarian's supervision. MCL 333.16215(1); MSA 14.15(16215)(1). MCL 333.16109(2); MSA 14.15(16109)(2) provides:

> "Supervision", except as otherwise provided in this article, means the overseeing of or participation in the work of another individual by a health professional licensed under this article in circumstances where at least all of the following conditions exist:
>
> (a) The continuous availability of direct communication in person or by radio, telephone, or telecommunication

between the supervised individual and a licensed health professional.

(b) The availability of a licensed health professional on a regularly scheduled basis to review the practice of the supervised individual, to provide consultation to the supervised individual, to review records, and to further educate the supervised individual in the performance of the individual's functions.

(c) The provision by the licensed supervising health professional of predetermined procedures and drug protocol.

The hearing referee found, as a factual matter, that appellee was not under a veterinarian's supervision as statutorily defined. This factual finding is supported by the record. Horse owners were usually, but not always, referred to appellee by a veterinarian. Dr. John Haberline, a licensed veterinarian, had referred horse owners to appellee and Dr. Haberline was available to appellee by a pager. The hearing referee found, correctly we believe, that "the informal availability described by Dr. Haberline does not meet the [statutory] requirement for supervision." Therefore, appellee does not have the authority to practice equine chiropractic under MCL 333.16215(1); MSA 14.15(16215)(1) because he is not being "supervised" as that term is defined in MCL 333.16109(2); MSA 14.15(16109)(2).

The disciplinary subcommittee's order to dismiss the notice and order to cease and dismiss is reversed. We remand to the disciplinary subcommittee to enter an order that appellee shall not perform chiropractic diagnosis and adjustment of animals without having a license to practice veterinary medicine, unless appellee is properly under the supervision of a licensed veterinarian as defined in MCL 333.16109(2); MSA 14.15(16109)(2).

PEOPLE v WUJKOWSKI

Docket No. 202060. Submitted March 18, 1998, at Lansing. Decided June 5, 1998, at 9:05 A.M.

Thomas E. Wujkowski pleaded guilty in the 76th District Court, William R. Rush, J., of impaired driving and possession of marijuana. The plea was conditioned on his right to appeal from the denial of his motion to dismiss and motion to suppress the results of a Breathalyzer test. The Isabella Circuit Court, Paul H. Chamberlain, J., reversed the order denying suppression of the Breathalyzer test results and remanded the case to the district court to allow the defendant to withdraw his guilty plea. The reversal was based on a violation of an administrative rule regarding the administration of Breathalyzer tests that requires the operator of the test machine to observe the subject for fifteen consecutive minutes before administering the test. Here, the operator had continually observed the defendant for eighteen consecutive minutes before administering the test, except for six seconds when he walked away from the defendant to check the machine to determine if fifteen minutes had elapsed, and another officer was with the defendant during that six-second period. The prosecution appealed by leave granted.

The Court of Appeals *held*:

The district court properly held that the operator's momentary loss of view of the defendant during the observation period was not significant when viewed in the totality of the circumstances. The momentary time that the operator did not observe the defendant was so minimal that the test results cannot be assumed to be inaccurate and there is no allegation that the defendant placed anything in his mouth or regurgitated during that period. Furthermore, there is no showing that the test results were inaccurate. Thus, any violation of the administrative rule was harmless error and suppression of the results was not an appropriate remedy. The circuit court's order must be reversed and the defendant's convictions and sentences reinstated.

Order reversed; convictions and sentences reinstated.

1. ADMINISTRATIVE LAW — ADMINISTRATIVE RULES — JUDICIAL CONSTRUCTION.
   The usual rules of statutory construction apply to administrative rules; administrative rules should be read in a manner to avoid absurd, illogical, or unreasonable results.

2. ADMINISTRATIVE LAW — ADMINISTRATIVE RULES — EVIDENCE.
   The exclusion of evidence is not necessarily the appropriate remedy for every violation of an administrative rule.

3. ADMINISTRATIVE LAW — ADMINISTRATIVE RULES — BREATHALYZER TESTS — EVIDENCE.
   The purpose of the administrative rule regarding the administration of Breathalyzer tests is to ensure the accuracy of the tests; suppression of the results of a test not alleged or shown to be inaccurate but conducted in technical violation of the administrative rule is not an appropriate remedy where the violation resulted in harmless error (1994 AACS, R 325.2655[1][e]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Larry J. Burdick*, Prosecuting Attorney, and *Robert A. Holmes, Jr.*, Senior Assistant Prosecuting Attorney, for the people.

Michael E. Zwick, for the defendant.

Before: HOEKSTRA, P.J., and JANSEN and GAGE, JJ.

JANSEN, J. The prosecution appeals by leave granted from a March 4, 1997, order suppressing results from a Breathalyzer test administered to defendant. We reverse the order of the circuit court and reinstate defendant's convictions and sentences.

This case arises out of a drunk driving incident that occurred on November 24, 1995. Officer Robert Hall of the Saginaw-Chippewa Tribal Police observed an automobile being driven in a manner that he believed constituted a traffic violation. Officer Hall stopped the automobile, which was being driven by defendant, and Officer Hall arrested defendant for suspected drunk driving. Officer Hall transported defendant to

the Isabella County jail to perform a Breathalyzer test. Following the results of the Breathalyzer test[1] and a search of the vehicle, defendant was charged with operating a motor vehicle while under the influence of intoxicating liquor, MCL 257.625(1); MSA 9.2325(1), possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d), and transporting or possessing alcoholic liquor in an open container in a vehicle, MCL 257.624a; MSA 9.2324(1).

On January 16, 1996, defendant filed a motion to dismiss and a motion to suppress in the district court. Defendant argued that the charges should be dismissed because the traffic violation stop was illegal pursuant to the Fourth Amendment, US Const, Am IV. In the alternative, defendant argued that the results of his Breathalyzer test should be suppressed because the officer performing the test failed to observe defendant for fifteen continuous minutes, as required by 1994 AACS, R 325.2655(1)(e). The district court, in an order dated January 25, 1996, denied defendant's motions, finding that the traffic stop was lawful and that the momentary loss of view by Officer Hall during the fifteen minutes before giving the Breathalyzer test was not significant when viewed in the totality of the circumstances and did not require suppression of the Breathalyzer test results.

On March 11, 1996, defendant tendered a conditional guilty plea to the charges of impaired driving and possession of marijuana, and preserved his two

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[1] Neither the lower court record nor the briefs on appeal indicate the actual results of the Breathalyzer test. Therefore, we do not know defendant's blood alcohol level following his arrest. We assume that the blood alcohol level was at least 0.10 percent because defendant was charged under MCL 257.625(1); MSA 9.2325(1).

issues for appeal.[2] On March 20, 1996, defendant was sentenced to ninety days in the county jail for the conviction of impaired driving and four months' probation for the conviction of possession of marijuana. Defendant appealed to the circuit court. The circuit court affirmed the district court's decision that the traffic stop was lawful, but it reversed the district court's order denying suppression of the Breathalyzer test results. Specifically, the circuit court ruled that the administrative rule required the operator of the Breathalyzer machine to observe defendant for fifteen consecutive minutes before administering the test. Because the officer did not observe defendant for fifteen consecutive minutes, the rule was violated and the results of the Breathalyzer test had to be suppressed. The circuit court then ordered the case remanded to the district court to permit defendant to withdraw his guilty plea.

The parties stipulated to stay proceedings in an order dated March 24, 1997, and the prosecution sought leave to appeal in this Court on April 3, 1997. This Court granted the prosecution's application in an unpublished order dated October 28, 1997. On appeal, the prosecution raises one issue. It argues that the circuit court erred in ordering that the results of the Breathalyzer test had to be suppressed because of a violation of the administrative rule. We agree with the prosecution and reverse.

1994 AACS, R 325.2655(1)(e) provides:

> A person may be administered a breath alcohol analysis on an evidential breath alcohol test instrument only after

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[2] Defendant does not challenge the district court's and the circuit court's rulings that the traffic stop was lawful.

> being observed for 15 minutes by the operator before collection of the breath sample, during which period the person shall not have smoked, regurgitated, or placed anything in his or her mouth, except for the mouthpiece associated with the performance of the test.

The usual rules of statutory construction apply to administrative rules. *People v Tomko*, 202 Mich App 673, 676; 509 NW2d 868 (1993). One such rule is that statutes should be read in a manner to avoid absurd, illogical, or unreasonable results. *People v Sheets*, 223 Mich App 651, 660; 567 NW2d 478 (1997); *People v Tipolt*, 198 Mich App 44, 47; 497 NW2d 198 (1993).

In this case, Officer Hall was responsible for giving defendant the Breathalyzer test. Therefore, pursuant to the administrative rule, defendant had to be observed by the operator for fifteen minutes before the test was administered in order to prevent defendant from smoking, regurgitating, or placing anything in his mouth except for the mouthpiece used in the test. At the hearing held on January 23, 1996, Officer Hall testified that he brought defendant to the booking room at the county jail. After reading defendant his chemical test rights, Officer Hall noted the time on the Breathalyzer machine as 5:05 A.M. From 5:05 A.M. until 5:23 A.M. (when the first breath sample was taken), Officer Hall continually observed defendant except for approximately six seconds when the officer walked away from defendant to check the machine again to determine if fifteen minutes had elapsed. Officer Hall testified that it took him approximately six seconds to check the time, and that this was the only time that defendant was not in his sight. Additionally, Corrections Officer Susan French was

with defendant when Officer Hall left to check the time.

Defendant contended below that the Breathalyzer test results had to be suppressed because Officer Hall did not continually observe defendant for a full fifteen minutes as required by the administrative rule when the officer momentarily left the room to check the time. The district court disagreed, finding that the officer's momentary loss of view of defendant during the observation period was not significant when viewed in the totality of the circumstances. The circuit court took a more restrictive view of the administrative rule and found that because there was a violation, that the officer did not continually observe defendant for the full fifteen minutes, the results of the Breathalyzer test had to be suppressed. We agree with the district court's view that the momentary time that the officer did not observe defendant was so minimal that the test results cannot be assumed to be inaccurate, and there was no allegation that defendant placed anything in his mouth or regurgitated. Under these circumstances, the circuit court erred in ruling that the violation of the administrative rule required suppression of the results of the Breathalyzer test.

In *People v Willis*, 180 Mich App 31, 35-36; 446 NW2d 562 (1989), this Court held that where the administrative rules regarding the administration of Breathalyzer tests have not been complied with, the accuracy of those results is sufficiently questionable so as to preclude the test results from being admitted into evidence. This Court further stated that the exclusion of evidence was not necessarily the appropriate remedy for every violation of an administrative

rule, but that suppression was the appropriate remedy there because the egregious deviations from the administrative rules involved led to questionable accuracy of the test results. *Id.*, pp 35-36.

We have recently noted, however, that there is no bright-line rule of automatic suppression of evidence where an administrative rule has been violated. *People v Rexford*, 228 Mich App 371; 579 NW2d 111 (1998). This Court has held on several occasions that the exclusion of evidence is not necessarily the appropriate remedy for every violation of an administrative rule. *Id.*; *People v Hurn*, 205 Mich App 618, 620; 518 NW2d 502 (1994); *Tipolt*, *supra*, p 46. The purpose of the administrative rules with respect to the administration of Breathalyzer tests is to ensure the accuracy of those tests, *Rexford*, *supra*, pp 377-378; *People v Boughner*, 209 Mich App 397, 398; 531 NW2d 746 (1995); *Tipolt*, *supra*, p 46. In this case, however, as noted by the district court, there is no showing or even an allegation that defendant placed anything in his mouth or regurgitated. Therefore, there is no showing that the Breathalyzer test was inaccurate (indeed, defendant does not even allege inaccuracy) and we believe that suppression of the Breathalyzer test results is not an appropriate remedy in this case because any violation of the administrative rule was harmless. See, e.g., *Rexford*, *supra*, p 378; *People v Jacobsen*, 448 Mich 639, 641-642; 532 NW2d 838 (1995).

This Court's decision in *Boughner*, *supra*, does not compel a different result. In *Boughner*, this Court vacated the defendant's guilty plea to a charge of unlawful blood alcohol level and remanded the case to the circuit court for further proceedings because

the same administrative rule at issue here was clearly violated in this case. In *Boughner*, a thirty-five-minute videotape of the defendant showed that the operator of the Breathalyzer machine observed the defendant for no more than eight minutes before the test was given, the operator did not observe the defendant continually even for the eight minutes, and throughout the thirty-five minutes before the test was administered the defendant's hand was either at his face or mouth and this Court was unable to determine if the defendant actually placed anything in his mouth. Under those circumstances, it could certainly be concluded that the administrative rule had been violated and that the accuracy of the test could be considered sufficiently questionable so as to preclude the test results from being admitted.

The present case is factually distinguishable from *Boughner*. Here, Officer Hall was continually observing defendant for eighteen consecutive minutes before the test was administered, except for the few seconds it took him to check the time on the machine to determine if the fifteen-minute period had elapsed. During those few seconds, Corrections Officer French was with defendant. Neither Officer Hall nor Officer French saw defendant place anything in his mouth or regurgitate anything during that eighteen-minute period, and defendant does not even allege that he ever placed anything in his mouth or regurgitated anything before taking the Breathalyzer test. Accordingly, there is no showing in this case that the results of the Breathalyzer test were inaccurate. The technical violation of Rule 325.2655(1)(e) was harmless error.

The circuit court's order suppressing the results of the Breathalyzer test is reversed and we reinstate defendant's convictions and sentences.

SWAN v WEDGWOOD CHRISTIAN YOUTH AND FAMILY SERVICES, INC

Docket No. 200632. Submitted January 13, 1998, at Detroit. Decided June 5, 1998, at 9:10 A.M. Leave to appeal sought.

Harry Swan, as personal representative of the estate of Harry W. Swan, deceased, brought an action in the Kent Circuit Court against Wedgwood Christian Youth and Family Services, Inc., alleging that the defendant, which operates a secure residential program specializing in adolescents with serious emotional or behavioral problems, committed a breach of its duty to use reasonable care in the admission, treatment, and supervision of Clyde LaPalm, the sixteen-year-old son of the decedent's live-in girlfriend, by sending LaPalm home on an unsupervised visit, failing to ensure that LaPalm had an adequate amount of his prescription medication and would take it during the visit, and failing to take appropriate measures in response to a phone call from LaPalm's mother during the visit regarding LaPalm's behavior. The plaintiff claimed that the killing of Harry W. Swan by LaPalm during the visit was proximately caused by the defendant's negligence. The court, Paul J. Sullivan, J., granted summary disposition in favor of the defendant, finding that, although the defendant owed a duty of reasonable care to LaPalm, it owed no duty to unknown third parties such as the decedent. The plaintiff appealed.

The Court of Appeals *held*:

1. MCL 330.1946; MSA 14.800(946) limits the duty a mental health professional owes to third persons such as the plaintiff's decedent. Under the statute, the only duty owed is a duty to warn in those situations where a patient communicates a threat of physical violence and the object of the threat is reasonably identifiable. Here, LaPalm had communicated no threat against the decedent or any other third party. The defendant owed no duty to warn or protect the decedent under the terms of the statute.

2. To the extent that the plaintiff alleges a breach of duties on the part of the defendant, those duties were owed to LaPalm, not the decedent. The plaintiff cannot claim the benefit of any alleged breach of duty to LaPalm.

3. The defendant had no common-law duty to warn or protect the decedent under the circumstances of this case.

4. The duty to warn imposed under the statute applies to the defendant, a corporate institution that undertakes to render psychological treatment.

Affirmed.

MENTAL HEALTH — NEGLIGENCE — DUTY TO WARN THIRD PARTIES — MENTAL HEALTH PROFESSIONALS — CORPORATE INSTITUTIONS.

MCL 330.1946; MSA 14.800(946) limits the duty a mental health professional owes to third parties to a duty to warn in those situations where a patient has communicated a threat of physical violence against a reasonably identifiable third person; the duty to warn imposed on a mental health professional under the act also applies to a corporate institution that undertakes to render psychological treatment.

Messing, Palmer & Waibel, P.C. (by *Charles W. Palmer*), for the plaintiff.

Galbraith & Booms (by *Steven B. Galbraith* and *Laura A. Phillips*), for the defendant.

Before: GAGE, P.J., and REILLY and JANSEN, JJ.

GAGE, P.J. Plaintiff appeals as of right the circuit court order granting summary disposition to defendant Wedgwood Christian Youth and Family Services, Inc. We affirm.

This case arises out of the killing of sixty-nine-year-old Harry Washington Swan by his live-in girlfriend's sixteen-year-old son, Clyde LaPalm. LaPalm had a long history of behavioral problems, including violent and assaultive conduct, self-mutilation, and several suicide attempts. He had been arrested six or more times for petty theft, grand theft, damaging property, and assault. On June 10, 1992, LaPalm was admitted to a psychiatric hospital after he took an overdose of the prescription drug Tegretol in an attempt to "get high." On June 29, 1992, he was the subject of juve-

nile proceedings arising out of charges of retail fraud, assault and battery, and malicious destruction of property. The probate court ordered that LaPalm continue as a temporary ward of the court and placed him in a juvenile detention center until July 8, 1992. On July 9, 1992, LaPalm was turned over to the county Community Mental Health Department (CMHD) for placement.

LaPalm was transferred to defendant's facility on July 16, 1992. Defendant ran a "secure residential program," which specialized in adolescents who had serious emotional or behavioral problems and were difficult to place. LaPalm's intake referral form noted his past placements that resulted from his aggressive conduct or destruction of property and indicated a history of "some assault." The consulting psychiatrist diagnosed La Palm with oppositional defiant disorder and bipolar disorder in full remission. Thereafter, an "Initial Service Plan" was prepared, which indicated that LaPalm was progressing well and had demonstrated a strong desire to complete treatment and resolve his inability to control his anger. The plan also stated that LaPalm's mother and the decedent, her live-in boyfriend, had visited him twice since his admission. Because those visits went well, LaPalm's mother and representatives from defendant and the CMHD agreed that LaPalm could visit his mother's home from August 21 through August 26.

LaPalm traveled by bus to visit his mother as planned on Friday, August 21, 1992. LaPalm testified in a deposition that on the evening of Sunday, August 23, he unsuccessfully tried to set fire to a truck and then a house using gasoline. Afterward, he went home and jumped out of a second floor window

because he was depressed and wanted to hurt himself. His mother called defendant's facility, and both she and LaPalm spoke to a youth treatment specialist about the incident. Defendant's employee did not believe that LaPalm required immediate psychiatric attention, and he and LaPalm agreed to discuss the incident further when LaPalm returned to Wedgwood.

Shortly after the telephone call, LaPalm went outside, poured gasoline over his head, and lit himself on fire. He put the fire out after a few moments and went back inside the house. The decedent told LaPalm to "calm down" and put his hand on LaPalm's shoulder. At that point, LaPalm began punching the decedent, and the decedent fell to the floor. LaPalm then dropped a microwave oven and a television on the decedent. According to the autopsy report, the decedent's immediate cause of death was blunt trauma to the head with massive underlying cerebral hemorrhage and contusion. LaPalm was charged with open murder and pleaded guilty but mentally ill to a charge of manslaughter. According to plaintiff, LaPalm is serving a ten- to fifteen-year sentence at a prison psychiatric hospital.

Plaintiff, the personal representative of the decedent's estate, subsequently brought this civil action claiming that defendant committed a breach of its duty to use reasonable care in the admission, treatment, and supervision of LaPalm by sending LaPalm home on an unsupervised visit, failing to take appropriate steps to insure the provision of an adequate amount of prescription medication for the visit, failing to take adequate steps to ensure that LaPalm would take the prescribed medication, and failing to take appropriate measures in response to the phone

call from LaPalm's mother on August 23, 1992. Plaintiff further claimed that defendant's negligence proximately caused the decedent's death. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) on the basis of a failure to state a claim on which relief can be granted and MCR 2.116(C)(10) on the basis of a lack of factual issues to proceed to trial. The circuit court granted the motion and denied plaintiff's subsequent motion for rehearing.

Plaintiff now argues that the circuit court erred in granting summary disposition to defendant. The court concluded that while defendant owed a duty of reasonable care to LaPalm, it owed no duty to unknown third parties, such as the decedent. Plaintiff contends that defendant did owe a duty of reasonable care in supervising LaPalm's home visit. Plaintiff further argues that the circuit court erred in applying MCL 330.1946; MSA 14.800(946) to the present case and in holding that the statute barred plaintiff's claim against defendant.

This Court reviews a grant of summary disposition de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Defendant brought its motion pursuant to both MCR 2.116(C)(8) and (10). The circuit court did not indicate under which subrule it granted summary disposition. However, because it appears that the court looked beyond the pleadings in making its determination, we will consider the motion granted pursuant to MCR 2.116(C)(10). A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Id.* A court reviewing such a motion should review the record evidence and all reasonable inferences drawn from it and decide whether a genu-

ine issue regarding any material fact exists to warrant a trial. *Id.*

Plaintiff argued to the circuit court that the decedent was killed as a result of Wedgwood's negligence in caring for LaPalm. Plaintiff contended that defendant assumed parental responsibilities for LaPalm when it entered into a contract with the CMHD for LaPalm's care. Moreover, a special relationship existed between defendant and LaPalm because of LaPalm's status as a psychiatric patient. Plaintiff further contended that because of the special relationship, defendant had a duty to control LaPalm's behavior. Because it was foreseeable that defendant's negligence in treating LaPalm could result in harm to another, argued plaintiff, defendant owed a duty to the decedent and the grant of summary disposition was inappropriate.

To establish a prima facie case of negligence, the plaintiff must prove: (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached that duty, (3) that the defendant's breach of that duty was a proximate cause of the plaintiff's damages, and (4) that the plaintiff suffered damages. *Baker*, *supra* at 203. Duty is any obligation the defendant has to the plaintiff to avoid negligent conduct. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). The existence of a duty is a question of law for the court to decide. *Id.* In the landmark case on a psychiatrist's duty to third persons, *Tarasoff v Regents of Univ of California*, 17 Cal 3d 425; 131 Cal Rptr 14; 551 P2d 334 (1976), the California Supreme Court held that a psychiatrist owes a duty to use reasonable care to protect persons endangered by his patient. The holding in *Tarasoff* was based upon the common-law rule

of negligence that a person owes a duty to protect individuals from third persons when there is a special relationship with either the dangerous person or the potential victim.

In *Davis v Lhim*, 124 Mich App 291, 301; 335 NW2d 481 (1983), this Court adopted the *Tarasoff* reasoning and held that a psychiatrist owes a duty of reasonable care to a person who is foreseeably endangered by his patient. However, the Supreme Court reversed this decision on other grounds in *Canon v Thumudo*, 430 Mich 326; 422 NW2d 688 (1988), and the Court found that on the basis of its holding it did not need to decide whether a duty to warn should be imposed upon mental health professionals. In 1989, the Michigan Legislature sought to codify the holding set forth in *Tarasoff* in a "duty to warn" statute, MCL 330.1946; MSA 14.800(946),[1] which provides in pertinent part:

> (1) If a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient has the apparent intent and ability to carry out that threat in the foreseeable future, the mental health professional has a duty to take action as prescribed in subsection (2). Except as provided in this section, *a mental health professional does not have a duty to warn a third person*

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[1] This statute has undergone two amendments since the occurrence in 1992 of the events that form the basis of plaintiff's complaint. Neither amendment provided any substantive changes to the original statute and would not alter our analysis or result. We quote the most recent amendment, which became effective March 28, 1996. This is the version relied upon by appellant in his brief. Moreover, amendments of statutes related to remedies or modes of procedure, which do not create new or take away vested rights, but operate only in furtherance of a remedy or confirmation of rights already existing, are held to operate retrospectively unless a different intention is clear. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992); *Detroit v Walker*, 445 Mich 682, 704; 520 NW2d 135 (1994).

of a threat as described in this subsection or to protect the third person.

(2) A mental health professional has discharged the duty created under subsection (1) if the mental health professional, subsequent to the threat, does 1 or more of the following in a timely manner:

(a) Hospitalizes the patient or initiates proceedings to hospitalize the patient under chapter 4 or 4a.

(b) Makes a reasonable attempt to communicate the threat to the third person and communicates the threat to the local police department or county sheriff for the area where the third person resides or for the area where the patient resides, or to the state police.

* * *

(5) This section does not affect a duty a mental health professional may have under any other section of law. [Emphasis added.]

Defendant argued successfully to the circuit court that the statute serves as a bar to plaintiff's suit because, pursuant to the statute, it owed no duty to the decedent. Plaintiff now contends that this holding was in error. When courts construe statutory language, their primary goal is to ascertain and give effect to legislative intent. *Jenks v Brown*, 219 Mich App 415, 418; 557 NW2d 114 (1996). In order to determine legislative intent, this Court may examine the legislative history of an act to ascertain the reason for the act and the meaning of its provisions. *Id.* Among the legislative purposes in enacting the statute in 1989 was limiting the liability of mental health practitioners. *Id.*, citing House Legislative Analysis, HB 4237, July 11, 1989. In response to cases in which the common-law duty to warn had been extended to unnamed third parties and even to property, the statute limited a mental health practitioner's duty to third parties to

the duty provided in the statute. *Id.* at 418-419. It is apparent from the language of the statute and its legislative history that it is intended to protect only those readily identifiable individuals against whom a threat of physical violence is made. *Id.* at 419.

Plaintiff argued to the circuit court and now to this Court that the statute does not apply in the present case. According to plaintiff, the statute by its own terms applies only in those situations where a psychiatric patient has communicated a threat to a mental health professional against a reasonably identifiable third person. We disagree. MCL 330.1946; MSA 14.800(946) limits the duty a mental health professional owes to third persons such as plaintiff's decedent. Under the statute, the only duty owed is a duty to warn in those situations where a patient communicates a threat and the object of the threat is reasonably identifiable. In *Jenks*, the plaintiff had been awarded physical custody of his minor child in a modified judgment of divorce. The plaintiff sued his former wife's psychiatrist and the psychiatrist's employer, alleging that his former wife had communicated to the psychiatrist her intention to kidnap the child. This Court determined that because the plaintiff's former wife had not communicated a threat against the plaintiff, the defendants did not owe him a duty under MCL 330.1946; MSA 14.800(946). Moreover, the Court determined that because the plaintiff did not assert a claim on behalf of his son, the circuit court did not err in holding that the complaint failed to state a cause of action. *Jenks*, *supra* at 417-419. In the present case, plaintiff concedes that LaPalm had communicated no threat against the decedent or any other third party. The decedent had participated in

two visits with LaPalm in the preceding month that had gone well. Moreover, there is no evidence that LaPalm ever threatened or assaulted the decedent before the assault on August 23, 1992. Therefore, defendant owed no duty to warn or protect the decedent under the terms of the statute.

Plaintiff further argues that the statute does not apply in the present case because plaintiff's claim is not based upon a failure to warn but upon defendant's negligence in treating LaPalm. Plaintiff notes correctly that the type of claims it asserts are often brought together with a failure to warn claim, but they are separate questions. See *Paul v Plymouth General Hosp*, 160 Mich App 537, 541-542; 408 NW2d 492 (1987). However, plaintiff's argument fails because to the extent that he alleges a breach of duties on the part of defendant, those duties were owed to LaPalm and not to the decedent, as the circuit court correctly noted. Moreover, plaintiff's argument ignores the last sentence of MCL 330.1946(1); MSA 14.800(946)(1), which provides, "Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection *or to protect the third person.*" (Emphasis added.) We believe that this language is unambiguous and clearly limits the duty a mental health professional owes to third persons to the duty to warn identifiable third persons "as provided in this section . . . ." Plaintiff cannot claim the benefit of any alleged breach of duty to LaPalm, and the statute plainly provides that defendant did not owe a duty to the decedent.

To the extent that plaintiff's position can be interpreted as arguing that defendant owed a common-law

duty to the decedent, rather than a statutory duty, we disagree with plaintiff's argument. An individual generally has no duty to protect another who is endangered by a third person's conduct. *Jenks*, *supra* at 420-421. A duty of reasonable care may arise where one stands in a special relationship with either the victim or the person causing the injury. *Id.* at 421. "Special relationships" recognized under Michigan law include psychiatrist-patient and doctor-patient. *Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993). Michigan courts have established in this context a duty of reasonable care toward only those third parties who are " 'readily identifiable as foreseeably endangered.' " *Jenks*, *supra* at 421, quoting *Marcelletti*, *supra* at 665.

In *Jenks*, the Court discussed the possibility of a mental health professional owing a common-law duty to third persons in the context of a trial court's refusal to allow the plaintiff leave to add a common-law theory of negligence to his complaint against the defendant. The panel did not decide whether a common-law duty flowing from psychiatrists to third persons had survived the enactment of MCL 330.1946; MSA 14.800(946). However, the panel determined that the proposed amendment was futile because the patient had not communicated any threat of violence against the plaintiff. *Jenks*, *supra* at 421. In the present case, we also do not need to decide whether a common-law duty survived the enactment of the statute because no foreseeable danger to plaintiff's decedent was made known during defendant's treatment of LaPalm. Nor did LaPalm communicate any threat of violence against the decedent or any other persons, except himself. Under these circumstances, defendant

had no common-law duty to warn or protect the decedent. See *id.*

Finally, plaintiff argues that MCL 330.1946; MSA 14.800(946) does not apply to the present case because he did not bring suit against a particular health professional but against a corporate institution. We note that the statute does not define "mental health professional" or specify whether that term includes mental health institutions such as defendant. However, this Court has held that the common-law duty to warn may be imposed upon psychiatric hospitals or other entities that undertake to render psychological treatment. *Hinkelman v Borgess Medical Center*, 157 Mich App 314, 322; 403 NW2d 547 (1987). We do not believe that the Legislature intended a different result under the statute.

Because we hold that summary disposition was properly granted on the ground that defendant owed no duty to the decedent, we do not need to address defendant's argument that plaintiff's claims were properly dismissed on public policy grounds.

Affirmed.

NEAL v DEPARTMENT OF CORRECTIONS

Docket No. 198616. Submitted September 4, 1997, at Grand Rapids. Decided June 5, 1998, at 9:15 A.M.

Tracy Neal, Helen Gibbs, and other female prisoners housed in facilities operated by the Michigan Department of Corrections (MDOC) brought a class action in the Washtenaw Circuit Court against the MDOC, its director, and several wardens, deputy wardens, and corrections officers, alleging that male corrections personnel have systematically engaged in gender-based discriminatory conduct, sexual harassment, and retaliation for reporting gender-based misconduct in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and seeking injunctive and declaratory relief and monetary and compensatory damages. The court, Timothy P. Connors, J., entered orders dismissing the request for monetary damages and denying the defendants' motion for summary disposition that was based on several grounds. The court held, in part, that the MDOC is a "public service" agency prohibited from engaging in gender-based discrimination or harassment under subsection 302(a) of the act, MCL 37.2302(a); MSA 3.548(302)(a), and that the act does not exclude prisoners from its coverage. Most of the defendants were granted leave to appeal from the order denying their motion, but leave was limited to their claims concerning application of the Civil Rights Act and the court's subject-matter jurisdiction.

The Court of Appeals *held*:

1. To the extent a prison opens its doors to visitors, employees, officials, or other persons who voluntarily seek admittance or to utilize any service available to free citizens, those persons may not be subjected to any form of discrimination proscribed by the Civil Rights Act.

2. The Civil Rights Act does not apply to prisons' dealings with prisoners. The dictates of the act are not intended to be extended to prisoners.

3. Prisons are not a "place of public accommodation" or a "public service" and do not provide a "service to the public" as those terms are used in subsections 301(a) and (b) of the act, MCL 37.2301(a) and (b); MSA 3.548(301)(a) and (b). The part of the court's order

finding the Civil Rights Act to apply in this action must be reversed.

4. The plaintiffs are not without avenues of relief to redress their complaints. They may maintain actions against the defendants under 42 USC 1983 for alleged invasions of the plaintiffs' US Const, Am VI privacy rights and under the Equal Protection Clauses of US Const, Am XIV and Const 1963, art 1, § 2 if the defendants' gender-based classifications fail to serve important governmental objectives or are not substantially related to the achievement of those objectives.

5. The circuit court, rather than the Court of Claims, has proper jurisdiction to consider the remaining equitable and declaratory claims against the MDOC and its director because the court dismissed the original request for monetary damages and the plaintiffs are no longer seeking money damages. The part of the court's order finding that it had proper jurisdiction must be affirmed.

6. The matter must be remanded for further proceedings.

Affirmed in part, reversed in part, and remanded.

MACKENZIE, J., concurring in part and dissenting in part, stated that the case should be remanded for further proceedings and that the trial court did not err in finding that the plaintiffs have stated a valid cause of action under the Civil Rights Act. The order of the trial court should be affirmed. The trial court correctly ruled that the MDOC falls within the broad definition of a "public service" set forth in subsection 301(b) of the act. Because the protections of subsection 302(a) of the act were intended to be coextensive with the Equal Protection and Antidiscrimination Clauses in Const 1963, art 1, § 2, and because prisoners do not lose their right to equal protection by virtue of their status as inmates, it follows that the Legislature intended all persons, including inmates, to be protected under subsection 302(a). The Civil Rights Act does not preclude its application because of a person's status as an inmate. Merely because the MDOC engages in a practice that treats men and women differently does not automatically or necessarily mean that it has engaged in unlawful gender discrimination under subsection 302(a). The gender-based treatment may pass constitutional muster if it serves important penological interests and is substantially related to the achievement of those interests.

1. CIVIL RIGHTS — PRISONS AND PRISONERS — CIVIL RIGHTS ACT.

The Civil Rights Act does not apply to prisons with respect to their dealings with prisoners (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*).

2. CIVIL RIGHTS — PRISONS AND PRISONERS — CIVIL RIGHTS ACT — WORDS AND PHRASES — PLACE OF PUBLIC ACCOMMODATION — PUBLIC SERVICE.

A prison is not a "place of public accommodation" or a "public service" "established to provide service to the public" as those terms are defined by the Civil Rights Act (MCL 37.2301; MSA 3.548[301]).

3. COURTS — JURISDICTION — COURT OF CLAIMS — CIRCUIT COURTS.

Although the Court of Claims generally has exclusive jurisdiction over all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies, a complaint against the state seeking only equitable or declaratory relief must be filed in the circuit court (MCL 600.6419[1][a]; MSA 27A.6419[1][a]).

Law Offices of Deborah LaBelle (by *Deborah LaBelle*), *Goodman, Eden, Millender & Bedrosian* (by *Richard A. Soble* and *Mary R. Minnet*), *Molly Reno*, and *Gail A. Grieger*, for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Lisa C. Ward*, Assistant Attorney General, for the defendants.

Before: O'CONNELL, P.J., and MACKENZIE and GAGE, JJ.

O'CONNELL, P.J. This is a class-action suit brought, in relevant part, under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, by female prisoners housed in facilities operated by the Michigan Department of Corrections (MDOC). Defendants are the department, its director, and several MDOC wardens, deputy wardens, and corrections officers. Defendants appeal by leave granted from a circuit court order denying their motion for summary disposition pursuant to MCR 2.116(C)(4), (7), and (8). We affirm in part, reverse in part, and remand.

The case arises out of allegations that male corrections personnel have systematically engaged in a pat-

tern of sexual harassment of female inmates incarcerated by the MDOC. Specifically, plaintiffs' complaint alleges that the MDOC assigns male officers to the housing units at all women's facilities without providing any training related to cross-gender supervision; that women are forced to dress, undress, and perform basic hygiene and body functions in the open with male officers observing; that defendants allow male officers to observe during gynecological and other intimate medical care; that defendants require male officers to perform body searches of women prisoners that include pat-downs of their breasts and genital areas; that women prisoners are routinely subjected to offensive sex-based sexual harassment, offensive touching, and requests for sexual acts by male officers; and that there is a pattern of male officers' requesting sexual acts from women prisoners as a condition of retaining good-time credits, work details, and educational and rehabilitative program opportunities. The complaint also alleges that the inmates are subject to retaliation for reporting this gender-based misconduct. Plaintiffs claim that these actions, and defendants' failure to protect female inmates from this misconduct through adequate training, supervision, investigation, or discipline of MDOC employees, constitute gender-based discriminatory conduct, sexual harassment, and retaliation in violation of the Civil Rights Act. Plaintiffs' complaint requests injunctive and declaratory relief as well as compensatory damages.[1]

On August 1, 1996, defendants moved for summary disposition on the grounds that the circuit court

[1] An initial request for monetary damages was ordered dismissed.

lacked subject-matter jurisdiction, that the claims of some class members were barred by release, prior judgment, or statute of limitations, that all defendants enjoyed immunity under Michigan law, and that plaintiffs had failed to state a claim upon which relief could be granted. On September 24, 1996, the circuit court denied defendants' motion on all grounds. On October 23, 1996, defendants requested leave to appeal the court's denial of their motion for summary disposition with regard to the claims set forth under the Civil Rights Act and with regard to the subject-matter jurisdiction issue. This Court granted leave to appeal on October 31, 1996, limited to those issues. We now examine each issue in turn.

I

Defendants first claim that the Civil Rights Act does not apply to prisoners incarcerated by the Michigan Department of Corrections. Defendants specifically note that the language of the statute is inapplicable because correctional facilities are not open to the general public and because prisoners are not members of the general public for purposes of the statute. The trial court held that the MDOC is a "public service" agency prohibited from engaging in gender-based discrimination or harassment under subsection 302(a) of the act, MCL 37.2302(a); MSA 3.548(302)(a). The court further noted that the act does not specifically exclude prisoners from its coverage and declined to read such an exclusion into the act. Because this is an issue of first impression in Michigan, our task is to determine whether the Legislature intended the activities complained of here to be included within the scope of the Civil Rights Act.

When interpreting a statute, our goal is to ascertain and effectuate the intent of the Legislature. *Folands Jewelry Brokers, Inc v City of Warren*, 210 Mich App 304, 307; 532 NW2d 920 (1995). The first criterion in determining intent is to examine the specific language in the statute. *Ballman v Borges*, 226 Mich App 166, 168; 572 NW2d 47 (1997). Statutory language should be construed reasonably, keeping in mind the purpose of the statute. *Attorney General v Public Service Comm*, 220 Mich App 561, 565; 560 NW2d 348 (1996). We resort to judicial construction only where the statute is so unclear that reasonable minds could disagree with regard to the meaning of the statute. *Folands, supra.*

The Legislature enacted the Civil Rights Act as a means of preventing discrimination directed against a person because of that person's membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. *Noecker v Dep't of Corrections*, 203 Mich App 43, 46; 512 NW2d 44 (1993). The Preamble to 1976 PA 453 provides, in relevant part, that the purposes of the act include: "to define civil rights; to prohibit discriminatory practices, policies, and customs in the exercise of those rights based upon religion, race, color, national origin, age, sex, height, weight, familial status or marital status; . . . [and] to provide remedies and penalties . . . ." The act is remedial and must be liberally construed to provide a broad remedy. *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 15; 506 NW2d 231 (1993).

Article 3 of the Civil Rights Act prohibits discrimination in public accommodations and public services. Subsection 302(a) states:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status. [MCL 37.2302(a); MSA 3.548(302)(a)].

Section 103 of the act, MCL 37.2103; MSA 3.548(103), declares that sexual harassment is a form of sex discrimination.

Section 301 defines "place of public accommodation" and "public service" as those terms are used in subsection 302(a). It states:

> As used in this article:
>
> (a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. . . .
>
> * * *
>
> (b) "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof, or a tax exempt private agency established to provide service to the public. [MCL 37.2301; MSA 3.548(301)].

Finally, § 303 of the act creates an exemption under article 3 for private clubs:

> This article shall not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the private club or establishment are made available to the customers or patrons of another establishment that is a place of public accommoda-

> tion or is licensed by the state . . . . [MCL 37.2303; MSA 3.548(303)].

Plaintiffs argue that MDOC correctional facilities are places of "public service" under § 301 and subsection 302(a), and thus that discrimination against inmates, based on sex, is prohibited in such facilities. Defendants assert that if the MDOC is a "public service," its prisons are not required to comply with subsection 302(a) because they fall within the § 303 exemption for "private club[s], or other establishment[s] not in fact open to the public . . . ."

To the extent a prison opens its doors to visitors, employees, officials, or other persons who voluntarily seek admittance or to utilize any service available to free citizens, those persons concededly may not be the subject of any form of discrimination proscribed by the Civil Rights Act. However, we can perceive no legislative intent to extend the dictates of the Civil Rights Act to prisoners. A cardinal rule of statutory construction precludes any interpretation of a statute that leads to absurd or unjust results. *Williams v Secretary of State*, 338 Mich 202, 208; 60 NW2d 910 (1953). If the Civil Rights Act applies to prisoners, then the existence of separate prison "*facilities*" for men and women patently violates the statutory prohibition against gender discrimination; yet surely it is absurd to suggest that male and female prisoners must be housed together. See *Klinger v Dep't of Corrections*, 31 F3d 727 (CA 8, 1994); *Timm v Gunter*, 917 F2d 1093, 1102-1103 (CA 8, 1990). Similarly, it is absurd to suggest that the MDOC could not segregate prisoners according to age, despite legitimate penological purposes that are served by such a classification. Yet, if the Civil Rights Act applies to prisoners,

one might draw such a conclusion. Hence, we reject a reading of the act that would include prisons within its ambit in their dealings with prisoners.

Prison administrators must be accorded wide-ranging deference with respect to their adoption, implementation, and execution of policies and practices that in their judgment are needed to preserve internal order, discipline, and institutional security. *Bell v Wolfish*, 441 US 520, 547; 99 S Ct 1861; 60 L Ed 2d 447 (1979). However, that deference does not insulate from review actions taken in bad faith and for no legitimate penological purpose. *Whitley v Albers*, 475 US 312, 321-322; 106 S Ct 1078; 89 L Ed 2d 251 (1986). Thus, for example, a prison inmate generally lacks a reasonable expectation of privacy with respect to the Fourth Amendment protection against unreasonable searches and seizures. *Hudson v Palmer*, 468 US 517, 525-526; 104 S Ct 3194; 82 L Ed 2d 393 (1984). On the other hand, notwithstanding a prisoner's diminished right of privacy as compared with free citizens, the infringement of that privacy by prison officials cannot be based upon an arbitrary or irrational justification or no justification at all. *Bell*, *supra* at 559.

Accepting, in the summary disposition context, the well-pleaded allegations of plaintiffs' complaint as true, *Horn v Dep't of Corrections*, 216 Mich App 58, 66; 548 NW2d 660 (1996), infringements of the privacy of female inmates occur on a regular basis in the Michigan correctional system. When faced with the conflict between legitimate security precautions and sexual harassment or abuse, a number of federal courts have required prison administrators to allow female inmates to dress or undress and use toilet facilities without unnecessarily being viewed by

guards or other prisoners, particularly those of the opposite gender. See, e.g., *Forts v Ward*, 621 F2d 1210, 1216-1217 (CA 2, 1980); *Lee v Downs*, 641 F2d 1117, 1119 (CA 4, 1981). Absent a showing of a legitimate governmental interest in the privacy invasions alleged, these unnecessary infringements on privacy rights are actionable under 42 USC 1983 as violations of plaintiffs' constitutional rights. *Dawson v Kendrick*, 527 F Supp 1252, 1316-1317 (SD W Va, 1981). Admittedly, 42 USC 1983 ordinarily does not permit vicarious liability to be imposed on prison administrators. See *Will v Michigan Dep't of State Police*, 491 US 58, 68-69; 109 S Ct 2304; 105 L Ed 2d 45 (1989). However, because the activity violates the Eighth Amendment, a *Bivens*[2]-type action, arising directly under the United States Constitution, may be maintained against both the recreant officials and the MDOC. *Carlson v Green*, 446 US 14, 19-20; 100 S Ct 1468; 64 L Ed 2d 15 (1980). See, also, *Smith v Dep't of Public Health*, 428 Mich 540, 618-619; 410 NW2d 749 (1987) (BRICKLEY, J.), aff'd sub nom *Will*, *supra*.

Plaintiffs may also have a direct constitutional claim. For example, the Equal Protection Clauses of the Fourteenth Amendment and Const 1963, art 1, § 2 may provide the constitutional underpinnings for a cause of action to redress the situation. *Craig v Boren*, 429 US 190, 197; 97 S Ct 451; 50 L Ed 2d 397 (1976); *Kersh v Bounds*, 501 F2d 585, 588 (CA 4, 1974). This type of action is appropriate if gender-based classifications fail to serve important governmental objectives or are not substantially related to

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[2] *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971).

the achievement of those objectives. See *Craig, supra.* A constitutional claim may also be appropriate against those persons or entities not amenable to suit under 42 USC 1983.

Our decision recognizes the rights of plaintiffs not to be subjected to any form of sexual harassment. At the same time, our decision accords proper deference to principles of statutory interpretation. By relying directly on the state and federal constitutions, we achieve the goal of legally protecting basic human rights. Thus, even though we hold that the Civil Rights Act does not apply to the MDOC's relations with prisoners, our decision is not a license for the MDOC to engage in discriminatory practices in the operation of its correctional facilities. The MDOC may still, consistent with the Fourteenth Amendment of the United States Constitution, treat prisoners differently on the basis of gender. However, the gender-based treatment must still pass constitutional muster—that is, the gender-based treatment must serve important penological interests and be substantially related to the achievement of those interests. See *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 190-194; 387 NW2d 821 (1986); *Craig, supra.*

Finally, we feel it appropriate to reply to the concurring opinion. The parties recognize that the scope of the Civil Rights Act is limited to either a "place of public accommodation" or a "public service" as defined by the statute. The parties concede that a prison is not a "place of public accommodation." Therefore, in order for the MDOC to fall within the ambit of the Civil Rights Act, it must fall within the scope of the term "public service." While the statute

could, in fact, be read in a manner that supports plaintiffs' position, we believe that such a reading is inappropriate and dangerous.

The concurring opinion liberally construes the term "public service" and concludes that the MDOC "falls within the broad statutory definition of a 'public service' set forth in subsection 301(b)." *Post* at 217. While we may agree with the concurring opinion that subsection 301(b) is inartfully drafted, and that the Legislature may wish to redraft this definition, we do not conclude that the term somehow includes prisoners, or that prisons are "established to provide service to the public." We are not inclined to put a judicial gloss on the otherwise plain meaning found in this statutory definition.

It is important to remember that subsection 301(b) does not stipulate which buildings or agencies are included within the scope of the act, nor does it define the individuals that are or are not covered by the act. It defines the term "public service." The key phrase in this subsection is: "established to provide service to the public." The concurring opinion concludes that because the MDOC is a state "department" or "agency," then the Civil Rights Act must apply to any facilities that it operates; this interpretation is an oversimplification of the definition. No reasonable reading of the statute would conclude that "public service" merely means a department or agency. If the concurring opinion is correct, there would be no need to use or define the term "public service," because "government" would subsume the entire spectrum. See *Frank v William A Kibbe & Associates, Inc*, 208 Mich App 346, 350-351; 527 NW2d 82 (1995) ("In construing a statute, the court should presume that every

word has meaning and avoid a construction which would render a statute, or any part of it, surplusage or nugatory.").

The definition of "public service" in subsection 301(b) reads, in pertinent part: " 'Public service' means a . . . department [or] agency . . . owned, operated, or managed by or on behalf of the state . . . established to provide service to the public." Prisons are not established to provide service to the public (at least not to a public that includes prisoners). Indeed, they are designed to do just the opposite—to keep incarcerated individuals from the public. A prison is not like a court, a hospital, or the office of the Secretary of State, all of which were established to provide, and do provide, "service to the public."

It could be argued that prisons serve the public by confining individuals who commit felonies. However, this, in our opinion, is not the equivalent of "established to provide service to the public." If the concurring opinion is correct, then every act done by prison officials could subject those officials and the MDOC to a discrimination lawsuit. An example, hopefully, will clarify this point. Suppose that two gangs, membership in each of which is based on race or ethnicity, get into a fight in a Michigan prison. In order to avoid any further incidents, the warden arranges transfers of the gang leaders to different prisons. One of these individuals then brings a lawsuit pursuant to the Civil Rights Act against the MDOC, alleging that he was transferred on account of race, sex, age, or some other protected personal characteristic. Unfortunately, the concurring opinion would allow this type of discrimination lawsuit. We do not believe that this was the intended result of the Civil Rights Act. Pris-

oners simply are not protected against discrimination by the act (which is by no means to say that they are entirely unprotected; whatever restraints exist, however, are found outside the four corners of the act).

We conclude that in order for an agency or department to fall within the scope of the Civil Rights Act, it must be "established to provide service to the public." While prisons may perform a public service by confining those who have been convicted of serious crimes, they are not established as a "place of public accommodation" or as an agency that provides "service to the public." Given our conclusion, we reject any interpretation of the Civil Rights Act that would bring prisons within its scope and subject prison personnel to discrimination lawsuits brought by prisoners pursuant to the act.

II

Defendants' next argument on appeal is that the Court of Claims, not the circuit court, had subject-matter jurisdiction over plaintiffs' case. We disagree. While it is generally true that the Court of Claims has exclusive jurisdiction over "all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state" or any of its agencies, MCL 600.6419(1)(a); MSA 27A.6419(1)(a), a complaint against the state seeking only equitable or declaratory relief must be filed in the circuit court. *Silverman v Univ of Michigan Bd of Regents*, 445 Mich 209, 217; 516 NW2d 54 (1994). Because plaintiffs no longer are seeking money damages, the circuit court, rather than the Court of Claims, has proper jurisdiction to consider the remaining equitable and declaratory claims

against the MDOC and defendant Kenneth McGinnis in his official capacity as the director of the MDOC.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

GAGE, J., concurred.

MACKENZIE, J. (*concurring in part and dissenting in part*). I agree with the result reached by the majority, that is, that this case must be remanded for further proceedings. I write separately because, in my view, the trial court correctly concluded that plaintiffs, female prisoners housed in facilities operated by the Michigan Department of Corrections (MDOC), have stated a valid cause of action under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*

At issue in this case is the construction of subsection 302(a) of the act, which states:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status. [MCL 37.2302(a); MSA 3.548(302)(a)].

"Public service" is defined as "a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof, or a tax exempt private agency established to provide service to the public." MCL 37.2301(b); MSA 3.548(301)(b). The MDOC is a state department or agency, and this state's correctional facilities are managed and operated by it. Liberally construing the statutory definition, as this Court is required to do, see *Reed v Michigan Metro*

Girl Scout Council, 201 Mich App 10, 15; 506 NW2d 231 (1993), the trial court correctly ruled that the MDOC falls within the broad statutory definition of a "public service" set forth in subsection 301(b). Defendants essentially concede as much.

According to the majority, the Legislature could not have intended subsection 302(a) to apply to prisoners housed in the MDOC's facilities because allowing inmates to bring discrimination claims against the state would lead to an absurd or unjust result. A review of the legislative history of the statute, along with the application of basic principles of statutory construction, leads me to a contrary conclusion.

The purpose of the Civil Rights Act is to prevent discrimination directed against a person because of that person's membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. *Noecker v Dep't of Corrections*, 203 Mich App 43, 46; 512 NW2d 44 (1993). The act is remedial and must be liberally construed to effectuate its ends. *Reed, supra.*

An examination of the legislative purpose of the Civil Rights Act in general and subsection 302(a) in particular actually begins with the Michigan Constitution's Equal Protection and Antidiscrimination Clauses. Const 1963, art 1, § 2 states:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

The Civil Rights Act was enacted as 1976 PA 453. Its purpose was two-fold. First, it was intended to centralize and make uniform the patchwork of then-existing civil rights statutes applying to the private sector, such as the Fair Housing Act, the Fair Employment Practices Act, and the Public Accommodations Act. See *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 187-188; 387 NW2d 821 (1986). Second, it was intended to broaden the scope of the then-existing civil rights statutes to include governmental action:

> [T]he Legislature's addition of "public service" to [subsection] 302(a), thereby including state action violations that amount to constitutional deprivation with private sector, non-state action legislative violations, can be explained by the fact that article 1, § 2 of the Michigan Constitution provides: "the legislature *shall* implement this section by appropriate legislation." It is the only provision of the Declaration of Rights to so provide. [*Id.*, p 188 (emphasis in the original).]

Thus, insofar as subsection 302(a) of the Civil Rights Act governs "public service," it is essentially a codification of the constitution's Equal Protection and Antidiscrimination Clauses, broadened to include categories not covered under the constitution, such as age, sex, and marital status. See *Dep't of Civil Rights*, pp 188-189.

The constitutional equal protection guarantee applies to prisoners. As explained in *Jackson v Bishop*, 404 F2d 571, 576 (CA 8, 1968):

> Lawful incarceration may properly operate to deprive the convict of certain rights which would otherwise be his to enjoy. A classic example is [the] denial to the felon of the right to vote. . . .

* * *

> On the other hand, a prisoner of the state does not lose all his civil rights during and because of his incarceration. In particular, he continues to be protected by the due process and equal protection clauses which follow him through the prison doors. [Citations omitted.]

Because, as our Supreme Court has stated, the protections of subsection 302(a) of the Civil Rights Act were intended to be coextensive with the Equal Protection and Antidiscrimination Clauses of the Michigan Constitution, and because prisoners do not lose their right to equal protection by virtue of their status as inmates, it follows that the Legislature also intended all persons—including inmates—to be protected under subsection 302(a).

Further, as noted by the trial court, nowhere does the language of the Civil Rights Act purport to preclude its application because of a person's status as a prisoner or inmate. Compare *Marsh v Dep't of Civil Service*, 142 Mich App 557, 569; 370 NW2d 613 (1985); *Walters v Dep't of Treasury*, 148 Mich App 809, 819; 385 NW2d 695 (1986). When the Legislature has seen fit to exclude prisoners from the provisions of a statute, it has specifically done so. See, e.g., MCL 15.231(2); MSA 4.1801(1)(2), excluding "those persons incarcerated in state or local correctional facilities" from provisions of the Freedom of Information Act. A court must not judicially legislate by adding into a statute provisions that the Legislature did not include. *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 421; 565 NW2d 844 (1997). Yet the majority has done precisely that by effectively adding to the Civil Rights Act an exclusion barring prisoners from bringing an action under subsection 302(a) of the act.

The majority believes that reading subsection 302(a) of the Civil Rights Act as applying to prisoners leads to an absurd result because, if the act applies to inmates, then the existence of separate prison facilities for men and women would violate its prohibition against gender discrimination. That is an oversimplification that fails to take into account our Supreme Court's observation that subsection 302(a) is a codification of the Equal Protection Clause of the Michigan Constitution. *Dep't of Civil Rights*, *supra*. As stated in *Dep't of Civil Rights*, p 189:

> Discrimination, in constitutional terms, refers to baseless and irrational line drawing. . . . When there is a sufficiently important governmental interest and the classification is adequately related to that interest, it does not amount to discrimination to draw legislative lines on the basis of those classifications.
>
> It would be anomalous at best and contradictory at worst to attempt to rid the state of discriminatory practices by the use of an arbitrary standard that would prohibit, in effect, any line drawn between the genders, regardless of its relevance to the purpose of the regulation, unless the Legislature, in its wisdom and its own good time, countervails it.

Thus, merely because the state has engaged in a practice that treats men and women differently does not automatically or necessarily mean that it has engaged in unlawful gender discrimination. Rather, the test is whether the gender-based treatment serves a sufficiently important governmental interest and is substantially related to the achievement of that interest. *Id.*, p 189. Clearly, maintaining separate prison facilities for male and female prisoners serves important penological interests and is substantially related to those interests. The state's operation of such facilities

therefore would not give rise to a valid discrimination claim under subsection 302(a) and would not lead to the absurd result the majority perceives. Rather, the MDOC could still treat prisoners differently on the basis of gender without violating subsection 302(a), provided that the gender-based treatment could pass constitutional muster—that is, if the gender-based treatment served important penological interests and was substantially related to the achievement of those interests. See *Dep't of Civil Rights*, *supra*, pp 190-194.

Finally, it should be noted that this approach to state sex discrimination claims by inmates mirrors not only the analysis employed in equal protection cases, but also the analyses typically employed by federal courts in 42 USC 1983 actions. See anno: *Sex discrimination in treatment of jail or prison inmates*, 12 ALR4th 1219. A holding that prisoners are not excluded from the protections of subsection 302(a) of the Civil Rights Act would therefore impose upon defendants no stricter standards than those to which they must presently adhere in order to survive either a constitutional or § 1983 challenge. In the absence of any meaningful evidence that the Legislature intended to deny plaintiffs a statutory remedy for defendants' alleged gender-based misconduct, I would affirm the order of the trial court.

STRAUS v GOVERNOR

Docket No. 204457. Submitted January 6, 1998, at Lansing. Decided June 9, 1998, at 9:00 A.M. Leave to appeal granted, 458 Mich 865.

Kathleen N. Straus and three other members of the State Board of Education brought an action in the Ingham Circuit Court against the Governor, seeking declaratory and injunctive relief against the implementation of Executive Order Nos. 1996-11 and 1996-12. The executive orders make the Superintendent of Public Instruction the head of the Department of Education by transferring from the board to the superintendent most of the board's statutory administrative powers, duties, functions, and responsibilities. The court, Carolyn Stell, J., granted summary disposition for the plaintiffs and permanently enjoined the implementation of the executive orders. The court concluded that the orders violate Const 1963, art 8, § 3, which vests the board with leadership and general supervision over public education, and exceed the Governor's authority under Const 1963, art 5, § 2 to reorganize the executive branch of state government. The Governor appealed.

The Court of Appeals *held*:

The executive orders do not infringe the board's constitutional powers or prerogatives and are within the scope of the Governor's constitutional authority to reorganize the executive branch of state government.

1. The diminution in the plaintiffs' collective influence and power that will result upon the implementation of the executive orders confers on the plaintiffs standing to bring an action that challenges the validity of the executive orders.

2. The Governor's constitutional power to reorganize the executive branch of state government is nearly plenary and includes the authority to delegate, assign, or transfer existing power, responsibility, or authority within, among, or across the executive departments. The board, although created and vested by the constitution with five specific functions, is nevertheless part of the executive branch and subject to the Governor's power of reorganization.

3. The executive orders, in transferring only statutory powers and duties, leave unaffected the board's constitutional powers and

duties, including its ability to provide leadership and general supervision over public education.

Reversed; judgment of no cause of action granted to Governor.

FITZGERALD, P.J., concurring in part and dissenting in part, stated that the board is part of the executive branch of state government, that the executive orders infringe the board's powers under Const 1963, art 8, § 3, and that the executive orders are not within the scope of the Governor's authority under Const 1963, art 5, § 2 to reorganize the executive branch. The board is constitutionally empowered, as part of its function of providing leadership and supervision over public education, to head the Department of Education. The executive orders, by making the superintendent the head of the department, infringe the board's constitutional powers. The Governor has constitutional authority to reorganize legislatively created executive departments, boards, and commissions, but not constitutionally created departments, boards (such as the State Board of Education), and commissions. The executive orders are not within the scope of the Governor's authority over executive reorganization.

1. CONSTITUTIONAL LAW — GOVERNOR — EXECUTIVE REORGANIZATION.

The Governor's power under the state constitution to reorganize the executive branch of state government is nearly plenary; the Governor may delegate, assign, or transfer existing power, responsibility, or authority within, among, or across the executive departments (Const 1963, art 5, § 2).

2. CONSTITUTIONAL LAW — ACTS — EXECUTIVE ORDERS — FACIAL CHALLENGES.

A party who challenges an act or executive order as being unconstitutional on its face must establish that no set of circumstances exists under which the act or executive order would be valid; the fact that the act or executive order might operate unconstitutionally under some set of circumstances is insufficient.

3. CONSTITUTIONAL LAW — EXECUTIVE REORGANIZATION — STATE BOARD OF EDUCATION — SUPERINTENDENT OF PUBLIC INSTRUCTION.

Executive orders by which the Governor made the Superintendent of Public Instruction the head of the Department of Education in place of the State Board of Education by transferring to the superintendent the board's statutory administrative duties, functions, and responsibilities do not infringe the board's constitutionally vested authority to lead and generally supervise all public education (Const 1963, art 5, § 2, art 8, § 3; Executive Order Nos. 1996-11, 1996-12).

Mark H. Cousens, Sachs, Waldman, O'Hare, Helveston, Bogas & McIntosh, P.C. (by *Mary Ellen Gurewitz*), and *White, Przybylowicz, Schneider & Baird, P.C.* (by *Arthur R. Przybylowicz*), for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Thomas R. Wheeker*, Assistant Attorney General, for the defendant.

Before: FITZGERALD, P.J., and O'CONNELL and WHITBECK, JJ.

O'CONNELL, J. In this appeal of right, plaintiffs, elected members of the State Board of Education (hereafter the board), challenge, as being in excess of the authority vested in the Governor by Const 1963, art 5, § 2, and as being in derogation of the board's inherent constitutional prerogatives under Const 1963, art 8, § 3, the actions of the Governor in promulgating Executive Order Nos. 1996-11 and 1996-12. These orders transfer various powers of the board to the Superintendent of Public Instruction. The Ingham Circuit Court agreed with plaintiffs' contentions, and, on cross-motions for summary disposition, MCR 2.116(C)(8) and (10), issued a declaratory judgment and permanent injunction against the implementation of these orders. We reverse.

I. FACTS AND BACKGROUND INFORMATION

The facts in this matter are not in dispute. On December 19, 1996, the Governor issued Executive Order No. 1996-11, which transferred "all of the administrative statutory powers, duties, functions and responsibilities" of the board to the superintendent by

a "Type II transfer."[1] In effect, Executive Order No. 1996-11 made the superintendent, rather than the board, the administrative head of the Department of Education. This order was to become effective March 10, 1997.

Also on December 19, 1996, the Governor issued Executive Order No. 1996-12. Section 1 of this order transferred "all of the administrative statutory powers, duties, functions, and responsibilities" of the board, as set forth in approximately one hundred different sections of the Michigan Compiled Laws, to the superintendent by a "Type II transfer." Section 2 transferred "[a]ll of the statutory rule making powers, duties, functions, and responsibilities" of the board, as set forth in an additional approximately thirty-nine sections of the Michigan Compiled Laws, to the superintendent by a "Type II transfer." Section 3 stated that "all the statutory policy making powers, duties, functions, and responsibilities" of the board, as set forth in approximately thirty-six different sections of the Michigan Compiled Laws, "shall remain with the State Board of Education." Executive Order No. 1996-12 was to become effective July 1, 1997.

Given the nature of the case before us, we must take note of the limits of judicial competence in such matters. We cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may only determine whether some constitutional provision has been violated by an

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[1] Pursuant to MCL 16.103(b); MSA 3.29(3)(b), a "type II transfer" allows the transferring of an existing board to a principal department.

act (or omission) of the executive or legislative branch. As has been long recognized, when a court confronts a constitutional challenge it must determine the controversy "stripped of all digressive and impertinently heated veneer lest the Court enter—unnecessarily this time—another thorny and trackless bramblebush of politics." *Taylor v Dearborn Twp*, 370 Mich 47, 50, 51-52; 120 NW2d 737 (1963) (BLACK, J., joined by KAVANAGH, J.). Indeed, it is clear that issues of motive underlying the contested action are not justiciable. See also *Tenney v Brandhove*, 341 US 367, 376; 71 S Ct 783; 95 L Ed 1019 (1951) (noting that it is "not consonant with our scheme of government for a court to inquire into the motives of legislatures").

II. STANDING

As a threshold matter, we address plaintiffs' standing to maintain this suit and our jurisdiction to issue injunctive relief against the Governor. Plaintiffs represent precisely one-half the membership of the State Board of Education. Voting as a bloc, plaintiffs have the ability to either determine the result of any matter coming before the board, by convincing one other member to join them, or to create an impasse if all other members of the board seek an opposite outcome. However, under Executive Order Nos. 1996-11 and 1996-12, plaintiffs' ability to forestall action by the board in the exercise of statutorily delegated powers is limited because the superintendent may act unilaterally (unless a majority of the board directs otherwise). This arguable diminution in plaintiffs' *collective* influence and official power suffices, in our view, to confer standing on them to pursue this challenge. *House Speaker v State Administrative Bd*, 441

Mich 547, 556; 495 NW2d 539 (1993); see also *Raines v Byrd*, ___ US ___; 117 S Ct 2312, 2319; 138 L Ed 2d 849 (1997).

We would also note that, because a court at all times is required to question sua sponte its own jurisdiction (whether over a person, the subject matter of an action, or the limits on the relief it may afford), *Fox v Univ of Michigan Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965), we have some doubt with respect to the propriety of injunctive relief against the Governor. It is clear that separation of powers principles, Const 1963, art 3, § 2, preclude mandatory injunctive relief, mandamus, against the Governor. *People ex rel Sutherland v Governor*, 29 Mich 320; 18 Am Rep 89 (1874). Whether similar reasoning also puts prohibitory injunctive relief beyond the competence of the judiciary appears to be an open question that need not be resolved in this case. We do note that the Supreme Court has recently recognized that declaratory relief normally will suffice to induce the legislative and executive branches, the principal members of which have taken oaths of fealty to the constitution identical to that taken by the judiciary, Const 1963, art 11, § 1, to conform their actions to constitutional requirements or confine them within constitutional limits. *Durant v Michigan*, 456 Mich 175, 205; 566 NW2d 272 (1997). Only when declaratory relief has failed should the courts even begin to consider additional forms of relief in these situations. *Id.* at 206. The need for utmost delicacy on the part of the judiciary, and respect for the unique office of Governor, was similarly recognized in *People ex rel Johnson v Coffey*, 237 Mich 591, 602; 213 NW 460 (1927):

> The governor holds an exalted office. To him, and to him alone, a sovereign people has committed the power and the right to determine the facts in the proceeding before us. His decision of disputed question of fact is final. His finding of fact, if it has evidence to support it, is conclusive on this court. It would be unbecoming in us to impugn his motives, and unseemly and unlawful to invade his discretion.

III. STANDARD OF REVIEW

This case is before us on cross-motions for summary disposition, MCR 2.116(C)(8) and (10). We review a trial court's ruling on a motion for summary disposition de novo. *G & A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Indeed, summary disposition under either MCR 2.116(C)(8) or (10) will always present an issue of law for our determination. *Nahra*, *supra* at 330.

IV. ANALYSIS

When reviewing constitutional provisions, the objective of such review is to effectuate the intent of the people who adopted the constitution. *Livingston Co v Dep't of Management & Budget*, 430 Mich 635, 641-642; 425 NW2d 65 (1988). The lodestar principle is that of "common understanding," the sense of the words used that would have been most obvious to those who voted to adopt the constitution.[2] *House*

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[2] Both sides have cited portions of the "Address to the People" and the record of the Constitutional Convention, both of which may properly be considered in interpreting constitutional provisions. *Bingo Coalition for Charity—Not Politics v Bd of State Canvassers*, 215 Mich App 405, 410; 546 NW2d 637 (1996). However, nowhere was this precise issue considered or discussed, and what remains is too ambiguous and short-lived to serve as a reliable basis for resolution of the issue confronting us, particularly when the constitutional phraseology at issue is, in our view, straightforward in meaning and application on the record before us. See *Doe v Dep't of Social Services*, 439 Mich 650, 672-674; 487 NW2d 166 (1992).

Speaker v Governor, 443 Mich 560, 577; 506 NW2d 190 (1993). Where, as here, there is a claim that two different provisions of the constitution collide, we must seek a construction that harmonizes them both. This is so because, both having been adopted simultaneously, neither can logically trump the other. *Kunzig v Liquor Control Comm*, 327 Mich 474, 480-481; 42 NW2d 247 (1950).

The Governor's power under Const 1963, art 5, § 2, as has been noted, is nearly plenary.[3] In the absence of a legislative veto within sixty days during a regular session (or a full regular session of shorter duration), the Governor, by executive order submitted to the Legislature, may make changes in the organization of the executive branch or in the assignment of functions among its units that the Governor considers necessary for efficient administration. This power

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[3] Const 1963, art 5, § 2 provides:

> All executive and administrative offices, agencies and instrumentalities of the executive branch of state government and their respective functions, powers and duties, except for the office of governor and lieutenant governor and the governing bodies of institutions of higher education provided for in this constitution, shall be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes.
>
> Subsequent to the initial allocation, the governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature. Thereafter the legislature shall have 60 calendar days of a regular session, or a full regular session if of shorter duration, to disapprove each executive order. Unless disapproved in both houses by a resolution concurred in by a majority of the members elected to and serving in each house, each order shall become effective at a date thereafter to be designated by the governor.

includes the authority to delegate, assign, or transfer existing power, responsibility, or authority within, among, or across not more than twenty principal departments. The Governor's power is limited only by constitutional provisions that would inhibit the Legislature itself. *House Speaker v Governor*, *supra* at 578-579; *Morris v Governor (On Remand, After Remand)*, 214 Mich App 604, 608; 543 NW2d 363 (1995). Because the Governor's action has the status of enacted legislation, it is entitled to the same presumption of constitutionality that an equivalent statute would enjoy. Therefore, the judiciary should construe the executive orders as constitutional unless unconstitutionality clearly appears. *Mahaffey v Attorney General*, 222 Mich App 325, 344; 564 NW2d 104 (1997) (statutes should be construed as constitutional unless unconstitutionality is clearly apparent).

The board is a constitutional authority, empowered with "[l]eadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees." Const 1963, art 8, § 3.[4] The board serves "as the general planning and coordinating body

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[4] Const 1963, art 8, § 3 provides, in part:

> Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.
>
> The state board of education shall appoint a superintendent of public instruction whose term of office shall be determined by the board. He shall be the chairman of the board without the right to vote, and shall be responsible for the execution of its policies. He

for all public education, including higher education," and as advisor to "the legislature as to the financial requirements in connection therewith." Const 1963, art 8, § 3, cl 1. The board consists of eight members nominated by party conventions and elected at large for terms of eight years as prescribed by law. *Id.*, § 3, cl 3. The superintendent is appointed by the board, serves as its chairperson, but without voting rights, and is imbued by the constitution with responsibility for execution of board policies. *Id.*, § 3, cl 2. The Governor serves as an ex-officio member of the board, without the right to vote. *Id.*, § 3, cl 3. As are all such administrative agencies, the board is part of the executive branch of government.[5] *Judges of the 74th Judicial Dist v Bay Co*, 385 Mich 710, 727; 190 NW2d 219 (1971).

Nonetheless, plaintiffs contend that the board is not part of or within the executive branch. In this regard, we note that Const 1963, art 3, § 2 provides that the powers of government are divided into three branches: legislative, executive, and judicial. In *Federated Publications v Michigan State Univ Bd of Trustees*, 221 Mich App 103, 113; 561 NW2d 433 (1997), we dealt with a somewhat similar argument, to the effect that the Open Meetings Act, MCL 15.261 *et seq.*; MSA 4.1800(11) *et seq.*, does not apply to public universi-

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shall be the principal executive officer of a state department of education which shall have powers and duties provided by law.

[5] Because members of the board are neither appointed nor directly overseen by the Legislature or the judiciary, the board must be part of the executive branch. There is no fourth branch of government. *Walker v Wolverine Fabricating & Mfg, Inc*, 425 Mich 586, 607; 391 NW2d 296 (1986); *Civil Service Comm v Auditor General*, 302 Mich 673, 682; 5 NW2d 536 (1942).

ties that were asserted to be "coequal branches of government." We responded unequivocally:

> We disagree. In *In re 1976 PA 267* [400 Mich 660; 255 NW2d 635 (1977)], the Court noted that the powers of government were divided among *three* branches of government pursuant to Const 1963, art 3, § 2. It further noted that the separation of powers set forth in the constitution was "designed to preserve the independence of the three branches of government." *Id.* at 662. Although various cases have stated that public universities are branches of government coequal with the Legislature, the constitution does not contain any provision that elevates them to a fourth branch of government. See *Walker v Wolverine Fabricating Mfg Co, Inc*, 425 Mich 586, 607; 391 NW2d 286 (1986). Because autonomous state universities have not achieved that status under the constitution, *In re 1976 PA 267* is inapplicable to this case. [*Federated Publications, supra* at 113-114 (emphasis in original).]

We apply the same reasoning here. The board is not a fourth branch of government. To so hold would be to directly contravene the plain meaning of Const 1963, art 3, § 2. Further, the board is not a part of the legislative or the judicial branch. Rather, the board is part of and within the executive branch, albeit as a constitutionally created entity with five specifically delineated, and therefore constitutionally inviolable, functions.[6] In this regard, the constitutional location of the board's functions within the executive branch is simi-

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[6] These functions are (1) to exercise "[l]eadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees," (2) to serve "as the general planning and coordinating body for all public education, including higher education, before" (3) to "advise the legislature as to the final requirements in connection therewith," (4) to appoint the superintendent, and (5) to determine the term of office of the superintendent. Const 1963, art 8, § 3.

lar to that of the State Transportation Commission, under Const 1963, art 5, § 28, the Civil Rights Commission, under Const 1963, art 5, § 29, and the Civil Service Commission, under Const 1963, art 11, § 5.[7]

The constitution contains specific requirements relating to the Department of Education. Const 1963, art 8, § 3, cl 2 specifies that the superintendent "shall be the principal executive officer of a state department of education which shall have powers and duties provided by law." This must be read as some limitation on the Governor's generally plenary power under Const 1963, art 5, § 2, subject to veto by joint legislative resolution, to reorganize state government into not more than twenty principal departments. It may be logically concluded, given the fact that the Department of Education is specifically mentioned in the constitution, that the department is one of the twenty "principal departments."

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[7] We note that the Civil Service Commission's functions are not set out in the article of Const 1963 dealing with the executive branch but in the article dealing with public officers and employment. However, in *Reed v Civil Service Comm*, 301 Mich 137, 152; 3 NW2d 41 (1942), the Michigan Supreme Court, in construing the 1941 amendment of Const 1908 that created the Civil Service Commission as a constitutional rather than a statutory entity, referred to "rights . . . affected by the arbitrary or unreasonable action of an *administrative* agency." (Emphasis supplied.) The logical repository for *administrative*, as compared to legislative or judicial, functions is in the executive branch. But see the concurrence of CHANDLER, C.J., joined by BUSHNELL, J:

> Unquestionably the civil service commission is a constitutional body possessing plenary power. In its acts it is not subject to control or regulation by either [sic] the executive, legislative or judicial branch of our State government. [*Reed, supra*, at 163.]

See also *Viculin v Dep't of Civil Service*, 386 Mich 375, 385-386, n 11; 192 NW2d 449 (1971) (boards and commissions created throughout the constitution are administrative bodies); *Judges of the 74th Judicial Dist, supra* at 727 (administrative agencies are part of the executive branch of government.).

The parties do not suggest that the executive orders at issue engender a violation of the constitutional limitation to twenty principal departments. Similarly, the parties do not suggest that the Governor sought to implement such orders before the expiration of the constitutionally prescribed sixty regular legislative session days or a full regular session of shorter duration. Finally, the parties do not suggest that the Legislature, by concurrent resolution of a majority of the members elected to and serving in each house, disapproved either or both of the executive orders on the basis of a concern about the board's constitutional prerogatives or authority.

The executive orders at issue transfer a variety of statutory powers, both administrative and regulatory, from the board to the superintendent. Both orders explicitly provide:

> Nothing in this Executive Order should be construed to diminish the constitutional authority of the State Board of Education to provide leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, and its authority to serve as the general planning and coordinating body for all public education including higher education, and to advise the legislature as to the financial requirements in connection therewith. [Executive Order No. 1996-11, ¶ 2; Executive Order 1996-12, ¶ 5.]

Executive Order No. 1996-12 additionally specifies that the board "shall retain its policy making authority with regard to these statutory provisions by determining the policies, if any, on which the administration of these provisions shall be based."

The first factor critical to our determination is that the executive orders address only the powers and duties that are conferred upon the board by statute. Contrary to plaintiffs' assertion, the Governor did not transfer *constitutionally* granted functions from one executive branch agency, board, or entity to another. Const 1963, art 8, § 3 does not state that the board is to be the head of the Department of Education. Rather, this language is contained in § 301 of the Executive Organization Act of 1965, MCL 16.401; MSA 3.29(301).[8] Similarly, the functions transferred by Executive Order Nos. 1996-11 and 1996-12 were created by the Legislature through enactment of the relevant statutes, not by the people directly through adoption of Const 1963, art 8, § 5.[9]

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[8] As noted by plaintiffs, Lieutenant and Acting Governor William Milliken in Executive Order No. 1965-19 (1) established the Department of Education in the executive branch, (2) established the state board as the head of the Department of Education, (3) established the superintendent as the principal executive officer of the Department of Education, and (4) stated that, "[T]he state board of education is hereafter responsible for carrying out the functions, duties, and responsibilities of the department of education in accordance with the constitution and the statutes of this state." As noted in *House Speaker*, *supra*, at 579, when the Governor makes changes within the executive branch through the executive order procedure, he has the authority, in effect, to enact laws to carry out those changes. See also *Morris*, *supra* at 612, quoting *House Speaker* to the effect that the Governor's reorganization powers are equal to the Legislature's initial and subsequent reorganization powers. Thus, we consider Lieutenant and Acting Governor William Milliken's actions in Executive Order No. 1965-19 to be equivalent to the Legislature's actions in § 301 of the Executive Organization Act of 1965.

[9] Executive Order No. 1996-11 transfers "administrative statutory powers, duties, functions and responsibilities" of the board. These "statutory powers" are found in MCL 16.401; MSA 3.29(301), MCL 16.107(a); MSA 3.29(7)(a), and MCL 16.109; MSA 3.29(9). Section 1 of Executive Order No. 1996-12 transfers approximately one hundred "administrative statutory powers, duties, functions, and responsibilities" of the board, as found in the relevant provisions of the Michigan Compiled Laws. Section 2 transfers the board's "statutory rule making powers, duties, functions, and responsibilities" as found in approximately thirty-nine provisions of the

Therefore, the board is not *constitutionally* required, as part of its function of providing leadership and general supervision over all public education, to head the Department of Education. We believe it axiomatic that the Governor may, under Const 1963, art 5, § 2, cl 2, alter the current scheme and vest that function in the superintendent. Because the Legislature could have delegated such powers to the superintendent *ab initio*, the Governor is free to redistribute those powers within the Department of Education in any manner in which the Legislature could have assigned such authority originally or by amendment. See *House Speaker*, *supra*.

We note that plaintiffs' counsel during oral argument appeared to concede that the Legislature could constitutionally *repeal* the sections of the statutes delineating the functions that Executive Order No. 1996-12 transferred. Counsel was unwilling to concede, however, that the Legislature could constitutionally *transfer* such functions away from the board. Clearly, plaintiffs are standing on unstable ground. Because the Legislature originally enacted these statutory provisions, there can be no constitutional bar to a later repeal. Equally clearly, such a repeal would not impinge upon the board's constitutional function of leadership and general supervision over public education.

We also believe it clear that the Legislature could constitutionally *transfer* functions that it had previously vested in the board. Indeed, we see no functional difference between a repeal of such functions

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Michigan Compiled Laws. The statutory sections cited in Executive Order No. 1996-12 are simply too numerous to cite in this opinion.

and a transfer of such functions. Here, the transfers in question were accomplished by executive order rather than legislative action but, as noted above, under *House Speaker*, *supra*, and *Morris*, *supra*, when the Legislature allocates a function, the Governor may thereafter change that allocation through the exercise of the Governor's reorganization powers under Const 1963, art 5, § 2, cl 2. As *House Speaker*, *supra* at 579, specifically held:

> The constitution, then, specifically recognizes that, where the Governor feels compelled to make certain changes within the executive branch, he has authority, through the executive order procedure, in effect, to enact laws to carry out those changes. The only way to preclude such changes is through a properly supported legislative veto. *In other words, after the initial executive branch organization, the Governor's reorganization powers are equal to the Legislature's initial and subsequent reorganization powers.* [Emphasis added.][10]

Simply put, and as argued by the Governor, if the Legislature can place a *statutory* function within an executive branch agency, board, or entity, the Governor by executive order may transfer the function to another executive branch agency, board, or entity.[11]

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[10] See also *Morris*, *supra* at 609:

> [T]he Governor's reorganization powers are equal to the Legislature's *initial* as well as subsequent reorganization powers. *In other words, when the Governor acts under this constitutional provision by means of an executive order, and that order is not overturned by the Legislature, it is as if the Legislature had acted.* [First emphasis in original; second emphasis supplied.]

[11] The affidavits that plaintiffs Kathleen Straus and Barbara Roberts Mason submitted to the lower court do not alter our conclusion. We first note that these affidavits contain a mixture of fact and opinion. Secondly, and perhaps more importantly, while these affidavits describe the current

Plaintiffs also argue that contemporaneous legislative (i.e., the enactment of § 301 of the Executive Organization Act of 1965) and gubernatorial (i.e., the issuance of Executive Order No. 1965-9) actions constitute "understandings" that Const 1963, art 8, § 3 should be read as requiring the board to be the head of the Department of Education. We disagree. Rather, we regard these actions not as signaling a contemporaneous understanding that the constitution *requires* such an outcome but rather as expressing a policy determination that such an outcome was then desirable. Under Const 1963, art 3, § 2, we do not function as reviewers of such policy determinations, whether they are made by the legislative or executive branch, and we therefore express no opinion with respect to the wisdom, or lack thereof, of making the superintendent the head of the Department of Education. Rather, we hold that the constitution does not *require* that the board function in this capacity.[12]

By expressly declaring that the board may continue to set policies pursuant to which the superintendent shall carry out these various statutorily created responsibilities, the Governor has merely shifted legislatively delegated authority from the board to the

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process by which the board carries out its *legislatively* derived functions, it does not logically follow that such functions are inherent to, and therefore inseparable from, the board's *constitutionally* derived functions. Therefore, we do not agree that these affidavits support a finding, advanced by plaintiffs, that the executive orders transferred "*all* powers which are a necessary incident of the Board's overarching power or duty to exercise leadership and general supervision of all public education in Michigan." (Emphasis supplied.)

[12] In this regard, we note that the Address to the People accompanying Const 1963, art 8, § 3 stated that "The superintendent would be considered as *administrative head* of a state department of education and as such would be a staff officer to the governor and on his administrative board." (Emphasis supplied.)

superintendent. In no perceptible way does this facially infringe any of the board's constitutional powers or prerogatives under Const 1963, art 8, § 3. Indeed, Executive Order No. 1996-12 specifically provides that the board shall *retain* its statutory *policy-making* powers, duties, functions, and responsibilities. Because the Governor has protected the ultimate authority of the board with apparent fidelity to Const 1963, art 8, § 3, no improper transfer of its powers or diminution of its ultimate responsibilities has occurred. See *Bays v Dep't of State Police*, 119 Mich App 719, 721-722; 326 NW2d 620 (1982) (no improper delegation of decision-making power of the Civil Service Commission where it retained "ultimate power over those decisions with which it is charged").

Our second major area of analysis concerns whether the Governor's actions divest the board of "control" over the system of public education in Michigan. We do not believe that the Governor has divested the board of ultimate control or that the Governor's actions limit that control in violation of Const 1963, art 8, § 3.

The party challenging the facial constitutionality of an act "must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . ." *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). Further, "if any state of facts reasonably can be conceived that would sustain [an act], the existence of the state of facts at the time the law [or, here, an executive order] was enacted must be assumed." 16 Am Jur 2d, Constitutional Law, § 218, p 642. In addition, "[a] statute [or,

here, an executive order] may be constitutional although it lacks provisions which meet constitutional requirements, if it has terms not excluding such requirements, and in this situation the court is justified in holding that the statute was intended to be subject to such requirements, and that those requirements are to be considered as embodied in the statute." *Id.*, § 225, p 659.[13]

Here, Executive Order No. 1996-11 states that nothing within it is to be construed to diminish the constitutional authority of the board to provide leadership and general supervision over all public education. Thus, the terms of the executive order specifically *include* the requirements of Const 1963, art 8, § 3. Additionally, we can easily conceive of a state of facts in which the superintendent exercises the administrative functions of the head of the Department of Education while the board continues to exercise its leadership and general supervision over public education. Indeed, construing Executive Order No. 1996-11 in its entirety, we conclude that this is what the Governor intended. Executive Order No. 1996-11 basically involves the internal organization of the Department of Education and, as such, would have minimal effect on the functioning of the board. It would also appear to be exactly the type of transfer envisioned by Const 1963, art 5, § 2 and *House Speaker*, *supra*. We do not discount the fact that the superintendent, or his successor(s), could, conceivably and at some time in the future, encroach upon the board's constitutionally granted functions. However,

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[13] Quoted with approval in *Council of Organizations v Governor*, 455 Mich 557, 568-569; 566 NW2d 208 (1997).

unless and until such an encroachment actually occurs, the issue is not ripe for adjudication. *General Motors Corp v Attorney General*, 294 Mich 558, 568; 293 NW 751 (1940).

Similarly, we find no constitutional bar prohibiting the transfer of functions effectuated by Executive Order No. 1996-12. As noted above, this order transfers the "*administrative* statutory powers, duties, functions and responsibilities" of the board to the superintendent. Plaintiffs argue that these transfers directly affect the authority of the board and are not "concerned with the organization and powers of the Department of Education." However, plaintiffs have not established that there is no set of circumstances under which the transfers would be valid and we note that, as with Executive Order No. 1996-11, Executive Order No. 1996-12 states that nothing within it is to be construed to diminish the constitutional authority of the board to provide leadership and general supervision over all public education. Furthermore, as noted above, Executive Order No. 1996-12 explicitly provides that the board shall retain certain statutory policy-making powers and responsibilities.

In this respect, we note that there is no question that the board retains its constitutional authority to appoint the superintendent and to determine the superintendent's term of office and, by implication, this language suggests that the board also retains the power to shorten the term of office of the superintendent. The board also retains its statutory policy-making powers and its ability to provide "leadership and general supervision." These powers, retained by the board, certainly give the board authority over the superintendent and control over public education. We

therefore, under the facts before us, find that *ultimate* control remains with the board.

In conclusion, we do not believe that either Executive Order No. 1996-11 or Executive Order No. 1996-12 facially[14] infringes any of the board's constitutional powers or prerogatives under Const 1963, art 8, § 3. Given that the Governor has protected the board's ultimate authority over our educational system, we hold that the Governor has made no improper transfer of its powers or responsibilities. We further hold that the executive orders at issue are within the scope of the Governor's authority under Const 1963, art 5, § 2.

We reverse the decision of the circuit court and, pursuant to MCR 7.216(A)(7), grant a judgment of no cause of action in favor of the defendant. We also give this decision immediate effect pursuant to MCR 7.215(E)(2). We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, a question of public significance being involved.

WHITBECK, J., concurred.

FITZGERALD, P.J. (*concurring in part and dissenting in part.*) I concur with the majority's conclusion that the State Board of Education is within the executive

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[14] We are not blind to the possibility that the superintendent could exceed these boundaries. However, we have no reason to anticipate that such a public officer will engage in *ultra vires* actions. Furthermore, on proper complaint, the judiciary will inquire into the matter and, if the board's constitutional prerogatives have been invaded, redress the infringement. Until such time, no such issue is ripe for adjudication. *United Public Workers of America (CIO) v Mitchell*, 330 US 75, 89-91; 67 S Ct 556; 91 L Ed 754 (1947); *General Motors*, *supra* at 568. Where a constitutional question is presented anticipatorily, the Court is required by the limits on its authority to decline to rule. *Sullivan v Bd of Dentistry*, 268 Mich 427, 429-430; 256 NW 471 (1934).

branch of government. I disagree, however, with the majority's conclusion that Executive Order Nos. 1996-11 and 1996-12 do not infringe the board's constitutional powers under Const 1963, art 8, § 3, and that the executive orders at issue are within the scope of the Governor's authority under Const 1963, art 5, § 2.

FACTS

The facts in this matter are not in dispute. On December 19, 1996, the Governor issued Executive Order No. 1996-11, which transferred "[a]ll of the administrative statutory powers, duties functions and responsibilities" of the State Board of Education "as administrative head of the Department of Education" to the superintendent of Public Instruction by a "Type II transfer." In effect, Executive Order No. 1996-11 made the superintendent, rather than the board, the head of the Department of Education. Executive Order No. 1996-11 was to become effective March 10, 1997.

Also on December 19, 1996, the Governor issued Executive Order No. 1996-12, which purported to transfer "[a]ll of the administrative statutory powers, duties, functions, and responsibilities" of the board to the superintendent by a "Type II transfer." Under Executive Order No. 1996-12, the board retained only "statutory policy making powers, duties, functions, and responsibilities." Executive Order No. 1996-12 was to become effective July 1, 1997.

On March 3, 1997, plaintiffs instituted an action in the lower court to enjoin enforcement of Executive Order Nos. 1996-11 and 1996-12. Plaintiffs alleged that the executive orders violated Const 1963, art 8, § 3 on the ground that the constitution vested the board

with the authority to decide whether to exercise directly or to delegate the various statutory powers, responsibilities, and duties. Plaintiffs further alleged that art 8, § 3 limits any power of the Governor to transfer powers, responsibilities, and duties of the board.

On March 7, 1997, the lower court issued a preliminary injunction against implementation of Executive Order No. 1996-11, but denied a preliminary injunction against implementation of Executive Order No. 1996-12 on the ground that there was no immediate harm threatened by that executive order because it was not to go into effect until July 1, 1997. The parties thereafter filed cross-motions for summary disposition. On May 29, 1997, the lower court issued its oral opinion on these cross-motions. The lower court stated in part:

> The 1963 constitution reflects a clear change from a popularly elected superintendent with general supervisor [sic] powers, and a State Board with limited supervisory powers to a State Board with general supervisory powers over all public education, except as to institutions of higher education granting baccalaureate degrees; and a superintendent appointed by the Board to act as the non-voting chairperson of the board and to be the principal executive officer of a State Department of Education with powers and duties provided by law.
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> * * *
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> The constitution impliably (sic) provides for the State Board to be the head of the Department of Education. To determine otherwise would reduce the State Board's constitutional authority over education to a nullity.
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> * * *

I would note that the statement in each of the executive orders at issue here that they do not affect the State Board's constitutional role, would be comparable to the legislature passing a statute and adding a sentence at the end of the statute is not unconstitutional [sic]. You cannot determine the constitutional role of the State Board simply by adding a sentence in an executive order.

What this case is not about is whether the governor has the power to reorganize the executive branch of government. *Housespeaker* [sic] *v Governor* [443 Mich 560; 506 NW2d 190 (1993)] and *Morris v Governor* [*(On Remand, After Remand)*, 214 Mich App 604; 543 NW2d 363 (1995)] speak clearly on that issue.

This case is about whether the governor can use his reorganization power in a way which deprives the popularly elected State Board of Education of some or all of its constitutional authority. *Housespeaker* [sic] and *Morris* do not address this issue. Those cases focused on the interplay between executive orders implementing reorganization of the executive branch and the legislature's initial and subsequent power to reorganize the executive branch.

* * *

. . . [T]his Court is bound by the Supreme Court's broad and expansive interpretation of the constitutional powers vested in a popularly elected State Board of Education. These executive orders represent an unconstitutional transfer of the State Board's authority, power and responsibility to the state superintendent. The governor's judicially recognized powers to reorganize the executive branch do not extend this far.

The June 16 order, presumably issued pursuant to this oral opinion, stated:

[A]s the Mich Const of 1963 provides for the State Board of Education to serve in a leadership and general supervision capacity over all public education in Michigan, the State Board of Education necessarily must serve as the head of the Department of Education, and the attempted

transfer of powers, responsibilities, and duties contained in Executive Orders 1996-11 and 1996-12 are contrary to and violate art 8, § 3 of Mich Const of 1963.

Because the lower court's order was based on a grant of summary disposition, this Court's review is de novo. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 650; 513 NW2d 441 (1994).

I. CONSTITUTIONAL CONSIDERATIONS

A. EXECUTIVE BRANCH REORGANIZATION: CONST 1963, ART 5, § 2

Const 1963, art 5, § 2 provides:

> All executive and administrative offices, agencies and instrumentalities of the executive branch of state government and their respective functions, powers and duties, except for the office of governor and lieutenant governor and the governing bodies of institutions of higher education provided for in this constitution, shall be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes.
>
> Subsequent to the initial allocation, the governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature. Thereafter the legislature shall have 60 calendar days of a regular session, or a full regular session if of shorter duration, to disapprove each executive order. Unless disapproved in both houses by a resolution concurred in by a majority of the members elected to and serving in each house, each order shall become effective at a date thereafter to be designated by the governor.

Art 5, § 2 confers two distinct types of power on the Governor. The first is the power to "make changes in the organization of the executive branch." The second

is the power to "make changes in the . . . assignment of functions among its units." Both powers are at issue in this matter.

B. LEADERSHIP AND GENERAL SUPERVISION OVER PUBLIC EDUCATION: CONST 1963, ART 8, § 3.

1. LANGUAGE

Const 1963, art 8, § 3 provides in pertinent part:

> Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.
>
> The state board of education shall appoint a superintendent of public instruction whose term of office shall be determined by the board. He shall be the chairman of the board without the right to vote, and shall be responsible for the execution of its policies. He shall be the principal executive officer of a state department of education which shall have powers and duties provided by law.

Art 8, § 3 therefore vests five functions in the board. They are:

(a) Exercising "[l]eadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees."[1]

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[1] The exception relating to institutions of higher education granting baccalaureate degrees, not being relevant to this opinion, will not be further referred to in this opinion.

(b) Serving as the general planning and coordinating body for all public education including higher education.

(c) Advising the Legislature as to the financial requirements in connection with public education.

(d) Appointing the superintendent.

(e) Determining the term of office of the superintendent.

At issue in this case is the first of these functions, providing "leadership and general supervision" over all public education.

2. HISTORY

As pointed out by plaintiffs, the Northwest Ordinance of 1787 provided that "[r]eligion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance of 1787, art 3. Consistent with this declaration, every Michigan constitution has provided for statewide supervision over public education.

Accordingly, Const 1835, art 10, § 1 provided for a Superintendent of Public Instruction, to be appointed by the Governor, "whose duties shall be prescribed by law." Const 1850, art 8, § 1 provided for the popular election of a Superintendent of Public Instruction who, under art 13, § 1, "shall have the general supervision of public instruction, and his duties shall be prescribed by law." Const 1850, art 13, § 9 also created an elected board charged with general supervision over the state normal school and other duties "prescribed by law." Const 1908, art 11, § 2 also provided for the popular election of the Superintendent of Public Instruction, giving him the responsibility for

"general supervision of public instruction in the state"; Const 1908, art 11, § 6 also continued the limitation on the role of the elected board to supervision of the state normal college and the state normal schools and to such duties "prescribed by law."

Const 1963, art 8, § 3 substantially changed the roles of the board and the superintendent. No longer were the functions of the board to be solely "prescribed by law"; rather, as outlined above, art 8, § 3 constitutionally recognized five functions of the board. Delegate George Romney, a member of the Education Committee, explained this change to the convention:

> The third thing it does is to enlarge the functions of the board. The new board of education is given leadership and supervision over education other than colleges and universities. This means the elementary and secondary schools as well as other institutions of an educational character. The third thing it does is to give this board overall planning and coordinating responsibility for all of education. This we have not had. . . . It gives this board the key position in recommending to the governor and the legislature all the steps taken to meet our educational needs in the state.
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> . . . In connection with the enlargement of the board's activities, I think it is important to know that this enlargement of the board's activities does not increase the authority of the board beyond that now granted in the present constitution to the superintendent of public instruction. The present constitution gives the superintendent of public instruction very broad authority over education, but he is not properly equipped either from the standpoint of staff and department or from the standpoint of ability to cover the full field to discharge that function. This contemplates the establishment of this board with these broad functions and certainly, this provides a more suitable means of dis-

charging these important functions. [1 Official Record, Constitutional Convention 1961, p 1190.][2]

C. CONSTRUING CONST 1963[3]

1. ORIGINAL INTENT, COMMON UNDERSTANDING, AND CONTEMPORANEOUS CONSTRUCTION

The Michigan Supreme Court has long held that the constitution must be interpreted in light of the original intent and understanding of its drafters. See, e.g., *People v DeJonge (After Remand)*, 442 Mich 266, 274; 501 NW2d 127 (1993); *Committee for Constitutional Reform v Secretary of State*, 425 Mich 336, 342; 389 NW2d 430 (1986). The framers' intent must be understood in conjunction with the intentions and understanding of the constitution held by its ratifiers.

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[2] See also the comments of Delegate D. Hale Brake, emphasized by plaintiffs:

> That being true, the governor being a politician, as a governor must be a politician, the other members of the board being professional educators, as they should be, my first premise is that the 8 members of the board should lay down the policy to be followed by this board. *They should make the decisions. They know what the problems are. They should be the dominant force.*
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> It seems to me that while Mr. Romney didn't say so that one of the principal objectives in the set up that has been suggested to us here is that of moving the department of education a little bit further away from the political arena. The board is elective. They pick the superintendent of public instruction instead of having him elected by the people as in the past. Then the committee turns right around and comes right straight back toward the political arena by putting the chief politician of the state on the board.
>
> My first premise is that *the board ought to run this show.* [1 Official Record, Constitutional Convention 1961, p 1193 (emphasis supplied).]

[3] It has been said that in construing a constitution, the technical rules of statutory construction do not apply. *McCulloch v Maryland*, 17 US (4 Wheat) 316, 407; 4 L Ed 579 (1819); *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971).

DeJonge, *supra* at 274. The intent of the framers may be determined, at least in part, through the use of the rule of "common understanding." *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971). Justice Cooley in Cooley's Const Lim 81, described this rule as follows:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed."[4]

Similarly, contemporaneous legislative[5] and judicial[6] interpretations aid in ascertaining original intent and the common understanding.

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[4] Quoted with approval in *Council of Organizations v Governor*, 455 Mich 557, 569; 566 NW2d 208 (1997); *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 745; 330 NW2d 346 (1982); *Council No 11, AFSCME v Civil Service Comm*, 408 Mich 385, 405; 292 NW2d 442 (1980); *Traverse City School Dist*, *supra* at 405;

[5] See *Harmelin v Michigan*, 501 US 957, 980; 111 S Ct 2680; 115 L Ed 2d 836 (1991), in which Mr. Justice Scalia stated that it was necessary to examine "[t]he actions of the First Congress, which are of course persuasive evidence of what the Constitution means."

[6] See *Advisory Opinion Re: Constitutionality of 1972 PA 294*, 389 Mich 441, 470; 208 NW2d 469 (1973), in which the Michigan Supreme Court stated:

> A second consideration in determining the meaning of constitutional language is the analysis of precedent. How have the courts interpreted this language? In pursuing precedent, those cases decided at a time proximate to the ratification of the constitution

2. CIRCUMSTANCES AND PURPOSES

A second rule of constitutional construction requires consideration of the circumstances surrounding the adoption of a constitutional provision and the purposes sought to be accomplished. In *Kearney v Bd of State Auditors*, 189 Mich 666, 673; 155 NW 510 (1915), the Michigan Supreme Court stated:

> In construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished.[7]

As stated by the Michigan Supreme Court in *House Speaker v Governor*, 443 Mich 560, 581; 506 NW2d 190 (1993), the most instructive tool for discerning the circumstances surrounding the adoption of the provision is the floor debates in the Constitutional Convention record. However, the consideration of the debates is limited because:

> They are individual expressions of concepts as the speakers perceive them (or make an effort to explain them). Although they are sometimes illuminating, affording a sense of direction, they are not decisive as to the intent of the general convention (or of the people) in adopting the measures. [*Univ of Michigan Regents v Michigan*, 395 Mich 52, 59-60; 235 NW2d 1 (1975).]

However, the Court also noted that these floor debates are particularly helpful "when we find in the debates a recurring thread of explanation binding

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are important in that they better reflect the meaning of the language of the constitution at the time it was written.

[7] See *Soap & Detergent Ass'n*, n 4, *supra* at 745, and *Traverse City School Dist*, *supra* at 405.

together the whole of a constitutional concept." *Id.* at 60.

3. AVOIDANCE OF CONSTITUTIONAL INVALIDITY

A third rule of constitutional construction requires the avoidance of an interpretation that creates a constitutional invalidity. *House Speaker*, *supra* at 585.

4. COMPLETE EFFECT AND PLAIN MEANING

This rule of interpretation contains two prongs. The first prong is to give effect to the entire section of the constitution. The second prong is to give the words of the constitution their usual and ordinary meaning. *People v Bd of State Canvassers*, 323 Mich 523, 529; 35 NW2d 669 (1949).

II. THE BOARD VERSUS THE SUPERINTENDENT AS THE "HEAD" OF THE DEPARTMENT OF EDUCATION

Executive Order No. 1996-11, in effect, made the superintendent, rather than the board, the head of the Department of Education. Plaintiffs argue that the constitutionally vested duty of the board to provide leadership and general supervision over all public education, necessarily requires the board to be the head of the Department of Education. The lower court agreed, finding that Const 1963 by implication provides for the board to be the head of the Department of Education.

Const 1963, art 8, § 3 does not explicitly state that the board is to be the head of the Department of Education. This language is, however, contained in § 301 of the Executive Organization Act of 1965, MCL 16.401; MSA 3.29(301). Both of the Governor's powers under art 5, § 2 are implicated under Executive Order No. 1996-11. Empowering the superintendent as the

head of the Department of Education certainly constitutes a "change" in the organization of the executive branch. Similarly, to the extent that serving as the head of the Department of Education constitutes a "function," Executive Order No. 1996-11 certainly transferred that function from the board to the superintendent. Thus, the question is whether the change in organization or transfer of functions accomplished by Executive Order No. 1996-11 impinged upon the board's constitutional function of providing leadership and general supervision over all public education in Michigan.[8]

I would hold that the board is constitutionally empowered, as part of its function of providing leadership and general supervision over all public education in the state, to head the Department of Education. To this end, the Legislature contemporaneously vested this function in the board in § 301 of the Executive Organization Act of 1965 and Lieutenant and Acting Governor Milliken did the same in Executive Order No. 1965-19. I regard these actions as signaling a contemporaneous understanding that the constitution requires such an outcome.

Likewise, contemporaneous judicial interpretations support this holding. In *Welling v Livonia Bd of Ed*, 382 Mich 620, 625; 171 NW2d 545 (1969), Justice BLACK, in a concurring opinion joined by Justices T. M. KAVANAGH and T. G. KAVANAGH, stated:

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[8] Plaintiffs do not argue, and the lower court did not find, that Executive Order No. 1996-11 impinged upon the board's other four delineated functions under Const 1963, art 8, § 3 (i.e., serving as the general planning and coordinating body for all public education, including higher education; advising the Legislature with regard to the financial requirements in connection therewith; appointing the superintendent; and determining the term of office of the superintendent).

> Formerly the constitutional responsibility for such administration, with duties "prescribed by law," devolved upon an elected superintendent of public instruction (Const 1908, art 11, § 2). By the Constitution of 1963, however, the framers proposed and the people adopted a new policy for administration of the system. Now the State board of education, unfettered by those qualifying words "prescribed by law" or "provided by law," is armed and charged exclusively with the power and responsibility of administering the public school system which the legislature has set up and now maintains pursuant to section 2 of the eighth article. By section 3 of the same article, the board has been directed—not by the legislature but by the people—to lead and superintend the system and become, exclusively, *the administrative policy-maker thereof.* That specific directive having come from the people, the legislature may not by law interfere with its execution by the board. [*Id.* (emphasis supplied).]

Indeed, the general supervisory power over education formerly vested in the superintendent under the 1908 Constitution is, under Const 1963, reposed in the board. Under a Type II transfer as provided in Executive Order No. 1996-11, the board loses autonomous control over its functions. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 748-749; 330 NW2d 346 (1982); MCL 16.103(b); MSA 3.29(3)(b). The change proposed by Executive Order No. 1996-11 would return the running of public education to the system in place under the Constitution of 1908. If Executive Order No. 1996-11 is implemented, the superintendent will once again become the main voice in public education in Michigan. Such a change would essentially eliminate the transfer of power voted on by the people when they voted for the 1963 constitution and would render the transfer meaningless.

III. THE TRANSFER OF STATUTORY "FUNCTIONS" FROM THE BOARD TO THE SUPERINTENDENT.

Executive Order No. 1996-12 transferred the "administrative statutory powers, duties, functions, and responsibilities" of the board set forth in some 139 different sections of the Michigan Compiled Laws from the board to the superintendent. Plaintiffs argue that these transfers directly affect the authority of the board to "lead and control." The lower court agreed, finding that the executive orders represent an unconstitutional transfer of the board's authority, power, and responsibility to the superintendent.

Here, the Governor's powers under art 5, § 2 to make changes in the assignment of functions among the units of the executive branch are at issue. Clearly, the Governor has the authority under art 5, § 2 to transfer all the authority, powers, duties, functions, and responsibilities of a *legislatively created principal department* to a gubernatorially created principal department. *House Speaker*, *supra* at 564. I believe that the Governor has similar authority with respect to legislatively created boards and commissions. Here, however, the board is *not* a legislatively created entity. The board is a constitutionally created entity and, therefore, the Governor cannot exercise his art 5, § 2 powers to impair or restrict powers derived directly from the people under the constitution. *Michigan Civil Rights Comm v Clark*, 390 Mich 717; 212 NW2d 912 (1973). Although the functions sought to be transferred by Administrative Order No. 1996-12 were created by the Legislature through enactment of the relevant statutes, the statutes were enacted to vest functions in the board pursuant to the constitutional directive that the board have "leadership and control"

over public education. Thus, the transfer of functions derogates the constitutional powers of the board.

Simply put, although there appears to be no dispute that the Legislature has authority to *repeal* statutorily granted functions, the Governor does not have the authority to transfer such statutorily granted functions that were given to the board pursuant to the constitutional responsibility placed on the board to provide leadership and general supervision over all public education in Michigan. Although this holding does not avoid a constitutional invalidity, I would conclude that this holding is most consistent with the common understanding of art 5, § 2 and art 8, § 3 and is the interpretation that "reasonable minds, the great mass of the people themselves," would give to these provisions.

In sum, I believe that Executive Order Nos. 1996-11 and 1996-12 infringe the board's constitutional powers under Const 1963, art 8, § 3 and that the executive orders at issue are not within the scope of the Governor's authority under Const 1963, art 5, § 2. I would affirm the lower court's permanent injunction against implementation of these orders.

WAYNE COUNTY CHIEF EXECUTIVE v GOVERNOR

Docket No. 199290. Submitted March 17, 1998, at Lansing. Decided June 9, 1998, at 9:05 A.M.

The Wayne County Chief Executive and Wayne County brought an action in the Court of Claims against the Governor of the State of Michigan and others, alleging that between 1988 and 1994 legislation had been signed into law that imposed new requirements on or allowed for new activities by probate courts, that Wayne County Probate Court had implemented the legislation, that the implementation of the new legislative directives had caused the court to incur additional administrative and operating expenses, and that the county had been required to provide the funds for the new expenses because the Legislature had not appropriated or disbursed any funds to pay for the new activities and services of the probate court. The plaintiffs further alleged that the state's failure to fund the costs of the new activities and services was a violation of the requirements of Const 1963, art 9, § 29 and sought as remedies a declaration defining the parties' respective responsibilities regarding the payment of the implementation costs, an injunction requiring the defendants to appropriate and distribute funding for the new activities and services, and money damages to compensate the county for the total costs incurred in implementing the new activities and services. The court, Michael G. Harrison, J., granted summary disposition for the defendants, finding that it did not have subject-matter jurisdiction. The plaintiffs appealed and the defendants cross-appealed.

The Court of Appeals *held*:

1. The second sentence of Const 1963, art 9, § 29 provides: "A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs." The clear intent of art 9, § 29 was to prohibit the state from requiring local units of government to provide new activities or services unless the state provided the funds necessary to cover the costs of the new activities or services.

2. The appropriate response of a local unit of government upon whom the state has imposed the responsibility of providing a new activity or service without appropriating and disbursing the funds necessary to cover the costs of the new activity or service is to refuse to provide the new activity or service and to bring an action for declaratory relief. Accordingly, except for special circumstances, damages are not an appropriate remedy by a local unit of government where the state had mandated a new activity or service and has not appropriated and disbursed the necessary funds to cover the costs of the new program.

3. Const 1963, art 9, § 32 provides that suits to enforce the provisions of art 9, § 29 may be brought by a taxpayer in the Court of Appeals, and MCL 600.308a(1); MSA 27A.308(1)(1) provides that actions brought pursuant to art 9, § 32 may be commenced in either the Court of Appeals or a circuit court having proper jurisdiction, at the option of the party bringing the action. Because the plaintiffs, a county and its chief executive, are representing the interest of taxpayers, they have standing under art 9, § 32 to enforce the provisions of art 9, § 29. Art 9, § 32 in conjunction with the statutory provision limits the choice of the forum in which to seek enforcement of the provisions of the second sentence of art 9, § 29 to either the Court of Appeals or a circuit court of proper jurisdiction. The Court of Claims is a court of limited jurisdiction, and there exists no basis on which to find that jurisdiction to enforce the provisions of the second sentence of art 9, § 29 lies in the Court of Claims. Because damages are not normally a proper remedy in an action to enforce the provisions of the second sentence of art 9, § 29, the jurisdiction of the Court of Claims to hear actions for damages brought against the state does not provide a sound basis for finding that the Court of Claims has jurisdiction to hear such actions. Accordingly, the court properly determined that it did not have subject-matter jurisdiction of the plaintiffs' action.

4. Because the Court of Claims does not have subject-matter jurisdiction of an action to enforce the provisions of the second sentence of art 9, § 29, the three-year limitation period contained in the Court of Claims Act, MCL 600.6452(1); MSA 27A.6452(1), is not applicable to the plaintiffs' action.

5. Because damages are not available as a remedy in an action to enforce the provisions of the second sentence of art 9, § 29, the one-year limitation of MCL 600.308a; MSA 27A.308(1)(3) is not applicable, because statutes of limitation do not bar the bringing of an action for declaratory relief or for injunctive relief to prevent a future wrong.

6. Although the Court of Claims properly determined that it did not have subject-matter jurisdiction of the plaintiffs' action, it erred in dismissing the plaintiffs' cause of action rather than transferring the action to a court of proper venue.

Affirmed in part, modified in part, and remanded.

1. ACTIONS — REMEDIES — DAMAGES — HEADLEE AMENDMENT — NEW ACTIVITIES OR SERVICES.

Damages are not normally an appropriate remedy in an action by a local unit of government brought to enforce the provisions of the Michigan Constitution concerning new activities or services that the state had required the local unit of government to provide but for which no state appropriation or disbursement was made to cover the necessary costs of implementation; the appropriate response of a local unit of government upon whom the state has imposed the responsibility of providing a new activity or service without appropriating and disbursing the funds necessary to cover the costs of the new activity or service is to refuse to provide the new activity or service and to bring an action for declaratory relief (Const 1963, art 9, § 29).

2. COURTS — COURT OF CLAIMS — SUBJECT-MATTER JURISDICTION — HEADLEE AMENDMENT — NEW ACTIVITIES OR SERVICES.

The Court of Claims lacks subject-matter jurisdiction of an action brought by a local unit of government to enforce provisions of the Michigan Constitution concerning new activities or services that the state has required the local unit of government to provide but for which no state appropriation or disbursement was made to cover the necessary costs of implementation (Const 1963, art 9, § 29).

3. ACTIONS — LIMITATION OF ACTIONS — DECLARATORY RELIEF — INJUNCTIVE RELIEF.

Statutes of limitation do not affect the bringing of actions for declaratory relief or injunctive relief to prevent a future wrong.

Fink Zausmer, P.C. (by *David H. Fink, Amy M. Sitner,* and *Gary K. August*), for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Thomas C. Nelson* and *Socorro Guerreo, Katharyn A. Barron,* and *Mitchell J. Wood,* Assistant Attorneys General, for the defendants.

Before: HOEKSTRA, P.J., and JANSEN and GAGE, JJ.

HOEKSTRA, P.J. This appeal raises a number of significant issues involved in pursuing an action based on the Headlee Amendment of the Michigan Constitution, Const 1963, art 9, §§ 25-34. Resolution of these issues requires that we properly construe the second sentence of § 29 of the Headlee Amendment, which states:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

In this regard, we decide the following three questions of law: first, whether money damages are an available remedy for a violation of the second sentence of § 29 of the Headlee Amendment; second, whether the Court of Claims has subject-matter jurisdiction to hear Headlee Amendment claims; and third, whether the one-year period of limitation set forth at MCL 600.308a(3); MSA 27A.308(1)(3) or the three-year period of limitation set forth at MCL 600.6452(1); MSA 27A.6452(1) is applicable to a suit brought pursuant to the second sentence of § 29 of the Headlee Amendment.

We hold that money damages are neither a necessary nor proper remedy in a suit in which a violation of the second sentence of § 29 of the Headlee Amendment is established. We further hold that the Court of Claims lacks subject-matter jurisdiction to hear Headlee Amendment claims, because money damages are, at best, an aberrant remedy for a violation of § 29

and the Court of Claims does not have subject-matter jurisdiction absent a claim for money damages. Finally, we hold that because money damages are not an available remedy in a suit brought pursuant to the second sentence of § 29 of the Headlee Amendment, neither the one-year period of limitation set forth at MCL 600.308a(3); MSA 27A.308(1)(3) nor the three-year period of limitation set forth at MCL 600.6452(1); MSA 27A.6452(1) is applicable to such a suit.

I. FACTS

Between 1988 and 1994, the Governor signed into law a series of bills passed by the Legislature affecting the probate court system.[1] According to plaintiffs, the acts imposed new requirements on or allowed for new activities beyond those required by existing law. The Wayne County Probate Court apparently implemented the acts on their various effective dates. Plaintiffs alleged that the implementation of the acts caused the court to incur additional administrative and operating expenses, which, in turn, plaintiffs were required to provide because the Legislature had not appropriated or disbursed any funds to pay the necessary costs of the new activities and services.

Positing that the acts violated the second sentence of § 29 of the Headlee Amendment, plaintiffs filed suit in the Court of Claims in September 1995. Plaintiffs sought three remedies: a declaratory judgment defin-

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[1] Although plaintiffs identified thirty-one public acts in their complaint, they voluntarily dismissed the action with regard to eleven of such acts, leaving the following twenty public acts relevant to this litigation: 1988 PA 13, 1988 PA 76, 1988 PA 205, 1988 PA 398, 1989 PA 67, 1989 PA 69, 1989 PA 71, 1990 PA 313, 1990 PA 314, 1991 PA 90, 1991 PA 93, 1991 PA 98, 1993 PA 259, 1993 PA 361, 1994 PA 202, 1994 PA 209, 1994 PA 222, 1994 PA 239, 1994 PA 264, and 1994 PA 340.

ing the parties' respective responsibilities regarding the payment of the implementation costs in light of the Headlee Amendment, a mandatory injunction requiring defendants to provide for the appropriation and distribution of funding for the new activities and services, and money damages to compensate plaintiffs for the total costs incurred in implementing the acts beginning with the fiscal year 1991-92. The parties filed motions for summary disposition on various grounds, but the ultimate decision of the Court of Claims was to dismiss sua sponte plaintiffs' suit for a lack of subject-matter jurisdiction.

II. MONEY DAMAGES

We first address whether a plaintiff in a suit brought pursuant to the second sentence of § 29 of the Headlee Amendment may recover money damages. This case is properly analyzed as a case brought pursuant to the second sentence of § 29 because plaintiffs alleged in their complaint that the acts required the Wayne County Probate Court to implement new activities or services or increase its level of existing activities or services. We address the money damages issue before the subject-matter jurisdiction issue because whether money damages are an available remedy is an inquiry necessarily preceding a determination of whether the Court of Claims has subject-matter jurisdiction.

We review de novo constitutional issues and construction. *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998). As our Supreme Court has stated, in order to properly interpret the meaning of the Headlee Amendment, "we must ascertain the intent of the voters who passed [it]." *Durant v State*

Bd of Ed, 424 Mich 364, 378; 381 NW2d 662 (1985). The starting point for that inquiry is "the language of the constitution itself." *Id.* However, the Headlee Amendment does not expressly provide for damages as a remedy. The sole reference in the Headlee Amendment to the remedy contemplated by the Legislature and adopted by the voters is found in § 32, the standing provision of the amendment. Const 1963, art 9, § 32. This section states that any taxpayer of the state shall have standing "to enforce" the provisions of the amendment, although the section does not elaborate on the type of enforcement intended.

" 'While intent must be inferred from the language used, it is not the meaning of the particular words only in the abstract or their strictly grammatical construction alone that governs.' " *Livingston Co v Dep't of Management & Budget*, 430 Mich 635, 643; 425 NW2d 65 (1988) (quoting *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 [1979]). Rather, " '[t]he words are to be applied to the subject matter and to the general scope of the provision, and they are to be considered in light of the general purpose sought to be accomplished or the evil sought to be remedied by the constitution.' " *Id.* In general, the subject matter of § 29 reflects an effort on the part of the voters to forestall any attempt by the Legislature to shift fiscal responsibility for services to the local government, once state revenues were limited by the Headlee Amendment, in order to save the money the state would have had to appropriate to provide the services itself. *Durant*, *supra* at 379. The scope of the section reveals that it was specifically intended to encompass two different injuries. As the great mass of people surely understood from the language of the section,

claims brought pursuant to § 29 arise from situations involving one of two harms: either the withdrawal of state financial support where such support of state-mandated local activities was already being provided or the introduction of new local obligations without accompanying and offsetting state appropriations. *Livingston, supra* at 644.

The bifurcated nature of the Headlee Amendment is derived from its express language. The first sentence of § 29 states that "[t]he state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law." The second sentence of § 29 states:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

Thus, as a threshold matter, we are persuaded from the subject matter and scope of § 29 that courts should construe the phrase "to enforce" in § 32 differently depending on which sentence of § 29 a claimant invokes.

With regard to the type of enforcement mechanism, we next examine the purpose sought to be accomplished by the second sentence of § 29. In general, the purpose of this sentence of § 29 was to ensure that the state would fund any new activity or service or an increase in the level of any activity or service required by the state. *Livingston, supra* at 648. The drafters' notes to the amendment state that " '[n]o

mandated activity or service should be legally binding on any local unit until the appropriations for such mandated activity or service is made and disbursed to the applicable local units,' " as quoted in *Schmidt v Dep't of Ed*, 441 Mich 236, 257, n 24; 490 NW2d 584 (1992). For this reason, our Supreme Court, albeit in dicta, noted that any perceived "Hobson's choice" between raising taxes or cutting programs is illusory because the local unit of government retains control of its resources and has a "real choice" in whether to offer an unfunded "mandated" program. *Id.* at 260, n 28.

Simply put, cases brought pursuant to the second sentence of § 29 address future services or activities. *Durant*, *supra* at 379. A plaintiff who brings suit pursuant to the second sentence of § 29 is seeking funding for the future implementation of the newly mandated service or activity. The alleged injury to be remedied is not the state's past nonperformance of a financial obligation. Rather, because of the parties' disagreement, a court has yet to determine and impose the obligation. Thus, the remedy required in a case brought pursuant to the second sentence comprises a resolution of the parties' prospective rights and obligations by declaratory judgment. The specific course of action a claimant faced with an unfunded new activity or service should take is to refuse to fund the activity or service in question, while at the same time seeking a declaratory judgment on its obligation under the Headlee Amendment to fund those services.[2] *Durant v Michigan*, 456 Mich 175, 205, 210;

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[2] For example, defendants attached to their brief on appeal several letters from persons in the probate court system written as early as March 1989. The letters evidence awareness that the new acts would increase the

566 NW2d 272 (1997). The state would then either have to fund the activity, remove the mandate, or obtain a stay from the judiciary. *Id.* at 205-206.

Therefore, the subject matter, scope, and purpose of § 29 of the Headlee Amendment convince us that in cases establishing a violation of the second sentence of § 29 of the Headlee Amendment, an award of money damages is neither necessary nor proper.[3] In so holding, we find that a declaratory judgment alone may be sufficient to compel obedience to the constitutional mandate of § 29. However, pursuant to MCR 2.605(F), a plaintiff could also seek "other relief" in the form of an injunction enjoining the state from requiring the local unit of government to provide the new activity or service. Through declaratory and injunctive relief, the courts effectively implement the phrase "to enforce" in § 32 of the Headlee Amendment.

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costs that plaintiffs allege Wayne County was required to incur. Nonetheless, the Wayne County Probate Court implemented the acts, and plaintiffs did not file suit until September 1995. Despite plaintiffs' sympathetic position in incurring this financial burden, we believe that the only possible avenue for attacking the new acts was for plaintiffs to maintain the status quo and seek a judicial determination of the obligation, if any, to implement the new mandates.

[3] In so holding, we decline to address the merits of two related issues presented by defendants because the issues are moot: whether plaintiffs incurred any money damages because the county refused to increase funding to the probate court, and whether plaintiffs waived any right to money damages by voluntarily funding the new activities or services. For reasons other than mootness, we also decline to address defendants' argument that the Headlee Amendment is inapplicable to this case because the burden of funding the new activities and services falls on the probate court, which is part of state government, and not on plaintiffs, a local unit of government and its chief executive. We believe that justice would be better served if, upon transfer, the parties litigated this issue in light of our holding that an award of money damages is neither necessary nor proper in a case establishing a violation of the second sentence of § 29 of the Headlee Amendment.

Although this is an issue of first impression for Michigan courts in that it involves the appropriate remedy for a claim brought pursuant to the second sentence of § 29 of the Headlee Amendment, our analysis and holding are supported by our Supreme Court's recent decisions. First, in *Durant*, 456 Mich 210, n 39, the Court observed that "declaratory relief alone may be the appropriate method of 'enforcing' § 29, particularly in cases of new mandates where the lack of entrenched obligations gives units of local government fairly free choice not to commence an unfunded state mandate." Next, in *Oakland Co v Michigan*, 456 Mich 144, 167; 566 NW2d 616 (1997), the Court reasoned that "[i]f monetary damages were routinely available for § 29 violations, additional taxation may be necessary to fund the damage award," a result that would be inconsistent with the "raison d'être of Headlee."

We are cognizant that our Supreme Court's decision in *Durant*, 456 Mich 203-211, identifies a narrow window through which monetary relief may sometimes be available in cases brought pursuant to the first sentence of § 29 that arise from underfunding of an existing activity or service and other exceptional facts, such as the "prolonged recalcitrance" of the defendants. There, the Court stated that "[t]he prolonged 'recalcitrance' of the state in shirking its obligations to fund state-mandated services clearly cannot be cured by declaratory relief alone." *Durant*, 456 Mich 210. Inasmuch as it was a remedy "tailored to fit" what the Court hoped was a "very unusual violation," *id.* at 217-218, the money damages remedy may be limited to the plaintiff in the *Durant* controversy, *id.* at 227 (BRICKLEY, J., concurring in part and dissent-

ing in part). In any event, on the basis of our analysis, we do not find the same window open in cases brought pursuant to the second sentence of § 29, cases that arise from a lack of funding for a new activity or service or an increase in the level of any activity or service. Indeed, where a local unit of government refuses to fund the services in question, there is no financial advantage gained from recalcitrance by the state, whether prolonged or otherwise.

Therefore, to the extent that, upon transfer of this matter to a court with proper subject-matter jurisdiction, plaintiffs are able to prove a violation of the second sentence of § 29 of the Headlee Amendment, plaintiffs will not be entitled to money damages as a remedy, but will be limited to the declaratory remedies we have outlined.

III. SUBJECT-MATTER JURISDICTION

Having decided that a plaintiff in a suit brought pursuant to the second sentence of § 29 of the Headlee Amendment may not recover money damages, we now turn to the second issue of first impression, which is whether the Court of Claims has subject-matter jurisdiction to hear Headlee Amendment suits. Subject-matter jurisdiction is a question of law that we review de novo. *WA Foote Memorial Hosp v Dep't of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995).

The term jurisdiction refers to the power of a court to act and the authority a court has to hear and determine a case. *In re Waite*, 188 Mich App 189, 196-197; 468 NW2d 912 (1991). In this regard, the Headlee Amendment states that "[a]ny taxpayer shall have standing to bring suit in the Michigan State Court of

Appeals to enforce the provisions of Sections 25 through 31." Const 1963, art 9, § 32. Additionally, the Legislature provided a plaintiff with the option of invoking circuit court jurisdiction over Headlee Amendment claims. MCL 600.308a(1); MSA 27A.308 (1)(1) states that "[a]n action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action." This statute was apparently a legislative response to this Court's decision in *Waterford School Dist v State Bd of Ed*, 98 Mich App 658, 664; 296 NW2d 328 (1980), that in the absence of a specific grant of exclusivity to the Court of Appeals, the circuit court also had concurrent jurisdiction over a suit based on the Headlee Amendment where standing was otherwise present. See *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994). Consequently, a plaintiff may properly file its case in either this Court or the circuit court.

By drawing an analogy to this Court's holding in *Waterford* that the circuit court has concurrent jurisdiction over Headlee claims, plaintiffs opine that the Legislature has also conferred concurrent jurisdiction on the Court of Claims, and that the Court of Claims in this case improperly held otherwise. Plaintiffs concede that this Court's holding in *Waterford* addressed the circuit court's concurrent jurisdiction with this Court and not the concurrent jurisdiction of the Court of Claims with this Court. Nonetheless, plaintiffs argue that the opinion stands for "general principles of jurisdiction" that would apply to the Court of Claims. Plaintiffs point out that § 32 does not state

that it establishes *exclusive* jurisdiction in the Court of Appeals; therefore, plaintiffs argue that MCL 600.308a(1); MSA 27A.308(1)(1), which references suits brought under § 32, cannot establish exclusive jurisdiction in either the circuit court or this Court. Moreover, plaintiffs argue that they cannot be constrained by the jurisdictional choices of § 32 because that section refers only to a suit filed by a "taxpayer" and the county is not a taxpayer but a local unit of government.

Initially, we find that because plaintiffs are effectively representing the interests of taxpayers, § 32 properly grants plaintiffs standing to bring this suit pursuant to § 29 of the Headlee Amendment. Several cases of this Court have found that both entities and persons bringing a claim for relief under § 29 should be treated similarly. See, e.g., *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 203 Mich App 537, 542; 513 NW2d 202 (1994), rev'd on other grounds 450 Mich 119; 537 NW2d 596 (1995); *East Jackson Public Schools v Michigan*, 133 Mich App 132, 138; 348 NW2d 303 (1984); *Durant v Dep't of Ed*, 110 Mich App 351, 353; 313 NW2d 571 (1981), rev'd on other grounds 413 Mich 862 (1982). See also *Oakland Co*, *supra* at 167 (plurality opinion).

Additionally, we find that art 9, § 32 and MCL 600.308a(1); MSA 27A.308(1)(1) together limit plaintiffs' jurisdictional choices to either this Court or the circuit court. We are not persuaded by plaintiffs' expansion of our holding in *Waterford*. The holding in *Waterford* was premised upon the broad jurisdictional grant accorded to the circuit court; therefore, it cannot be extended by analogy to establish concurrent jurisdiction in the Court of Claims, which does not

have the same broad jurisdictional grant. Circuit courts are created by the state constitution with general and original jurisdiction over all matters not prohibited by law. Const 1963, art 6, § 13; MCL 600.605; MSA 27A.605. In contrast, the Court of Claims is created by statute and has only limited jurisdiction. MCL 600.6419(1); MSA 27A.6419(1); *Dunbar v Dep't of Mental Health*, 197 Mich App 1, 5; 495 NW2d 152 (1992). Indeed, in the statute establishing the Court of Claims, the Legislature specifically acknowledged the limited jurisdiction it was granting in providing that "this chapter shall not deprive the circuit court of this state of jurisdiction over . . . actions against state agencies based upon the statues of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court." MCL 600.6419(4); MSA 27A.6419(4).

Plaintiffs also cite our Supreme Court's holding in *Silverman v Univ of Michigan Bd of Regents*, 445 Mich 209, 212; 516 NW2d 54 (1994), as support for their argument that the Court of Claims is the proper forum in which to seek claims of money damages from the state or its agencies. For the reasons already discussed, this argument is without merit because money damages are not available in suits brought pursuant to the second sentence of § 29 of the Headlee Amendment. Regarding suits brought pursuant to the first sentence of § 29 of the amendment, our Supreme Court held that money damages are available only on an extremely limited basis. *Durant*, 456 Mich 217-218; *Oakland Co*, *supra* at 166-167 (plurality opinion), 168 (MALLETT, C.J.). Therefore, money damages are, at best, an aberrant remedy for violations of § 29 of the Headlee Amendment. Conse-

quently, we are not persuaded that plaintiffs' argument justifies concluding that the Court of Claims has subject-matter jurisdiction of Headlee Amendment claims.[4] Therefore, the Court of Claims properly found that it lacked subject-matter jurisdiction to hear this case.

IV. STATUTE OF LIMITATIONS

Although an order of the Court of Claims regarding the applicable statute of limitations is consequently of no force or validity, *Waite, supra* at 197, we nonetheless decide the issue to offer the parties guidance. In the interest of judicial economy, this Court is permitted to decide a question of law when the record is sufficiently developed to resolve the issue. See, e.g., *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

According to the parties, there are two competing periods of limitation in this case. Defendants assert that the applicable period is one year, as set forth at MCL 600.308a(3); MSA 27A.308(1)(3), which states that a "taxpayer shall not bring or maintain an action under this section unless the action is commenced within 1 year after the cause of action accrued." Plaintiffs rely upon the three-year period set forth at MCL 600.6452(1); MSA 27A.6452(1), which states that "[e]very claim against the state, cognizable by the

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[4] Moreover, in *Silverman, supra* at 217, our Supreme Court held that the Court of Claims lacks jurisdiction over a case not including a claim for money damages. Therefore, we find that a contrary holding in this case regarding the subject-matter jurisdiction over Headlee Amendment claims would have impractical results. For example, a plaintiff who files in the Court of Claims and pleads for relief in the form of money damages in its complaint would be required to refile its case in either the circuit court or this Court if the Court of Claims dismissed its claim for money damages.

court of claims, shall be forever barred unless the claim is filed with the clerk of the court or suit instituted thereon in federal court as authorized in section 6440, within 3 years after the claim first accrues." We hold that neither period is applicable to this suit.

First, MCL 600.6452(1); MSA 27A.6452(1) is part of the Court of Claims Act, MCL 600.6401 *et seq.*; MSA 27A.6401 *et seq.* In light of our holding that the Court of Claims lacks subject-matter jurisdiction to hear Headlee Amendment claims, we have no reason to apply the statute of limitations governing actions brought in the Court of Claims. Next, in light of our holding that money damages are not an available remedy for a violation of the second sentence of § 29 of the Headlee Amendment, plaintiffs' claim is not barred by the period set forth at MCL 600.308a(3); MSA 27A.308(1)(3), because the statute of limitations does not affect a claim for declaratory relief. *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 128-129; 537 NW2d 596 (1995). Similarly, the statute of limitations does not affect a claim for injunctive relief to prevent a future wrong. *Id.* at 127-128. We therefore hold that the periods of limitation set forth at MCL 600.308a(3); MSA 27A.308(1)(3) and MCL 600.6452(1); MSA 27A.6452(1) are inapplicable to a suit brought pursuant to the second sentence of § 29 of the Headlee Amendment. Inasmuch as plaintiffs' cause of action is limited to such declaratory or injunctive relief, it is not barred.

V. CONCLUSION

We affirm the order of the Court of Claims finding that it lacked subject-matter jurisdiction, but modify that aspect of its order dismissing plaintiffs' cause of

action pursuant to MCR 7.216(A)(7) to instead provide that the action is transferred to a court of proper venue, as decided following an opportunity for the parties to be heard concerning the venue question. Plaintiffs shall be liable for costs pursuant to MCR 2.223(B)(1) but shall not be held liable for reasonable compensation for defendants' expenses, because this appeal raises questions of public interest and importance, including constitutional questions not considered before.

Remanded to the Court of Claims for further proceedings consistent with this opinion. We do not retain jurisdiction.

In re HERBACH ESTATE

HERBACH v HERBACH

Docket No. 199167. Submitted February 11, 1998, at Detroit. Decided June 9, 1998, at 9:10 A.M. Leave to appeal sought.

Walter Herbach died on January 25, 1995, and Barry Herbach, his son, who was named personal representative of Walter's estate in a will executed in March 1982, commenced probate proceedings in the Oakland County Probate Court in February 1995. In the will, Walter devised $50,000 to Eileen Chudler, as a "friend." Eileen and Walter were married in April 1983 and remained married until Walter's death. In July 1995, Eileen Herbach filed a petition seeking a family allowance. Five days later, the respondent personal representative notified the petitioner of her right to request a family allowance and of her right to make an election under MCL 700.282; MSA 27.5282. In July 1995, the probate court, Sandra G. Silver, J., awarded the petitioner a prospective family allowance for an uncertain duration. In February 1996, the probate court ordered that any family allowance payments made after January 25, 1996, would be charged as advancements against the petitioner's interest in the estate. In March 1996, the probate court denied the petitioner's request for retroactive nonchargeable family allowance payments for the five months immediately following Walter's death. The petitioner notified the probate court within the statutory period for making her election under § 282 that she intended to take her statutory share of the estate rather than abide by the terms of the will. The petitioner also sought a share of the estate as a pretermitted spouse under MCL 700.126; MSA 27.5126. The probate court ruled that the petitioner could take as a pretermitted spouse if she was named in the will, as long as she was not named in the will in contemplation of marriage. That issue was set for trial along with the issue whether Walter transferred assets to the petitioner outside the will in lieu of a testamentary disposition. A jury determined that Walter did not contemplate marriage to the petitioner when he executed his will, that Walter provided for the petitioner by transfers outside the will, and that the transfers were made in lieu of a testamentary disposition. The probate court ruled that the petitioner was not entitled to take as a pretermitted

spouse. After the trial, the probate court granted the respondent's motion for reimbursement from the petitioner of the family allowance paid after January 25, 1996, agreed with the respondent's claim that the nontestamentary transfer to the petitioner reduced the value of her elective share to zero, denied the petitioner's request to withdraw her election of the statutory spouse's share, and ruled that the petitioner was not entitled to any amount of the estate pursuant to her election. The petitioner appealed.

The Court of Appeals *held*:

1. The petitioner is precluded as a matter of law from taking as a pretermitted spouse because she was named in the will. Under the plain language of § 126, the petitioner is not eligible to take a share as an omitted spouse because she was not left out of or unmentioned in the will. The statute makes no distinction between a devise made to a future spouse in contemplation of marriage and a devise made to a future spouse as a friend or in a different capacity. The statute simply requires a failure by the testator to provide for a surviving spouse in any capacity in order for the surviving spouse to be a pretermitted spouse. The petitioner was not entitled to a trial regarding her right to take as a pretermitted spouse.

2. The petitioner was entitled pursuant to MCL 700.287; MSA 27.5287 to receive one full year of nonchargeable family allowance payments from the time of the testator's death. The probate court erred in failing to grant the petitioner's request for retroactive payments for the five months immediately following her husband's death. The probate court's order must be reversed and the matter must be remanded for an order directing the respondent to pay the petitioner a reasonable family allowance for those five months.

3. The probate court did not err in denying the petitioner's request to withdraw her election of the statutory spouse's share and to take under the will instead. A surviving spouse generally should not be permitted to withdraw an election where the statutory period for making the election has passed.

Affirmed in part, reversed in part, and remanded.

1. APPEAL — GROUNDS FOR AFFIRMANCE — CROSS APPEALS.

A party that has not sought to cross appeal cannot obtain a decision on appeal more favorable than that rendered by the lower court; a cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court.

2. WILLS — PRETERMITTED SPOUSES.

The pretermitted spouse statute makes no distinction between a devise made to a future spouse in contemplation of marriage and

one made to a future spouse as a friend or in a different capacity; the statute simply requires a failure by the testator to provide in a will for a surviving spouse in any capacity in order for the surviving spouse to be considered a pretermitted spouse (MCL 700.126; MSA 27.5126).

3. WILLS — FAMILY ALLOWANCE PAYMENTS — RETROACTIVE GRANT OF PAYMENTS.

The family allowance statute provides that a nonchargeable family allowance shall be granted for one full year upon petition to the probate court following a testator's death; the statute does not preclude a retroactive grant of such payments for the period between the time of the death and the time of the filing of the petition where the total nonchargeable allowance is for one year (MCL 700.287; MSA 27.5287).

4. WILLS — SPOUSE'S ELECTION — WITHDRAWAL OF ELECTIONS.

The spouse's election statute provides that a surviving spouse of a decedent domiciled in Michigan who dies testate may elect to either abide by the terms of the will or take a portion of the share that would have passed to the surviving spouse had the decedent died intestate; the surviving spouse must make the election within sixty days after the date for presentment of claims or within sixty days after the filing of the proof of service of the inventory upon the surviving spouse, whichever is later; a surviving spouse generally should not be permitted to withdraw an election after the statutory period for making the election has passed (MCL 700.282; MSA 27.5282).

Bassey and Selesko, P.C. (by *Robert C. Zack* and *Mark Merlanti*), for the petitioner.

Shulman and Kolin, PLC (by *Marjorie L. Kolin* and *Leonard B. Shulman*), for the respondent.

Before: DOCTOROFF, P.J., and REILLY and G. S. ALLEN*, JJ.

REILLY, J. Petitioner Eileen Herbach appeals as of right from a probate court judgment denying her claim to take as a pretermitted spouse, ruling that she

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

was not entitled to take any amount of the estate of Walter B. Herbach, deceased, pursuant to an elective share, ordering her to reimburse respondent Barry Herbach, personal representative of the decedent's estate, for certain family allowance payments made to her by the estate, and ordering her to pay $700 in costs and attorney fees. We affirm in part, reverse in part, and remand.

The testator, Walter Herbach, executed his last will and testament on March 13, 1982. In his will he devised $50,000 to petitioner, as a "friend." Petitioner and the testator were married in April 1983 and remained married until the testator's death on January 25, 1995. The testator's son, respondent Barry Herbach, was named as the personal representative of the testator's estate and probate proceedings were commenced in February 1995.

On June 15, 1995, petitioner filed a petition with the probate court seeking a family allowance. See MCL 700.287; MSA 27.5287.[1] Five days later, respondent

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[1] The family allowance statute provides:

> (1) In addition to the right to homestead allowance and exempt property, the surviving spouse of a decedent who was domiciled in this state and minor children of a decedent whom the decedent is legally obliged to support are entitled to a reasonable family allowance out of the estate for their maintenance during the progress of the settlement of the estate according to their circumstances but never for a longer period than until their shares to the estate shall be assigned to them nor for more than 1 year after the death of the decedent in an insolvent estate. On showing of necessity, the allowances may be continued from time to time in a solvent estate beyond the year, but the allowances beyond the year shall be charged as advancements from the estate against the interest of the spouse or against the interests of the minor children, as the case may be. The allowance shall be granted upon petition to the court and after notice as provided by supreme court rule. The allowance is payable to the surviving spouse for the use of the surviving spouse and minor children; otherwise to the minor children, their

notified petitioner of her right to request a family allowance and of her right to make an election under MCL 700.282; MSA 27.5282.[2] Petitioner sought a nonchargeable family allowance for a period of one

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fiduciaries, or other persons having their care and custody. If a minor child is not living with the surviving spouse, the allowance may be made to the minor child or to the fiduciary or other person having care and custody of the minor child, as his or her needs may appear. The family allowance paid for the 1 year is exempt from and has priority over all claims and is not charged against any benefit or share passing to the surviving spouse or minor children by the will of the decedent, by intestate succession, or otherwise.

(2) Notice of hearing on a petition for allowance for the support of a spouse or minor children shall be personally served upon the personal representative of the estate of the decedent at least 5 days before the hearing on the petition, unless the personal representative appears in court or in writing waives the notice. If the spouse is the personal representative, notice of hearing on the petition shall be given to interested parties as provided by supreme court rule. [MCL 700.287; MSA 27.5287.]

[2] The spouse's election statute provides:

(1) If a decedent who was domiciled in this state dies testate leaving a surviving spouse, the fiduciary appointed to represent the estate, before the date for presentment of claims, shall serve notice on the surviving spouse of the spouse's right to an election as provided by this section and to file with the court an election in writing that the spouse elects 1 of the following:

(a) That the spouse will abide by the terms of the will.

(b) That the spouse will take ½ of the sum or share that would have passed to the spouse had the testator died intestate, reduced by ½ of the value of all property derived by the spouse from the decedent by any means other than testate or intestate succession upon the decedent's death.

(c) If a widow, that the spouse will take her dower right under sections 1 to 29 of chapter 66 of the revised statutes of 1846, as amended.

(2) The surviving spouse shall be entitled to only 1 election choice under subsection (1) unless the contrary plainly appears by the will to be intended by the testator. The right of election of the surviving spouse may be exercised only during the lifetime of the surviving spouse. The election shall be made within 60 days after the date for presentment of claims, or within 60 days after filing proof of service of the inventory upon the surviving spouse, whichever is later.

year. On July 5, 1995, petitioner was awarded a prospective family allowance in the amount of $6,500 a month for an uncertain duration. In November 1995, the probate court reduced the monthly rate to $5,500. Then, on February 22, 1996, the probate court issued an order providing that any family allowance payments made to petitioner after January 25, 1996 (the one-year anniversary of the testator's death) would be charged as advancements against petitioner's interest in the estate. On March 7, 1996, petitioner filed a petition for nonchargeable family allowance payments retroactive to the date of the testator's death in which she asserted that she would have requested family allowance payments sooner if respondent had not delayed in notifying her of the commencement of the proceedings and of her right to receive a family allow-

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(3) Notice of right of election shall be served upon the decedent's spouse, if any, and proof of that notice shall be filed with the court. An election as provided by this section may be filed in lieu of service of notice and filing of proof.

(4) In the case of a legally incapacitated person, the right of election may be exercised only by order of the court in which a proceeding as to that person's property is pending, after finding that exercise is necessary to provide adequate support for the legally incapacitated person during that person's life expectancy.

(5) The surviving spouse of a decedent who was not domiciled in this state shall be entitled only to election against the will as may be provided by the law of the place in which the decedent was domiciled at the time of death.

(6) As used in subsection (1), "property derived by the spouse from the decedent," includes all of the following transfers:

(a) A transfer made within 2 years of decedent's death to the extent that the transfer is subject to federal gift or estate taxes.

(b) A transfer made before the date of death subject to a power retained by the decedent which would make the property, or a portion of the property, subject to federal estate tax.

(c) A transfer effectuated by the death of the decedent through joint ownership, tenancy by the entireties, insurance beneficiary, or similar means. [MCL 700.282; MSA 27.5282.]

ance. The probate court denied petitioner's request for retroactive payments without explanation.

Within the statutory period for making her election as a surviving spouse pursuant to MCL 700.282; MSA 27.5282, petitioner notified the probate court that she intended to take her elective statutory share of the estate rather than abide by the terms of the will. Petitioner also filed a petition with the probate court to take a share of the estate as a pretermitted spouse under MCL 700.126; MSA 27.5126.[3] Respondent argued that petitioner was not entitled to take as a pretermitted spouse because she had not been omitted from the will. In an opinion and order, the probate court ruled that petitioner could take as a pretermitted spouse if she was named in the will, as long as she was not named in the will in contemplation of marriage. Because the testator's intent in naming petitioner in his will was a question of fact, the issue was set for trial. The other question of fact to be resolved at trial was whether the testator transferred assets to petitioner outside the will in lieu of a testamentary disposition. After a six-day trial, a jury determined in a special verdict (1) that the testator did not contemplate marriage to petitioner when he executed his will, (2) that the testator provided for petitioner by transfers outside the will, and (3) that these transfers were made in lieu of a testamentary disposition. Accordingly, because of the second and third findings of the jury, the probate court ruled that petitioner was not entitled to take as a pretermitted spouse.

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[3] Petitioner's decision to take her elective share of the estate did not operate as a waiver of her right to pursue the larger share potentially available to her as a pretermitted spouse. See *In Re Cole Estate*, 120 Mich App 539, 543; 328 NW2d 76 (1982).

Shortly after the trial, respondent moved for reimbursement of the family allowance payments chargeable as advancements against petitioner's interest in the estate. Respondent asserted in his motion that, in addition to foreclosing petitioner's claim as a pretermitted spouse, the testator's nontestamentary transfers to petitioner also reduced the value of her elective share to zero. The probate court granted respondent's motion and ordered petitioner to reimburse the estate $44,000 for family allowance payments paid after January 25, 1996. The probate court also denied petitioner's request to withdraw her election of the statutory spouse's share and to take under the will instead. Finally, the probate court ruled that petitioner was not entitled to any amount of the estate pursuant to her election.

On appeal, petitioner first argues that the probate court erred in instructing the jury that petitioner bore the burden of proof on the issues whether the testator provided for petitioner outside the will and whether the testator intended those transfers to be in lieu of a testamentary provision. Because we are persuaded that petitioner was not entitled to a trial with regard to the issue of her right to take as a pretermitted spouse, we will not address petitioner's argument regarding the proper allocation of the burden of proof.

Instead, we agree with respondent's contention that because petitioner was named in the will, she is precluded as a matter of law from taking as a pretermitted spouse. This argument was rejected by the probate court and is not now raised in a cross appeal. Nevertheless, we may address the argument because respondent is merely urging an alternative ground for

affirming the result reached by the probate court. Although a cross appeal is necessary to obtain a decision more favorable than that rendered by the lower tribunal, a cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court. *Middlebrooks v Wayne Co*, 446 Mich 151, 166, n 41; 521 NW2d 774 (1994); *Ass'n of Businesses Advocating Tariff Equity v Public Service Comm*, 192 Mich App 19, 24; 480 NW2d 585 (1991). But see *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993).

The application of Michigan's pretermitted spouse statute to a surviving spouse named in the will, but not named in contemplation of marriage, is an issue of first impression in Michigan. The statute provides, in pertinent part:

> If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate the omitted spouse would have received if the decedent did not leave a will, unless it appears from the will that the omission was intentional, or unless the testator provided for the spouse by transfers outside the will and the intent that the transfers were in lieu of a testamentary provision is shown by declarations of the testator, by the amount of the transfers, or by other evidence. [MCL 700.126(1); MSA 27.5126(1).]

The primary goal of judicial interpretation of statutes is to ascertain the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The first criterion in determining intent is the specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547,

567; 495 NW2d 539 (1993). The Legislature is presumed to have intended the meaning it plainly expressed. *McFarlane v McFarlane*, 223 Mich App 119, 123; 566 NW2d 297 (1997). If the language used by the Legislature is clear and unambiguous, no further judicial interpretation of the statute is permitted. *Id.*

Unless defined in the statute, every word or phrase of a statute should be understood according to the common and approved usage of the language, taking into account the context in which the words are used. MCL 8.3a; MSA 2.212(1); *Yaldo v North Pointe Ins Co*, 217 Mich App 617, 621; 552 NW2d 657 (1996). When the words are not defined in the statute, a court may consult dictionary definitions. *Id. Webster's New Collegiate Dictionary* (1977) defines "omit," in part, as "to leave out or leave unmentioned." In this case, it is undisputed that petitioner, who claims to be an "omitted spouse," was not left out of the will or left unmentioned in the will. Accordingly, under the plain language of the pretermitted spouse statute, petitioner is not eligible to take a share because she was not "omitted" from the testator's will.

Some appellate courts addressing similar provisions in other jurisdictions have allowed surviving spouses to recover against antenuptial wills in cases where they were named in the will in some capacity other than as a spouse. See *Estate of Ganier v Estate of Ganier*, 418 So 2d 256 (Fla, 1982); *In re Estate of Groeper*, 665 SW2d 367 (Mo App, 1984); see also *Miles v Miles*, 312 SC 408; 440 SE2d 882 (1994). These courts have reasoned that such constructions are necessary to protect the surviving spouse from inadvertent disinheritance. *Gainer*, *supra* at 258; *Groeper*,

supra at 369. To reach this result, however, these courts have been forced to read a "contemplation of marriage" requirement into their respective pretermitted spouse statutes, allowing surviving spouses named in the will (but not named in contemplation of marriage) to take against the will as "omitted" spouses, or spouses not "provided for" in the will. See *Gainer*, *supra* at 260; *Groeper*, *supra* at 369; *Miles*, *supra* at 409-411. Other foreign courts have interpreted similar pretermitted spouse statutes more narrowly. See *In re Keeven Estate*, 110 Idaho 452; 716 P2d 1224 (1986); *In re Christensen Estate*, 655 P2d 646 (Utah, 1982). These courts have reasoned that, because the "contemplation of marriage" requirement figured prominently in the common law, its omission from a subsequent statute on the subject should be deemed intentional, and its addition by way of a judicial decision would be inappropriate. *Keeven*, *supra* at 458; *Christensen*, *supra* at 649. We are persuaded that the reasoning of these latter courts is more in accordance with our principles of statutory construction.

Contrary to petitioner's contention, our decision is consistent with *In re McPeak Estate*, 210 Mich App 410; 534 NW2d 140 (1995), a case in which this Court was called on to interpret Michigan's pretermitted heir statute, MCL 700.127; MSA 27.5127. In holding that the testator's adopted daughter was not a pretermitted heir because she had been provided for in the testator's will, this Court noted as a matter of fact that the testator was contemplating her adoption at the time of the execution of the will. *McPeak*, *supra* at 414. However, the Court also specifically noted:

> Our holding comports with the plain language of the pretermitted heir statute . . . . The statute makes no distinction between a devise made to a child as a prospective adoptee and a devise made to a child as a stepchild or in a different status. Rather, the statute simply requires a failure by the testator to provide for his child. [*Id.* at 414-415.]

Likewise, the pretermitted spouse statute makes no distinction between a devise made to a future spouse in contemplation of marriage and a devise made to a future spouse as a friend or in a different capacity. Rather, the statute simply requires a failure by the testator to provide for a surviving spouse in any capacity. If the Legislature sought to include surviving spouses named in the will in some capacity other than spouse within the purview of the pretermitted spouse statute, it could have done so by including a "contemplation of marriage" requirement in the plain language of the statute.[4] Finally, we note that Michi-

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[4] For example, the 1993 amended version of the Uniform Probate Code contains an explicit "contemplation of marriage" requirement in its "pretermitted spouse" section, which provides:

> (a) If a testator's surviving spouse married the testator after the testator executed his [or her] will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he [or she] would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes under Sections 2-603 or 2-604 to such a child or to a descendant of such a child, unless:
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> (1) it appears from the will or other evidence that the will was *made in contemplation of the testator's marriage to the surviving spouse*;
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> (2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or
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> (3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary

gan's elective share provision, which does not require omission from the testator's will, is available to offer some protection to surviving spouses like petitioner. See MCL 700.282; MSA 27.5282.

Because petitioner was named in the will, she could not succeed in her claim to be a pretermitted spouse. Therefore, because she was not entitled to a trial regarding the issue of her right to take as a pretermitted spouse, she is not entitled to the relief requested on appeal. Moreover, we need not address her second argument regarding the probate court's exclusion of expert testimony during the trial.

Petitioner next argues that the probate court erred in terminating petitioner's nonchargeable family allowance after only seven months. Although petitioner frames this issue in terms of her right to a continuation of nonchargeable monthly family allowance payments during the five months immediately following the one-year anniversary of the testator's death, her argument is based on the fact that she did not receive any nonchargeable monthly family allowance payments during the five months immediately following the testator's death. Accordingly, we will construe this issue as one contesting the probate court's decision to deny her petition for nonchargeable family

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provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under Sections 2-603 or 2-604 to a descendant of such a child, abate as provided in Section 3-902. [Uniform Probate Code, § 2-301 (emphasis added).]

allowance payments retroactive to the date of the testator's death. Cast in these terms, we agree that the probate court was in error. Whether petitioner was entitled to a retroactive spousal allowance is a question of statutory interpretation. Statutory interpretation is a question of law that is reviewed de novo. *Rose Hill Center, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997).

The issue whether a surviving spouse, after filing a petition for family allowance payments, is entitled to payments retroactive to the time of the decedent's death has not been squarely addressed by Michigan's appellate courts. Once again, our analysis is guided by the plain language employed by the Legislature. Under the family allowance statute, MCL 700.287; MSA 27.5287, a surviving spouse is "entitled" to a reasonable family allowance "during the progress of the settlement of the estate . . . ." The allowance "paid for the 1 year" has priority over all other claims. After one year, on a showing of necessity, the payments may be continued as advancements against the surviving spouse's interest in the estate. The statute provides that the family allowance "shall" be granted upon petition to the court and nothing in the statute precludes a retroactive grant of payments for the period between the time of the testator's death and the time of the filing of the petition. *Id.* On the basis of the unambiguous statutory language, we conclude that the Legislature's intent in drafting the family allowance statute was to provide for the support of surviving spouses (and the other persons designated in the statute) during the period between the decedent's death and the distribution of the estate.

Our conclusion is bolstered by the Michigan Supreme Court's interpretation of the predecessors of the current family allowance statute. In construing a set of statutes substantially similar to MCL 700.287; MSA 27.5287, the Supreme Court explained that, as a matter of law, a surviving spouse is "absolutely entitled" to family allowance payments for a period of one year from the time of the decedent's death. *Bacon v Kent Co Probate Judge*, 100 Mich 183, 186-188; 58 NW 835 (1894); see also *Pulling v Wayne Co Probate Judge*, 88 Mich 387, 389-390; 50 NW 319 (1891). Because petitioner was entitled to receive one full year of nonchargeable family allowance payments from the time of the testator's death, including the five months immediately following the testator's death, the probate court erred in failing to grant petitioner's request for nonchargeable family allowance payments retroactive to the time of the testator's death. The determination of the amount of a family allowance is left to the sound discretion of the probate court. *In re Burton Estate*, 145 Mich App 133, 137; 377 NW2d 364 (1985). On remand, the probate court is directed to order respondent to pay petitioner from the estate a reasonable family allowance attributable to the five months immediately following the testator's death.

Petitioner next argues that the probate court erred in denying her request to withdraw her election of the statutory spouse's share and to take under the will instead. We disagree. Under the spouse's election statute, MCL 700.282; MSA 27.5282, the surviving spouse of a decedent domiciled in Michigan who dies testate may elect to either (1) abide by the terms of the will or (2) take a portion of the share that would have

passed to the surviving spouse had the decedent died intestate. The surviving spouse must make the election within sixty days after the date for presentment of claims, or within sixty days after the filing of the proof of service of the inventory upon the surviving spouse, whichever is later. *Id.*

As a general rule, we think that a surviving spouse should not be permitted to withdraw an election after the statutory period for making such an election has passed. To allow untimely withdrawals simply as a matter of course would render the statute's sixty-day time limit for making elections essentially meaningless. See *In re Quintero Estate*, 224 Mich App 682, 699; 569 NW2d 889 (1997) ("We will avoid statutory constructions that render a statute, or any part of it, surplusage or nugatory."). In support of her argument that she should have been allowed to withdraw her election and take under the will, petitioner argued to the probate court, and now argues to this Court, that her election was uninformed because the initial inventory of the estate provided by respondent allegedly contained factual errors. In her briefs on appeal, however, petitioner fails to adequately apprise this Court of the specific factual "errors" or even the extent of those errors. Petitioner also failed to apprise the probate court of the specific factual errors when she requested to withdraw her election. Accordingly, we are unable to consider their effect on petitioner's request to withdraw her election.

Finally, petitioner asserts in her statement of questions involved that the trial court failed to make a finding regarding the amount of her elective share. Although the probate court made no explicit findings regarding the amount of property derived by peti-

tioner from the testator by means other than testate or intestate succession upon the testator's death, it did find that petitioner was not entitled to any amount pursuant to her election.[5] Because petitioner provides no real argument or authority for the proposition that the probate court was required to make specific and explicit findings regarding each aspect of the elective share calculation, we deem this issue to have been waived for purposes of this appeal. See *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996).

Affirmed in part, reversed in part, and remanded. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

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[5] In his motion for entry of judgment and reimbursement of chargeable spousal allowance, respondent asserted that, viewing the evidence from the trial in a light most favorable to petitioner, one half of the value of the property derived by petitioner from the testator by means other then testate or intestate succession upon the testator's death exceeded one quarter of the value of the estate. On the basis of these figures, which were adduced at trial, respondent asserted that the value of petitioner's elective share was zero. By granting respondent's motion, the trial court implicitly accepted these figures.

GILMAN v NORTHWEST AIRLINES, INC

Docket No. 200161. Submitted April 22, 1998, at Detroit. Decided June 9, 1998, at 9:15 A.M.

Rachel Gilman brought an action in the Oakland Circuit Court against Northwest Airlines, Inc., and Jay Jennings, alleging that the defendants wrongfully discharged her from employment in violation of an agreement that her employment could be terminated for just cause only and in violation of prohibitions in the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, against sex-based and age-based discrimination. The defendants moved for partial summary disposition, arguing that the sex- and age-discrimination claims are preempted by the Airline Deregulation Act, 49 USC 41713(b)(1). The court, Fred M. Mester, J., denied the motion. The defendants appealed by leave granted.

The Court of Appeals *held*:

The preemption clause of the Airline Deregulation Act, which prohibits states from enacting or enforcing laws or regulations related to airline prices, routes, or services, does not apply where the effect of the laws or regulations on prices, routes, or services is too tenuous, remote, or peripheral. The Civil Rights Act, insofar as it prohibits sex-based and age-based discrimination by airlines against their employees, affects airline prices, routes, or services in a manner that is too tenuous, remote, and peripheral to be preempted by the Airline Deregulation Act.

Affirmed.

CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — AIRLINE DEREGULATION ACT — PREEMPTION.

An action brought under the Civil Rights Act alleging sex-based or age-based employment discrimination by an airline is not preempted by the federal Airline Deregulation Act (49 USC 41713[b][1]; MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*).

Sommers, Schwartz, Silver & Schwartz, P.C. (by *Donald J. Gasiorek* and *David F. Greco*), for the plaintiff.

Miller, Canfield, Paddock and Stone, P.L.C. (by *George D. Mesritz* and *Donna J. Donati*), for the defendants.

Before: JANSEN, P.J., and KELLY and MARKEY, JJ.

PER CURIAM. Defendants, Northwest Airlines, Inc., and Jay Jennings, appeal by leave granted from the circuit court order denying their motion for partial summary disposition. We affirm.

On April 17, 1978, plaintiff, Rachel Gilman, commenced employment with defendant Northwest Airlines, Inc. Defendant Jennings became plaintiff's immediate supervisor in March of 1994. On September 1, 1994, Jennings placed plaintiff on a performance improvement plan. On December 12, 1994, plaintiff was terminated from her employment for alleged poor job performance. At the time of her termination, plaintiff was an account executive in Northwest's Detroit sales office.

On May 7, 1996, plaintiff filed a three-count complaint against defendants. Count one stated a claim for wrongful discharge wherein plaintiff alleged that she could be terminated for just cause only. Count two was a claim of age discrimination in violation of the Civil Rights Act[1] wherein plaintiff contended that she was treated differently than the younger employees and was terminated on the basis of her age. Count three was a claim of sex discrimination in violation of the Civil Rights Act wherein plaintiff claimed she was treated differently than the male employees and was terminated on the basis of her sex.

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[1] MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*

Subsequently, defendants filed a motion for partial summary disposition pursuant to MCR 2.116(C)(4) and (8). They argued that plaintiff's sex- and age-discrimination claims, brought under the Civil Rights Act, were preempted by the Airline Deregulation Act (ADA), 49 USC 41713(b)(1), and thus, plaintiff should only be able to proceed with respect to her claim of breach of employment contract in state court. After a hearing on defendants' motion, the trial court concluded that plaintiff's claims were not preempted by the ADA and denied defendants' motion for partial summary disposition. We granted defendants' subsequent application for leave to appeal.

On appeal, defendants claim that the trial court erred in denying their motion for partial summary disposition because plaintiff's age- and sex-discrimination claims under the Civil Rights Act were preempted by the ADA.

The question presented in this appeal, whether state Civil Rights Act claims are preempted by the ADA, is one of first impression in Michigan. In order to decide the question presented in this case, it is necessary to examine the legislative intent behind the enactment of the ADA, and the preemption provision in particular.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). Statutory language should be interpreted reasonably, considering the purpose of the act. *Barr v Mt Brighton Inc*, 215 Mich App 512, 516; 546 NW2d 273 (1996). Once the intention of the legislation is discovered, it must prevail over any construction arrived at through a con-

flicting rule of statutory construction. *Terzano v Wayne Co*, 216 Mich App 522, 527; 549 NW2d 606 (1997).

In determining the intent of the Legislature, the court must first look to the specific language used in the statute. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). If the plain and ordinary meaning of the language is clear, judicial construction is normally not necessary or permitted. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992); *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). However, if reasonable minds could differ with respect to the meaning of a statute, judicial construction is appropriate. *Id.* The court must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994).

The ADA was enacted by Congress in 1978 in large part to deregulate domestic air transport. *American Airlines v Wolens*, 513 US 219; 115 S Ct 817; 130 L Ed 2d 715 (1995). Two of its primary purposes are the "maintenance of safety as the highest priority in air commerce" and the "placement of maximum reliance on competitive market forces." *Belgard v United Airlines*, 857 P2d 467, 471 (Colo App, 1993). In addition, the quality of the services rendered by an airline employee is of extreme importance because it directly affects the services the airline renders to its customers. *Id.* Thus, in order to ensure that the states would not interfere with federal deregulation or enact

similar laws, the ADA included a preemption clause that provides, in relevant part:

> Except as provided in this subsection a State, political subdivision of a State, or a political authority of at least two States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any air carrier that may provide air transportation under this subpart. [49 USC 41713(b)(1).]

Since the statute was enacted, there has been a clear indication from the courts that Congress intended this provision to be broadly interpreted. However, there is nothing in the language of the statute to suggest that Congress intended, nor does the case law suggest, that the preemption provision should be interpreted in such a broad and extensive manner as to completely shelter airlines from a state action by an employee who has allegedly been discriminated against by the airline in no connection whatsoever to the services it provides. Indeed, the ADA was concerned with the states' attempt to regulate airlines fares, routes, and services, not employment practices. *Delta Air Lines, Inc v New York State Div Of Human Rights*, 229 AD2d 132, 137; 652 NYS2d 253 (1996).

In *Morales v Trans World Airlines, Inc*, 504 US 374, 384; 112 S Ct 2031; 119 L Ed 2d 157 (1992), the Supreme Court explained that a state law is "related to" airline routes or services if it has "a connection with or reference to airline 'rates, routes, or services.' " The Court limited the scope of the preemptive effect of the ADA, however, by noting that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have a preemptive effect. *Id.*, 390. In other words, if a provision in a

state statute is "too tenuous, remote, or peripheral" to have an effect on the prices, routes, or services provided by an airline, the ADA does not preempt the provision. This notion was reaffirmed in *Wolens*, *supra*, 225, where the Court stated that "[t]he ADA's preemption clause . . . ruled out 'only those state laws and regulations that specifically relate to and have more than a tangential connection with an airline's rates, routes or services.' " Hence, the decisive issue in the instant matter is not simply whether any claim brought under the Civil Rights Act is preempted by the ADA, but whether sex- and age-discrimination claims involving physical characteristics that are unrelated to an individual's job qualifications and too tenuous or peripheral to affect the airline's services fall within the scope of the preemptive provision of the ADA.

In support of their argument that plaintiff's state claims are preempted by the ADA, defendants rely primarily on a recent opinion of this Court, *Fitzpatrick v Simmons Airlines, Inc*, 218 Mich App 689, 690; 555 NW2d 479 (1996). In that case, the plaintiff was employed by a division of American Airlines and was terminated because he did not meet the height and weight standards promulgated by the defendant. *Id.* Thereafter, the plaintiff filed an action under the Civil Rights Act, alleging that he was unlawfully discharged because he was overweight according to the standards utilized by the defendant. *Id.* The defendant moved for summary disposition, maintaining that the plaintiff's claim was preempted by the Airline Deregulation Act, 49 USC 41713(b)(1). *Fitzpatrick*, *supra*, 690. The trial court granted the defendant's motion for summary disposition, and the plaintiff appealed,

arguing that the trial court erred because his claim was not preempted. *Id.*, 690-691.

On appeal, this Court explained that the first inquiry was whether preemption was expressed or implied in the statute at issue. *Id.* The language contained in the ADA expressly preempts a state from enacting any law relating to services of any air carrier. *Id.* Thus, the next question was whether the Civil Rights Act is a law relating to services of an air carrier. *Id.*, 691. Relying on *Morales*, *supra*, this Court found that it was. *Id.* This Court concluded that the provision of the Civil Rights Act that protected employees from discrimination based on height or weight was "related to" services of an air carrier, and that the Civil Rights Act would restrict the defendants' ability to select employees. *Fitzpatrick*, *supra*, 692-693. Accordingly, this Court denied the plaintiff's claim and affirmed the trial court's grant of summary disposition in favor of the defendants, finding that the plaintiff's state claim was preempted by the ADA. *Id.*, 693.

Defendants also cite *Belgard*, *supra*, 467, where the plaintiffs were denied employment as pilots because they had undergone eye surgery. The Colorado Court of Appeals determined that they could not pursue their claims under the state's handicap discrimination law because the law, when applied to an airline, had "a connection with" or "reference to" the airline's services. The Colorado Court of Appeals explained:

> [A]ny law or regulation that restricts an airline's selection of employees, based upon their physical characteristics, must necessarily have a connection with and reference to, and therefore must be one "relating to," the services to be rendered by that airline. [*Id.*, 471.]

We believe that the foregoing cases of preemption are distinguishable from the instant case. In particular, there is an important distinction to be drawn between the effect physical abilities or characteristics have on an airline's services and the effect one's age or sex has on the industry. For instance, it is easy to make sense of the airline industry's need to implement height and weight standards for certain positions in order to promote safety and efficiency when providing services. Thus, it is conceivable that an individual's weight or height may be sufficiently related to the safety and quality of services an air carrier can provide to permit preemption on this basis. Hence, we do not contest that the quality of airline employees, flight personnel in particular, as well as their physical capabilities and good health, will directly affect the services rendered by an airline. In fact, this element was such a concern of the airline industry that the federal legislation established minimum physical requirements for such personnel. See *Belgard, supra*, 471.

However, nowhere in the statute are there minimum requirements pertaining to an individual's age or gender to ensure top quality employees. Indeed, these qualities are, for the most part, wholly unrelated to an individual's ability to carry out duties and serve the airline industry. We are unable to discern how an individual's age or sex has any reasonable connection or relation to airline services or how a state law abridging unlawful discrimination on those bases will restrict an airline's authority to select employees. To the contrary, a state law prohibiting an airline from hiring or terminating employees on the basis of race, gender, or ethnicity is wholly unrelated to the ser-

vices it provides. See also *Ruggiero v AMR Corp*, 1995 WL 549010 (ND Cal, 1995) (holding the plaintiff's retaliatory discharge claim distinguishable from claims for discrimination based on physical characteristics because the ADA did not regulate wrongful termination); *Anderson v American Airlines, Inc*, 2 F3d 590 (CA 5, 1993) (holding that the ADA was passed to deregulate the airline industry and a claim for retaliatory discharge had too remote an effect on services to be preempted).

In fact, the United States Supreme Court entered a ruling consistent with this theory several years ago in *Colorado Anti-Discrimination Comm v Continental Air Lines, Inc*, 372 US 714; 83 S Ct 1022; 10 L Ed 2d 84 (1963). The Court held that a federal law did not preempt the enforcement against an air carrier of a Colorado statute prohibiting racial discrimination in the hiring of employees. The Court reasoned that the state law could not have an adverse effect on, or even interfere with, the required national law prohibiting discrimination, because a contrary requirement would not be enforceable in any state. In contrast to state statutes that regulate an airline's hiring practices with respect to physical characteristics (i.e., height, weight, handicap), state statutes that prohibit discrimination based on age and race do not raise the same potential for conflicting rules and inconsistencies because it is illegal, under the laws of all states, to discriminate against an employee on the basis of age or gender.

More recently, in *Abdu-Brisson v Delta Air Lines, Inc*, 128 F3d 77 (CA 2, 1997), the Second Circuit Court of Appeals held that the plaintiff's age discrimination claim was not preempted by the ADA because

the defendants were unable to establish how enforcement of the state laws would frustrate the purpose of the ADA. In particular, the Second Circuit Court of Appeals noted that the enforcement of New York's age discrimination law would not affect competition between airlines, which was the primary concern in enacting the ADA. *Id.*, 84. The court distinguished the case from *Morales* and *Wolens*, noting:

> [W]hether an airline discriminates on the basis of age (or race or sex) has little or nothing to do with competition or efficiency. Although one may argue that shedding older workers can result in savings, such savings will result in a better competitive position only indirectly, if at all. Moreover, to the extent that the scope of the protected group in age discrimination statutes may vary from jurisdiction to jurisdiction, state and local age discrimination laws are little different from generally applicable tax, environmental, or blue sky laws, which as a general matter are not preempted under the ADA. [*Id.*]

Similarly, in *Delta Air Lines v New York State Div of Human Rights*, *supra*, 137-138, the court upheld several age, disability, and marital status discrimination claims filed by employees under state law. In holding that the claims were not preempted by the ADA, the court remarked that "preemption . . . is not favored absent persuasive reasons either that the nature of the . . . subject matter" or the state regulations requires preemption or Congress has expressly prescribed preemption, and that "preemption must be determined on a case-by-case basis," ascertaining " 'whether the dangers and hardships of diverse regulation justify foreclosing a State from the exercise of its traditional powers.' " *Id.* (Citation omitted.) The court reasoned that compliance with the state human

rights laws in no way interfered with the airline's ability to comply with the ADA because the statute did not prescribe what amounted to discrimination against airline employees. *Id.*, 139. Moreover a finding either for or against the airline would not frustrate the purpose of the ADA. *Id.* Accordingly, the plaintiffs' claims were not preempted. *Id.*

We note that recently, in *Parise v Delta Air Lines*, 1997 WL 375296 (MD Fla, 1997), a United States District Court ruled that the ADA preempted state discrimination laws where the petitioners alleged age discrimination. However, that case is inapposite to the instant case because the conduct for which the plaintiff was ultimately terminated was determined to have directly affected the services of the airline.[2] The court explained that an airline's decision to terminate an agent for fear of customer safety was related to the airline's services and fell within the preemption clause of the ADA. *Id.* However, in so ruling, the court cautioned that "the ADA does not 'completely preempt' employment anti-discrimination laws ([only] if they 'relate to' airline 'rates, routes, or services,') . . . ." *Id.*, * 3.

The foregoing cases make it clear that while the ADA has been interpreted to have a broad preemptive sweep over state Civil Rights Act claims, there must, nonetheless, be an apparent connection or relation to the airline's routes, prices, or services, in order for the preemptive provision of the ADA to be applicable. Furthermore, we note that defendants did not introduce any evidence that plaintiff's claims would frus-

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[2] The plaintiff was terminated for admittedly making numerous violent threats to his supervisor and co-worker.

trate the purposes of the ADA. Nor did defendants put forth any evidence to show that plaintiff's age- and sex-discrimination claims were connected with or related to the airline's routes, prices, or services. We hold, therefore, that plaintiff's claims were not preempted by the ADA. In light of our conclusion, the trial court properly denied defendants' motion for partial summary disposition.

Affirmed.

WEST AMERICAN INSURANCE COMPANY v MERIDIAN MUTUAL INSURANCE COMPANY

Docket No. 195158. Submitted December 8, 1997, at Detroit. Decided June 16, 1998, at 9:00 A.M. Leave to appeal sought.

West American Insurance Company, as subrogee of Ann Arbor Carpets, obtained in the Jackson Circuit Court a default judgment in an action that alleged negligence in November 1993 by Jon Gutekunst, doing business as Floormaster Floor Covering, Inc. West then served a writ of garnishment on Meridian Mutual Insurance Company, believing Meridian to be Floormaster's commercial liability insurer from June 30, 1993, to June 30, 1994, on the basis of a certificate of insurance obtained by Ann Arbor Carpets from an independent insurance agent. Meridian filed a garnishee disclosure indicating that it was not obligated to Floormaster because Floormaster's policy had been canceled on June 14, 1993. Following a bench trial, the court, Charles A. Nelson, J., entered a judgment in favor of West, concluding that Meridian was equitably estopped from asserting that Floormaster was uninsured. Meridian appealed.

The Court of Appeals *held*:

1. Silence or inaction may form the basis for equitable estoppel only where the silent party had a duty or obligation to speak or take action. In this case, equitable estoppel does not apply with respect to Meridian's failure to take action to prevent Ann Arbor Carpets from relying on the certificate of insurance because Meridian was under no legal duty or obligation to take such action. An independent insurance agent, when facilitating an insurance agreement between the insurer and the insured, is the agent of the insured, not the insurer. The certificate of insurance in this case was issued to a third party by an agent of the insured on behalf of the insured. Under such circumstances, the insurer has no legal duty or obligation to advise the third party about inaccuracies in, or subsequent changes to, the information contained in the certificate of insurance.

2. The trial court did not err in refusing to dismiss the garnishment action on the basis of West's uncontested statement in the garnisee disclosure that it was not indebted to Floormaster by vir-

tue of the policy cancellation on June 14, 1993. The certificate of insurance purportedly indicated coverage from June 30, 1993, to June 30, 1994, and Ann Arbor Carpets' loss occurred in November 1993. Cancellation or interruption of Floormaster's insurance before June 30, 1993, is not relevant to this case.

3. The matter must be remanded for findings of fact with respect to whether Floormaster had a right to recover from Meridian for the loss incurred by Ann Arbor Carpets.

Reversed and remanded.

1. ESTOPPEL — EQUITABLE ESTOPPEL.

Equitable estoppel may arise where a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party is prejudiced if the first party is allowed to deny the existence of those facts.

2. ESTOPPEL — EQUITABLE ESTOPPEL — SILENCE OR INACTION.

Silence or inaction may form the basis for equitable estoppel only where the silent party had a duty or obligation to speak or take action.

3. INSURANCE — INDEPENDENT AGENTS — AGENCY.

An independent insurance agent, when facilitating an insurance agreement between the insurer and the insured, is an agent of the insured, not the insurer.

4. INSURANCE — CERTIFICATES OF INSURANCE — INSURERS — INDEPENDENT AGENTS — THIRD PARTIES.

An insurer under an insurance agreement facilitated by an independent insurance agent owes to a third party to whom the agent, on behalf of the insured, has issued a certificate of insurance no legal duty or obligation to advise the third party about inaccuracies in, or subsequent changes to, the information contained in the certificate of insurance.

Grenn & Grenn, P.C. (by *Joseph E. Grenn* and *Margaret P. Andrews*), for West American Insurance Company.

Coticchio, Zotter, Sullivan, Molter, Skupin & Turner, P.C. (by *James Howard Turner*), for Meridian Mutual Insurance Company.

Before: SAWYER, P.J., and WAHLS and REILLY, JJ.

PER CURIAM. Garnishee-defendant Meridian Mutual Insurance Company appeals as of right from the trial court's order granting judgment in favor of plaintiff West American Insurance Company in this garnishment action for damages awarded in a previous judgment against Meridian's former insured, Jon Gutekunst, doing business as Floormaster Floorcovering, Inc. We reverse and remand.

This case arises out of a loss incurred by Ann Arbor Carpets, subrogor of West, as the result of Floormaster's negligence. Ann Arbor Carpets sought to enter into a subcontracting agreement with Floormaster. On September 15, 1993, the Birch Agency of Jackson, an independent insurance agency that wrote insurance coverage for several companies including Meridian, issued a certificate of insurance to Ann Arbor Carpets, at the request of Ann Arbor Carpets, indicating that Floormaster had a commercial liability policy with Meridian effective from June 30, 1993, through June 30, 1994. Birch also sent a copy of the certificate of insurance to Meridian. The certificate featured prominently the following disclaimer:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND, OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

The certificate further provided:

> THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN

IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES.

Relying on the certificate of insurance from Birch, Ann Arbor Carpets hired Floormaster. In November of 1993, Ann Arbor Carpets suffered a loss as a result of Floormaster's negligence. Eventually, West (Ann Arbor Carpets' insurer and subrogee) secured a default judgment against Floormaster in the amount of $15,771.13.

After securing the default judgment against Floormaster, West served on Meridian a request and writ for garnishment. Meridian answered with a garnishee disclosure stating that it was not indebted to Floormaster because Floormaster's policy with Meridian had been canceled on June 14, 1993. Subsequently, West provided interrogatories and requests for admission to Meridian, to which Meridian did not timely respond. The trial court denied Meridian's request to file late answers to plaintiff's interrogatories and requests to admit and granted summary disposition in favor of West on the basis of the admissions being taken as true. The trial court then set aside the order granting summary disposition, reasoning that Meridian's failure to respond to West's interrogatories and requests to admit was excused because the interrogatories and requests to admit themselves had not been timely filed. In the order setting aside the judgment in favor of West, the trial court indicated that discovery should begin anew. However, no further discovery took place.

The trial court issued an opinion and order in favor of West after a one-day bench trial. Testimony at the bench trial revealed that although Floormaster had purchased the policy through Birch, it was supposed

to pay its premiums directly to Meridian. When Birch issued the certificate of insurance to Ann Arbor Carpets, it did so on the basis of its own internal records. It never contacted Meridian for verification that Floormaster's policy was still in effect. By the same token, Meridian never informed Birch that Floormaster's policy had been canceled. The trial court made no finding with respect to whether Floormaster's policy with Meridian was in effect in November of 1993 when Floormaster's negligent act caused Ann Arbor Carpets to suffer the loss. Instead, it based its decision on a determination that Meridian was estopped from asserting that Floormaster was not covered. The trial court reasoned that Meridian was estopped because (1) it authorized Birch to provide certificates of insurance, (2) it intended that organizations such as Ann Arbor Carpets rely on such certificates of insurance, (3) it took no action when Birch issued the certificate of insurance indicating that Floormaster was covered by a policy from Meridian, and (4) Ann Arbor Carpets relied on the certificate of insurance.

Meridian argues on appeal that the trial court erred in relying on the doctrine of equitable estoppel. We agree. Because equity is involved, this Court's review of a trial court's application of the doctrine of equitable estoppel is de novo. *Guise v Robinson*, 219 Mich App 139, 143; 555 NW2d 887 (1996). We will reverse if the trial court's findings were clearly erroneous or if we conclude that we would have reached a different result had we occupied the lower court's position. *Id.*

Equitable estoppel is not an independent cause of action, but rather a doctrine that may assist a party by preventing the opposing party from asserting or

denying the existence of a particular fact. See *Hoye v Westfield Ins Co*, 194 Mich App 696, 705-707; 487 NW2d 838 (1992), citing Prosser, Torts (4th ed), § 105, pp 691-692. Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *Guise, supra* at 144. Silence or inaction may form the basis for an equitable estoppel only where the silent party had a duty or obligation to speak or take action. *Lumber Village, Inc v Siegler*, 135 Mich App 685, 698; 355 NW2d 654 (1984); see also *Cook v Grand River Hydroelectric Power Co*, 131 Mich App 821, 828; 346 NW2d 881 (1984). Here, the trial court based its application of the doctrine of equitable estoppel on Meridian's failure to take action to prevent Ann Arbor Carpets from relying on the certificate of insurance, without expressly finding that Meridian was under any duty or obligation to take any such action.

An insurance policy constitutes a contractual agreement between the insurer and the insured. *Zurich-American Ins Co v Amerisure Ins Co*, 215 Mich App 526, 530; 547 NW2d 52 (1996). When such an agreement is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer. *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 215; 565 NW2d 907 (1997). Accordingly, the certificate of insurance in this case was issued to a third party by an agent of the insured on behalf of the insured. Whether the

insurer has a legal duty or obligation in such circumstances to advise the third party holding the certificate of insurance about inaccuracies in, or subsequent changes to, the information contained in the certificate of insurance is a question of first impression in Michigan.

A legal duty or obligation may arise by contract, statute, constitution, or common law. West contends in its supplemental brief on appeal that Meridian was under a common-law duty to Ann Arbor Carpets on the basis of its affirmative act of issuing the certificate through its agent. This argument is without merit, primarily because the certificate of insurance was not issued by Meridian's agent, but rather by an agent of the insured. West also suggests that Meridian was under a statutory duty based on MCL 500.2064(1); MSA 24.12064(1), which provides, in part:

> No insurer, or any officer, director, agent or solicitor thereof shall issue, circulate or use or cause or permit to be issued, circulated or used, any written or oral statement or circular misrepresenting the terms of any policy issued or to be issued by such insurer, or misrepresenting the benefits or privileges promised under any such policy, or estimating the future dividends payable under any such policy.

This argument too is without merit, primarily because the certificate of insurance at issue did not purport to represent the terms, benefits, or privileges promised under the policy. Instead, its stated purpose was merely to certify that the listed insurance policies had been issued. We are aware of no other statutory or constitutional provisions that, under the circumstances of this case, would have imposed a duty on Meridian to advise Ann Arbor Carpets of any inaccuracies contained in the certificate of insurance issued

by Floormaster's agent. Moreover, Meridian could not have been under any contractual duty to Ann Arbor Carpets, because there was no contract between Meridian and Ann Arbor Carpets.

Appellate courts in Colorado and New Hampshire have addressed similar issues. See *Broderick Investment Co v Strand Nordstrom Stailey Parker, Inc*, 794 P2d 264 (Colo App, 1990); *Bradley Real Estate Trust v Plummer & Rowe Ins Agency, Inc*, 136 NH 1; 609 A2d 1233 (1992). In both cases, the plaintiffs relied on certificates of insurance and were injured when the persons listed on the certificates did not actually have the coverage listed on the certificates. Unlike in this case, however, the plaintiffs in *Broderick* and *Bradley* sued the insurance agencies *issuing* the certificates of insurance. Both courts held that, under the circumstances, the agencies issuing the certificates of insurance were under no duty to advise the holders of the certificate about material changes in the information included on the certificates. *Broderick*, *supra* at 267; *Bradley*, *supra* at 4. Relying on *Broderick*, *supra* at 266, the *Bradley* court reasoned that disclaimers on the certificate of insurance (which were nearly identical to the disclaimers on the certificate of insurance in this case) rendered it a "worthless document" which did "no more than certify that insurance existed on the day the certificate was issued." *Bradley*, *supra* at 4. We agree with the reasoning of these courts, and conclude, for all the reasons stated above, that Meridian was under no duty to advise Ann Arbor Carpets about any inaccuracies in, or subsequent changes to, the information contained in the certificate of insurance issued by Floormaster's agent on Floormaster's behalf. Because Meridian was under no

such duty, the trial court erred in applying the doctrine of equitable estoppel to prevent Meridian from asserting Floormaster's lack of insurance coverage. *Lumber Village, supra* at 698. Given this determination, we need not address whether Ann Arbor Carpets' reliance on the certificate of insurance was justified.

Meridian also argues that the trial court should have dismissed West's garnishment action on the basis of Meridian's uncontested statement in the garnishee disclosure that it was not indebted to Floormaster. As a general rule, facts stated in a garnishee disclosure must be accepted as true at trial if the plaintiff fails to timely contest the garnishee disclosure through discovery. See MCR 3.101(M)(2); *Alyas v Illinois Employers Ins of Wausau*, 208 Mich App 324, 327; 527 NW2d 548 (1995). In this case, the only fact stated in Meridian's garnishee disclosure was that insurance policy number CPP4015533 was canceled on June 14, 1993. (This was the same policy number as listed on the certificate of insurance.) Because West failed to timely challenge this fact through discovery, it should have been accepted as true. However, the trial court's acceptance of this fact would not have required the dismissal of West's garnishment action. The certificate of insurance issued by Birch, relied on by Ann Arbor Carpets, and possessed by West before the instigation of this garnishment action suggested that Floormaster had a policy with Meridian that was effective from June 30, 1993, to June 30, 1994. Because Ann Arbor Carpets' loss occurred during that period, any cancellation or interruption of Floormaster's coverage during a prior term would not be relevant to this case. Accordingly, the trial court

did not err in failing to dismiss the action on the basis of Meridian's garnishee disclosure.

A subrogee's right to recover from a garnishee defendant in a garnishment action is dependent on the principal defendant's right to recover from the garnishee defendant. *Poelman v Payne*, 332 Mich 597, 600; 52 NW2d 229 (1952). Because the trial court made no finding of fact with respect to whether Floormaster had a right to recover from Meridian, we cannot issue an order dismissing West's garnishment action, as requested by Meridian. Instead, we remand for further findings of fact. West is entitled to judgment against Meridian only to the extent that Floormaster was actually entitled to recover from Meridian under the disputed June 30, 1993 - June 30, 1994 insurance policy. *Poelman, supra* at 600.

Reversed and remanded. We do not retain jurisdiction.

HAWKINS v MERCY HEALTH SERVICES, INC

Docket No. 200563. Submitted March 12, 1998, at Grand Rapids. Decided June 16, 1998, at 9:05 A.M.

Bonita and Ray Hawkins brought an action in the Wexford Circuit Court against Mercy Health Services, Inc., alleging that the defendant defamed Bonita Hawkins in two press releases and in a Cadillac Mercy Hospital memorandum. The plaintiffs alleged that the press releases and the memorandum falsely implied that Bonita Hawkins' employment at the hospital ended because of her involvement in a medication overdose that led to a patient's death. The plaintiffs alleged that Bonita Hawkins chose to resign rather than be fired after hospital officials accused her of lying about criticizing the physician involved in the overdosing incident in conversations with co-workers. The court, Charles D. Corwin, J., granted summary disposition for the defendant on the basis of the substantial truth defense. The court concluded that the implication flowing from the press releases and the memorandum was substantially true and therefore not actionable. The plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court correctly determined that summary disposition based on the substantial truth doctrine may be granted even where there is a genuine issue of fact regarding whether the alleged defamatory statement was made negligently or intentionally. Material falsity of the alleged defamatory statement and fault of the maker of the statement involve separate, distinct, and independent determinations.

2. The trial court erred in granting summary disposition on the basis of the substantial truth doctrine. Although the statements made in the press releases and in the memorandum were literally true, the press releases and the memorandum nevertheless falsely implied that Bonita Hawkins ceased to be employed at the hospital because of involvement in the fatal overdosing incident.

Reversed and remanded for further proceedings.

1. LIBEL AND SLANDER — LIBEL — ELEMENTS.

The four components of a cause of action for libel are a false and defamatory statement concerning the plaintiff, an unprivileged communication to a third party, fault amounting to at least negli-

gence on the part of the publisher, and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

2. LIBEL AND SLANDER — DEFAMATION BY IMPLICATION.

A cause of action for defamation by implication exists in Michigan; a plaintiff alleging defamation by implication must prove that the defamatory implication is materially false; such a cause of action can be successful even without a direct showing of a literally false statement.

3. LIBEL AND SLANDER — DEFENSES — SUBSTANTIAL TRUTH.

A defendant is not liable for libel where the gist of the article or the sting of the charge is substantially true.

4. LIBEL AND SLANDER — FALSITY OF STATEMENT — FAULT OF MAKER.

Separate, distinct, and independent determinations are to be made with respect to the material falsity of an alleged defamatory statement and the fault of the maker of the statement; summary disposition for a defendant based on the substantial truth defense may be granted even where there exists a genuine issue of fact concerning whether the alleged defamatory statement was made negligently or intentionally.

5. LIBEL AND SLANDER — DEFAMATION BY IMPLICATION — DEFENSES — SUBSTANTIAL TRUTH.

Substantial truth is a defense to an action for defamation by implication.

Kaufman and Payton (by *Jeffrey K. VanHattum*), for the plaintiffs.

Miller, Johnson, Snell & Cummiskey, P.L.C. (by *Jon G. March* and *Lori J. Stich*), for the defendant.

Before: MARKEY, P.J., and GRIFFIN and WHITBECK, JJ.

WHITBECK, J. In this defamation action, plaintiffs appeal as of right an order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We reverse and remand.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. THE EVENTS OF MAY 22-MAY 23, 1995

On the night of May 22, 1995, plaintiff Bonita Hawkins, a nurse, was working in the intensive care unit of Cadillac Mercy Hospital, which is operated by defendant Mercy Health Services, Inc. The intensive care unit is located next to the hospital's "step-down" unit. At some point during that evening, another nurse, Cindy Hall, came to the intensive care unit to obtain medication to be administered to Phyllis L. Shimel, a patient in the step-down unit. Shimel was under the care of Dr. Merrilee Brandt. While at Shimel's bedside, Dr. Brandt had written an order for 2.5 milligrams of esmolol hydrochloride, the trade name for which is Brevibloc. Brevibloc is used to reduce a patient's heart rate.

According to Hawkins, Hall told her that Hall "needed 2.5 grams of Brevibloc for Dr. Brandt." Hawkins went with Hall to the medication room to find the medication. At her deposition, Hawkins testified that "I located it in its drawer and pulled it out." Hawkins further testified: "We both looked at the label. I said, 'This is 2.5 grams of Brevibloc. Is this what you want?' and [Hall] . . . said, 'Yes.' " Hawkins did not read the entire label of the 2.5 gram ampoule of Brevibloc that states, in bold letters: "NOT FOR DIRECT IV INJECTION MUST BE DILUTED BEFORE USE." Hawkins then filled a syringe with 2.5 grams of Brevibloc and gave the syringe to Hall, who returned to the step-down unit.

Hawkins later observed on Shimel's heart monitor (heart monitors for patients in the step-down unit, including Shimel, were located in the intensive care unit) that Shimel's heart rate was still elevated. Haw-

kins then went to Shimel's room, where she met Hall and Dr. Brandt. Hawkins testified in her deposition that she then asked Dr. Brandt if the medication Dr. Brandt and Hall had obtained was the one that Dr. Brandt wanted. According to Hawkins, Dr. Brandt said, "Yes, that's what I want." Hawkins testified that she then told Dr. Brandt that the syringe contained 2.5 grams of Brevibloc and asked, "Is this what you wanted?" According to Hawkins, Dr. Brandt responded, "Yes." Hawkins testified that she was told by Dr. Brandt to administer the medication, which Hawkins did.

The dosage administered by Hawkins to Shimel was incorrect; the correct dosage was 2.5 *milligrams* of Brevibloc, not 2.5 *grams*. Following the administration of the drug, Shimel's heart rate slowed drastically, she suffered cardiac arrest, and she lapsed into a coma. After approximately thirty minutes, Shimel was transferred to the intensive care unit. Shimel died on May 23, 1995.

B. THE CONVERSATIONS CONCERNING DR. BRANDT

Following Shimel's transfer to the intensive care unit, Hawkins spoke with Matt Long and Jan Olsen,[1] two other nurses working in the intensive care unit on the evening of May 22, 1995. During that conversation, Hawkins and the two other nurses criticized Dr. Brandt's handling of Shimel's care. These comments were overheard by members of Shimel's family, one of whom complained to officials of the hospital on May 23, 1995. When asked by hospital officials, Hawkins denied having made the remarks about Dr.

[1] We note that differing spellings of this surname are used in the parties' briefs and the lower court record.

Brandt. However, Long and Olsen both admitted that the conversation had taken place.

C. THE TERMINATION/RESIGNATION OF HAWKINS

When she was informed that she would be terminated because she had lied about the May 23, 1995, conversation with Long and Olsen, Hawkins requested that she be allowed to resign instead. The hospital's "Determination of Disciplinary Action" stated:

> Nature of Offense: HR Guideline # 810/316. Falsification by commission or omission re: information provided during investigation of patient/family incident.
>
> Employer Statement: Bonnie denied her participation in discussion held at nurses (sic) station regarding physician practice on the night of May 22 → AM of May 23, 1995. Witnessed by family and confirmed by 2 RN peers.
>
> Corrective Action Recommended: Termination effective 6-2-95
>
> Discipline Imposed: (Check one) Employee made decision to resign eff 6-2-95.

Mary Powers, Hawkins' supervisor and the person who signed the Determination of Disciplinary Action as imposing the discipline, testified in her deposition that the basis for Hawkins' termination was "the comments [she] made at the nursing station and the hospital determination that [she] didn't tell the truth about those comments." In particular, Powers testified:

> *Q.* Okay. And the basis for the difference in discipline between the verbal warnings given to Jan Olson [sic] and Matt Long and the written warning given to Jan Olson—the basis between—the difference between that discipline and the discipline—the decision to terminate Bonnie Hawkins

was that Jan Olson and Matt Long admitted to the conversation that occurred at the nurses' station; correct?

A. Correct.

Q. Okay. And there's no other basis for the distinction—in that discipline, that you're aware of, is there? That is the basis; correct?

A. That's correct.

Similarly, in its brief, the hospital states that "because plaintiff had denied making comments in the presence of the patient's family about Dr. Brandt, hospital officials concluded they could no longer trust plaintiff and therefore determined to terminate her employment."

Long and Olsen both received warnings for their involvement in the May 23, 1995, conversation. Hall received a three-day suspension, apparently because of her involvement in the medication dosage error.

D. PUBLICATION BY THE HOSPITAL

Following Shimel's death and upon receipt of inquiries from the media, the hospital issued two press releases addressing the incident. The first press release (the "May 31, 1995, release") stated:

On Monday, May 22, the patient was admitted to our special care unit for the treatment of septic shock. The patient had had a lengthy illness prior to this particular admittance.

While the patient was being cared for by two registered nurses and a physician, there appears to have been an inappropriate dosage of medication administered.

The pharmaceutical company indicates that an inappropriate amount of this particular medication would normally cause lower blood pressure, drowsiness, and/or loss of consciousness.

The patient was placed on life support in response to her overall medical condition.

> The patient expired the afternoon of Tuesday, May 23.
>
> The autopsy report indicates that the patient died of a thrombotic occlusion, which is a medical term for a blood clot.

The matter received front page coverage in the *Cadillac Evening News* on June 1, 1995, and the media thereafter pursued the story. In particular, the media wanted to know the results of the hospital's investigation into the incident, which employees and physicians were involved, and what action had been taken regarding them. The hospital then issued the second press release (the "June 2, 1995, release") that stated:

> As of today, interviews from hospital personnel and physicians regarding this incident and a review of the medical records have been referred to the hospital's Medical Staff Credentials Committee in accordance with Medical Staff bylaws.
>
> The Credentials Committee will perform an evaluation of this patient's medical care.
>
> Our administration has also instituted disciplinary action. In accordance to [sic] our employee disciplinary policies and procedures, one employee is no longer with the hospital. Another employee has received an appropriate disciplinary action.
>
> Circumstances regarding this incident have been communicated to appropriate regulatory, accrediting and licensing agencies.
>
> As we move forward we will insure through all appropriate methods that quality medical care is delivered to this community.

The press releases were drafted as a group effort by the chief executive officer, the chief operating officer, the director of community relations, the risk manager, the director of critical care, the attorney for the hos-

pital, and several members of a public relations firm hired by the hospital.

E. THE HAWKINS COMPLAINT

Hawkins initiated this lawsuit with the filing of her complaint on October 12, 1995, in which she alleged that the hospital had published false and defamatory statements that conveyed that she "was discharged from her employment with Defendant because of Plaintiff's actions in administering a drug to a patient at the hospital, which resulted in the death of the patient."[2] Hawkins in her complaint identified the allegedly defamatory statement as (1) the May 31, 1995, release; (2) the June 2, 1995, release; (3) a June 2, 1995, intrahospital memorandum, the text of which is identical to the June 2, 1995, release; (4) a letter of June 19, 1995, from the hospital to the director of the Michigan Office of Health Services; and (5) statements made on behalf of the hospital to the *Cadillac Evening News* on or about June 1 and June 3, 1995. The focus of this appeal is on the May 31, 1995, release, the June 2, 1995, release, and the June 2, 1995, memorandum.

F. RULINGS ON SUMMARY DISPOSITION.

On October 21, 1996, the hospital moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the statements contained in "the press releases, internal memorandum, and related statements . . . are literally true, and the implications of those statements . . . are so substantially true that the plaintiff has no claim as a matter of law." The hospital

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[2] Hawkins' husband, Raymond Hawkins, was later added as a plaintiff, but his claim is purely derivative.

also asserted that the "statements in the letter of June 19, 1995 are . . . privileged."

On November 12, 1996, the circuit court granted the hospital's motion with respect to the June 19, 1995, letter but denied it with respect to the other cited statements. The circuit court reasoned that, in the absence of any controlling Michigan case law, the applicability of the substantial truth doctrine to a situation where there is a genuine dispute concerning whether a defendant intentionally published misstatements is questionable. The circuit court concluded by stating: "I find that the rationale behind the substantial truth doctrine is somewhat diminished . . . if it can be shown that the hospital intentionally did this in a way to make them [sic] look good . . . with the public."

However, in response to the hospital's motion for reconsideration, on December 11, 1996, the circuit court concluded that it had erred in previously failing to apply the substantial truth doctrine because of its misgivings that the doctrine applied given that there was a genuine issue regarding whether the hospital had intentionally published misstatements about Hawkins. The circuit court concluded:

> In addition to defendant's Motion for Reconsideration and the accompanying Brief, the Court has once again reviewed defendant's original motion and brief, plaintiff's response and brief, defendant's reply brief and the authority cited in the briefs. The Court has specifically revisited the Michigan Supreme Court cases of *Locricchio* v *Evening News Ass'n*, 438 Mich 84; 476 NW2d 84 (1991) and *Rouch* v *Enquirer & News of Battle Creek*, 440 Mich 238; 487 NW2d 205 (1991). From a review of all of the foregoing, the Court finds that it erred in it's [sic] previous ruling, and defendant should be

entitled to summary disposition based upon the "substantial truth doctrine."

It is clear that the Michigan Supreme Court in *Rouch* determined that the issue of fault, i.e. whether the statement at issue was made negligently or intentionally, is independent of the question of material falsity to which the "substantial truth doctrine" is applicable.

The circuit court therefore granted summary disposition with respect to all of Hawkins' claims.

II. STANDARD OF REVIEW

We review a trial court's grant or denial of a motion for summary disposition de novo. *Carlyon v Mut of Omaha Ins Co*, 220 Mich App 444, 446; 559 NW2d 407 (1996). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), we consider all documentary evidence available to us in a light most favorable to the nonmoving party in order to determine whether there is a genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

III. CONCEPTUAL OVERVIEW

A. THE ELEMENTS OF DEFAMATION

Michigan law has traditionally defined a defamatory communication as one which " ' "tends so to harm the reputation of [persons so] as to lower [them] in the estimation of the community or to deter [others] from associating or dealing with [them]." ' " *Locricchio v Evening News Ass'n*, 438 Mich 84, 115; 476 NW2d 112 (1991), quoting with approval *Nuyen v Slater*, 372 Mich 654, 662, n *; 127 NW2d 369 (1964) (citation

omitted).[3] A cause of action for libel has four components: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Locricchio, supra* at 115-116, cited with approval in *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992). See also *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 443-444; 566 NW2d 661 (1997); *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 323; 539 NW2d 774 (1995). "A cause of action for libel requires a plaintiff to show defamatory meaning as well as falsity, fault, and publication." *Locricchio, supra* at 116.

The waters, however, become considerably muddier when one ventures beyond these broad common-law principles. Generally speaking, a litigant alleging defamation or libel must additionally overcome certain constitutional barriers to such claims. As recognized in *Locricchio* and *Rouch*, analysis under the constitution has focused on three elements: the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, and the public or private character of the speech. *Rouch, supra* at 251-252; *Locricchio, supra* at 118. In addition, as this

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[3] See also 3 Restatement Torts, 2d, § 559, p 156, quoted with approval in *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992):

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

case illustrates, a fourth element may be involved and that is whether it is the statements *themselves* or the *implications* that may be drawn from such statements that are alleged to be false. Thus, in matrix form, the following elements may be involved in a defamation case:

Type of Plaintiff	Type of Defendant	Character of the Speech	Type of Statement
Public Figure	News Media	Matters of Public Concern	Statements true/ implications true
Private Figure	Nonmedia	Matters of Private Concern	Statements true/ implications false
			Statements false/ implications true
			Statements false/ implications false

As is readily apparent, depending on the underlying facts, a bewildering number of possibilities may be involved in a given defamation action. It is well, therefore, to keep the particular facts of this case in mind. Here, we have a private-figure plaintiff, Hawkins, suing a nonmedia defendant, the hospital, over statements relating to a matter of public concern, the death of a patient at the hospital following the inappropriate administration of medication. Further, Hawkins does *not* appear to assert that the statements in the May 31, 1995, release, the June 2, 1995, release, and the June 2, 1995, memorandum were, when read literally, untrue.[4] It is literally true that, as stated in

[4] We use the term "appear" because Hawkins' brief on appeal contains a number of passages that can be read as assertions that the statements *themselves* were false. However, Hawkins' counsel during oral argument conceded that the statements in the May 31, 1995, release, the June 2, 1995, release, and the June 2, 1995, memorandum were, when read literally, true.

the May 31, 1995, release, "[w]hile the patient [Shimel] was being cared for by two registered nurses [Hawkins and Hall] and a physician [Dr. Brandt], there appears to have been an inappropriate dosage of medication administered." Further, it is literally true that, as stated in the June 2, 1995, release and the June 2, 1995, memorandum, the hospital "instituted disciplinary action" (against Hawkins, as shown in the Determination of Disciplinary Action), that "one employee [Hawkins] is no longer with the hospital" and that "[a]nother employee [apparently Hall] has received an appropriate disciplinary action."

Rather, Hawkins appears to assert that (1) the *implication* of the hospital's statements is that Hawkins employment was terminated for her actions in providing professional care and that (2) the further *implication* is that Hawkins was incompetent to provide such care. While Hawkins' termination/resignation certainly grew out of her inappropriate dosage of Brevibloc to Shimel, a jury could find that the first implication of the hospital's statements is literally false because, as the hospital's own records show, Hawkins was actually allowed to resign in lieu of being terminated for giving false statements during an investigation. Similarly, while the issue of Hawkins "incompetence" or "negligence" is a mixed question of fact and law, a jury could find the second implication to be literally false as well.[5]

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[5] The hospital asserts that Hawkins admitted in her deposition, at pages 125-127, that she was partly responsible for the improper dosage of medication, that she was "negligent" by failing to read the entire warning label for the Brevibloc, that she was "negligent" when she failed to read the Brevibloc protocol, and that she was "negligent" by failing to read Dr. Brandt's written orders. However, these pages from Hawkins' deposition testimony are not in the lower court record. Indeed, the hospital has not

We pause to emphasize, therefore, that as did *Locricchio* and *Rouch*, this case involves a private-figure plaintiff and matters of public concern. However, unlike *Locricchio* and *Rouch* this case does not involve a news media defendant. Further, again unlike *Locricchio*[6] and *Rouch*,[7] this case does not involve a situation in which the statements at issue were in the main accurate, although arguably marred by minor inaccuracies. See, e.g., *McCracken v Evening News Ass'n*, 3 Mich App 32, 40; 141 NW2d 694 (1966). Here, the statements were literally accurate. Hawkins' contention is that the *implication* of the statements was

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even provided this Court with a copy of those pages. Accordingly, we may not consider this alleged testimony by Hawkins. See *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 654; 517 NW2d 864 (1994) (where a party did not provide pertinent deposition testimony, issue considered abandoned on appeal). In any event, even if these apparent statements by Hawkins in her deposition were properly before us, we would not need to rule with respect to whether these statements constituted admissions of negligence in the legal sense of the term or whether Hawkins, under these particular circumstances, was in a position to evaluate her own conduct with respect to negligence in the legal sense.

[6] See *Locricchio*, *supra* at 130:

> The plaintiffs' primary claim is that the Pine Knob series as a whole falsely implied that plaintiffs were members or associates of organized crime. Although the plaintiffs initially declined to provide any specific allegations of falsity, they argue on appeal that the layout of the Pine Knob articles, including photographs and headlines, as well as the repetition of certain words such as "Mafia," "Sicilian," and "money wash," and indeed certain specific statements, contribute to the overall implication.

[7] See *Rouch*, *supra* at 260:

> The substantial truth doctrine is frequently invoked to solve two recurring problems: minor inaccuracies and technically incorrect or flawed use of legal terminology. This case raises both questions.

The Supreme Court went on to find that, although there were minor differences between the statements in the newspaper article at issue in *Rouch* and the literal truth, the "gist or sting" of the article was not changed by these minor differences. *Id.* at 262.

false and defamatory. Thus, under the matrix, we have a case in which the statements were literally true but the implications were arguably false.

B. DEFAMATION BY IMPLICATION

Michigan common law recognizes defamation by implication albeit in a somewhat circumscribed fashion. In *Locricchio*, Justice BRICKLEY, writing for the majority, noted that this Court recognized that a number of cases "have held that a cause of action exists for defamation by implication." *Locricchio*, *supra* at 123. Justice BRICKLEY went on to state, however, that the cases this Court relied on "bear little relation to the case presented here." *Id.* Justice BRICKLEY concluded his analysis of the cases cited by the plaintiffs by observing:

> In any event, the questions whether a statement is capable of rendering a defamatory implication and whether, in fact, a plaintiff has proved falsity in an implication are separate inquiries. *A plaintiff alleging defamation by implication must still prove material falsity.* To do otherwise would allow a plaintiff to recover without a showing of falsity, in contravention of the rule announced in *Hepps*. [*Philadelphia Newspapers, Inc v Hepps*, 475 US 767; 106 S Ct 1558; 89 L Ed 2d 783 (1986)]. Our review of the plaintiffs' proofs, conducted below, convinces us that the plaintiffs failed to make such a showing. [*Locricchio*, *supra* at 130 (emphasis supplied).]

This statement should be read in conjunction with Justice BRICKLEY's earlier observation:

> As will be seen, we do not, and need not, disagree in theory with the conclusion of the Court of Appeals that a cause of action for libel by implication might succeed *without a direct showing of false statements.* We do disagree with its failure to conduct a review of the sufficiency of the

> evidence of falsity for any such libel by implication, as did the trial court. [*Id.* at 123, n 32 (emphasis supplied).][8]

Thus, one may conclude from Justice BRICKLEY's opinion that (1) a cause of action for defamation by implication exists in Michigan, but only if the plaintiff proves that the defamatory *implications* are materially false, and (2) that such a cause of action might succeed even without a direct showing of any actual literally false *statements*.[9] This conclusion is strengthened by Justice BRICKLEY's statement at the outset in *Locricchio* that the Court simply held that "plaintiffs failed to carry their burden of proving *either* false and defamatory factual statements *or false implications*." [*Id.* at 90-91 (emphasis supplied).]

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[8] Justice BRICKLEY earlier summarized the cases on which this Court relied: *Sanders v Evening News Ass'n*, 313 Mich 334, 340; 21 NW2d 152 (1946); *Caldwell v Crowell-Collier Publishing Co*, 161 F2d 333, 335-336 (CA 5, 1947), and *Memphis Publishing Co v Nichols*, 569 SW2d 412, 419-420 (Tenn, 1978). According to Justice BRICKLEY:

> From *Sanders*, the Court of Appeals extracted the maxim that " '[t]o test its libelous quality, a publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein.' " *Id.* at 340. From *Caldwell* and *Nichols*, the Court of Appeals extrapolated the proposition that "[i]nsinuation, imputation or inference may be as defamatory as a direct, unveiled assertion." Having thus affirmed the theoretical validity of a cause of action for defamation by implication, the Court of Appeals held that "[t]he pleadings have given rise to a genuine issue of material fact which is to be left to the trier of facts and cannot be disposed of by summary judgment," and remanded the case for trial. [*Locricchio*, *supra* at 100.]

[9] But see Justice BRICKLEY's observation that "[o]ur review has disclosed no case where a plaintiff prevailed by alleging defamation by implication without a showing of either direct or underlying material falsity, or a material omission of true facts." *Locricchio*, *supra* at 133, n 41. We have located no reported decision of this Court or the Michigan Supreme Court after *Locricchio* in which a plaintiff has ultimately prevailed on a claim of defamation by implication.

It remains true, however, that claims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle. *Id.* at 122.[10] Principles of general libel and First Amendment libel law continue to apply. *Id.* at 132. Further, Michigan libel law prohibits libel liability "for *true speech*[11] on matters of public concern." *Id.* at 121 (emphasis supplied). See also *Royal*

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[10] We note, however, that Justice BRICKLEY here cited *Hepps, supra. Hepps* involved a private-figure plaintiff suing a news media defendant. Here, of course, we have a nonmedia defendant. However, *Hepps* also involved "speech of public concern." *Hepps, supra* at 768-769. Thus, the "constitutional hurdle" referred to by Justice BRICKLEY is also present in this case. In a defamation-by-implication suit involving a matter of public interest, but a private-figure plaintiff, Justice BRICKLEY, writing for the majority in *Locricchio*, determined that the plaintiff "must still prove material falsity." *Locricchio, supra* at 130. However, such a private-figure plaintiff does *not* have to meet the "actual malice" standard of *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964). *Locricchio, supra* at 129-130. Under the actual malice standard, a public-figure plaintiff must prove by clear and convincing evidence that a defamatory statement was made with knowledge that it was false or with reckless disregard of whether it was false. *Masson v New Yorker Magazine, Inc*, 501 US 496, 510; 111 S Ct 2419; 115 L Ed 2d 447 (1991).

[11] The reference to "true speech" incorporates the concept that some conduct that constitutes speaking or communicating in a physical sense does not constitute "speech" in the constitutional sense of the term. Blatantly and intentionally false representations of simple facts do not constitute "true speech":

> At best, it can be said that the [United States Supreme] Court has struggled analytically to balance private reputational interests against public free expression in the context of falsity. *On the one hand the Court* [in *Hustler Magazine, Inc v Falwell*, 485 US 46, 52; 108 S Ct 876; 99 L Ed 2d 41 (1988)]*has asserted that "[f]alse statements of fact" are constitutionally valueless because such statements "interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."* On the other hand, the Court has also asserted that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." [*Gertz v Robert Welch, Inc*, 418 US 323, 341; 94 S Ct 2997; 41 L Ed 2d 789 (1974).][*Locricchio, supra* at 121 (emphasis supplied).]

Palace Homes, Inc v Channel 7 of Detroit, Inc, 197 Mich App 48, 52; 495 NW2d 392 (1992).

C. THE SUBSTANTIAL TRUTH DEFENSE

As stated in *Rouch*:

> The common law has never required defendants to prove that a publication is literally and absolutely accurate in every minute detail. For example, the Restatement of Torts provides that "[s]light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." Michigan courts have traditionally followed this approach. At early common law, Michigan courts predicated a claim for libel on the question whether the article was substantially true. In *McAllister v Detroit Free Press Co*, 85 Mich 453; 460-461; 48 NW 612 (1891), this Court explained that liability could not be imposed for a slight inaccuracy:
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> "It is sufficient for the defendant to justify so much of the defamatory matter as constitutes the sting of the charge, and it is unnecessary to repeat and justify every word of the alleged defamatory matter, so long as the substance of the libelous charge be justified. . . . [A] slight inaccuracy in one of its details will not prevent the defendant's succeeding, providing the inaccuracy in no way alters the complexion of the affair, and would have no different effect on the reader than that which the literal truth would produce. . . . "
>
> Thus, the test looked to the sting of the article to determine its effect on the reader; if the literal truth produced the same effect, minor differences were deemed immaterial. [*Rouch*, *supra* at 258-259.][12]

As Justice BRICKLEY observed for the majority in *Locricchio*, "The Holmesian concept of the 'marketplace of ideas' plays a central role in all First Amendment jurisprudence." *Id.* at 121, n 29.

[12] The United States Supreme Court has grounded the concept of falsity on the historical definition of falsity in common-law libel. In *Masson*, *supra* at 516-517, the Court said:

> The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. It over-

Therefore, if the gist of an article or the sting of the charge is "substantially accurate," the defendant cannot be liable. *Fisher v Detroit Free Press, Inc*, 158 Mich App 409, 414; 404 NW2d 765 (1987), cited with approval in *Butcher v SEM Newspapers, Inc*, 190 Mich App 309, 312; 475 NW2d 380 (1992). See also *Royal Palace*, *supra* at 56. While it is true that these cases all involved news media defendants, there is no logical reason why the substantial truth defense should not also apply in cases involving nonmedia defendants, such as this one. Similarly, there is no logical reason why the substantial truth defense should not apply in cases involving the gist or the sting of defamatory implications from statements that are literally true, again such as this one.

IV. THE RELATIONSHIP BETWEEN MATERIAL FALSITY AND FAULT

With this overview in mind, we now address the interplay between the material falsity and fault elements of a defamation cause of action. Hawkins asserts that summary disposition based on the substantial truth doctrine is inappropriate when there is a genuine issue regarding whether the hospital intentionally misrepresented the reason for her dismissal.

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looks minor inaccuracies and concentrates upon substantial truth. . . . The essence of that inquiry, however, remains the same whether the burden rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified." . . . Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." [Citations omitted.]

As the Michigan Supreme Court observed in *Rouch*, *supra* at 260, although *Masson* pertained to the falsity component of an actual malice determination, it is clear that the constitutional requirement for testing falsity mirrors Michigan's common-law test.

We disagree. As noted above, in *Rouch, supra* at 251-253, the Michigan Supreme Court approached the material falsity and fault questions as separate and distinct components of its analysis. In *Rouch,* the resolution of the material falsity question turned on the application of the substantial truth doctrine. *Rouch, supra* at 261-271. This authoritative example convinces us that the question whether a statement is substantially true is to be examined *independently* from the question of the level of fault. The circuit court was exactly correct, therefore, when it ruled that the issue whether a statement was made negligently or intentionally "is independent of the question of material falsity to which the 'substantial truth doctrine' is applicable."

V. APPLICATION OF THE SUBSTANTIAL TRUTH DOCTRINE

We disagree, however, with the circuit court's conclusion that the hospital was entitled to summary disposition on the basis of the substantial truth doctrine. As noted above, the heart of Hawkins' cause of action stems from the June 2, 1995, release as read in conjunction with the May 31, 1995, release. Hawkins argues that the third paragraph of the June 2, 1995, release incorrectly implies that she was discharged because of her involvement in the medication overdose. The circuit court concluded that summary disposition was warranted because this implication was substantially true. We respectfully disagree.

The June 2, 1995, release failed to mention that Hawkins was not discharged because of her involvement in administering the overdose, but rather because of her failure to admit that she was a participant in the May 23, 1995, conversation concerning Dr.

Brandt. Looking at the evidence in a light most favorable to Hawkins, *Quinto*, *supra* at 362, it was erroneous to conclude as a matter of law that the implication created by the June 2, 1995, release would have the same effect on the mind of the audience as would a statement accurately identifying the reasons underlying the discharge. Without any mention of the actual justification for the discharge, the clear implication raised by the June 2, 1995, release is that the hospital discharged Hawkins for her involvement in the administration of the overdose. See *Memphis Publishing Co v Nichols*, 569 SW2d 412, 419-420 (Tenn, 1978) (observing that identified material omissions in a newspaper article had raised a clear and erroneous implication of an adulterous relationship).

The hospital's assertion that Hawkins could have been discharged because of her actions both during and after the overdose is irrelevant and, indeed, tends to obscure the real issue. The fact of the matter is that the hospital did *not* discharge Hawkins for her involvement in the overdose. Further, there is no evidence that the hospital even *attempted* to discharge Hawkins for her involvement in the overdose. We refuse to be drawn into an argument about whether the hospital could have fired Hawkins for her involvement in the overdose or whether Hawkins was more culpable than the other health-care providers involved. This is not the proper forum for resolving those issues. Moreover, lying about having participated in a conversation, the alleged conduct for which Hawkins may have been fired, is far different conduct than negligence in administering medication to a patient. Thus, the statements at issue by the hospital cannot by any reasonable analysis fall into the

"substantial truth" rubric discussed in *Rouch*. Certainly, it is no defense to liability for defamation based on false implication that the plaintiff has committed other, substantially unrelated, misconduct. That one has made a mistake, or even committed intentional wrongdoing, in one context does not justify a false implication about the person in another context.

Summary disposition was therefore inappropriate under MCR 2.116(C)(10) because there were and are genuine issues of material fact and the hospital was not entitled to judgment as a matter of law. We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. Hawkins, being the prevailing party, may tax costs pursuant to MCR 7.219.

PEOPLE v PARKER

Docket No. 200688. Submitted March 18, 1998, at Lansing. Decided June 16, 1998, at 9:10 A.M. Leave to appeal sought.

Jabez Q. Parker was convicted by a jury in the Bay Circuit Court, Lawrence M. Bielawski, J., of conspiracy to commit carjacking, carjacking, armed robbery, and two counts of possession of a firearm during the commission of a felony. He was sentenced as a second-offense habitual offender for each conviction. The defendant appealed.

The Court of Appeals *held*:

1. The court did not err in finding that the defendant lacked standing to challenge the search of the apartment where he was found by the police and the seizure of evidence found therein linking him to the crimes because he did not live in the apartment and was not an overnight guest and, therefore, had no expectation of privacy.

2. The Legislature intended separate convictions and punishments for both carjacking and armed robbery, even if the defendant committed the offenses in the same criminal transaction. The Legislature intended multiple punishments for the violations of the different social norms addressed in the armed robbery and carjacking statutes. The armed robbery and carjacking offenses are not the "same offense" under the same-elements test of *Blockburger v United States*, 284 US 299 (1932). The defendant's convictions of carjacking, stemming from the taking of an automobile at gunpoint, and armed robbery, stemming from the subsequent taking of the victim's wallet and money at gunpoint, do not violate the double jeopardy protections of the United States or Michigan Constitutions.

Affirmed.

1. CRIMINAL LAW — SEARCHES AND SEIZURES — EXPECTATION OF PRIVACY.

A search must have infringed a constitutionally protected interest in order for a defendant to attack the propriety of the search and seizure; a trial court, in determining whether an infringement occurred, must decide, upon consideration of the totality of the circumstances, whether the defendant had an expectation of privacy in the object of the search and seizure and whether that expecta-

tion is one that society is prepared to recognize as reasonable (US Const, Am IV; Const 1963, art 1, § 11).

2. CRIMINAL LAW — DOUBLE JEOPARDY — CARJACKING — ARMED ROBBERY.

A defendant's convictions of carjacking, stemming from the taking of an automobile at gunpoint, and armed robbery, stemming from the subsequent taking of the victim's wallet and money at gunpoint, do not violate the double jeopardy provisions of the federal or state constitutions; the Legislature designed both statutes to prevent a different type of crime and authorized multiple punishments for violations of the different social norms addressed by the statutes; the statutes each contain an element that the other does not and, thus, do not involve the "same offense"; the Legislature intended to separately punish a defendant convicted both of carjacking and armed robbery, even if the defendant committed the offenses in the same criminal transaction (US Const, Am V; Const 1963, art 1, § 15; MCL 750.529, 750.529a; MSA 28.797, 28.797[a]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Joseph K. Sheeran*, Prosecuting Attorney, and *Martha G. Mettee*, Assistant Prosecuting Attorney, for the people.

Robert J. Dunn, for the defendant.

Before: HOEKSTRA, P.J., and JANSEN and GAGE, JJ.

HOEKSTRA, P.J. Following a jury trial, defendant was convicted of conspiracy to commit carjacking, MCL 750.157a; MSA 28.354(1), carjacking, MCL 750.529a; MSA 28.797(a), armed robbery, MCL 750.529; MSA 28.797, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as a second-offense habitual offender to three concurrent terms of fourteen to forty years' imprisonment for the carjacking convictions and the armed robbery conviction. He was also sentenced to two concurrent terms of two years' imprisonment for the felony-firearm convictions, which are to be served consecutively to the

other terms of imprisonment. Defendant appeals as of right. We affirm.

This case arises from the crimes committed by defendant and a codefendant against two men who had stopped at a highway rest area in the early morning hours of September 13, 1995. After tracing defendant to an apartment rented by two women, police officers located defendant asleep in bed with one of the lessees near noon that same day. The officers searched the apartment pursuant to a search warrant and confiscated evidence linking defendant to the crimes. At the hearing regarding defendant's motion to suppress the evidence, defendant called two acquaintances to testify on his behalf; however, defendant did not call the lessees of the apartment. The trial court denied defendant's motion, finding that defendant lacked standing to challenge the search and seizure.

Defendant argues that the trial court erred in denying his motion to suppress the evidence. We disagree. This Court reviews de novo the trial court's ultimate decision with regard to a motion to suppress evidence; however, we review the trial court's findings of fact in deciding the motion for clear error. *People v Darwich*, 226 Mich App 635, 636; 575 NW2d 44 (1997). See *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996).

For a defendant to attack the propriety of a search and seizure, the search must have infringed a constitutionally protected interest. US Const, Am IV; Const

1963, art 1, § 11; *People v Smith*, 420 Mich 1, 6, n 1; 360 NW2d 841 (1984). In determining whether such an infringement occurred, the trial court must decide, upon consideration of the totality of the circumstances, whether the defendant had an expectation of privacy in the object of the search and seizure and whether that expectation is one that society is prepared to recognize as reasonable. *Id.* at 28. Defendant contends that he has standing to assert the claim that the evidence was improperly seized on the authority of *Minnesota v Olson*, 495 US 91; 110 S Ct 1684; 109 L Ed 2d 85 (1990). There, the Supreme Court held that an overnight guest at a residence had a legitimate expectation of privacy protected by the Fourth Amendment and that that expectation conferred standing to challenge a nonconsensual entry into a residence without a warrant that resulted in an arrest. *Id.* at 93-94, 100. The trial court in this case, which quoted *Olson* extensively in its opinion denying defendant's motion, held that the evidence presented at the suppression hearing in this case did not support the conclusion that defendant was an overnight guest at the apartment.

First, the trial court noted that none of the witnesses testified that defendant lived at the apartment. Rather, the codefendant, who was called by the prosecution, testified that defendant lived with his mother. Next, with regard to whether defendant was an overnight guest, the court stated that it disbelieved the inconsistent testimony of one of the defendant's witnesses about whether the witness was at the apartment on the night of September 12, but the court stated that it believed the testimony of the codefendant. The codefendant testified that he and defendant

first went to the apartment on the evening of September 12 to ask one of the lessees if they could borrow her vehicle, that they did not come back to the apartment in question until 6:00 or 7:00 the following morning, that defendant asked him to wait while he went to talk with one of the lessees, that he waited for defendant, and that neither he nor defendant planned to stay and fall asleep in the apartment. After hearing and reviewing this evidence, the court found that, at best, defendant's evidence established that he was a mere visitor at the apartment.

Particularly where the issue involves the credibility of the witness whose testimony is in conflict, the trial court's resolution of a factual issue is entitled to deference. *Burrell, supra* at 448-449. Here, the trial court specifically stated that it found the codefendant's testimony credible. Therefore, the trial court stated that it was unconvinced that defendant lived at the apartment or that defendant was an overnight guest at the apartment. We are not left with a definite and firm conviction that the trial court's findings of fact were mistaken, nor do we disagree with the trial court's conclusion that these findings of fact are distinguishable from the facts in *Olson, supra.*[1] Accordingly, we affirm the court's denial of the motion to suppress the evidence because defendant lacked standing to challenge the search and seizure.

Next, defendant argues that the trial court erred in denying his motion for a directed verdict with regard

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[1] Courts in other jurisdictions have also declined to extend the holding in *Olson* to cases that are factually distinguishable. See *Terry v Martin*, 120 F3d 661 (CA 7, 1997); *Fisher v State*, 665 So 2d 1014 (Ala Crim App, 1995); *State v Wise*, 879 SW2d 494 (Mo, 1994); *State v Harris*, 609 A2d 944 (RI, 1992); *Villarreal v State*, 893 SW2d 559 (Tex App, 1994).

to either the charge of armed robbery or the charge of carjacking because allowing the jury to convict defendant of both felonies placed defendant in jeopardy of suffering multiple punishments for the same offense. We disagree with defendant's argument. We review de novo questions of law, including double jeopardy issues. *People v Price*, 214 Mich App 538, 542; 543 NW2d 49 (1995). The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. Judicial examination of the scope of double jeopardy protection under both constitutions is confined to a determination of legislative intent. *People v Sturgis*, 427 Mich 392, 400; 397 NW2d 783 (1986) (citing *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 [1984]).

With regard to the Double Jeopardy Clause of the state constitution, this Court uses traditional means to determine legislative intent, such as the subject, language, and history of the statutes. *People v Denio*, 454 Mich 691, 708-709; 564 NW2d 13 (1997). Defendant's carjacking conviction stems from the taking of the automobile at gunpoint, whereas defendant's armed robbery conviction stems from the subsequent taking of the victim's wallet and money at gunpoint. The statute prohibiting armed robbery states the following:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term

> of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. [MCL 750.529; MSA 28.797.]

The statute prohibiting carjacking, which the Legislature promulgated in 1994, states the following:

> (1) A person who by force or violence, or by threat of force or violence, or by putting in fear robs, steals, or takes a motor vehicle as defined in section 412 from another person, in the presence of that person or the presence of a passenger or in the presence of any other person in lawful possession of the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.
>
> (2) A sentence imposed for a violation of this section may be imposed to run consecutively to any other sentence imposed for a conviction that arises out of the same transaction. [MCL 750.529a; MSA 28.797(a).]

Although both crimes involve property loss to a person, either a motor vehicle or other property, the Legislature designed each statute to prevent a different type of harm. See *People v Guiles*, 199 Mich App 54, 58; 500 NW2d 757 (1993). It is clear from the language of the carjacking statute that the Legislature intended to prohibit takings accomplished with force or the mere threat of force. In contrast, it is clear from the language of the armed robbery statute that the Legislature intended to prohibit takings accomplished by an assault and the wielding of a dangerous weapon. A further source of legislative intent is the amount of punishment expressly authorized by the Legislature. *Denio, supra at 708* (citing *Robideau, supra* at 487-488). In the carjacking statute, the Legis-

lature specifically authorized two separate convictions arising out of the same transaction. MCL 750.529a(2); MSA 28.797(a)(2). Although the Double Jeopardy Clauses restrict courts from imposing more punishment than that intended by the Legislature, the Legislature may authorize cumulative punishment of the same conduct under two different statutes. *Denio*, *supra* at 709 (citing *Sturgis*, *supra* at 403). From the subject and language of these statutes, we can conclude that the Legislature intended multiple punishments for violations of different social norms.

Defendant's carjacking and armed robbery convictions also do not violate the Double Jeopardy Clause of the federal constitution because they do not constitute the "same offense" under the same-elements test from *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). See *Denio*, *supra* at 707-708. Under the *Blockburger* test, our inquiry is whether the two separate statutes each include an element that the other does not. *Id.* at 707. Here, the offense of carjacking does not require proof that the defendant intended to deprive the victim permanently of possession of the vehicle. *People v Terry*, 224 Mich App 447, 454-455; 569 NW2d 641 (1997). Armed robbery, a specific intent crime, requires this showing. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Also, the offense of armed robbery requires proof that the defendant was armed with a dangerous weapon. *Id.* The offense of carjacking has no such requirement.

Therefore, under both federal and state analyses, it is clear that the Legislature intended to separately punish a defendant convicted of both carjacking and armed robbery, even if the defendant committed the

offenses in the same criminal transaction. Accordingly, we hold that the trial court did not err in denying defendant's motion for a directed verdict.

Affirmed.

RIETH v KEELER

Docket No. 199352. Submitted March 12, 1998, at Grand Rapids. Decided June 16, 1998, at 9:15 A.M.

Kenneth K. Rieth and others brought an action in the Kent Circuit Court against Herbert Keeler and others, alleging fraud. Mediation resulted in an award for the plaintiffs, which they and Keeler accepted. However, Keeler's acceptance was not filed with the mediation clerk within twenty-eight days of the evaluation, and, pursuant to MCR 2.403(L)(1), Keeler was deemed to have rejected the evaluation. Keeler filed a motion seeking to have his acceptance of the evaluation allowed as timely. The court, Dennis C. Kolenda, J., denied the motion. Keeler appealed by leave granted.

The Court of Appeals *held*:

The trial court failed to recognize that it has the discretion to allow an amendment of a rejection of a mediation evaluation where rejection is deemed from a party's failure to respond to the evaluation in the manner required by the court rule. The trial court's order denying Keeler's motion must be reversed, and the matter must be remanded for reconsideration of Keeler's motion. If the trial court, on remand, allows Keeler to amend the rejection of the evaluation to an acceptance of it, the plaintiffs must be provided an opportunity to reiterate their acceptance of the evaluation or to reject the evaluation.

Reversed and remanded.

PRETRIAL PROCEDURE — MEDIATION — AMENDMENT OF DEEMED REJECTIONS.

A trial court has discretion over whether to allow an amendment of a party's rejection of a mediation evaluation that was accepted by the other party where rejection is deemed from the failure to respond to evaluation in the manner required by court rule; if amendment is allowed, the other party must be provided an opportunity to reiterate its acceptance of the evaluation or to reject the evaluation (MCR 1.105, 2.403[L][1]).

Dickinson, Wright, Moon, Van Dusen & Freeman (by *Rock A. Wood* and *Lawrence G. Campbell*), for the plaintiffs.

Plaszczak & Bauhof, P.C. (by *James F. Bauhof*), for the defendant.

Before: MARKEY, P.J., and GRIFFIN and WHITBECK, JJ.

PER CURIAM. Defendant Herbert Keeler appeals by leave from an order of the trial court denying his motion to allow his acceptance of the mediation evaluation as timely. We reverse and remand for further proceedings.

Plaintiffs filed suit alleging that defendant and others had fraudulently induced plaintiffs to enter into a transaction that included the merger of Old Leap Technologies, Inc., and Riviera Plastic Products Company. After mediation, the mediation panel awarded damages to plaintiffs and against defendants. Plaintiffs initially accepted the mediation evaluation with respect to defendant. While defendant apparently decided to accept the mediation evaluation, the acceptance was not sent to the mediation clerk, as envisioned under MCR 2.403(L)(1).[1] Plaintiffs' counsel informed defendant's counsel that plaintiffs would not stipulate an amendment of the notice of acceptance/rejection to reflect an acceptance of the award. Defendant then filed his motion with the trial court to allow defendant's acceptance of the mediation evaluation as timely. Defendant argued that the acceptance of the mediation had inadvertently not been mailed to the mediation clerk. The trial court denied defendant's motion.

On appeal, defendant seeks reversal on the grounds that the trial court failed to exercise its discretion

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[1] Under MCR 2.403(L)(1), failure to file a written acceptance of the mediation evaluation within twenty-eight days after the service of the mediation panel's evaluation constitutes a rejection.

with respect to defendant's motion to allow defendant's acceptance of the mediation evaluation as timely. We review a claim alleging a failure to exercise discretion under the abuse of discretion standard. *People v Stafford*, 434 Mich 125, 134, n 4; 450 NW2d 559 (1990). In that case, the Michigan Supreme Court held that "failure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion." *Id.*

The trial court, in denying defendant's motion, relied upon *Busch v Hoffmeyer*, 429 Mich 874 (1987). The trial court reasoned as follows:

> It is true that under the rules, the Court can extend most deadlines. There are a few it can't extend, but it can extend most. The effect of that and the manner of which it is usually done is, frankly, forgiving the missing of a deadline. Few people ask us to extend them in advance. They always ask us after the fact to forgive the fact that one was missed. Same thing I think, just slightly different form.
>
> However, when it comes to forgiving the missing of a deadline, the cases involving defaults in general, and it appears to me those involving acceptance or rejection of mediation in particular, do seem to uniformly say that the mistake of the lawyer is not sufficient grounds. That's what I clearly read *Busch* to say.
>
> In terms of prejudice to the objecting party here, despite what I said to begin this argument, there are, indeed, a variety of stratagems which are being pursued when it comes to accepting and rejecting mediation. Sometimes it is done in the hopes that the other side will reject, so that by accepting, attorney's fees can be avoided, and negotiating postures change. So, the truth of the matter is, is that there is substantial potential here for something being done adversely, giving what these parties had planned on doing.
>
> Accordingly, in light of the case law most recently, the Supreme Court, which is the ultimate arbiter of all of these, the motion is denied.

In its brief summary discussion in *Busch*, the Michigan Supreme Court held that the trial court had not abused its discretion in denying the plaintiffs' motion for relief from the mediation order where the rejection letter had not been timely mailed.[2] *Id.* at 874-875; see *Busch v Hoffmeyer*, 158 Mich App 786, 789; 405 NW2d 220 (1987), rev'd 429 Mich 874 (1987). Here, although its language is more than a little opaque, the trial court apparently read *Busch* as containing a mandatory pronouncement that if there is an error or inadvertent mistake of counsel with regard to meeting a mediation deadline, then under no circumstances can relief be granted. We read *Busch*, however, as merely stating that, under the facts of that case, the trial court had not abused its discretion. The important distinction, we believe, is that *Busch* should not be read as laying down a mandatory rule of law; rather, *Busch*, properly understood, stands for the proposition that trial courts have discretion regarding whether to provide relief from inadvertently missing a mediation deadline. After carefully reviewing the record, we conclude that the lower court here operated under the assumption that it did not have such discretion. The trial court appears to have believed that under *Busch* it simply could not extend the deadline for filing a mediation acceptance.

This Court has previously held that a trial court has discretion to allow a party to amend the deemed rejection of a mediation evaluation based on the party's failure to respond within the required twenty-eight-day period to reflect the party's acceptance of

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[2] The *Busch* case was decided under the old version of MCR 2.403(L)(1), wherein failure to contact the mediation clerk within the twenty-eight days was deemed an acceptance of the award.

the mediation evaluation. *State Farm Mut Automobile Ins Co v Galen*, 199 Mich App 274, 278-279; 500 NW2d 769 (1993). However, in such an event, the trial court should enter judgment on the mediation evaluation only "if the opposing party reaffirms its continued acceptance of the award." *Id.* at 278-279. Thus, if on remand the trial court eventually decides to allow defendant to amend his deemed rejection of the mediation evaluation to an acceptance of that evaluation, plaintiffs must thereafter be provided an opportunity to either reiterate their acceptance of the mediation evaluation or to reject the mediation evaluation.

Moreover, our conclusion is strengthened by the provisions of MCR 1.105. Although not cited by the parties, this rule provides:

> These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.

We believe that the mediation rules are to be construed consistently with MCR 1.105. Here, the error of not timely filing the acceptance with the mediation clerk does not appear to have affected the substantial rights of a party. However, in exercising its discretion on remand, the trial court may consider whether this error had an effect on plaintiffs' substantial rights. Accordingly, we find that the trial court failed to exercise discretion when called on to do so and hence abused its discretion. *Stafford, supra.*

We therefore reverse and remand to the trial court for reconsideration of defendant's motion and further proceedings consistent with this opinion. We instruct the trial court to exercise its discretion in considering

that motion and to construe the mediation rules consistently with MCR 1.105. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs under MCR 7.219.

HAKARI v SKI BRULE, INC

Docket No. 204772. Submitted May 21, 1998, at Marquette. Decided June 19, 1998, at 9:00 A.M.

Diane Hakari brought an action in the Iron Circuit Court against Ski Brule, Inc., and an unidentified skier, alleging negligence in connection with injuries she sustained while skiing at Ski Brule's resort when she collided with the unidentified skier. The plaintiff sought leave to amend her complaint to allege that Ski Brule had and breached a duty under the Ski Area Safety Act and the common law to obtain from the unidentified skier information concerning his identity. The court, John D. Payant, J., denied leave to amend the complaint and subsequently granted summary disposition for Ski Brule, ruling that the claim against Ski Brule was precluded by the Ski Area Safety Act. The plaintiff appealed, challenging the denial of leave to amend her complaint.

The Court of Appeals *held*:

The trial court did not abuse its discretion in denying the plaintiff leave to amend her complaint inasmuch as amendment would be futile because neither the Ski Area Safety Act nor the common law imposes a duty on a ski area operator to ascertain the identity of a skier involved in accidental injury to another skier.

1. Section 23(1) of the Ski Area Safety Act, MCL 408.343(1); MSA 18.483(23)(1), expressly imposes a duty on a skier involved in an accident to identify himself to the ski patrol, the ski area operator, or law-enforcement or emergency personnel, but cannot be construed to impose a duty on a ski area operator to ascertain the identity of a skier involved in accidental injury to another skier. Such a construction would be inconsistent with legislative intent underlying the act to let skiers assume the obvious and necessary dangers of skiing.

2. Generally, under common law, an individual has no duty to protect another who is endangered by a third person's conduct. Where there is a duty to protect an individual from harm by a third person, that duty to exercise reasonable care arises from a special relationship between either the defendant and the victim or the defendant and the third party who caused the injury. Such a special relationship must be sufficiently strong to require a defendant to

take action to benefit the injured party. In this case, no special relationship existed between Ski Brule and the plaintiff that would give rise to a duty on the part of Ski Brule to render assistance to the plaintiff in the form of ascertaining the identity of the unidentified skier.

Affirmed.

NEGLIGENCE — SKI AREA OPERATORS — ASCERTAINING IDENTITIES OF SKIERS — SKI AREA SAFETY ACT.

Neither the Ski Area Safety Act nor the common law imposes a duty on a ski area operator to ascertain, for the benefit of an accidentally injured skier, the identity of any other skier involved in the accident; the failure of a ski area operator to ascertain the identity of a skier involved in accidental injury to another skier does not subject the operator to liability to the injured skier for negligence (MCL 408.343[1]; MSA 18.483[23][1]).

Fisher, Omdahl & Lawrence (by *Torger G. Omdahl* and *Geoffrey C. Lawrence*), for the plaintiff.

Dean & O'Dea (by *Timothy M. Dean*), for the defendant.

Before: MARKMAN, P.J., and GRIFFIN and WHITBECK, JJ.

GRIFFIN, J. Plaintiff appeals as of right from the trial court's order denying her motion to file a first amended complaint. We affirm.

On March 4, 1995, plaintiff was injured when she was struck from behind by another skier while skiing on a slope at defendant's ski resort. Plaintiff filed suit, alleging that defendant negligently adjusted boots and bindings that she purchased from its ski shop and, further, that defendant failed to supervise the actions of other skiers on the ski slope. The name of the other skier, identified only as defendant John Doe in plaintiff's original complaint, was thereafter ascertained to be John H. Jacques, although no further

information regarding this individual was available.[1] Plaintiff attempted to amend her original complaint to also allege that defendant negligently failed to take proper identification from Jacques, in violation of the Ski Area Safety Act of 1962, MCL 408.321 *et seq.*; MSA 18.483(1) *et seq.*, and the common law, thus allegedly denying her the opportunity to trace this person and bring suit against him. The trial court denied plaintiff's motion to amend her complaint as futile, concluding that there existed neither a statutory nor a common-law duty on the part of defendant to obtain and provide to plaintiff further information concerning the identity of the other skier. The trial court subsequently granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) and (10), finding that there existed no genuine issue of material fact with regard to the claims set forth in plaintiff's original complaint and that plaintiff's cause of action was precluded by the Ski Area Safety Act. On appeal, plaintiff challenges only the denial of her motion to amend the complaint.

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[1] Immediately following the accident, the other skier identified himself to ski patrol personnel as John H. Jacques" but gave no other information regarding his identity, such as address, social security number, driver's license number, or phone number. There were no other witnesses to the accident and no other information corroborating the identity of Jacques. Jacques gave a handwritten account of the accident to the ski patrol, which in its totality consisted of the following:

> Diane was in front of me to my right and made a sudden turn to the left. She was moving slower than most skiers on that hill. We collided, my right side to her left side as I was falling to try to avoid her.

This statement was produced during the course of discovery, after the filing of plaintiff's original complaint.

I

A trial court should freely grant leave to amend pleadings if justice so requires. MCR 2.118(A)(2); *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). However, leave to amend a complaint may be denied for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991). This Court reviews grants and denials of motions for leave to amend pleadings for an abuse of discretion. *Weymers*, *supra* at 658; *Jenks*, *supra* at 420.

In the present case, plaintiff moved to amend her original complaint to state a claim of negligence against defendant for its failure to procure adequate information regarding the identity of the other skier, John Jacques, involved in the accident. Plaintiff sought to allege that pursuant to the common law and the Ski Area Safety Act, a ski hill operator has an affirmative duty to procure specific and complete identification from any skier involved in an accident. However, we conclude that the existence of such a duty is supported neither by case law nor by a reasonable construction of the statute; hence, the trial court properly denied the amendment as futile.

A fundamental rule of statutory construction is to ascertain and effectuate the intent of the Legislature

in enacting the provision. *Jenks, supra* at 418; *Barr v Mt Brighton Inc*, 215 Mich App 512, 517; 546 NW2d 273 (1996). Statutory language should be construed reasonably with the purpose of the statute in mind. *Id.* The words and phrases in a statute are to be given their plain and ordinary meaning. *Panich v Iron Wood Products Corp*, 179 Mich App 136, 141; 445 NW2d 795 (1989). A statute is not open to construction by the courts unless the language used in the statute is ambiguous or where reasonable minds could differ. *Grieb v Alpine Valley Ski Area, Inc*, 155 Mich App 484, 486; 400 NW2d 653 (1986).

The Ski Area Safety Act was enacted to provide for certain presumptions relative to liability for injury or damage sustained by skiers and to clearly delineate the rights and responsibilities of skiers and ski area operators. *Barr, supra* at 515; *Schmitz v Cannonsburg Skiing Corp*, 170 Mich App 692, 693-694; 428 NW2d 742 (1988). As this Court noted in *Grieb, supra* at 488-489:

> The Legislature perceived a problem with respect to the inherent dangers of skiing and the need for promoting safety, coupled with the uncertain and potentially enormous ski area operators' liability. Given these competing interests, the Legislature decided to establish rules in order to regulate the ski operators and to set out ski operators' and skiers' responsibilities in the area of safety. MCL 408.340 *et seq.*; MSA 18.483(20) *et seq.* As part of this reform, the Legislature has decided that all skiers assume the obvious and necessary dangers of skiing. This is a rational solution for limiting ski area operators' liability and promoting safety.

The portion of the Ski Area Safety Act that, according to plaintiff, arguably gives rise to a ski operator's

affirmative duty to ascertain the identity of a skier involved in an accident reads as follows:

> *A skier involved in an accident causing an injury to another person shall to the extent that he or she is reasonably able to do so immediately notify the ski patrol or the operator, or law enforcement or emergency personnel, and shall clearly identify himself or herself.* A skier who wilfully fails to give identification after involvement in a skiing accident with another person, or a skier who is reasonably able to do so who fails to notify the proper authorities or to obtain assistance when the skier knows that another person involved in the accident is in need of medical or other assistance, is guilty of a misdemeanor, punishable by imprisonment for not more than 30 days, or a fine of not more than $100.00, or both. [MCL 408.343(1); MSA 18.483(23)(1) (emphasis added).]

The language of the statute is neither ambiguous nor unclear. As the statute is written, it is the *skier's* duty to identify himself to the ski patrol, operator, law enforcement, or emergency personnel. Although this section does identify the operator as one of the persons to whom the parties to an injury must "clearly identify" themselves, we will not, by implication, read into the statute an affirmative duty on the part of the ski area operator to ascertain, verify, or record the identity of the skier involved in an accident. This Court, albeit in a different context,[2] has refused to create a statutory duty where no such duty could be gleaned from the language or intent of the statute. *Panich, supra.* In so doing, we noted:

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[2] In *Panich, supra,* the plaintiff sought to create a duty of an employer pursuant to the Worker's Disability Compensation Act, MCL 418.827(1), (5); MSA 17.237(827)(1), (5), to preserve evidence necessary to aid the plaintiff's third-party tort action.

> The role of the judiciary is to construe statutes as intended by the Legislature, not to rewrite them. No fair reading of the statute lends support to plaintiff's position that the Legislature intended to impose such a duty on employers. [*Id.* at 142].

We adhere to this principle in the instant case. Indeed, the imposition of a duty upon the skier, alone, to "clearly identify" himself is consistent with the distribution of risks and responsibilities set forth in other portions of the Ski Area Safety Act. MCL 408.342(2); MSA 18.483(22)(2) provides in pertinent part:

> Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to . . . *collisions* . . . *with other skiers* . . . . [Emphasis added.]

This statutory section "clearly and unambiguously provides that an injury resulting from a collision with another skier is an obvious and necessary danger *assumed by skiers.*" *Grieb*, *supra* at 486 (emphasis added). See also *Barr*, *supra* at 517. In *Schmitz*, *supra* at 696, this Court further stated that "it is logical to construe this section of the statute [MCL 408.342(2); MSA 18.483(22)(2)] as an assumption of risk clause that renders the reasonableness of the skiers' or the ski area operator's behavior irrelevant." It would be logically inconsistent, then, to create by implication an affirmative duty on the part of the ski area operator to properly identify any skiers involved in an accident stemming from a collision when the operator is otherwise statutorily absolved of liability under those circumstances.

We conclude that the language and intent of MCL 408.343(1); MSA 18.483(23)(1) is not amenable to the expansive statutory construction proposed by plaintiff. The trial court therefore did not abuse its discretion in denying plaintiff's motion to amend her complaint to set forth a claim pursuant to that section of the Ski Area Safety Act.

II

Plaintiff also sought to amend her complaint to allege that defendant owed her a common-law duty to obtain adequate identification from John Jacques after the accident. However, we find no basis for such a cause of action and therefore conclude that the trial court properly denied plaintiff's motion to amend in this regard.

The issue of duty is a question of law for the court to decide. *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977); *Panich*, *supra* at 139. The concept of duty encompasses whether the defendant owes the plaintiff any obligation to avoid negligent conduct. *Moning*, *supra* at 437; *Jenks*, *supra* at 417. In deciding whether a duty should be imposed, the court must look at several factors, including the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997); *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992). It is axiomatic that, where no duty exists, there can be no actionable negligence. *Schenk v Mercury Marine Div, Lowe Industries*, 155 Mich App 20, 25; 399 NW2d 428 (1986). It is likewise well established that

> [g]enerally, an individual has no duty to protect another who is endangered by a third person's conduct. Where there is a duty to protect an individual from a harm by a third person, that duty to exercise reasonable care arises from a "special relationship" either between the defendant and the victim, or the defendant and the third party who caused the injury. . . . Such a special relationship must be sufficiently strong to require a defendant to take action to benefit the injured party. [*Murdock*, *supra* at 54.]

In the instant case, plaintiff was physically injured by a collision with a third person, not by the conduct of defendant. No "special relationship"[3] existed between defendant and plaintiff that would give rise to a duty on the part of defendant to render assistance to plaintiff in the form of procuring information concerning the identity of the other skier. As the trial court properly noted, the relationship between defendant and plaintiff was merely contractual. Thus, there was no "special relationship" that required defendant to act affirmatively in the manner alleged by plaintiff. *Murdock*, *supra*; *Schenk*, *supra*. We hold that the trial court properly exercised its discretion in disallowing, as futile, plaintiff's proposed amendments of her complaint. *Gonyea*, *supra*.

Affirmed.

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[3] Some generally recognized "special relationships" include invitor-invitee, common carrier-passenger, innkeeper-guest, landlord-tenant, employer-employee, and doctor-patient/psychiatrist-patient. *Murdock*, *supra* at 55, n 11.

MORRIS v ALLSTATE INSURANCE COMPANY

Docket No. 198937. Submitted November 5, 1997, at Grand Rapids. Decided June 19, 1998, at 9:05 A.M.

Tina M. Morris brought an action in the Muskegon Circuit Court against Allstate Insurance Company, seeking personal protection insurance benefits under no-fault insurance policies issued by the defendant with regard to motor vehicles owned by the plaintiff and her husband under which the plaintiff was a named insured. The benefits were sought for injuries sustained in a collision between two uninsured off-road recreational vehicles (ORVs). The plaintiff had been a passenger in one of the vehicles, which was owned and driven by her husband. The owner-driver of the other ORV was killed in the accident. The defendant brought a motion for summary disposition, claiming that benefits were not payable because the road on which the collision occurred was not a public highway and the plaintiff's injuries did not arise out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. The court, James M. Graves, Jr., J., found that the collision had in fact occurred on a public highway, denied the defendant's motion, and granted partial summary disposition in favor of the plaintiff. The court also denied the defendant's motion for leave to file a third-party complaint against the owner-driver of the ORV in which the plaintiff was a passenger and the estate of the other owner-driver to recoup the benefits the defendant had paid. The defendant appealed.

The Court of Appeals *held*:

1. The determination whether the ORVs, which were not designed for operation on the public highway and were not titled or registered under the Michigan Vehicle Code, were "motor vehicles" within the meaning of MCL 500.3101(2)(e); MSA 24.13101(2)(e) depends in this case upon whether they were being operated on a public highway at the time of the accident. Genuine issues of material fact existed regarding whether the road constituted a public highway. The court erred in granting summary disposition in favor of the plaintiff on the ground that the road was a public highway. That order must be reversed and the matter must be remanded for further proceedings.

2. The court properly denied the defendant's motion for leave to file a third-party complaint seeking reimbursement, pursuant to MCL 500.3177(1); MSA 24.13177(1), from the owners of the uninsured ORVs. The court properly found that reimbursement is available only with regard to vehicles that are required to be insured under the no-fault act and that the ORVs involved in the accident were not required to be insured under the no-fault act. The list of persons who are not entitled to personal protection insurance benefits in MCL 500.3113; MSA 24.13113 does not include persons whom the Legislature has exempted from purchasing no-fault insurance. The no-fault act does not expose to tort liability under § 3177 someone who has not violated the no-fault act.

3. The court's decision that the vehicles were ORVs is consistent with its decision that they were motor vehicles. The statutory categories regarding ORVs and motor vehicles are not mutually exclusive.

Affirmed in part, reversed in part, and remanded.

1. MOTIONS AND ORDERS — SUMMARY DISPOSITION — ISSUES OF MATERIAL FACT.

Summary disposition may not be granted pursuant to MCR 2.116(C)(10) where a record might be developed that leaves open an issue of material fact upon which reasonable minds could differ.

2. INSURANCE — NO-FAULT ACT — PERSONAL PROTECTION INSURANCE BENEFITS — PERSONS EXCLUDED.

Section 3113 of the no-fault act identifies those persons who are not entitled to personal protection insurance benefits under the act to include persons who fail to purchase the required insurance for their own vehicle; a person specifically exempted from purchasing no-fault insurance is not included in the list of persons not entitled to such benefits (MCL 500.3113; MSA 24.13113).

3. INSURANCE — NO-FAULT ACT — EXEMPT VEHICLES — THIRD-PARTY LIABILITY.

The Legislature intended the no-fault insurance act on occasion to afford no-fault benefits to someone injured as a result of the ownership, operation, maintenance, or use of a motor vehicle that is not required to be registered or insured; the owner of a vehicle not required to be registered or insured should not be subjected to tort liability under § 3177 of the act in a third-party action by an insurer that has been obligated to pay personal protection insurance benefits for accidental bodily injury to a person arising out of the ownership, maintenance, or use of an uninsured motor vehicle that was not required to be insured (MCL 500.3177[1]; MSA 24.13177[1]).

4. INSURANCE — MOTOR VEHICLES — OFF-ROAD VEHICLES.

A vehicle may be found to be both a motor vehicle and an off-road vehicle; the categories defining both motor vehicles and off-road vehicles are not mutually exclusive (MCL 324.81101[n], 500.3101[2][e]; MSA 13A.81101[n], 24.13101[2][e]).

Kortering Law Firm (by *Vernon D. Kortering*), for the plaintiff.

James M. Searer, P.C. (by *James M. Searer*), for the defendant.

Before: MARKEY, P.J., and KELLY and WHITBECK, JJ.

PER CURIAM. Plaintiff, an injured passenger, filed suit for no-fault benefits arising out of a September 1992 collision between two off-road recreational vehicles (ORVs). Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), claiming that the road on which the collision occurred was not a public highway and that plaintiff's injuries did not arise out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. On appeal, the parties raise the same legal questions as those presented to the trial court for summary disposition on the basis of stipulated facts.

The trial court granted partial summary disposition to plaintiff after finding that the collision had, in fact, occurred on a public highway. The court also denied defendant's motion for leave to file a third-party complaint against the owner-driver of the ORV in which plaintiff was a passenger and the estate of the owner-driver of the other ORV, who was killed in the collision, to recoup the benefits defendant has paid.

Defendant appeals as of right. We affirm in part, reverse in part, and remand.

I

We review a trial court's decision regarding a motion for summary disposition de novo, examining the entire record and construing all reasonable inferences arising from the evidence in a light most favorable to the nonmoving party. *Henderson v State Farm Fire & Casualty Co*, 225 Mich App 703, 708-709; 572 NW2d 216 (1997); *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion pursuant to MCR 2.116(C)(10) may be granted when, except with regard to the amount of damages, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Henderson*, *supra*. Stated otherwise, we ask whether a record might be developed that leaves open an issue upon which reasonable minds could differ. *Id.* Critically, the court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition. *Id.*

Defendant argues that the trial court erred in finding (1) that the vehicles involved in the accident were motor vehicles and (2) that the accident occurred on a public highway. According to defendant, the parties in essence stipulated that the road was not a public highway on the basis of the "uncontroverted" affidavit of Michael Smith, the engineer-manager of the Oceana County Road Commission, in which he averred that the road commission does not consider the road in question to be a public highway. The no-fault act defines motor vehicle, in pertinent part, as a vehicle "*operated* or designed for operation *upon a public highway* . . . ." MCL 500.3101(2)(e); MSA 24.13101(2)(e) (emphasis added). The parties stipu-

lated that the ORVs "were not designed for operation upon the public highway and were not titled or registered under the Michigan vehicle code." Whether the ORVs were "motor vehicles" within the meaning of MCL 500.3101(2)(e); MSA 24.13101(2)(e)[1] therefore depends on whether they were being operated on a "public highway" at the time of the accident.

Although the parties stipulated certain facts, we must reiterate that this case was not tried. Rather, defendant sought summary disposition pursuant to MCR 2.116(C)(10). The court not only denied defendant's motion but also granted partial summary disposition to plaintiff, finding that she was "entitled to unspecified No-Fault benefits from defendant." In denying defendant's motion, the trial court made the following findings, in pertinent part:

> Paragraph 5 of the "Stipulation of Facts" establishes that plaintiff's vehicle was not *designed* for operation upon a public highway. However, the Court must still determine whether or not the accident took place while the vehicles were operated on a "public highway." The No-Fault Act does not define "public highway," but does define "highway" at MCL 500.3101(2)(b); MSA 24.13101(2)(b) by incorporating the definition of "highway" appearing at MCL 257.20; MSA 9.1820, which states:
>
> " 'Highway or street' means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel."
>
> The Court holds that because this definition of "highway" appears in the No-Fault Act itself, and because the definition refers to a "way" which "is open to the use of the pub-

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[1] Defendant refers this Court to *Nelson v Transamerica Ins Services*, 441 Mich 508, 513, n 13; 495 NW2d 370 (1992), where our Supreme Court, speaking of a motorcycle that collided with a truck, stated that "being on a public road does not change the character of an ORV . . . ."

> lic . . . ," that this definition applies to both the term "highway" and "public highway" when used in the No-Fault Act. As the stipulation of facts indicates that the road upon which the accident occurred had been maintained by Oceana County (see Paragraph 6 of the Stipulation of Facts [which stated that the "Oceana County Road Commission has occasionally plowed snow off the roadway involved in the accident and has repaired a portion of the roadway which 'washed out' due to flooding"]); that the two ORV's had unimpeded access to the road; that the photos of the road attached to the "Stipulation of Facts" reveal unimpeded access to the road by the general public; and that no factual issue has been raised that the road was *not* open to the general public, the Court finds that the two ORV's were being operated on a "public highway" when the accident occurred. Because the two ORV's were operated on a public highway at the time of the accident, they were "motor vehicles" within the meaning of MCL 500.3101(2)(e); MSA 24.13101(2)(e).

Upon our review de novo, we find that genuine issues of material fact abound regarding whether the road at issue constituted a "public highway" and that the trial court erred in granting summary disposition.

First, the parties' stipulation of facts incorporates the affidavit of Michael Smith, engineer-manager of the Oceana County Road Commission attached to the stipulation of facts. Mr. Smith avers that the local road commission does not consider the involved roadway to be a public highway, but he also states that the Oceana County Road Commission occasionally has plowed snow off the roadway and has repaired a portion of the roadway washed out by flooding. We believe that a question of fact exists regarding whether this infrequent attention to the roadway constitutes "public maintenance" of the road, pursuant to MCL 257.20; MSA 9.1820, as

applied through MCL 500.3101(2)(b); MSA 24.13101(2)(b).

Second, our review de novo of the photographs attached to the stipulation of facts reveals nothing more than the area surrounding the accident; the photographs do not show the access points to the road. Moreover, the stipulation is silent regarding how the ORVs gained access to the roadway and does not state that access to the road was unimpeded. Thus, the trial court's conclusion that the general public had "unimpeded access" to this allegedly public road was unsupported by the evidence.

Finally, we find nothing in the record or the stipulated facts that names the owners of the property or roadway where the accident occurred. Plaintiff's complaint alleges that the roadway, known as Sand Road, is approximately seventeen feet wide and is a dedicated roadway used by the general public. We find no other evidence or documentation supporting the alleged public dedication; in fact, the parties stipulated that the collision occurred "on an unpaved, undedicated thoroughfare . . . ." Exhibit 3 to the stipulation of facts shows that the accident occurred at the intersection of two dirt roads that cross both private property and property owned by the state of Michigan in Section 33 of Otto Township in Oceana County. Clearly, more information is needed regarding the status of the roadway, the local road commission's actions regarding the roadway, the entrances and exits used to gain access to the roadway, and the ownership rights to the roadway before the trial court can resolve the genuine issue of material fact regarding whether this road constituted a public highway. We therefore reverse the grant of summary disposi-

tion in favor of plaintiff on this ground and remand for further proceedings.

II

In addition, defendant argues that the trial court erred in denying defendant's motion for leave to file a third-party complaint against the owners of the uninsured vehicles involved in the accident to seek reimbursement pursuant to MCL 500.3177(1); MSA 24.13177(1). We disagree. The decision to grant or deny a motion to implead rests within the trial court's sound discretion and will not be disturbed absent an abuse of discretion. *Ureche v Holbrook*, 110 Mich App 557, 559; 313 NW2d 148 (1981). Determining whether the trial court accurately and faithfully applied the law in making its determination falls within the ambit of this review.

Subsection 3177(1) of the no-fault act, MCL 500.3177(1); MSA 24.13177(1), states:

> An insurer obligated to pay personal protection insurance benefits for accidental bodily injury to a person arising out of the ownership, maintenance, or use of an uninsured motor vehicle as a motor vehicle may recover such benefits paid and appropriate loss adjustment costs incurred from the owner or registrant of the uninsured motor vehicle or from his or her estate. . . . An uninsured motor vehicle for the purpose of this section is a motor vehicle with respect to which security as required by sections 3101 and 3102 is not in effect at the time of the accident.

The trial court denied defendant's motion because reimbursement is available only with regard to vehicles that are required to be insured under the no-fault act, MCL 500.3177(1); MSA 24.13177(1), and the ORVs involved in the accident were not required to be so

insured pursuant to MCL 257.1603; MSA 9.3300(3) as in force at the time of the accident, now MCL 324.81106; MSA 13A.81106.

We can find no abuse of discretion where the trial court has made a decision on the basis of an accurate determination of the applicable law. As a general proposition, the no-fault act was enacted to provide motorists with assured, adequate, and prompt reparations from their insurers in the event of a motor vehicle collision, without regard to fault or negligence, while protecting motorists from tort liability. *Walker v Farmers Ins Exchange*, 226 Mich App 75, 78-79; 572 NW2d 17 (1997). Section 3113 of the no-fault act, MCL 500.3113; MSA 24.13113, identifies those persons who are not entitled to personal protection insurance benefits under the act, including persons who are unlawfully in possession of the vehicle or who fail to purchase the required insurance for their own vehicles. It does not include persons who, by the grace of the Legislature, are exempted from purchasing no-fault insurance. Thus, under §§ 3113 and 3177, someone who drives a motor vehicle, is involved in an accident, and had failed to obtain the required no-fault insurance is not entitled to the protections from tort liability that the no-fault act offers, i.e., the no-fault insurer can sue him in a third-party action premised on his unlawful operation of a motor vehicle. On the other hand, a person specifically *exempted* from purchasing no-fault insurance should not be cast into the group of wrongdoers listed in § 3113 and suffer this fate. Clearly, that would not be what the Legislature intended.

Even assuming that plaintiff is entitled to no-fault coverage, it would be illogical to grant plaintiff the

protections from tort liability that the no-fault act offers but to then expose plaintiff's husband, the owner and driver of the ORV in which plaintiff was a passenger, and the other ORV driver's estate to tort liability under § 3177, when ORV owners and drivers who do not purchase no-fault insurance for their ORVs are in compliance with MCL 324.81106; MSA 13A.81106. In short, we can find no support in the statute or any rationale from case law to hold someone liable who has not violated the no-fault act. Defendant presents no compelling argument supporting such a conclusion and fails to refer us to case law supporting this conclusion. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Accordingly, we find that the trial court did not abuse its discretion in denying defendant's motion to file a third-party complaint.

III

Finally, we also reject defendant's argument that the trial court's decision that the vehicles were ORVs is inconsistent with its decision that they were motor vehicles. It is clear from the definitions of motor vehicle, MCL 500.3101(2)(e); MSA 24.13101(2)(e), and ORV, MCL 257.1601(m); MSA 9.3300(1)(m) as in force at the time of the accident, now MCL 324.81101(n); MSA 13A.81101(n), that these categories are not mutually exclusive. See *Nelson v Transamerica Ins Services*, 441 Mich 508, 516; 495 NW2d 370 (1992). Another example of a vehicle's being simultaneously a motor vehicle and an ORV is found in *State Farm Mut Automobile Ins Co v Wyant*, 154 Mich App 745, 748; 398 NW2d 517 (1986), where this Court held that a

farm tractor being used for a hayride was a motor vehicle because it was being operated on a public highway.[2] Again, the Legislature has apparently seen fit to define motor vehicles as it clearly has and, in fact, intended that, on occasion, no-fault benefits will be afforded to someone injured as a result of the ownership, operation, maintenance, or use of a motor vehicle that is not required to be registered or insured.[3]

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

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[2] We recognize that "a farm vehicle *being used for farming*" is excluded from the statutory definition of an ORV. MCL 324.81101(n); MSA 13A.81101(n).

[3] *Lee v DAIIE*, 412 Mich 505; 315 NW2d 413 (1982), presents another example of a no-fault insurer's being held liable for personal protection insurance benefits although no-fault insurance was not required to be purchased for the motor vehicle involved in the accident. In *Lee*, the plaintiff was employed by the United States Postal Service and injured his back while unloading mail from a mail truck. *Id.* at 508. The plaintiff sought no-fault personal protection insurance benefits under the no-fault insurance policy covering his personal vehicle. *Id.* Although the mail truck, as a vehicle owned by the federal government, did not have to be insured, *id.* at 508, n 2, the Michigan Supreme Court concluded that the plaintiff was entitled to no-fault personal protection insurance benefits because he suffered accidental bodily injury arising from the use of a motor vehicle as a motor vehicle. See *id.* at 516-517.

In re HUISMAN

Docket No. 206872. Submitted April 21, 1998, at Grand Rapids. Decided June 19, 1998, at 9:10 A.M.

Anthony and Deborah Huisman petitioned the Juvenile Division of the Ottawa County Probate Court for the termination of the parental rights of Michelle Huisman, Anthony Huisman's former wife, to J.H., the son born of Anthony's marriage to Michelle. At the time the petition was filed, Anthony had sole legal and physical custody of J.H. pursuant to a divorce decree of the Ottawa Circuit Court, and Michelle was in prison serving an eight- to twenty-five-year sentence after having pleaded guilty of assaulting J.H. with intent to murder. The petitioners alleged that the respondent had attempted to murder J.H. while he was in her care and that it was in J.H.'s best interests that respondent's parental rights be terminated. The probate court, Mark A. Feyen, J., held that the petitioners had standing to file a petition to terminate parental rights and, after hearing testimony concerning the child's best interests, terminated the respondent's parental rights. The respondent appealed.

The Court of Appeals *held*:

1. Section 19b(1) of the Juvenile Code, MCL 712A.19b(1); MSA 27.3178(598.19b)(1), provides that a petition to terminate parental rights may be brought by a custodian of the child in question. Because the Juvenile Code does not define "custodian," the term must be accorded its plain and ordinary meaning within the context of the statute. The plain and ordinary meaning of custodian certainly encompasses a custodial parent, and there is nothing in the Juvenile Code to suggest that the Legislature intended that the term have a narrow or technical meaning that would exclude a custodial parent. Anthony Huisman, as the parent of the child having legal physical custody of the child pursuant to the order of the circuit court, had standing under the Juvenile Code to file the petition to terminate parental rights.

2. A probate court may properly terminate the parental rights of just one parent. Accordingly, the court could properly terminate the respondent's rights, even though it did not terminate the parental rights of petitioner Anthony Huisman.

3. Although § 51(b) of the Adoption Code, MCL 710.51(6); MSA 27.3178(555.51)(6), provides a procedure for termination of parental rights in which the parent having legal custody of a child subsequently marries and the custodial parent's new spouse seeks to adopt the child, § 41(1) of the Adoption Code, MCL 710.41(1); MSA 27.3178(555.41)(1), clearly contemplates that a termination of parental rights preceding an adoption can be under either the Adoption Code or the Juvenile Code. Accordingly, the fact that the termination of the respondent's parental rights may have been for the purpose of allowing petitioner Deborah Huisman's adoption of J.H. does not preclude termination of the respondent's parental rights pursuant to the provisions of the Juvenile Code.

4. The probate court's finding that a statutory basis for the termination of the respondent's parental rights existed and that it was in the child's best interests to terminate those rights was supported by the evidence on the record.

Affirmed.

1. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — STANDING.

A custodial natural parent who has legal and physical custody of a child pursuant to a decree of divorce from the other natural parent has standing to petition for termination of the noncustodial parent's parental rights pursuant to the provisions of the Juvenile Code (MCL 712A.19b[1]; MSA 27.3178[598.19b][1]).

2. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — PROBATE COURT — JUVENILE CODE.

The provisions of the Juvenile Code relating to the termination of parental rights allow a probate court to terminate the parental rights of just one parent; the Juvenile Code does not require that the rights of both parents be terminated (MCL 712A.19b[1]; MSA 27.3178[598.19b][1]).

3. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — ADOPTION.

Termination of the parental rights of a former spouse for the purpose of allowing the present spouse of a custodial parent to adopt a child of the former marriage may be sought under the provisions of either the Juvenile Code or the Adoption Code (MCL 710.41[1], 710.51[6], 712A.19b[1]; MSA 27.3178[555.41][1], 27.3178[555.51][6], 27.3178[598.19b][1]).

Knoll, Persinger, Knoll & Bedevia, P.C. (by *Richard D. Persinger*), for the petitioners.

Daniel J. Fojtik, for the respondent.

Before: CORRIGAN, C.J., and HOEKSTRA and YOUNG, JR., JJ.

YOUNG, JR., J. Respondent Michelle Huisman appeals as of right from the probate court's order terminating her parental rights to her minor son, J.H. The principal issue in this case is whether respondent's former husband and J.H.'s natural father, petitioner Anthony Huisman, who has sole legal and physical custody of J.H., and Mr. Huisman's new wife, petitioner Deborah Huisman, had standing to seek termination of respondent's parental rights under § 19b of the Juvenile Code (chapter 12A of the Probate Code), MCL 712A.19b; MSA 27.3178(598.19b). We hold that Mr. Huisman did have standing to file a termination petition. Moreover, we find no error in the probate court's decision to terminate respondent's parental rights. We therefore affirm the decision of the probate court.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

In March 1996, after five years of marriage, Anthony Huisman and respondent were divorced. Apparently, respondent had emotional problems during the marriage, including problems with uncontrolled jealousy. Respondent was awarded physical custody of the parties' minor son, J.H., who was born on February 13, 1993. On July 9, 1996, after J.H. left for a visitation with Mr. Huisman, respondent dissolved into a glass of milk a large quantity of Novaine, an antipsychotic drug that had been prescribed for respondent for treatment of obsessive-compulsive disorder. Respondent gave the tainted milk to J.H. when he returned home.

Respondent admitted that she decided to kill J.H. to keep him away from his father. Respondent put J.H. to bed around 8:00 or 9:00 P.M., with the intent that he die in his sleep. However, J.H. awoke at 3:00 A.M. complaining of a stomachache. Respondent gave him apple juice and helped him vomit. She then lay down with J.H. on the couch and fell asleep. At 6:30 A.M., respondent finally decided to seek help. After speaking with her stepmother and then poison control, respondent eventually took J.H. to the emergency room. There, she lied to emergency room personnel, telling them that J.H. had gotten into her medication by himself. J.H. remained hospitalized for twenty-four hours, and, after his release, began living with Mr. Huisman and Deborah Huisman.

In January 1997, respondent pleaded guilty of assaulting J.H. with the intent to murder. She was sentenced to eight to twenty-five years' imprisonment. On January 3, 1997, the Ottawa Circuit Court, having retained jurisdiction in the divorce matter, awarded Mr. Huisman sole legal and physical custody of J.H. with no visitation rights to respondent. Ottawa County Children's Protective Services subsequently closed its investigation of the matter when it became clear that respondent no longer had access to J.H. On May 21, 1997, apparently because Deborah Huisman had been unsuccessful in adopting J.H. under § 51 of the Adoption Code, MCL 710.51(6); MSA 27.3178(555.51)(6),[1] Mr. Huisman and Deborah Huis-

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[1] MCL 710.51(6); MSA 27.3178(555.51)(6) provides:

> If the parents of a child are divorced . . . and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hear-

man filed a petition under the Juvenile Code for termination of respondent's parental rights, citing as the basis for the court's jurisdiction MCL 712A.2(b)(1) and (2); MSA 27.3178(598.2)(b)(1) and (2).[2] The petition specifically alleged that respondent had attempted to murder J.H. while he was in her care and custody and that termination of respondent's parental rights would be in his best interests. The probate court authorized the petition and, following an adjudicative hearing, found the allegations to be true and assumed jurisdiction over J.H.

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ing may issue an order terminating the rights of the other parent if both of the following occur:

(a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.

(b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

[2] At the time the petition was filed, MCL 712A.2(b); MSA 27.3178(598.2)(b), in relevant part, authorized the juvenile division of the probate court to assume jurisdiction over any juvenile under 18 years of age found within the county:

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.

. . .

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, or other custodian, is an unfit place for the juvenile to live in.

Effective January 1, 1998, § 2 establishes the same jurisdiction in the family division of the circuit court.

A dispositional hearing was subsequently held on September 9, 1997. At the hearing, respondent argued, among other things, that petitioners lacked standing to seek termination of respondent's parental rights under the Juvenile Code. The probate court disagreed, stating in relevant part:

> [Section 39 of the Adoption Code, MCL 710.39; MSA 27.3178(555.39)], it seems to me, clearly recognizes the situation in which an adoption petition can be filed and parental rights can be terminated thus paving the way for an adoption, and the parental rights can be terminated under either section 51[(6)] of the Adoption Code . . . or the Juvenile Code which has different legal criteria . . . .
>
> . . . [G]iven the reference in . . . the Adoption Code which seems to permit persons seeking an adoption to file a petition under the Juvenile Code, and given the absence of any prohibition in the Juvenile Code . . . the court has to hold that the present action is appropriately broad and it's permissible . . . .

Having heard conflicting testimony concerning J.H.'s best interest, the court found that termination of respondent's parental rights was justified under MCL 712A.19b(3)(b)(i); MSA 27.3178(598.19b)(3)(b)(i) (physical injury caused by parent), MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g) (failure to provide proper care and custody and there exists no reasonable likelihood of change within a reasonable amount of time), MCL 712A.19b(3)(h); MSA 27.3178(598.19b)(3)(h) (imprisonment for more than two years), and MCL 712A.19b(3)(j); MSA 27.3178(598.19b)(3)(j) (reasonable likelihood of harm if child is returned to parent's home), and also "because of the desirability of permitting [adoption] under the[] circumstances." Accordingly, the probate court terminated respondent's parental rights and

ordered that J.H. be made "available for adoption by his father and stepmother."

II. STANDING

Central to the question whether petitioners had standing to seek termination of respondent's parental rights under the Juvenile Code is MCL 712A.19b(1); MSA 27.3178(598.19b)(1), which provides as follows:

> Except as provided in subsection (4), if a child remains in foster care in the temporary custody of the court . . . or if a child remains in the custody of a guardian or limited guardian, upon petition of *the prosecuting attorney . . . or of the child, guardian, custodian, concerned person as defined in subsection (6), agency, or the child's ombudsman pursuant to Section 7 of the children's ombudsman act,* . . . the court shall hold a hearing to determine if the parental rights to a child should be terminated . . . . [Emphasis added.]

Respondent argues that MCL 712A.19b(1); MSA 27.3178(598.19b)(1) expressly limits the class of persons entitled to file a petition for termination of parental rights, and that it does not authorize the filing of a petition either by a natural parent (Mr. Huisman) or by a "stepparent" (Deborah Huisman). By contrast, petitioners argue that Mr. Huisman qualifies under the statute as a "custodian" because he has sole legal and physical custody of J.H., and that Deborah Huisman is also J.H.'s "custodian" because she provides care on a daily basis. We do not reach or decide the question of Deborah Huisman's standing to seek termination of respondent's parental rights under § 19b(1) because we hold that Mr. Huisman had standing as J.H.'s "custodian," and, therefore, that the termination petition was properly entertained.

The meaning of the statutory term "custodian" is a question of law subject to review de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The starting point in determining legislative intent is the specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). Courts may not speculate about the probable intent of the Legislature beyond the words expressed in the statute. *Detroit Edison Co v Spartan Express, Inc*, 225 Mich App 629, 632; 572 NW2d 39 (1997). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Barr v Mt Brighton Inc*, 215 Mich App 512, 516-517; 546 NW2d 273 (1996).

Section 19b(1) provides that a child's "custodian" may file a petition for termination of parental rights. Because the Juvenile Code does not define "custodian," we must accord the term its "plain and ordinary meaning within the context of the statute." *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 638; 552 NW2d 671 (1996); MCL 8.3a; MSA 2.212(1). In doing so, we may resort to dictionary definitions. *Lumley v Univ of Michigan Bd of Regents*, 215 Mich App 125, 130; 544 NW2d 692 (1996). *Random House Webster's College Dictionary* (1995) defines "custodian" as "a person who has custody; keeper; guardian." *Random House* defines "custody," in turn, as: "1. keeping; guardianship; care. . . . 4. (esp. in a divorce)

the right of determining the residence, care, schooling, etc., of a child or children." Black's Law Dictionary (6th ed) similarly provides that "custodian" is the "[g]eneral term to describe anyone who has charge or custody . . . ."

At the outset, we acknowledge that the comprehensive list of parties authorized to file a termination petition under § 19b(1) does not include the term "parent." However, given the Legislature's use of the apparently broad term "custodian" in § 19b(1), we can discern no statutory basis for excluding a *custodial* parent from filing a termination petition under the Juvenile Code to terminate the rights of the other natural parent.[3] The plain and ordinary meaning of "custodian" certainly encompasses a custodial parent, and none of the other Juvenile Code provisions appear to suggest otherwise.[4] Nor are we aware of any provision in the Juvenile Code in which the Legislature ascribes a narrow or technical meaning to the term "custodian." In the absence of such guidance from the Legislature, we are obligated to construe

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[3] We do assume without deciding that, in light of the fact that the term "parent" is omitted from § 19(b), a *noncustodial* parent is not authorized to file a petition seeking termination of the custodial parent's rights.

[4] The statute provides no contextual clues concerning the intended definition of "custodian" as used in § 19b(1) because of the inconsistent manner in which the terms "parent" and "custodian" are used throughout the Juvenile Code. While some code provisions refer to "parent" and "custodian" together in a manner suggesting they are to be assigned different meanings, see, e.g., MCL 712A.14(2); MSA 27.3178(598.14)(2) ("parents, guardian, or custodian"), and MCL 712A.13a(3); MSA 27.3178(598.13a)(3) ("juvenile's parents or the juvenile's guardian or custodian"), the Legislature uses the terms "parent" and "custodian" in other provisions in a manner suggesting that those terms are not mutually exclusive. See, e.g., MCL 712A.17(3); MSA 27.3178(598.17)(3) ("parent, guardian, or other custodian").

"custodian" in a nonstrained, nontechnical manner and apply the statute as written. *Barr, supra.*

In addition to being consistent with the plain and ordinary meaning of § 19b(1), we also believe that a broad reading of "custodian" comports with our statutory obligation to liberally construe the Juvenile Code to ensure that each child coming within the probate court's jurisdiction receives the care, guidance, and control conducive to the child's welfare and the best interest of the state. MCL 712A.1; MSA 27.3178(598.1); *In re Jagers*, 224 Mich App 359, 362; 568 NW2d 837 (1997).

Respondent relies principally on *In re Swope*, 190 Mich App 478; 476 NW2d 459 (1991), in support of her assertion that parents as a class do not have standing to file a petition for termination of parental rights under the Juvenile Code. However, we find *Swope* to be inapposite. In *Swope*, this Court held that the petitioners, the minor child's *adoptive* parents, lacked standing to petition for the termination of their *own* parental rights. The petitioners had asked the probate court to terminate their parental rights after the minor child made two suicide attempts, ran away from home several times, and engaged in delinquent behavior. *Id.* at 479. At the time the termination petition was filed, the minor child, who had been made a ward of the court, was residing in a foster home. *Id.* In upholding the probate court's dismissal of the petition, the *Swope* Court reasoned:

> [T]he specific language of the statute requires that a petition to terminate parental rights be brought by the prosecuting attorney, child, guardian, custodian, or agency. When a statute designates the persons who may bring a claim, only the persons so designated have the right to bring such

> an action. 59 Am Jur 2d, Parties, § 22, p 409. Our conclusion that parents lack standing to petition for termination is consistent with the intent of the Legislature, because the statute was clearly enacted for the protection of children, rather than for the convenience of parents. [*Id.* at 480-481.]

While *Swope* appears at first glance to suggest that all "parents" lack standing to petition for termination, we do not believe that *Swope* can be read so broadly because, as stated, the minor in *Swope* was residing in a foster home and therefore was not in the petitioners' "custody" at the time the termination petition was filed. Hence, this Court in *Swope* simply was not faced with the issue presented in this case.

Respondent also makes an argument similar to that addressed by this Court in *In re Marin*, 198 Mich App 560, 565; 499 NW2d 400 (1993): that there is no need to terminate parental rights of one parent where the child remains in the care and custody of the other parent. However, the *Marin* Court rejected this argument and found that "the Legislature envisioned and intended that the probate court could terminate the parental rights of just one parent." *Id.* at 566; see also *In re SR*, 229 Mich App 310; 581 NW2d 291 (1998). Moreover, despite respondent's contrary claim, we do not believe that the holding in *Marin* can be avoided simply because the termination petition in that case was filed by the Department of Social Services rather than the custodial parent.

Respondent finally argues that it was categorically improper for Mr. Huisman to seek termination of respondent's parental rights under the Juvenile Code because the Adoption Code contains a specific termination provision for cases such as this one in which the parent having legal custody of the child subse-

quently marries and that parent's spouse seeks to adopt the child ("stepparent adoption"). MCL 710.51(6); MSA 27.3178(555.51)(6). We find respondent's argument to be without merit.

It is clear that the Adoption Code contemplates termination of a natural parent's rights either under its provisions *or* under the provisions of the Juvenile Code. By way of example, the Adoption Code provides that "a child shall not be placed in a home for the purpose of adoption until an order terminating parental rights has been entered *pursuant to this chapter or chapter XIIA* [MCL 712A.1 *et seq.*; MSA 27.3178(598.1) *et seq.*]." MCL 710.41(1); MSA 27.3178(555.41)(1) (emphasis added).[5] We are not convinced that otherwise proper termination proceedings initiated under the Juvenile Code should be invalidated merely because adoption by a stepparent is thus facilitated. To the contrary, we conclude and hold that the Juvenile Code merely provides an alternate method for terminating parental rights in appropriate cases and in accordance with the Juvenile Code's specific provisions.[6]

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[5] Actually, the Adoption Code cross-references the Juvenile Code in a number of sections. See, e.g., MCL 710.27a(4); MSA 27.3178(555.27a)(4), MCL 710.31(1), (2); MSA 27.3178 (555.31)(1), (2), MCL 710.39(2), (3); MSA 27.3178(555.39)(2), (3).

[6] We acknowledge the Supreme Court's admonition in *In re Mathers*, 371 Mich 516, 535; 124 NW2d 878 (1963), that "[t]he use of neglect proceedings to circumvent the adoption code cannot be countenanced." However, we do not believe that this brief, conclusory statement furnishes any guidance in resolving the issue presented in this case because the relevant provisions of the Adoption Code and the Juvenile Code that we apply here either did not exist at the time *Mathers* was decided or have since been substantially reworked.

III. TERMINATION OF RESPONDENT'S PARENTAL RIGHTS

Having determined that Mr. Huisman, as J.H.'s "custodian," had standing to file a termination petition under MCL 712A.19b(1); MSA 27.3178(598.19b) (1), we must now determine whether the juvenile court erred in terminating respondent's parental rights under MCL 712A.19b(3)(b)(i); MSA 27.3178(598.19b) (3)(b)(i) (physical injury caused by parent), MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g) (failure to provide proper care and custody and there exists no reasonable likelihood of change within a reasonable amount of time), MCL 712A.19b(3)(h); MSA 27.3178(598.19b)(3)(h) (imprisonment for more than two years), and MCL 712A.19b(3)(j); MSA 27.3178(598.19b)(3)(j) (reasonable likelihood of harm if child is returned to parent's home).

We review a trial court's decision regarding termination in its entirety for clear error. *In re Hall-Smith*, 222 Mich App 470, 473; 564 NW2d 156 (1997). Once a statutory ground for termination has been met by clear and convincing evidence, the parent against whom termination proceedings have been brought has the burden of going forward with some evidence that termination is clearly not in the child's best interest. *Id.* at 473. If no such showing is made and a statutory ground for termination has been established, the trial court is without discretion; it must terminate parental rights. *Id.* at 472.

Respondent, largely without citation of authority, argues that the juvenile court misapplied subsections 3(b)(i), 3(g), 3(h), and 3(j). However, even assuming arguendo that there is some question about the applicability of one or more of these statutory grounds, we have no doubt that subsection 3(g) (failure to provide

proper care and custody and there exists no reasonable likelihood of change within a reasonable amount of time) was met by clear and convincing evidence. Respondent attempted to murder J.H., she is currently serving an eight- to twenty-five-year prison sentence, and there was evidence that respondent's serious emotional problems contributing to her actions will continue to exist. Cf. *In re Vasquez*, 199 Mich App 44; 501 NW2d 231 (1993); *In re Perry*, 193 Mich App 648; 484 NW2d 768 (1992); *In re McIntyre*, 192 Mich App 47; 480 NW2d 293 (1991).[7] This subsection alone provides a sufficient basis for terminating respondent's parental rights. MCL 712A.19b(3); MSA 27.3178(598.19b)(3).[8] Finally, while respondent presented some evidence that termination was not in J.H.'s best interest, we have reviewed in its entirety the record and the probate court's decision to terminate respondent's parental rights and find no clear error in that decision. *Hall-Smith*, *supra* at 472.

Affirmed.

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[7] We note that both *Perry* and *McIntyre* applied former subsection 3(d), which is now subsection 3(g).

[8] We reject as unfounded respondent's contention that subsection 3(g) does not apply because she provided proper care and custody by agreeing after the poisoning incident to J.H.'s placement in the custody of Mr. Huisman.

PEOPLE v RAMSDELL

Docket No. 197822. Submitted January 8, 1998, at Lansing. Decided June 23, 1998, at 9:00 A.M.

Bruce P. Ramsdell was convicted by a jury in the Jackson Circuit Court, Charles A. Nelson, J., of being a prisoner in possession of contraband (marijuana). The defendant appealed.

The Court of Appeals *held*:

1. The trial court did not err in refusing the defendant's request that the jury be instructed that the defendant must have knowingly possessed the marijuana in order to be convicted of the charged offense and did not err in preventing the defendant from presenting lack of such knowledge as a defense. Mere possession of contraband is sufficient for a conviction of prisoner in possession of contraband because the offense is a strict liability crime. MCL 800.281(4); MSA 28.1621(4), the statute that criminalizes the possession of contraband by prisoners, does not expressly require knowing or intentional possession of contraband. The general statute that proscribes the possession of controlled substances, MCL 333.7403; MSA 14.15(7403), expressly requires knowing or intentional possession of a controlled substance for conviction. To construe the statute that criminalizes the possession of contraband by prisoners to require similar knowing or intentional possession despite the absence of an express provision to that effect would be to ignore the Legislature's intent in light of its presumed knowledge of the general statute that proscribes the knowing or intentional possession of controlled substances.

2. The trial court did not err in refusing to let the defendant present duress as a defense. In his offer of proof outside the jury's presence, the defendant needed to establish, but did not, that he had faced a present, imminent, and impending threatened danger.

3. The defendant was not denied the right to testify at trial. The trial court expressly and unequivocally told the defendant that he could testify on his own behalf.

4. The defendant, by not making a request in the trial court to be provided with a transcript of the jury voir dire, failed to preserve for appellate review his claim that MCR 6.425(F)(2)(a)(i), as previously in effect, was unconstitutional in generally precluding indi-

gent defendants from obtaining free transcripts of jury voir dire. In any event, such a transcript was available to counsel after appellate briefs were filed in this case, and appellate defense counsel is presumed to have had an opportunity to review the transcript and file an amended or supplemental brief had the transcript indicated error requiring reversal.

5. The defendant, as a prisoner, was not protected by the Fourth Amendment from unreasonable searches and seizures. The defendant's Fourth Amendment claims therefore are without merit.

6. The trial court did not err in failing to instruct sua sponte the jury with regard to unlawful use of marijuana as a lesser offense. Except for cases of first-degree murder, there is no duty to instruct sua sponte with regard to lesser included offenses. A proper request is a precondition to a trial court's being required to instruct with regard to a lesser misdemeanor offense, and a requested instruction regarding a lesser misdemeanor offense should be given only if supported by a rational view of the evidence adduced at trial. Here, the defendant made no request for an instruction regarding unlawful use of marijuana, and the evidence did not support such an instruction.

7. The prosecution, in its opening statement, did not improperly vouch for the credibility of those of its witnesses who were corrections officers by remarking that corrections officers are trained to be observant. Such remarks provided a reasonable explanation for why the corrections officers would have been alert to occurrences that likely would have escaped the notice of others.

8. Evidence of two judgments of sentence pursuant to which the defendant was incarcerated at the time of the offense at issue was properly admitted into evidence; the evidence was relevant to showing that the defendant was a prisoner, an essential element of the charged crime.

9. The trial court did not err in refusing the defendant's request to discharge his trial counsel and represent himself. The constitutional right to self-representation is not absolute. Where a defendant behaves in a disruptive manner and makes a motion to proceed pro se for surreptitious reasons, a trial court may deny self-representation. Here, the defendant desired to represent himself in order to present testimony in support of lack of knowing possession of the contraband and in support of duress despite the trial court's proper rulings barring such evidence. The trial court properly denied the request for self-representation.

10. Alleged ineffective assistance of trial counsel cannot provide a basis for relief because, in light of the overwhelming evidence of

guilt, there is no reasonable probability that, but for the alleged errors, the result of the trial would have been different.

Affirmed.

FITZGERALD, P.J., concurring in part and dissenting in part, stated that prisoner in possession of contraband should not be a strict liability crime. Knowing possession is an element of the crime in light of indications in *People v Norman*, 176 Mich App 271 (1989), and *People v Vaughn*, 200 Mich App 32 (1993), that the offense is a general ntent crime that requires scienter and in light of a general rule in this state of avoiding the presumption of strict liability in penal statutes. The defendant's conviction should be reversed and the matter should be remanded on the basis of the trial court's failure to properly instruct the jury that knowing possession of contraband is required for conviction of prisoner in possession of contraband.

1. CRIMINAL LAW — PRISONER IN POSSESSION OF CONTRABAND — STRICT LIABILITY.

A prisoner's possession of contraband need not be knowing or intentional in order for the prisoner to be convicted of being a prisoner in possession of contraband; the offense is a strict liability crime that requires proof beyond a reasonable doubt that the accused is a prisoner and that the prisoner had actual physical control of the contraband (MCL 800.281[4]; MSA 28.1621[4]).

2. CRIMINAL LAW — DEFENSES — DURESS.

Duress, as an affirmative defense, requires a showing by the defendant that the threatened danger was present, imminent, and impending.

3. CRIMINAL LAW — LESSER MISDEMEANOR OFFENSES — JURY INSTRUCTIONS.

A proper request for a jury instruction regarding a lesser misdemeanor offense is a precondition to a court's being required to give such an instruction; such an instruction should be given only if supported by a rational view of the evidence adduced at trial.

4. CONSTITUTIONAL LAW — CRIMINAL TRIALS — SELF-REPRESENTATION.

The constitutional right to self-representation at a criminal trial is not absolute; a court may deny a defendant's request for self-representation where the defendant behaves in a disruptive manner and makes the request for surreptitious reasons (US Const, Am VI; Const 1963, art 1, § 13).

5. CRIMINAL LAW — INEFFECTIVE ASSISTANCE OF COUNSEL.

Relief based on ineffective assistance of counsel requires a reasonable probability that, but for unprofessional errors by counsel, the result of the proceeding would have been different.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *John G. McBain*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Arthur James Rubiner, for the defendant on appeal.

Before: FITZGERALD, P.J., and O'CONNELL and WHITBECK, JJ.

WHITBECK, J. A jury convicted defendant of the crime of prisoner in possession of contraband, MCL 800.281(4); MSA 28.1621(4). Defendant appeals as of right. We affirm.

I. FACTUAL BACKGROUND

Defendant was imprisoned at the State Prison of Southern Michigan on January 7, 1996. Michael Allan, a corrections officer at the prison, testified that on that date he saw defendant in his cell cutting up small, white pieces of paper into one- to two-inch squares. Allan explained that in his experience as a prison guard such small squares of paper were used to package cocaine, heroin, and marijuana. Allan testified that defendant later placed a sheet over the bars of his cell in violation of prison rules and subsequently left his cell. Eventually, corrections officers decided to search defendant and found twelve folded pieces of paper that appeared to contain marijuana. A laboratory scientist with the state police tested the contents of one of these packets and confirmed that it contained marijuana.

Before trial, the trial court held that the crime of prisoner in possession of contraband is a strict liability crime. Accordingly, the trial court refused to allow

defendant to present evidence to support theories that he did not know the contents of the package and that he possessed the package under duress. Defendant offered no testimony on his behalf before the jury.

However, defendant did present testimony from himself and two other prisoners as part of an offer of proof outside the jury's presence. Tyrone Williams, who testified that he was serving a life sentence, said that he saw defendant on January 7, 1996. Williams claimed that he "forced" defendant to take a plastic bag that contained little white pieces of paper and told defendant that he wanted defendant to drop it in Williams' "other chow hole." Williams indicated that, when defendant asked what was in the package, he told defendant "don't make no difference what it is" and "[i]f it don't get there, you can get hurt. Or, you gonna—you know, you gonna have to pay for this." Williams testified that he had defendant's arm and put the plastic bag in defendant's hand and that defendant "coulda throwed it down," but that doing so "woulda cost him. [Defendant] woulda been in some trouble."

Steven Roy, another prisoner, testified that he saw Williams hand defendant something "in a clear package." Defendant testified that Williams put a small plastic package in defendant's hand and that Williams told him that he wanted defendant to take the package to "the chow hall." Defendant said that Williams told him "if I refused to do what he wanted, then he would have—he would not have any problem with either forcing me to pay an elaborate sum or money [sic], or that I could be stabbed—that I could physically be stabbed." Defendant testified that he asked Williams what was in the paper and that Williams told him "not to worry about it." Defendant indicated that

he put the package in his pocket and proceeded toward the "chow hall."

II. ELEMENTS OF PRISONER IN POSSESSION OF CONTRABAND

Defendant argues that the trial court erred (1) by refusing his request for a jury instruction that to convict him of prisoner in possession of contraband the jury must find that he *knowingly* possessed the marijuana that the prosecution alleged was found on him and (2) by precluding defendant from offering a defense of lack of knowledge that he was in possession of marijuana. In effect, defendant's position is that the trial court erred in determining that prisoner in possession of contraband is a strict liability offense.[1] We disagree.

A. OVERVIEW

The pertinent statute, MCL 800.281(4); MSA 28.1621(4), states, "Except as provided in section 2 [regarding medical prescriptions], a prisoner shall not possess any alcoholic liquor, prescription drug, poison, or controlled substance." We decline defendant's invitation to amend the statute so that it reads "Except as provided in section 2, a prisoner shall not KNOWINGLY possess any alcoholic liquor, prescription drug, poison, or controlled substance." As this Court said in *People v Norman*, 176 Mich App 271, 274; 438 NW2d 895 (1989):

> In resolving disputed interpretations of statutory language, it is the function of the reviewing court to effectuate

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[1] For conviction of a strict liability crime, "the people merely need to prove that the defendant performed the wrongful act, irrespective of whether he intended to perform it." *People v Lardie*, 452 Mich 231, 241; 551 NW2d 656 (1996).

> legislative intent. If the language of the statute is clear and its meaning unambiguous, a common-sense reading of the statute will suffice and no interpretation is necessary. *Karl v Bryant Air Conditioning Co*, 416 Mich 558, 567; 331 NW2d 456 (1982); *State Farm Mutual Automobile Ins Co v Wyant*, 154 Mich App 745, 749-750; 398 NW2d 517 (1986). We find the language of the statute which proscribes the possession of liquor [and, as here, controlled substances] in prison, MCL 800.281; MSA 28.1621, to be clear and unambiguous. Therefore a common-sense reading of the statute will suffice.

Indeed, such a reading *should* suffice. In enacting the statute, the Legislature straightforwardly set out two, and only two, elements of the crime. First, a prosecutor must prove beyond a reasonable doubt that the defendant is, in fact, a "prisoner." Second, a prosecutor must prove beyond a reasonable doubt that the defendant "possessed" a controlled substance (or other item proscribed by MCL 800.281[4]; MSA 28.1621[4]), i.e., that the defendant had actual physical control of the controlled substance. It is undisputed on the record that the prosecutor in this case proved both of these elements beyond a reasonable doubt. There were no other elements for the prosecutor to prove. The word "knowingly" is absolutely absent from the statute as enacted by the Legislature and signed into law by the Governor.

Defendant's position implicitly suggests that the Legislature did not know quite what it was doing when it enacted MCL 800.281(4); MSA 28.1621(4). We disagree; the Legislature is presumed to be aware of the consequences of the use, or omission, of language when it enacts the laws that govern our behavior. As Judge FITZGERALD wrote in *Lumley v Univ of*

Michigan Bd of Regents, 215 Mich App 125, 129-130; 544 NW2d 692 (1996):

> Courts must read the statutory language being construed in light of the general purpose sought to be accomplished. Where the language is so plain as to leave no room for interpretation, courts should not read into it words that are not there or that cannot fairly be implied.
>
> It is presumed that, when the Legislature enacts statutes, it is familiar with the rules of statutory construction and has knowledge of existing laws on the same subject. [Citations omitted.]

Here, the suggestion of legislative incompetence is particularly egregious when the provisions of MCL 800.281(4); MSA 28.1621(4) are compared with MCL 333.7403; MSA 14.15(7403), which covers the possession of controlled substances generally. MCL 333.7403(1); MSA 14.15(7403)(1) provides that "[a] person shall not *knowingly or intentionally* possess a controlled substance . . ." (emphasis supplied). In the general statute regarding possession of controlled substances, the Legislature specifically made the possession of controlled substances a crime with an intent element by the conscious use of the words "knowingly or intentionally." On its face, the implicit assumption that, by accident rather than by design, the Legislature failed to include those words in the statute covering contraband in prisons is far afield from a common-sense reading.

This is particularly true when one recognizes that the preface to this statute states, as noted in *Norman*, *supra* at 275 & n 1, that its purpose is to prohibit or limit access by inmates to certain weapons, alcoholic liquors, and drugs. See *People v Krajenka*, 188 Mich

App 661, 664; 470 NW2d 403 (1990). Specifically, the preface reads:

> An Act to prohibit or limit the access by prisoners and by employees of correctional facilities to certain weapons and to alcoholic liquor, drugs, medicines, poisons, and controlled substances in, on, or outside of correctional facilities; to prohibit or limit the bringing into or onto certain facilities and real property, and the disposition of, certain weapons and substances; to prohibit or limit the selling, giving, or furnishing of certain weapons and substances to prisoners; to prohibit the control or possession of certain weapons and substances by prisoners; and to prescribe penalties.

It is significant that there is not a hint in this preface that it was the intent of the Legislature to prohibit only the *knowing* control of weapons and substances, including controlled substances, by prisoners. Further, there is a straightforward reason, requiring no great amount of thought or interpretation, for imposing a different, and stricter, standard on prisoners than on the general population: prisoners in correctional facilities are, after all, convicted criminals whose liberty is restricted by law and who are confined, after all, in the controlled, but often volatile, environment of a state prison. To require a *knowing* possession of drugs as an element of the crime for the general populace while omitting such a requirement for prisoners is, when viewed in this context, indeed sensible.

B. *NORMAN* AND *VAUGHN*

The dissent relies on two cases to reach its conclusion that the offense created under MCL 800.281(4); MSA 28.1621(4) is a general intent crime. The first is *Norman*, *supra*. *Norman* involved the prosecution of

a prisoner who was caught with a sealed bottle of an alcoholic liquor upon his return to prison. *Id.* at 272-273. The dissent indicates that the *Norman* panel implied that general intent is required for a conviction under the statute at issue. We do not see any such implication, at least no such implication upon which to base a decision literally amending the statute. *Norman*, in pertinent part, states:

> The decision to grant a motion for trial adjournment rested in the trial court's sound discretion, which decision will not be reversed absent an abuse of discretion resulting in prejudice to the accused. *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982). Because the parties stipulated to admission of documentary evidence establishing defendant's problem with alcoholism, the proffered testimony regarding defendant's alcoholism and blackouts was merely cumulative. The proffered testimony was also irrelevant, since specific intent was not required for proof of the crime and a showing of defendant's alcoholism *would only have been useful to prove inability to form specific intent.* . . .
>
> There is no merit to the argument that defense counsel rendered ineffective assistance of counsel when failing to request a jury instruction on the defense of intoxication. *Because the crime charged was not a specific intent crime*, the instruction was unnecessary and would not have affected defendant's chances for acquittal. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).
>
> *Similarly, because the defense of intoxication would not have negated a showing of general intent*, the trial court's omission to instruct, sua sponte, on the intoxication defense would not have affected the outcome of defendant's case. Moreover, the trial court's erroneous instruction on specific intent afforded defendant more protection than the statute required. Therefore, any error in the trial court's omission to instruct on intoxication was harmless. MCR 2.613. [*Id.* at 275-276 (emphasis supplied).]

Read as a whole, this passage from *Norman* simply means that the crime in question is not a specific intent crime. While the reference to the defense of intoxication not negating "a showing of general intent" may contain a hint that this crime might be considered a general intent crime, at best it is just that. Our jurisprudence is not, and should not be, based upon hints.

The dissent also relies on *People v Vaughn*, 200 Mich App 32; 504 NW2d 2 (1993). That case revolved around minute portions of materials on a syringe and notebook paper retrieved from a prisoner's garbage in a prosecution under MCL 800.281(4); MSA 28.1621 (4). *Vaughn*, *supra* at 33-35. Laboratory testing revealed that there was cocaine present on both materials. The *Vaughn* Court observed:

> The amount of cocaine found, however, was so minute that it could not be weighed and was invisible to the naked eye. On the basis of this evidence, defendant was convicted as charged.
>
> On appeal, defendant argues that there was insufficient evidence to sustain the possession conviction because the prosecution failed to establish that he *knowingly* possessed the cocaine. We disagree. [*Id.* at 35 (emphasis supplied).]

The defendant in *Vaughn* relied on *People v Hunten*, 115 Mich App 167; 320 NW2d 68 (1982), for the proposition that "the mere presence of a quantity of a controlled substance that is invisible to the naked eye, without more, is insufficient to support an inference of *knowing* possession of that substance." *Id.* at 37 (emphasis supplied). Importantly, *Hunten*, while it involved a prisoner, did not involve a prosecution under MCL 800.281(4); MSA 28.1621(4) or earlier statutes prohibiting the same conduct. Rather,

Hunten involved the charge of possession of a controlled substance in violation of MCL 333.7403(1) and (2)(b); MSA 14.15(7403)(1) and (2)(b). *Hunten, supra* at 168. *This is the statute that deals with possession of controlled substances generally and, as in effect at the time of the Hunten decision and as currently in effect, it contains the "knowingly or intentionally" language referred to above.*[2]

Although the discussion of scienter in *Vaughn, supra*, evolved from a similar discussion in *Hunten*, the *Hunten* Court construed a statute that specifically contained a scienter requirement. Any "suggestion" drawn from *Vaughn* that MCL 800.281(4); MSA

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[2] We note that *Hunten*, in turn, relies on *People v Harrington*, 396 Mich 33; 238 NW2d 20 (1976). See *Hunten*, supra at 169-171. *Harrington* did not involve a prisoner at all. Rather, it involved the prosecution of a nonprisoner defendant for possession of a small residue of heroin. *Harrington, supra* at 38. In fairness, however, the charge in *Harrington* was brought under MCL 335.153; MSA 18.1123, which provided that "[a]ny person not having a license . . . who shall possess or have under his or her control any narcotic drug shall be deemed guilty of a felony . . . ." See *Harrington, supra* at 39, n 1. This language was repealed and replaced in 1971 by the Controlled Substances Act, including MCL 335.341; MSA 18.1070(41), which provided in pertinent part:

> It is unlawful for any person *knowingly or intentionally* to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this act. [Emphasis supplied.]

In 1978, MCL 335.341; MSA 18.1070(41) was repealed and effectively replaced by MCL 333.7403; MSA 14.15(7403), which as discussed in the body of this opinion, generally prohibits knowingly or intentionally possessing a controlled substance. While MCL 333.7403; MSA 14.15(7403) has been amended many times since 1978, it has always included the pertinent "knowingly or intentionally" requirement.

Thus, the majority's discussion in *Harrington, supra*, of the requirement for knowing possession, *id.* at 43-44, while it did not deal with a prisoner, did deal with a situation in which the element of scienter was not explicitly part of the statute.

28.1621(4) defines a general intent crime, rather than a specific intent crime, is ill-founded.

C. *LARDIE*

We recognize that the Michigan Supreme Court declared in *People v Lardie*, 452 Mich 231, 240; 551 NW2d 656 (1996), that "[s]tatutes that create strict liability for all of their elements are not favored." Also, even where a crime is created by statute, criminal intent is ordinarily an element of the crime. *Id.* at 239. However, the Court also stated:

> In order to determine whether a statute imposes strict liability or requires proof of a mens rea, that is, a guilty mind, this Court first examines the statute itself and seeks to determine the Legislature's intent. In interpreting a statute in which the Legislature has not expressly included language indicating that fault is a necessary element of a crime, this Court must focus on whether the Legislature nevertheless intended to require some fault as a predicate to finding guilt. [*Id.* at 239 (citations omitted).]
>
> Where the offense in question does not codify the common law and omits reference to the element of intent, this Court will examine the Legislature's intent in enacting the legislation to determine whether there is a mens rea requirement. [*Id.* at 246.]

As explained above, a conclusion that the Legislature sub silentio intended to impose a "knowledge" requirement as part of the prisoner in possession of contraband statute at issue in this case is untenable in light of the differing language between the statute at hand, MCL 800.281(4); MSA 28.1621(4), which includes no reference to knowingly or intentionally possessing contraband, and the general statute regarding possession of controlled substances, MCL 333.7403; MSA 14.15(7403), which proscribes only

"knowingly or intentionally" possessing a controlled substance. Inasmuch as one must presume that (1) the Legislature was familiar with existing laws regarding the subject of possession of controlled substances when it enacted MCL 800.281(4); MSA 28.1621(4) in its current form in 1982, *Lumley*, *supra* at 129-130, and (2) the general statute regarding possession of controlled substances had been in effect—with the pertinent "knowingly or intentionally" language—since 1978, it follows that the Legislature did not intend to include a requirement of knowing or intentional possession in MCL 800.281(4); MSA 28.1621(4). Thus, no "knowledge" element should be "read into" MCL 800.281(4); MSA 28.1621(4). Rather, given that the Legislature included no express intent element in MCL 800.281(4); MSA 28.1621(4) in the face of such an element being present in the general statute against possession of controlled substances, we conclude that the Legislature intended for MCL 800.281(4); MSA 28.1621(4) to be a strict liability crime.[3]

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[3] In *Lardie*, *supra*, the Michigan Supreme Court construed the statute that prohibits operating a motor vehicle while under the influence of intoxicating liquor or a controlled substance, or with an unlawful blood alcohol level, and causing death ("OUIL/UBAL causing death"), MCL 257.625(4); MSA 9.2325(4), as in effect at the time of the incidents underlying the two consolidated cases in *Lardie*. See *Lardie*, *supra* at 238. While the OUIL/UBAL causing death statute included no express requirement of criminal intent, the Court nevertheless concluded that it required the showing of a general intent and was not a strict liability crime. *Id.* at 239, 256. This case is distinguishable from *Lardie* in light of the absence of any broader statute prohibiting conduct highly similar to OUIL/UBAL causing death that specifically requires proof of knowledge or intent. Unlike *Lardie*, the existence of a general statute dealing with the subject of possession of controlled substances that expressly requires proof of knowing or intentional possession shows that the omission of such a requirement in MCL 800.281(4); MSA 28.1621(4) reflects a legislative intent to impose

III. DEFENDANT'S CLAIM OF DURESS

Defendant also argues that the trial court erred in precluding him from presenting a defense of duress. Duress is an affirmative defense "applicable in situations where the crime committed avoids a greater

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no such requirement for the offense of prisoner in possession of contraband.

Similarly, while the dissent invokes *People v Perry*, 145 Mich App 778; 377 NW2d 911 (1985), the holding of that case is inapplicable to the case before us. In *Perry*, the defendant was convicted of the crime of possession of a weapon by an inmate, MCL 800.283; MSA 28.1623. *Perry, supra* at 779. The defendant in *Perry* testified that he was attacked by another inmate, that, in the struggle, he managed to pull a pipe from his attacker's hand, and that he was holding the pipe when guards arrived at the scene. *Id.* The trial court refused to give a jury instruction requested by the defense indicating, in effect, that defendant's right to self-defense included taking the weapon from another who would use it offensively against the defendant. *Id.* at 780. In reversing the defendant's conviction, this Court held "that defendant was entitled to have the jury instructed that, if the jury believed that defendant had acquired the pipe purely in self-defense and had intended to give it to the guards at the first opportunity, defendant was not guilty of 'possessing' the weapon." *Id.* at 783.

While we recognize that the *Perry* Court went on to include a discussion of the general principle that strict liability will not be presumed in a criminal statute, see *id.* at 783-785, that discussion was not essential to the pertinent holding. As noted in *People v Rau*, 174 Mich App 339, 342; 436 NW2d 409 (1989), the decision in *Perry* "turned on the issue of what constituted possession." Thus, whether the crime of prisoner in possession of a weapon is or is not a strict liability crime was immaterial to the actual decision in *Perry*. Under the actual holding in *Perry*, if the defendant prisoner in that case held a weapon only because he had taken it from his attacker, then the defendant never "possessed" the weapon and, thus, would be innocent of the crime of prisoner in possession of a weapon *even if* that crime is a strict liability crime.

Of course, whether prisoner in possession of a weapon is a strict liability crime is a question we need not address here. However, we note that even assuming arguendo that prisoner in possession of a weapon is not a strict liability crime, as with the crime at issue in *Lardie*, another distinction is that there is no general statute against possession of a weapon that applies to all, prisoners and nonprisoners alike. As discussed above, the general statute against possession of controlled substance explicitly includes a requirement of knowledge or intent while the prisoner in possession of contraband statute does not. Under well-established principles of statutory construction, we must presume that this difference in wording is not a mere accident but reflects legislative intent.

harm." *People v Lemons*, 454 Mich 234, 246; 562 NW2d 447 (1997). Accordingly, duress is not available as a defense to all crimes. For example, this Court has determined that "[d]uress is not a valid defense to homicide." *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993). Notably, this Court has also declined to extend the defense of duress to the crime of possession of a dangerous weapon by an inmate. *People v Rau*, 174 Mich App 339, 342; 436 NW2d 409 (1989).

Where duress is available as an affirmative defense, a defendant has the burden of producing a prima facie defense of duress. *Lemons*, *supra* at 248-249. A mere threat of future injury is insufficient to support a defense of duress. *Id.* at 247. Rather the threatened danger must be present, imminent, and impending. *Id.* Defendant's offer of proof outside the jury's presence involved only a threat of future harm by Williams if defendant did not take possession of the package that contained the marijuana. Indeed, defendant indicated that he proceeded toward the "chow hall" with the package after Williams gave it to him without any threat of imminent harm. Even if the defense of duress is available to a charge of prisoner in possession of contraband, the trial court precluded defendant from placing this issue before the jury because defendant did not establish a prima facie defense of duress. Thus, we decline to reach the hypothetical issue whether duress is available as a defense to the crime at issue.

IV. DEFENDANT'S RIGHT TO TESTIFY

Defendant claims that he was denied the right to testify at trial. This claim is without merit. Indeed, the

trial court expressly and unequivocally told defendant that he could testify on his own behalf.

V. TRANSCRIPTION OF JURY VOIR DIRE

Defendant argues, in essence, that MCR 6.425(F)(2)(a)(i), as previously in effect, was unconstitutional in generally precluding an indigent criminal defendant from obtaining a transcript of the jury voir dire at no cost. However, defendant failed properly to preserve this issue by making any request to the trial court for a transcript of the jury voir dire. *People v Hogan*, 225 Mich App 431, 437-438; 571 NW2d 737 (1997). Further, a transcript of the jury voir dire was filed with the trial court after the parties filed their appellate briefs. Accordingly, we presume that appellate defense counsel had an opportunity to examine the voir dire transcript for possible claims of error requiring reversal, as required under *People v Bass (On Rehearing)*, 223 Mich App 241, 258-260; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 865 (1998), and found none that he considered appropriate to advance by seeking permission from this Court to file an amended or supplemental brief. See MCR 7.216, authorizing this Court, in its discretion, to permit amendment or additions to grounds for an appeal. Thus, we find no error requiring reversal with respect to this issue.

VI. SEARCH AND SEIZURE

Defendant claims that the search of his person by prison authorities violated the Fourth Amendment protection against unreasonable searches and seizures. We disagree. This constitutional protection is inapplicable to prisoners. *Hudson v Palmer*, 468 US 517; 104 S Ct 3194; 82 L Ed 2d 393 (1984); *People v*

Phillips, 219 Mich App 159, 161; 555 NW2d 742 (1996).

VII. LACK OF JURY INSTRUCTION ON UNLAWFUL USE

Defendant argues that the trial court erred in failing to instruct sua sponte on the lesser offense of "unlawful use," by which we presume he means the misdemeanor of unlawful use of marijuana, MCL 333.7404(2)(d); MSA 14.15(7404)(2)(d). This argument is completely without merit. First, the trial court had no duty whatsoever to instruct sua sponte the jury on this lesser misdemeanor. *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982) (except for cases involving a first-degree murder charge, there is no duty to instruct sua sponte on lesser included offenses); see also *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996) (enumerating a proper request as one precondition to a trial court's being required to instruct on a lesser misdemeanor offense). Further, a requested instruction on a lesser misdemeanor offense should be given only if "supported by a rational view of the evidence adduced at trial." *Stephens*, *supra* at 262; *Corbiere*, *supra*. In this case the prosecution presented no evidence that defendant used any of the marijuana that he was charged with possessing. Thus, no rational view of the evidence supported instructing the jury on the lesser misdemeanor of unlawful use of marijuana.

VIII. ALLEGED PROSECUTORIAL MISCONDUCT

Defendant claims that the prosecutor improperly vouched for the credibility of prosecution witnesses by making the following remarks during his opening statement:

> And, the correction officers that work behind the bars, that don't have weapons, there's [sic] a lot more prisoners than they are [sic]. They're highly trained. They're trained to observe. They're trained to be watchful; to record things that happen. And, they will be telling you about that. They're supposed to be very observant about things. Subtle things that may occur.

Because defendant did not object to these remarks at trial, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Howard*, 226 Mich App 528; 575 NW2d 16 (1997). The remarks at issue were not improper. A prosecutor may not vouch for witness credibility or suggest that the government has some special knowledge that a witness will testify truthfully. *Id.* at 548. However, the remarks at issue did not improperly vouch for the credibility of prosecution witnesses, but rather provided a reasonable explanation for why correctional officers testifying on behalf of the prosecution would have been alert to occurrences that would likely escape the notice of others.

IX. ADMISSION OF EVIDENCE OF DEFENDANT'S PRIOR RECORD

Defendant argues that the two judgments of sentence from prior convictions that formed the basis for defendant's imprisonment at the time of the incident underlying this case were improperly admitted into evidence. However, because defendant did not object to the admission of this evidence below, our review of this issue is only for manifest injustice. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). In light of the overwhelming evidence of guilt, any arguable impropriety in the admission of

the judgments of sentence did not result in manifest injustice. However, we find this evidence to have been properly admitted because it was relevant to showing that defendant was a prisoner, an essential element of the charged crime. *People v Mauch*, 23 Mich App 723, 726; 179 NW2d 184 (1970).

X. SELF-REPRESENTATION

Defendant argues that he was denied the constitutional right to self-representation when the trial court denied his request during the course of trial to act as his own counsel. We disagree.

After the prosecution rested, the trial court reiterated its ruling that lack of knowledge and duress were not available as defenses to the crime of prisoner in possession of contraband. Following a colloquy between defendant personally and the trial court related to this ruling, defendant asked that his trial counsel withdraw and stated that he desired to represent himself. The trial court remarked in response to that request, "There's no constitutional right to represent yourself." There is, of course, a constitutional right to self-representation under the Sixth Amendment of the United States Constitution, *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975), as well as under Const 1963, art 1, § 13, *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996); *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976).

Nevertheless, the right to self-representation is not absolute. *Id.* at 366. A trial court should not allow a defendant to proceed pro se if the defendant will unduly disrupt the court. *Adkins*, *supra* at 721-722; *Anderson*, *supra* at 368. Where a defendant behaves

in a disruptive manner and makes a motion to proceed pro se for surreptitious reasons, a trial court may appropriately deny self-representation. See *People v Ahumada*, 222 Mich App 612, 615-617; 564 NW2d 188 (1997).

In the case before us, the trial court precluded defense counsel from presenting evidence in support of defenses that the trial court had previously held were inapplicable. This ruling prompted defendant's request to represent himself. Defendant stated that he desired to represent himself because "the problem that I got is that I'm not being allowed to present witnesses on my own behalf" and "I'm not being allowed to testify on my own behalf." It is evident that defendant desired to represent himself in order to elicit testimony to support claims of lack of knowledge and duress, in defiance of the trial court's rulings. Thus, the trial court properly denied the request for self-representation because it would have been unduly burdensome and was made for surreptitious reasons. While the trial court's ruling was apparently based on an incorrect belief that there is no constitutional right to self-representation, we do not reverse where the trial court reaches the right result for a wrong reason. *People v Brake*, 208 Mich App 233, 242, n 2; 527 NW2d 56 (1994).

We caution the trial court that in future cases it should consider requests to exercise the right to self-representation by criminal defendants in accordance with the procedure described in *Adkins*, *supra* at 721-722, and in compliance with MCR 6.005.[4]

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[4] In *Adkins*, *supra* at 721-722, the Court indicated that before granting a request for self-representation, the trial court should ascertain that (1) the request is unequivocal, (2) the request is made "knowingly, intelli-

XI. ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that trial counsel provided ineffective assistance on several grounds that do not warrant extended discussion. Relief based on ineffective assistance of counsel requires a reasonable probability that, but for unprofessional errors by counsel, the result of a proceeding would have been different. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). In light of the overwhelming evidence of guilt, there is no reasonable probability that, but for any of the alleged deficiencies by trial counsel, the result of the trial would have been different.

Affirmed.

O'CONNELL, J., concurred.

FITZGERALD, P.J. (*concurring in part and dissenting in part*). I respectfully dissent from the majority's conclusion that the offense of prisoner in possession of a controlled substance, MCL 800.281(4); MSA 28.1621(4), is a strict liability crime. I believe that "knowing" possession of the controlled substance is an element of the crime and therefore I conclude that defendant was denied his right to a properly instructed jury by the court's refusal to give his requested instruction. Accordingly, I would reverse defendant's conviction and remand for a new trial.

On the basis of its ruling that the crime of prisoner in possession of a controlled substance is a strict liability crime, the trial court refused to permit defendant to present witnesses to support defendant's theo-

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gently, and voluntarily," and (3) the defendant will not unduly disrupt the court while representing himself. MCR 6.005(D)-(E) sets forth certain requirements to be followed by a trial court in dealing with a criminal defendant who waives the right to counsel.

ries that he did not have knowledge of the contents of the package and that he possessed the package under duress. During an offer of proof made outside the presence of the jury, inmate Tyrone Williams testified that on the day of the incident he encountered defendant in a common area of the prison. He stated that he suspected he was about to be "shook down," so he forced defendant to take the package containing the marijuana that was eventually retrieved from defendant. Williams indicated that when defendant asked what was in the package, he told defendant "it makes no difference," and instructed defendant, under threat of physical harm, to deliver the package. Steven Roy, another witness, testified that he saw Williams give the package to defendant. Defendant testified that he was not told of the contents of the package and that he took the package only because Williams threatened that defendant could be stabbed if he did not take the package.

Defendant requested that the trial court instruct the jury that defendant must have knowingly possessed the marijuana. The trial court declined to do so and instead gave the following instruction on the offense of inmate in possession of controlled substances:

> The defendant is being charged with being a prisoner and having contraband, in this case marijuana, in his possession. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the Defendant was incarcerated with the Michigan Department of Corrections. And second, that he was in possession of contraband, namely marijuana. Possession does not necessarily mean ownership. Possession means that the person had actual physical control of the alleged contraband.

The thrust of the instruction was that mere possession was a sufficient basis for conviction.

Defendant argues that he was denied his right to a properly instructed jury by the court's refusal to instruct the jury that he must have knowingly possessed the marijuana. I agree.

MCL 800.281(4); MSA 28.1621(4) states in relevant part that "a prisoner shall not possess any alcoholic liquor, prescription drug, or controlled substance." The statute itself makes no reference to a specific intent. In *People v Norman*, 176 Mich App 271, 274; 438 NW2d 895 (1989), a panel of this Court ruled that § 1(4) does not require proof of specific intent for a conviction; however, the panel did not hold that § 1(4) creates a strict liability offense. Rather, the *Norman* panel implied that "a showing of general intent" is sufficient for a conviction under the statute. *Id.* at 276. Further, in *People v Vaughn*, 200 Mich App 32, 38; 504 NW2d 2 (1993), this Court, without specifying the intent necessary for a conviction under § 1(4), stated that some evidence must be presented "that would permit an inference of scienter." Case law, therefore, suggests that § 1(4) creates a general intent crime, not a specific intent crime, and certainly not a strict liability crime. For a general intent crime, the prosecutor must prove that the defendant purposely or voluntarily performed the wrongful act.

This Court has vacillated on the issue whether the existence of knowledge as an element makes a crime one of specific intent rather than general intent. *People v Perez-DeLeon*, 224 Mich App 43, 55-56; 568 NW2d 324 (1997). However, given this Court's implication in *Norman* and *Vaughn* that the crime of prisoner in possession of contraband is a general intent

crime, the existence of knowledge as an element of the crime would not make the crime a specific intent crime. Rather, the element of knowledge would limit the statute's application to knowing, rather than innocent, violations of the provisions of the statute. See, e.g., *People v Watts*, 133 Mich App 80, 82-84; 348 NW2d 39 (1984); *People v Laur*, 128 Mich App 453, 455; 340 NW2d 655 (1983). Construing the statute to require the element of knowledge is consistent with this state's general rule of avoiding the presumption of strict liability in a criminal penal statute. *People v Perry*, 145 Mich App 778, 783-784; 377 NW2d 911 (1985).

In *Perry*, the defendant inmate was charged with possessing a pipe that he allegedly used to attack another inmate. MCL 800.283; MSA 28.1623. At trial, the defendant testified that he was attacked by the other inmate and that, in the struggle, he managed to pull the pipe away from his attacker's hand. When the guards arrived, the defendant was holding the pipe. In connection with this testimony, the defendant requested that the trial court instruct the jury as follows:

> I instruct you that the defendant has a right to defend himself whether in prison or not. The right of self defense extends to and permits the taking of a weapon from another who would use that weapon offensively.
>
> If you believe that the defendant obtained possession of the pipe by taking it from an aggressor, and thereafter possessed the weapon in order to keep it away from an aggressor, without using it for offense purposes, then the defendant must be found not guilty. [*Id.* at 780.]

The trial court declined to give the instruction, reasoning that, if the jury believed defendant's story, the

jury would not convict him of possession even without the requested instruction.

During closing arguments, the prosecutor repeatedly admonished the jury to "follow" the law as provided by the court's instructions. The court then instructed the jury that the elements of the offense of inmate in possession of a weapon were (1) possession (2) of a weapon. This Court, after noting that the entire thrust of the court's instructions, especially when augmented by the prosecutor's arguments at trial, was that "mere possession" was a sufficient basis for conviction, *id. at 783*, concluded:

> We believe that defendant was entitled to have the jury instructed that, if the jury believed that defendant had acquired the pipe purely in self-defense and had intended to give it to the guards at the first opportunity, defendant was not guilty of "possessing" the weapon. The statute, MCL 800.283; MSA 28.1623, does not expressly provide for such an instruction. However, without such an instruction, the statute would, in effect, impose strict liability upon any prisoner found holding a weapon. As a general rule, strict liability will not be presumed in a criminal penal statute:
>
> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is universal and persistent in mature systems of law as believe in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . .
>
> "Crime, as a compound concept, generally constituted only from concurrence as an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of

> the offense that it required no statutory affirmation." (Citations omitted.) [*Id.* at 783-784.]

The Court then noted that this principle is particularly true when dealing with a possessory offense. *Id.* at 784. Concluding that possession requires the intent to possess, the Court reversed the defendant's conviction and instructed the trial court on retrial to so instruct the jury.

Like the offense of inmate in possession of a controlled substance, the offense of prisoner in possession of a weapon is encompassed within the act prohibiting the possession of weapons and contraband by inmates. Neither statute expressly contains an element of intent or knowledge. However, given this Court's implications in *Norman*, *supra*, and *Vaughn*, *supra*, as well as this Court's holding in *Perry*, *supra*, and the general rule disfavoring the presumption of strict liability in a criminal penal statute, I conclude that the offense of inmate in possession of a controlled substance is not a strict liability crime and that an element of knowing possession must be read into the statute. Accordingly, I would reverse defendant's conviction.

McCAW v T & L OPERATIONS, INC (ON REMAND)

Docket No. 206722. Submitted October 10, 1997, at Lansing. Decided June 23, 1998, at 9:05 A.M. Leave to appeal sought.

Daniel and Toni McCaw brought an action in the Oakland Circuit Court against T & L Operations, Inc., and Michael K. Williams, seeking damages for injuries sustained when Daniel McCaw (hereafter plaintiff), a police officer, was attacked by Williams at Williams' house when the plaintiff was dispatched to investigate a reported stabbing at the house. The claim against Williams, who admitted that he was not sober during the altercation with the plaintiff, was based on negligence, and a default was subsequently entered against him. The claim against T & L Operations (hereafter defendant) was based on the defendant's alleged violation of the dramshop act for having served alcohol to Williams on the day of the incident when Williams was both underage and visibly intoxicated. The trial court, David F. Breck, J., denied the defendant's motion for summary disposition that alleged that the claim was barred by the fireman's rule. A jury returned a verdict for the plaintiffs, and the court entered orders granting a judgment consistent with the verdict and awarding the plaintiffs costs and attorney fees. The defendant appealed. The Court of Appeals held that the plaintiff's claim was barred by the fireman's rule, reversed the order granting the judgment for the plaintiffs, and reversed the order awarding the plaintiffs costs and attorney fees. 217 Mich App 181 (1996). The Supreme Court, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for reconsideration in light of its decision in the consolidated cases *Gibbons v Caraway* and *Mariin v Fleur, Inc*, 455 Mich 314 (1997). 456 Mich 869 (1997).

On remand, the Court of Appeals *held*:

1. The injuries to the plaintiff resulted from Williams' wilful, wanton, reckless, or grossly negligent behavior. Williams was not a third party unconnected to the situation that brought the plaintiff to the scene, and he injured the plaintiff when the plaintiff attempted to prevent Williams from leaving the scene. The situation presented in this case is distinguishable from that in *Gibbons*, where the defendant driver struck the plaintiff police officer with her vehicle as the officer was directing traffic following an unrelated accident. Here, Williams' wrongdoing was not unconnected to

the situation that brought the plaintiff to the scene. *Gibbons* does not preclude application of the fireman's rule in this case.

2. The policy rationales behind the fireman's rule are applicable in this case. Because the purpose of safety professions is to confront danger, the public should not be liable for damages for injuries that occur in the performance of the very functions that police officers and fire fighters are intended to fulfill. Police officers and fire fighters are trained to deal with the hazards of their respective professions, and worker's compensation benefits are available to them when they are injured in the course of their employment. An additional policy consideration arises in this case where the plaintiff's claim against the defendant is based not on injuries directly inflicted on the plaintiff by the defendant, but rather on the defendant's violations of the dramshop act. If the fireman's rule did not apply here, dramshop owners might hesitate to summon the police for aid in disturbances and instead resort to self-help measures, creating additional risk to the public.

3. The orders granting a judgment consistent with the jury verdict in favor of the plaintiffs and awarding the plaintiffs costs and attorney fees must be reversed.

Reversed.

WHITE, J., dissenting, stated that application of the principles affirmed in *Gibbons* (i.e., that the rule generally applies to injuries derived from the negligence causing the safety officer's presence and also to those stemming from the normal risks of the profession and that the rule is to be applied flexibly as the circumstances require to flexibly address the different fact patterns as they are presented, recognizing individual exceptions in appropriate situations when the fundamental policy rationale is inapplicable) requires a finding that the policy rationales behind the rule are inapplicable in this case and the trial court's orders therefore should be affirmed. The dramshop violation was unrelated to the reason the plaintiff was on the scene. The aspect of the rationale that seeks to encourage citizens to call safety officers for assistance without regard for their own negligence is not implicated. The part that focuses on injuries derived from the negligence requiring the officer's presence is inapplicable because the defendant's negligence (the dramshop violation) was unrelated to the plaintiff's presence at Williams' house. Being assaulted by Williams was not a normal, inherent, and foreseeable risk for the plaintiff, except in the most general sense. The aspect of the rationale regarding the training of safety officers to handle dangerous situations and compensating them to deal with the hazards created by taxpayer negligence and the shielding of citizens from damage

claims for injuries sustained as a result of carelessness or ordinary negligence encountered as a normal risk of the profession is inapplicable here, where the injury from acts of persons served in violation of the dramshop act is addressed by the legislative scheme requiring dramshop owners to maintain security for liability under the dramshop act. The dramshop owner is not in the same position as the citizen whose ordinary negligence causes injury to the officer.

1. Negligence — Police Officers — Fireman's Rule.

The fireman's rule bars a recovery for damages by a police officer or fire fighter for injuries derived from the negligence causing the safety officer's presence and those stemming from the normal, inherent, and foreseeable risks of the safety officer's profession; although the analytical focus is on whether the injury stems directly from the safety officer's professional functions, the rule may not apply in situations where the policy rationales for its adoption are inapplicable; the fireman's rule is not a license to act with impunity, without regard for the safety officer's well-being.

2. Negligence — Police Officers — Fireman's Rule.

The foundational policy rationale for the fireman's rule is that the purpose of the safety professions is to confront danger, and therefore, the public should not be liable for damages for injuries that occur in the performance of the very function police officers and fire fighters are intended to fulfill; additional rationales include the fact that public safety officers are trained to deal with the hazards of their respective professions and that worker's compensation benefits are available to public safety officers injured in the course of their employment.

Raymond L. Krell, P.C. (by *Derek A. Hurt*), for the plaintiffs.

Kallas & Henk, P.C. (by *Edward J. Lee*), for T & L Operations, Inc.

ON REMAND

Before: MacKenzie, P.J., and Cavanagh and White, JJ.

Cavanagh, J. This case is before us for the second time. In our first decision, we concluded that plaintiff

Daniel McCaw's[1] claim was barred by the fireman's rule and reversed. *McCaw v T & L Operations, Inc*, 217 Mich App 181; 550 NW2d 852 (1996). The Supreme Court, in lieu of granting leave to appeal, remanded the case for reconsideration in light of its decision in the consolidated cases *Gibbons v Caraway* and *Mariin v Fleur, Inc*, 455 Mich 314; 565 NW2d 663 (1997). 456 Mich 869 (1997). We again reverse.

The facts of this case were set out in our previous opinion:

> Plaintiff Daniel McCaw is a police officer with the Waterford Township Police Department. During the evening of August 31, 1991, plaintiff was dispatched to investigate a reported stabbing at a house on Hira Street. When plaintiff arrived at the residence, he saw a man lying on the front lawn and realized that the man had been stabbed. A man, later identified as Michael Williams, came out on the porch. Because of Williams' behavior, slurred speech, and bloodshot, glassy eyes, plaintiff realized that he was under the influence of alcohol. Williams told plaintiff that he had called the police. When plaintiff attempted to question Williams about the stabbing, Williams became agitated and began to yell at plaintiff. Williams told plaintiff to leave, but plaintiff refused. Williams then informed plaintiff that he was going to leave. Plaintiff stepped in front of Williams to prevent him from departing. Williams began to attack plaintiff. During the ensuing scuffle, Williams struck plaintiff in the face. As a result of this incident, plaintiff suffers from blurred peripheral vision, tinnitus, and an injury to his jaw.
>
> At trial, Williams testified that on August 31, 1991, he was nineteen years old. On that day, he began drinking beer around 3:00 P.M. Around 6:00 P.M., Williams and two friends,

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[1] Toni McCaw, Daniel McCaw's wife, joins him as plaintiff. Because her loss of consortium claim is derivative and dependent on her husband's claim, and to avoid confusion, we will refer only to Daniel McCaw as plaintiff.

Jeff Morgan and Tim Smith, went to the Dixie Bar. At the bar, the three men shared several pitchers of beer and consumed three to five B-52 shots. Williams testified that he was feeling drunk while in the bar. After the men left the bar, Morgan and Smith began to argue. When the men arrived at Williams' house, Williams went inside and fell asleep or passed out. After Williams awoke, Morgan told him that he had stabbed Smith. Williams then called 911. Williams stated that he was not sober during the altercation with plaintiff.

On February 8, 1993, plaintiff filed suit against Williams and the owner and operator of the Dixie Bar, T & L Operations, Inc. (hereafter defendant), to recover for the injuries suffered in the incident. The claim against Williams was based on negligence and alleged that Williams acted in a "wilful, wanton and reckless manner." The claim against defendant was based on multiple violations of the dramshop act, MCL 436.22; MSA 18.993. Specifically, plaintiff alleged that defendant served alcohol to Williams when the latter was both underage and visibly intoxicated.

* * *

On July 21, 1994, a default was entered against Williams. Williams participated in the subsequent trial only as a witness and is not involved in this appeal.

Soon after, the case was tried before a jury. After the close of plaintiff's proofs, defendant moved for a directed verdict on the basis that the fireman's rule barred plaintiff's claim and because plaintiff failed to show that the dramshop violation was a proximate cause of plaintiff's injuries. The trial court denied the motion as it related to the fireman's rule and allowed plaintiff to recall Williams to establish the element of proximate cause. On August 1, 1994, the jury returned a verdict for plaintiff. Plaintiff was awarded $121,689.89, and plaintiff's wife was awarded $25,000 for her loss of consortium claim. The trial court later granted plaintiff's motion for an award of costs and attorney fees and denied defendant's motion for judgment notwithstanding the verdict. [*McCaw*, *supra* at 183-185.]

The fireman's rule was adopted by the Supreme Court as a common-law rule in *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347; 415 NW2d 178 (1987). The fireman's rule prevents police officers and fire fighters from recovering for injuries arising out of the risks of their respective professions. *Id.* at 351. The scope of the rule includes both negligence in causing the incident requiring a safety officer's presence and those risks inherent in fulfilling the police or fire fighting duties. *Id.* at 372.

The Court next addressed the application of the fireman's rule in *Woods v City of Warren*, 439 Mich 186, 190; 482 NW2d 696 (1992). In *Woods*, the Court explained that the rule bars recovery for two types of injury: "those derived from the negligence causing the safety officer's presence and those stemming from the normal risks of the safety officer's profession." *Id.* at 196. The analytical focus must be on whether the injury stems directly from the safety officer's professional functions. *Id.* at 193. Nevertheless, the fireman's rule may not apply in situations where the policy rationales for its adoption are inapplicable. *Id.* at 194, n 8.

The Supreme Court's recent decision in *Gibbons*, *supra*, involved two consolidated cases, *Gibbons v Caraway* and *Mariin v Fleur*. In *Mariin*, an off-duty police officer, dressed in civilian clothes, was socializing in a bar. The officer was injured when another patron in the bar recognized him as the one who had arrested the patron several years previously and attacked him. *Gibbons* at 319. A majority of the Court held that the fireman's rule did not bar the officer's claim because the connection between the injury was too attenuated from the exercise of his police func-

tion. See *id.* at 328 (Cavanagh, J.), 329 (Boyle, J.), 340-341 (Riley, J.).[2]

In *Gibbons*, a police officer directing traffic after an accident had occurred was injured when a third party driving along the road swerved and struck him. *Id.* at 317-318. The Court failed to produce a majority opinion in this case. However, five justices appear to agree that the fireman's rule does not bar a claim for damages for injuries caused by the subsequent wrongdoing of a third party unconnected to the situation that brought the officer to the scene, where the wrongdoing resulted from wanton, reckless, or grossly negligent behavior. See *id.* at 325-326 (Cavanagh, J.), 329-330 (Boyle, J.).

A majority of the *Gibbons* Court clearly agrees that the decision in *Woods*, *supra*, should be limited. See *id.* at 323-324 (Cavanagh, J.), 329 (Boyle, J.). However, the Court has not delineated the extent of the limitation. The five justices who agreed that the fireman's rule did not preclude recovery in *Gibbons* did not abandon the requirement in *Woods* that fire fighters and police officers may not recover for the normal, inherent, and foreseeable risks of their respective professions. These justices reconciled the result in *Gibbons* with *Woods* by reaching the somewhat counterintuitive conclusion that, for a police officer directing traffic at the scene of an accident, the danger of injury from a negligent or grossly negligent driver is not inherent in the risks of the profession.[3]

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[2] Justice Weaver concurred only in the result because of her belief that the fireman's rule should be limited to premises liability. See *id.* at 334 (Weaver, J.).

[3] In her opinion in *Gibbons*, Justice Riley criticized the majority's conclusion that the danger of injury from a negligent driver for a police

See *id.* at 325 (CAVANAGH, J.); 330 (BOYLE, J.). Justice CAVANAGH explained this result by quoting language from *Kreski* stating that the " 'fireman's rule is not a license to act with impunity, without regard for the safety officer's well-being.' " See *id.* at 325 (CAVANAGH, J.), quoting *Kreski*, *supra* at 372. Justice BOYLE concluded that the injury in *Gibbons* should be compensable because "there is no direct relationship between the act that caused the injury and the act that occasioned the officer's presence." See *Gibbons*, *supra* at 329 (BOYLE, J.).

In our opinion, there is an inherent inconsistency in stating both that the fireman's rule bars recovery for injuries stemming from the normal, inherent, and foreseeable risks of the profession and that the fireman's rule "is not a license to act with impunity, without regard for the safety officer's well-being."[4] *Kreski*, *supra* at 372. In the context of police officers, it is clear that the normal, inherent, and foreseeable risks of the profession include confronting people who will not only act without regard for their safety, but may deliberately attempt to harm them. As the Supreme Court noted in *Kreski*, "police officers cannot be certain what dangers surround them when investigating

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officer directing traffic at the scene of an accident is not inherent in the risks of the profession as a "fiction." *Id.* at 338 (RILEY, J.). Justice RILEY further stated: "Because the fireman's rule was adopted by this Court as a common-law rule, if we decide to rework the doctrine, we should not be reluctant to expressly redefine when the rule applies, rather than attempt to fit these facts into the preexisting rules established by *Kreski* and *Woods*." *Id.* at 338, n 2.

[4] We recognize that in the interim between the Supreme Court's decisions in *Kreski* and *Woods*, two panels of this Court held that the fireman's rule did not preclude an action by an injured police officer against an individual who either intentionally or wilfully and wantonly injured the officer. See *McAtee v Guthrie*, 182 Mich App 215, 220; 451 NW2d 551 (1989); *Rozenboom v Proper*, 177 Mich App 49, 57; 441 NW2d 11 (1989).

a burglary." *Id.* at 378. Likewise, police officers cannot predict what they will encounter when responding to a report of a stabbing, as plaintiff did in the present case. *Gibbons* did not produce a majority rationale for resolving this contradiction.

Under the facts of the present case, it is clear that the injuries to plaintiff resulted from Williams' wilful, wanton, reckless, or grossly negligent behavior.[5] However, after considering *Gibbons*, we find dispositive the fact that Williams was not a third party unconnected to the situation that brought plaintiff to the scene. On the contrary, Williams was present at the scene where a man had been stabbed. It was therefore likely that Williams had either committed the stabbing or possessed important information about it. In fact, Williams had spent the day in the company of both the perpetrator of the stabbing and the victim, and he had summoned plaintiff to the scene by calling 911. Plaintiff was injured when Williams attacked him after he attempted to prevent Williams from leaving the scene. We find this situation distinguishable from that in *Gibbons*, where the defendant struck the plaintiff with her vehicle as the latter was directing traffic following an unrelated accident. We cannot conclude that Williams' wrongdoing was unconnected to the situation that brought plaintiff to the scene. It therefore does not appear that *Gibbons* precludes the application of the fireman's rule in the present case.

However, our analysis does not end there. We now examine the policy rationales behind the fireman's rule to see if they are applicable. See *Woods*, *supra* at 194, n 8. According to the *Kreski* Court,

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[5] Plaintiff has not alleged that Williams acted intentionally.

> the foundational policy rationale [is] that the purpose of safety professions is to confront danger and, therefore, the public should not be liable for damages for injuries occurring in the performance of the very function police officers and fire fighters are intended to fulfill. [*Kreski*, *supra* at 368.]

In adopting the rule, the Court also cited the facts that police officers and fire fighters are trained to deal with the hazards of their respective professions and that worker's compensation benefits are available to police officers and fire fighters injured in the course of their employment. See *id.* at 366, 369. These policy rationales are all applicable in the instant case.

Our decision is also influenced by an additional policy consideration, mentioned in our previous opinion. Plaintiff's claim against defendant is based not on injuries directly inflicted on plaintiff by defendant, but rather on violations of the dramshop act. If the fireman's rule did not apply here, bar owners might hesitate to summon the police for aid in disturbances and instead resort to self-help measures, creating additional risk to the public. See *McCaw*, *supra* at 188-189.

For the foregoing reasons, we conclude that plaintiff's claim is barred by the fireman's rule. We therefore reverse the order granting a judgment consistent with the jury verdict in favor of plaintiff. We also reverse the order awarding plaintiff costs and attorney fees. Our resolution of this issue renders it unnecessary for us to address defendant's other issues.

Reversed.

MACKENZIE, P.J., concurred.

White, J. (*dissenting*). I do not address plaintiffs' argument that the fireman's rule is generally inapplicable to statutory actions under the dramshop act, MCL 436.22; MSA 18.993, because that question was decided adversely to plaintiffs in this Court's initial opinion and the Supreme Court's remand to this Court was solely for the purpose of reconsidering the case in light of *Gibbons v Caraway* and *Mariin v Fleur, Inc*, 455 Mich 314; 565 NW2d 663 (1997).

In *Gibbons*, the Supreme Court discussed its previous decisions applying the fireman's rule and reaffirmed the Court's recognition in *Woods v City of Warren*, 439 Mich 186; 482 NW2d 696 (1992), that the rule generally applies to injuries derived from the negligence causing the safety officer's presence and also to those stemming from the normal risks of the profession, but is to be applied "flexibly as circumstances require[]" to "flexibly address the different fact patterns as they are presented," recognizing "individual exceptions in appropriate situations" when the "fundamental policy rationale is inapplicable." *Gibbons*, at 322-323 (citations omitted). Applying these principles to the instant case, I would hold that the policy rationales are inapplicable and affirm.

The dramshop violation was unrelated to the reason plaintiff Daniel McCaw (plaintiff) was on the scene. Plaintiff was not called to the scene by a bar owner seeking assistance in dealing with a disorderly patron, called regarding a disturbance created by an intoxicated person, or called to the scene of an accident involving a drunk driver. Rather, he was called to investigate a stabbing involving two persons other than Williams. Thus, the aspect of the policy rationale that seeks to encourage citizens to call safety officers

for assistance without regard to their own negligence is not implicated, and the prong of the test that focuses on injuries derived from the negligence requiring the officer's presence is inapplicable because defendant's "negligence" (statutory violation) was unrelated to plaintiff's presence. Additionally, except in the most general sense, being assaulted by Williams was not a normal, inherent, and foreseeable risk. Williams' intoxication was peripheral to plaintiff's performance of his duties.

Further, the aspect of the policy rationale for the fireman's rule that recognizes that safety officers are trained at taxpayer expense to handle dangerous situations and are compensated at taxpayer expense to deal with hazards created by taxpayer negligence, and therefore shields citizens from damage claims for injuries sustained by officers as a result of carelessness or ordinary negligence encountered as a normal risk of the profession, *Gibbons*, at 321 (CAVANAGH, J.), 331 (BOYLE, J), is inapplicable to the instant situation where the risk of injury from the acts of persons served in violation of the dramshop act is specifically addressed by a legislative scheme that requires that the dramshop owner maintain security for liability under the dramshop act.[1] The dramshop owner is not

[1] I recognize that the same argument might be made regarding automobile accidents involving officers on the basis of the legislative requirements for security under the no-fault act. However, in such cases a different aspect of the policy favoring application of the fireman's rule is operative because, as observed by Justice BOYLE in *Gibbons*, the situation that required the officer's presence often creates the added risk that a third party unrelated to the situation will be distracted or inattentive and negligently cause injury to an officer at the scene. *Gibbons*, at 331 (BOYLE, J.). In such cases, the third-party driver may be excused from liability to the officer at the scene in the line of duty where that very situation provides the occasion for the third party's negligence. The instant case presents a

in the same position as the citizen whose ordinary negligence causes injury to the officer.

I would affirm.

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different fact pattern. Defendant's violation of the dramshop act was wholly independent of, preceded, and was in no way caused by the situation that led to plaintiff's presence on the scene in the exercise of his duties as an officer.

STATE DEFENDER UNION EMPLOYEES, UAW LOCAL 412-UNIT 64 v LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT

Docket No. 199075. Submitted May 5, 1998, at Detroit. Decided June 23, 1998, at 9:10 A.M.

State Defender Union Employees, UAW Local 412-Unit 64, a labor organization representing attorneys employed by the Legal Aid and Defender Association of Detroit (defendant), brought an action in the Wayne Circuit Court against the defendant, alleging that the defendant denied its request for the production of detailed financial reports and data in violation of the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.* The plaintiff contended that the defendant was obligated to comply with its request because the defendant receives the majority of its revenues from governmental entities and, therefore, is a public body primarily funded by or through state or local authority that is subject to the provisions of the FOIA. The court, Cynthia D. Stephens, J., granted summary disposition in favor of the defendant, finding that the defendant's receipt of money from governmental entities in exchange for the rendering of professional services did not amount to the defendant's being primarily funded by government sources and thus subject to the FOIA. The plaintiff appealed.

The Court of Appeals *held*:

1. The court properly found that the defendant is not a "public body" subject to the disclosure provisions of the FOIA.

2. The word "funded" used by the Legislature in MCL 15.232(b)(iv); MSA 4.1801(2)(b)(iv) in defining a "public body" as an organization "primarily funded by or through state of local authority" means the receipt of a governmental grant or subsidy. The court properly found that the defendant was not "funded" by or though state or local authority merely because public monies paid in exchange for services rendered comprise a certain percentage of the defendant's revenue. Earned fees are simply not a grant, subsidy, or funding.

Affirmed.

RECORDS — FREEDOM OF INFORMATION ACT — WORDS AND PHRASES — PUBLIC BODY — FUNDED.

The Freedom of Information Act requires a public body to disclose all public records that are not specifically exempt from disclosure under the act; the act provides, in part, that a "public body" is a body that is created by state or local authority or which is primarily funded by or through state or local authority; an organization that is not created by state or local authority and receives payment from governmental sources in return for providing goods or services is not as a result of such payment funded by or through state or local authority irrespective of the amount of those payments; the term "funded" means the receipt of a governmental grant or subsidy; earned fees are not a grant, subsidy, or funding (MCL 15.232[b][iv]; 15.233[1]; MSA 4.1801[2][b][iv], 4.1801[3][1]).

International Union, UAW (by *Jordan Rossen*, General Counsel, and *Georgi-Ann Oshagan*, Associate General Counsel), for the plaintiff.

Kienbaum Opperwall Hardy & Pelton, P.L.C. (by *Theodore R. Opperwall* and *Jeffery M. Peterson*) (*Dickinson, Wright, Moon, Van Dusen & Freeman*, by *John E. S. Scott*, of Counsel), for the defendant.

Before: NEFF, P.J., and O'CONNELL and YOUNG, JR., JJ.

YOUNG, JR., J. Defendant is a private, nonprofit corporation established to provide legal services to indigent persons residing in the city of Detroit. Plaintiff is a labor organization representing attorneys employed by defendant. Apparently apart from or in addition to the information customarily exchanged within the parties' bargaining relationship, plaintiff made a Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*, demand that defendant produce its detailed financial reports and data. Plaintiff contends that defendant was obligated to do so because defendant receives the majority of its revenues from governmental entities and, therefore, is a "public body," which is defined in the statute as an organization "primarily funded by or through state or

local authority." MCL 15.232(b)(iv); MSA 4.1801(2)(b)(iv).[1]

Plaintiff appeals as of right from the trial court's summary dismissal of its lawsuit in which plaintiff asserted that defendant unlawfully resisted plaintiff's proper demand for the requested financial information in violation of the FOIA. Because we agree with the trial court's determination that defendant is not a public body, we affirm.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

According to defendant's articles of incorporation, defendant is financed "[b]y contributions, donations, subscriptions, gifts or bequests from any person or organization and by public funds received for services rendered or to be rendered, including contracts with public agencies and as appointed counsel."

On January 9, 1996, plaintiff sent a letter to defendant making a formal FOIA request for the production of defendant's detailed financial statements, audits, and related documents, which records encompass an eight-year period and concern all aspects of defendant's business. Plaintiff further requested that all fees and costs associated with the request be waived because the request was made in the public interest. By letter dated January 18, 1996, defendant denied plaintiff's FOIA request. On February 28, 1996, plaintiff submitted a second letter to defendant demanding compliance with the FOIA request.

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[1] After the trial court rendered its decision in the present case, MCL 15.232; MSA 4.1801(2) was amended by 1996 PA 553, which amendment became effective on March 31, 1997. However, no substantive changes to the definition of "public body" were made. Former subsection 2(b) is now designated as subsection 2(d). For purposes of this opinion, all references will be made to former subsection 2(b).

After receiving no response to its second request, plaintiff filed the instant lawsuit. Therein, plaintiff alleged that defendant received more than eighty-five percent of its funding from governmental sources, including Wayne County, and therefore was a "public body" within the meaning of the FOIA and thus subject to its provisions.[2] Plaintiff further alleged that defendant was served with a request for public records on February 28, 1996, but unlawfully refused to provide the documents or offer any response to the FOIA request. Plaintiff requested an order compelling defendant to pay costs, attorney fees, and punitive damages for its conduct. In addition, plaintiff sought injunctive relief compelling production of the requested documents.

With its complaint plaintiff filed a motion for summary disposition, arguing that defendant was a public body, that defendant had violated several provisions of the FOIA, and that plaintiff was therefore entitled to all the relief it prayed for in its complaint. The trial court, however, in a well-reasoned written opinion and order, concluded that defendant is not subject to the FOIA. The trial court ruled that defendant is not "primarily funded" by government sources because it only received money from governmental entities in exchange for rendering professional services to indigent clients. Accordingly, the court granted summary disposition to defendant under MCR 2.116(I)(2) ("If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the

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[2] We note that there is a factual dispute concerning the exact percentage of defendant's revenue that is derived from governmental sources. However, as will be more fully explained later in this opinion, such a determination is irrelevant to our analysis.

court may render judgment in favor of the opposing party.").

II. ANALYSIS

Under the FOIA, a "public body" must disclose all public records that are not specifically exempt under the act. MCL 15.233(1); MSA 4.1801(3)(1); *Jackson v Eastern Michigan Univ Foundation*, 215 Mich App 240, 244; 544 NW2d 737 (1996). Subsection 2(b) of the FOIA provides the following definition of "public body":

> (b) "Public body" means:
>
> (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
>
> (ii) An agency, board, commission, or council in the legislative branch of the state government.
>
> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
>
> (iv) *Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.*
>
> (v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. [MCL 15.232(b); MSA 4.1801(2)(b) (emphasis added).]

At issue in this appeal is subsection 2(b)(iv). However, because there is no claim that defendant was created by state or local authority, we need only determine whether defendant is "primarily funded by

or through state or local authority." As discussed more fully later in this opinion, we conclude that it is not.

We review questions of statutory interpretation de novo on appeal. *Michigan Automotive Research Corp v Dep't of Treasury (After Remand)*, 222 Mich App 227, 231; 564 NW2d 503 (1997). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 219 Mich App 165, 169; 555 NW2d 510 (1996). The first criterion in determining intent is the specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Barr v Mt Brighton Inc*, 215 Mich App 512, 516-517; 546 NW2d 273 (1996).

In *Kubick v Child & Family Services of Michigan, Inc*, 171 Mich App 304; 429 NW2d 881 (1988), this Court construed the first part of the statutory term "primarily funded" and held that when the governmental contribution is less than half of an organization's total funding, the organization is not "primarily" funded by or through state or local authority. *Id.* at 308. This holding was reaffirmed in *Jackson*, *supra* at 245. However, no published decision either of this Court or the Supreme Court has addressed the precise issue presented here: whether an organization that receives payment from governmental sources in return for providing services is "funded by or through state or local authority," irrespective of the amount of those payments. This issue presents a question of first

impression in Michigan that requires us to ascertain the meaning of the statutory term "funded."

Because it is not defined in the statute, we must give the term "funded" its plain and ordinary meaning. MCL 8.3a; MSA 2.212(1); *In re Forfeiture of Bail Bond*, 209 Mich App 540, 544; 531 NW2d 806 (1995). "Reference to a dictionary is appropriate to ascertain what the ordinary meaning of a word is." *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 470; 521 NW2d 831 (1994). The verb form of fund is commonly understood as meaning "to allocate or provide [a supply of money or monetary resources] for (a program, project, etc.)." *Random House Webster's College Dictionary* (1997), p 525. Fund is also recognized as being synonymous with "subsidize." *Webster's Collegiate Thesaurus* (1988), p 331. A subsidy, in turn, is defined as "1. a direct financial aid furnished by a government, as to a private commercial enterprise, an individual, or another government. 2. any grant or contribution of money." *Webster's College Dictionary*, *supra*, p 1284. Thus, we conclude and hold that, as used in the statute, "funded" should be construed to mean the receipt of a governmental grant or subsidy.

Given this construction, it is clear that defendant is not "funded" by or through state or local authority in any ordinary sense of that term. Plaintiff's only assertion is that defendant is a "public body" because the majority of its revenues are generated from fee-for-service transactions with various governmental entities.[3] However, we agree with the trial court and hold that an otherwise private organization is not "funded

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[3] Defendant submitted an affidavit averring that all the money received by defendant from governmental sources is on a fee-for-service basis. That averment was not contested by plaintiff.

by or through state or local authority" merely because public monies paid in exchange for goods provided or services rendered comprise a certain percentage of the organization's revenue. Earned fees are simply not a grant, subsidy, or funding in any reasonable, common-sense construction of those synonymous words. Rather, it is clear that, in the FOIA, *funded* means something other than an exchange of services or goods for money, even if the source of money is a governmental entity.[4] Were we to hold otherwise, every organization doing the primary part of its business with the state or with local governments would have its books and records subject to the FOIA's disclosure provisions. In light of the plain meaning of the language our Legislature used in the FOIA, we do not believe that it intended such an extraordinary result.

Accordingly, because defendant is not a "public body," and therefore is not subject to the FOIA's disclosure provisions, the decision of the trial court granting summary disposition to defendant is affirmed.

Affirmed.

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[4] We note that court decisions from at least three other states, construing open records laws similar to Michigan's FOIA, also distinguish between bargained-for exchanges of services or goods for money and public funding. See *Indianapolis Convention & Visitors Ass'n, Inc v Indianapolis Newspapers, Inc*, 577 NE2d 208, 212-213 (Ind, 1991); *Adams Co Record v Greater North Dakota Ass'n*, 529 NW2d 830, 834-836 (ND, 1995); *Weston v Carolina Research & Development Foundation*, 303 SC 398, 404; 401 SE2d 161 (1991).

ALLSTATE INSURANCE COMPANY v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 191759. Submitted February 4, 1998, at Detroit. Decided June 23, 1998, at 9:15 A.M. Leave to appeal sought.

Laura and James Smith brought an action in the Oakland Circuit Court against Allstate Insurance Company and State Farm Mutual Automobile Insurance Company, seeking a declaration regarding which of the insurers is liable to the plaintiffs for negligence by Bruce Walsh and Charles Hinton, Jr. An automobile driven by James Smith and in which Laura Smith was a passenger had been struck by an automobile driven by Walsh. Just before the accident, Walsh had bought the car he was driving from Hinton, who signed over to Walsh the vehicle title and removed from the automobile his license plate, registration, and certificate of no-fault insurance by State Farm. Allstate, the Smiths' no-fault automobile insurer had denied their claim for uninsured motorist benefits. The court, Fred M. Mester, J., on competing motions by State Farm and Allstate for summary disposition, granted State Farm's motion and denied Allstate's motion. Allstate appealed.

The Court of Appeals *held*:

A named insured must have an insurable interest to support the existence of a valid automobile liability insurance policy. At the time of the accident in this case, Hinton did not have an insurable interest in the automobile he sold to Walsh, having ceased to be its owner and registrant by removing the license plate, registration, and certificate of insurance by State Farm. Thus, the State Farm policy was void for lack of an insurable interest on the part of Hinton.

Affirmed.

INSURANCE — LIABILITY — AUTOMOBILES — INSURABLE INTERESTS.

A named insured of an automobile liability policy must have an insurable interest in the automobile; a person who in a bona fide sale of an automobile removes from the automobile the person's license plate, registration, and certificate of insurance ceases to be the owner and registrant of the vehicle and therefore no longer has an insurable interest in the automobile such that the person's automobile liability insurance, if not already canceled, becomes void.

Garan, Lucow, Miller, Seward & Becker, P.C. (by *James L. Borin* and *Robert D. Goldstein*), for Allstate Insurance Company.

Draugelis & Ashton, L.L.P. (by *John A. Ashton*), for State Farm Mutual Automobile Insurance Company.

Gerald A. Sniderman & Associates (by *Gerald A. Sniderman*), for Laura and James Smith.

Before: SAAD, P.J., and WAHLS and GAGE, JJ.

WAHLS, J. In this declaratory judgment action, defendant Allstate Insurance Company appeals as of right from an order granting summary disposition for defendant State Farm Mutual Automobile Insurance Company. We affirm.

The insurance law issues presented here arise from an underlying lawsuit filed by plaintiffs Laura and James Smith against third parties. The underlying facts are undisputed. In the early evening of June 4, 1993, Charles Hinton, Jr., sold his 1977 Buick LeSabre to Bruce Walsh. Walsh paid for the car, and Hinton gave him a receipt. Hinton then signed the title over to Walsh, removed his license plate, registration, and certificate of insurance from the car, and gave Walsh possession of the car. Hinton had insured the car through defendant State Farm Insurance. While driving the LeSabre a few hours later, Walsh rear-ended a vehicle driven by plaintiff James Smith, and in which plaintiff Laura Smith was a passenger. Laura Smith was injured in the accident. Although Walsh had placed a license plate on the LeSabre when he bought it, he had not obtained insurance. Plaintiffs initially sought uninsured motorist benefits from their own

insurer, defendant Allstate Insurance Company. However, Allstate denied coverage, contending that Walsh was covered by Hinton's policy with State Farm. Plaintiffs then sued Walsh for negligence and Hinton for negligent entrustment. Hinton subsequently filed a motion for summary disposition, but agreed to hold it in abeyance to permit plaintiffs to file the instant declaratory judgment action. Plaintiffs sought a determination regarding which insurer, Allstate or State Farm, is liable for plaintiffs' damages. As noted above, the trial court granted summary disposition for State Farm.

The only issue on appeal is whether Walsh was covered by Hinton's policy with State Farm at the time of the accident, despite the fact that Hinton no longer owned the vehicle. In its motion for summary disposition and accompanying brief, State Farm never argued that the language of the policy excluded Walsh as an insured.[1] Instead, State Farm argued that, because Hinton had sold the vehicle in a bona fide sale, and because he had removed the license plate, registration, and proof of insurance from the vehicle, Hinton was no longer the owner or registrant of the vehicle, and there could be no coverage under the State Farm policy.

The parties and the trial court all relied on *Clevenger v Allstate Ins Co*, 443 Mich 646; 505 NW2d 553 (1993). In *Clevenger*, JoAnn Williams sold a car to her nephew, Douglas Preece. Preece paid Williams for the car, and Williams signed the title over to Preece.

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[1] Indeed, the lower court file did not contain a copy of the State Farm policy. In addition, neither party attached a copy of the policy to its brief. We express no opinion regarding the extent of coverage under Hinton's policy.

However, Williams allowed Preece to drive the car away with her license plate still attached, and with her registration and certificate of insurance in the glove box. Williams had insured the car through Allstate under a no-fault insurance policy. On his way home, Preece was involved in a head-on collision in which the plaintiff, Clifford Clevenger, was injured. Preece had not yet obtained his own insurance. Clevenger eventually filed an action seeking a declaratory judgment that Allstate had a duty to defend and indemnify Williams and Preece under Williams' no-fault policy. *Id.* at 648-649.

In *Clevenger*, the Supreme Court began by reviewing the language of Williams' no-fault policy, eventually concluding that, under the express terms of the policy, Allstate was obligated to defend and indemnify both Williams and Preece. *Id.* at 652-656. The Court then went on to address the question whether Williams had an insurable interest in the vehicle at the time of the accident. The Court found that, because Williams had left her license plate on the car, and because she had left the registration and certificate of insurance in the glove box, she remained the registrant of the vehicle. After noting that Michigan law imposes a duty on a registrant to maintain statutorily required insurance, the Court concluded that Williams had an insurable interest in the vehicle. *Id.* at 656-661. The Supreme Court did not discuss the underlying rationale for the insurable interest requirement, nor did it cite any authority on the topic. *Id.* However, it appears that the Court held that an insurable interest is necessary to support a valid automobile liability insurance policy. It also appears that the Supreme Court held that the insurable interest must

belong to a "named insured." We base our interpretation of *Clevenger* on the fact that (1) the Supreme Court addressed the defendant's "insurable interest" argument on the merits, rather than simply stating that there is no such requirement for automobile liability insurance, and (2) the Supreme Court only addressed the question whether the named insured, Williams, had an insurable interest, when it was clear that Preece had an insurable interest.[2]

We note that the Supreme Court's holdings do not represent forgone conclusions. There is a legitimate question whether liability insurance requires an "insurable interest." See *Hall v Weston*, 323 SW2d 673, 678-680 (Mo, 1959). Indeed, the "insurable interest" doctrine seems to find its origin in public policy concerns.[3] Among those concerns is a desire to prohibit the use of insurance as a form of wagering,[4] and a desire to prevent the creation of socially undesirable interests, such as where a creditor buys insurance on the life of a debtor for an amount greatly exceeding

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[2] The Supreme Court had already determined that Preece was an "insured" under Williams' policy. *Clevenger*, *supra* at 653.

[3] See *Hartford Fire Ins Co v Evans*, 255 SW 487, 489 (Tex Civ App, 1923) ("The principle prohibiting insurance in favor of one having no insurable interest therein is one of public policy.").

[4] See *Crossman v American Ins Co*, 198 Mich 304, 308; 164 NW 428 (1917); *Secor v Pioneer Foundry Co, Inc*, 20 Mich App 30, 34; 173 NW2d 780 (1969). As the Court in *Crossman* stated:

> Policies of insurance founded upon mere hope and expectation and without some interest in the property, or the life insured, are objectionable as a species of gambling, and so have been called wagering policies. All species of gambling policies were expressly prohibited in England by Stat. 19 Geo. II, chap. 37, and have been treated as illegal in this country upon the principles of that statute, without acknowledging it as authority. Here, such contracts of insurance are treated as contravening public policy, and are therefore void. [*Crossman*, *supra* at 308.]

the amount of the debt, such that the creditor "might be [tempted] to bring the debtor's life to an unnatural end." *Lakin v Postal Life & Casualty Ins Co*, 316 SW2d 542, 551 (Mo, 1958). These public policy concerns are not implicated in the case of liability insurance, because the holder of the insurance cannot collect cash on the policy.[5] We also note that the no-fault automobile liability insurance required in Michigan is not simply for the benefit of the policyholder or other insured. Rather, it is intended " 'to protect the members of the public at large from the ravages of automobile accidents.' " *Clevenger*, *supra* at 651, quoting *Coburn v Fox*, 425 Mich 300, 309; 389 NW2d 924 (1986). Thus, in the case of automobile liability insurance, the insurable interest appears to lie, at least to some degree, with an injured party rather than an insured.

While we have failed to discover any underlying rationale for application of the insurable interest requirement to liability insurance, we recognize that many jurisdictions observe such a requirement. See 1 ALR3d 1193, § 2, pp 1195-1196, and cases cited therein. In this case, the parties both appear to assume the applicability of the insurable interest requirement. Because *Clevenger* supports such a requirement, we conclude that, under Michigan law, an insured must have an "insurable interest" to support the existence of a valid automobile liability insurance policy.

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[5] See *Progressive Northern Ins Co v Consolidated Ins Co*, 673 NE2d 522, 525 (Ind App, 1996) ("Because liability coverage merely indemnifies the insured to the extent that the insured is held liable, there is less risk that the liability policy will be used for illegitimate purposes, as compared to a policy against loss.").

Next, we consider whether the required insurable interest must belong to some particular "insured" under the policy. As noted above, the Court in *Clevenger* appeared to hold that a "named insured" must have an insurable interest. Again, the reasoning behind this conclusion is unclear,[6] and, once again, the parties have not addressed the issue. However, with *Clevenger* as our only guide, we conclude that a "named insured" must have an insurable interest to support a valid automobile liability insurance policy.

The only remaining question is whether Hinton had an insurable interest sufficient to support a valid automobile liability insurance policy. We conclude, pursuant to *Clevenger*, that he did not. In *Clevenger*, the seller of the vehicle had an insurable interest only because, by leaving the license plate on the car, and by leaving the registration and certificate of insurance in the car, she "voluntarily remained the insuring registrant" of the car. *Clevenger*, *supra* at 660-661. Here, Hinton did exactly what the Supreme Court suggested a seller do; he removed his license plate, registration, and certificate of insurance from the vehicle before giving Walsh possession. These actions, in conjunc-

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[6] As with the conclusion that an insurable interest is necessary in the first place, there is room for disagreement on this point. See *Ohio Farmers Ins Co v Lantz*, 246 F2d 182, 185-186 (CA 7, 1957). There, the court recognized a distinction between property insurance and liability insurance:

> It is true that to support an action on a policy which insures a property right, i.e., against collision, fire, wind or theft, etc., an insurable interest in the named insured must be proved. On the other hand, where an insurance policy is one of indemnity against liability for loss and injury sustained by others and caused by the use of an automobile or other property named in the policy, an insurable interest in the named insured is not a prerequisite to a recovery against the insurer. [*Id.* at 185.]

tion with the bona fide sale of the vehicle, destroyed Hinton's status as owner and as registrant.[7] Unlike *Clevenger*, there simply are no facts from which we could infer that Hinton "voluntarily remained the insuring registrant." Thus, at the time of the accident, Hinton had no remaining interest in the vehicle, he had no insurable interest, and the State Farm liability policy covering the LeSabre was simply void. Under these circumstances, the trial court properly granted summary disposition for State Farm.

Affirmed.

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[7] Allstate argues that Hinton remained the registrant for an indefinite period after the sale. According to Allstate, in order to cast off his status as registrant, Hinton was required to cancel the registration with the Secretary of State or wait for the registration to expire. We find no authority for this proposition. Reading the applicable provisions of the vehicle code together, it is clear that the owner of a vehicle is responsible for registering it. See MCL 257.222-257.224; MSA 9.1922-9.1924 (instructing that the registration certificate and registration plate be delivered to the owner of the vehicle). If the owner transfers the title to the vehicle, she is required to remove the registration plates and transfer them, or retain them for transfer to another vehicle. MCL 257.233(1); MSA 9.1933(1). The code also makes it clear that the purchaser or transferee is responsible for obtaining a new certificate of title and registration certificate for the purchased vehicle. MCL 257.234; MSA 9.1934. However, the purchased vehicle is exempt from the registration and certificate of title provisions of the vehicle code for three days immediately following transfer of the title. MCL 257.216(1); MSA 9.1916(1). Implicit in this legislative scheme is the idea that a seller who complies with the statutory requirements by removing the registration plate, registration certificate, and certificate of insurance from the vehicle, is no longer a registrant of the vehicle. In *Clevenger*, the Supreme Court simply recognized that a person who transfers the title to a vehicle and allows the new owner to drive the vehicle away with her registration plate, registration certificate, and certificate of insurance, voluntarily remains the registrant of the vehicle. *Clevenger*, *supra* at 660-662.

PEOPLE v CASTILLO

Docket No. 200254. Submitted June 10, 1998, at Lansing. Decided June 23, 1998, at 9:20 A.M.

David I. Castillo was convicted by a jury in the Lapeer Circuit Court, Nick O. Holowka, J., of assault with intent to do great bodily harm less than murder and was sentenced to four to ten years of imprisonment, an upward departure from the zero- to two-year minimum term recommended under the Michigan Sentencing Guidelines. The defendant appealed.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion in admitting as demonstrative evidence a padlock that the prosecution alleged was similar to that which the defendant used to strike the victim on his head and from behind, causing skull fracture, concussion, and blood clotting. There was substantial evidence attesting to the similarity of the exhibit to the weapon allegedly used, there was no reasonable likelihood that the jury might have failed to understand the demonstrative nature of the evidence, and the defendant had ample opportunity for cross-examination regarding the demonstrative weapon. The disputed evidence also satisfied general principles governing the admissibility of evidence, having been relevant, probative, and not prejudicial.

2. The trial court did not abuse its discretion in departing from the sentencing guidelines. The sentence imposed is proportionate in light of the stated reasons for departing from the guidelines, i.e., the sentencing guidelines did not address adequately the attack-from-behind nature of the crime and the severity of the crime.

Affirmed.

1. EVIDENCE — DEMONSTRATIVE EVIDENCE — WEAPONS.

A weapon similar to one allegedly used in the commission of a crime may be admitted as demonstrative evidence where substantial evidence attests to the similarity of the exhibit offered and the weapon allegedly used, there is no reasonable likelihood that the jury may fail to understand the demonstrative nature of the evidence, and the opposing party has ample opportunity for cross-examination regarding the demonstrative weapon; such evidence

must also be relevant, probative, and not prejudicial (MRE 401-403).

2. SENTENCES — SENTENCING GUIDELINES — DEPARTURES.

A sentencing court may justify imposing a sentence whose minimum term exceeds that which is recommended under the sentencing guidelines by referring to factors inadequately weighed within the guidelines, as well as by introducing legitimate factors not considered by the guidelines.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Justus C. Scott*, Prosecuting Attorney, and *Timothy M. Turkelson*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Lyle N. Marshall*), for the defendant on appeal.

Before: JANSEN, P.J., and MARKEY and O'CONNELL, JJ.

O'CONNELL, J. Defendant appeals as of right from his jury conviction and sentence for assault with intent to do great bodily harm less than murder. MCL 750.84; MSA 28.279. Defendant, a seventeen-year-old high school student at the time of the underlying offense, was sentenced to four to ten years' imprisonment. We affirm.

This case arises from an incident between defendant and his victim on December 5, 1995. At the time both were high school students. Earlier incidents at their school had left the two feeling mutual animosity. The victim testified that he was standing on the street, unaware that defendant was approaching, when defendant struck him from behind. Defendant admitted striking the victim, but insisted that he did so with only his bare hand. The prosecution presented evidence that defendant struck the fifteen-year-old victim forcefully with a blunt object. The vic-

tim was rushed to the hospital by ambulance and helicopter and was treated for skull fracture, concussion, and blood clotting.

Defendant first argues that the trial court improperly admitted into evidence a padlock that the prosecution offered to demonstrate the kind of weapon it theorized was used in the assault. Defendant asserts that the prejudicial effect of that evidence outweighed its probative value because no witness actually saw a padlock in defendant's hand at the time of the assault. We disagree.

We review a trial court's determination to admit evidence for an abuse of discretion. *People v Hoffman*, 225 Mich App 103, 104; 570 NW2d 146 (1997). Demonstrative evidence, including physical objects alleged to be similar to those involved in the incident at issue, is admissible where it may aid the fact finder in reaching a conclusion on a matter material to the case. See *People v Howard*, 391 Mich 597, 602-603; 218 NW2d 20 (1974); *People v Gunter*, 76 Mich App 483, 493-494; 257 NW2d 133 (1977). As with all evidence, to be admissible, the demonstrative evidence offered must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice. See MRE 401-403; 23 CJS, Criminal Law, § 846, p 37. Beyond general principles of admissibility, the case law of this state has established no specific criteria for reviewing the propriety of a trial court's decision to admit demonstrative evidence. However, we find persuasive, and adopt for this state's jurisprudence, a test espoused by the Supreme Court of Missouri: A weapon similar to one allegedly used in the commission of a crime may be admitted as demonstrative evi-

dence where substantial evidence attests to the similarity of the exhibit offered to the weapon allegedly used, there is no reasonable likelihood that the jury may fail to understand the demonstrative nature of the evidence, and the opposing party has ample opportunity for cross-examination regarding the demonstrative weapon. *State v Carter*, 955 SW2d 548, 561 (Mo, 1997).[1] Our analysis of the admission of the demonstrative evidence in the present case, under these three elements plus general principles of admissibility, reveals no abuse of discretion.

Concerning the first element, one witness testified that she saw "a silver-gray" and "shiny" object in defendant's hand. Upon being shown the demonstration padlock, the witness testified that it was similar, though of different color, to what she observed in defendant's hand as he struck his victim. Further, other witnesses testified to hearing a "popping" sound as defendant struck the victim, that evidence comporting with the theory that defendant struck the victim with a padlock and tending to refute defendant's position that he struck with his bare hand. Additionally, the victim testified that he had seen defendant carrying a padlock, wrapping it around his finger like a ring. This evidence satisfies the requirement of a substantial evidentiary basis for likening the padlock in evidence to the alleged instrumentality of the crime.

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[1] The Missouri court listed a fourth element, that "the demonstration is probative of a material issue in the case," *Carter*, *supra*, but because that element falls under general principles of admissibility, see MRE 401, we decline to restate it here in connection specifically with demonstrative evidence.

With regard to the second element, there was no attempt to deceive the jury regarding the demonstrative nature of the padlock in evidence. The prosecution made plain before the jury that the exhibit was neither present at the assault nor otherwise actually associated with defendant. With regard to the third element, defendant had ample opportunity and did, in fact, cross-examine the eyewitness who likened the demonstration padlock to the weapon she saw at the assault concerning her observations, and defendant further elicited statements from other witnesses that they detected no weapon in defendant's hands when he assaulted the victim. Especially because the defense had every opportunity to highlight for the (jury what the prosecution readily acknowledged that the padlock in evidence was merely for demonstration purposes), there is no reasonable likelihood that the jury misapprehended the demonstrative nature of that evidence.

Nor did the evidence at issue run afoul of general principles of admissibility. The demonstration padlock was clearly probative of issues material to this case. The exhibit illustrated the prosecution's theory regarding the instrumentality of the crime, defendant's assaultive intent, and defendant's practice of wearing a padlock as if it were a ring. Further, the padlock demonstrated the congruence between the prosecution's theory of how the crime was committed and the evidence concerning the extent and nature of the victim's injuries. Defendant alleges no unfair prejudicial effect from admission of the evidence other than to assert that the mere presence of the demonstration padlock as an exhibit caused the jury to equate the padlock with the crime. However, because

defendant seized every opportunity to elicit testimony that raised all reasonable doubts regarding the connection between the exhibit and assault in question, any unfair prejudice defendant may have suffered from admission of the demonstrative evidence was certainly not sufficient to outweigh substantially the probative value of the evidence. MRE 403. For these reasons, the evidence in question satisfied the general requirements for relevance and probative value as balanced against prejudicial effect.

Defendant's remaining argument on appeal is that the trial court erred in imposing a sentence of four to ten years' imprisonment, while the Michigan Sentencing Guidelines recommended a sentence within the range of zero to two years' imprisonment. Defendant argues that the trial court failed to justify this departure because its stated reasons were either already embodied within the guidelines, were factors considered in every case at sentencing, or were simply irrelevant to sentencing. We disagree.

A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Although a trial court enjoys considerable latitude when deciding on a sentence, a sentence must be proportionate to the seriousness of the crime. *Id.* at 650. A court upwardly departing from the sentencing guidelines must place its reasons for doing so on the record at the time of sentencing. *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987). The

crucial test for proportionality is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995). A court may justify an upward departure by reference to factors considered, but adjudged inadequately weighed, within the guidelines, as well as by introducing legitimate factors not considered by the guidelines. See *People v Granderson*, 212 Mich App 673, 680-681; 538 NW2d 471 (1995). A sentence outside the recommended range that is imposed without reference to legitimate factors not adequately considered by the guidelines may be disproportionate. *Houston*, *supra* at 320.

The trial court placed its reasons for its upward departure on the record: (1) The cowardly nature of the assault, (2) the lack of any immediate confrontation prompting the assault, (3) the victim's lack of opportunity to defend himself, (4) the victim's lack of opportunity to avoid the assault, (5) the viciousness of the assault, (6) the boldness of the assault, taking place in broad daylight on a public street, (7) defendant's having abandoned the victim, leaving him unconscious on the street, and (8) the seriousness of the resulting injury. The court's reasons all concern the nature and severity of the crime, both of which are indisputably valid, indeed essential, sentencing considerations. *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985).

The trial court properly observed that the sentencing guidelines did not properly address the attack-from-behind nature of the crime. This consideration receives some attention within Offense Variable (OV) 7

of the sentencing guidelines, which addresses offender exploitation of victim vulnerability. Michigan Sentencing Guidelines, 2d ed, p 27 (1988). However, this variable does not include among its listed concerns the launching of a surprise attack. Thus, the trial court properly considered the nature of the crime in a way not fully addressed in the guidelines.

Regarding the severity of the crime, this too receives some attention within the guidelines. OV 2 covers physical attack or injury, and OV 13 covers psychological injury. *Id.* at pp 26, 27. However, the trial court specifically noted that the guidelines did not adequately reflect the severity of the instant crime. The court heavily weighed the fact that the victim's injuries were nearly fatal, the result of defendant's blow to a particularly vulnerable area of the head. This evidenced not only that defendant intended to do great bodily harm, but also that defendant acted with an unusually malevolent frame of mind. The trial court did not abuse its discretion in finding that the sentencing guidelines were not sufficient under the circumstances presented by this case.

Affirmed.

MARKEY, J., concurred.

JANSEN, P.J. I concur in the result only.

PEOPLE v BRECK

Docket No. 199668. Submitted May 5, 1998, at Grand Rapids. Decided June 23, 1998, at 9:25 A.M.

Larry J. Breck was convicted of third-degree criminal sexual conduct following a bench trial in the Kalamazoo Circuit Court, John F. Foley, J., for engaging in sexual penetration with a mentally incapable person, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c). The defendant appealed.

The Court of Appeals *held*:

1. MCL 750.520a(f); MSA 28.788(1)(f) defines "mentally incapable" as "suffering from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct." Contrary to the defendant's contention, a mentally incapable victim's appraisal of the nature of his conduct does not involve only the ability to be aware that a physical act is occurring; it also involves the ability to appreciate the moral implications of the act. In this case, the prosecution established through expert testimony that the victim was mentally retarded and was incapable of appraising the nature of his conduct because he could not appreciate the moral implications of sexual relations with the defendant.

2. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence of sexual penetration at the place and during the times alleged by the prosecution. The evidence included the testimony of the victim and his sister and brother.

3. The trial court did not abuse its discretion in determining that the victim was a competent witness. The victim, when questioned by the trial court, exhibited sufficient intelligence and a sense of obligation to testify truthfully and understandably.

Affirmed.

RAPE — THIRD-DEGREE CRIMINAL SEXUAL CONDUCT — MENTALLY INCAPABLE VICTIMS.

A person is "mentally incapable," for purposes of the statute that makes it criminal sexual conduct in the third degree to engage in sexual penetration with a person the actor knows or has reason to know is mentally incapable, if the person suffers from a mental

defect that renders that person temporarily or permanently incapable of appraising the nature of the person's conduct; the person's appraisal of the nature of the person's conduct involves the ability to be aware that a physical act is occurring, as well as the ability to appreciate the moral implications of the act (MCL 750.520a[f], 750.520d[1][c]; MSA 28.788[1][f], 28.788[4][1][c]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *James J. Gregart*, Prosecuting Attorney, and *Alan D. Harbaugh*, Assistant Prosecuting Attorney, for the people.

John M. Wiewiora, for the defendant on appeal.

Before: SAWYER, P.J., and KELLY and SMOLENSKI, JJ.

KELLY, J. Following a bench trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c). He was sentenced to five to fifteen years' imprisonment. He was fifty years old at the time of sentencing. Defendant now appeals as of right. We affirm.

The charges against defendant arose out of the victim's accusation that defendant had repeatedly "raped" him.[1] Expert testimony established that the victim, sixty seven years-old at the time of trial, was "mentally retarded."

Defendant was charged under MCL 750.520d(1)(c); MSA 28.788(4)(1)(c), which provides that a person is guilty of committing criminal sexual conduct if he engages in penetration with another person whom he knew or had reason to know was mentally incapable. MCL 750.520a(f); MSA 28.788(1)(f) defines "mentally incapable" as "suffer[ing] from a mental disease or defect which renders that person temporarily or per-

[1] The victim alleged that defendant engaged in repeated acts of anal intercourse with him.

manently incapable of appraising the nature of his or her conduct." At trial, the prosecutor alleged, and the trial court found, that the victim was incapable of consenting to acts of sexual intercourse with the defendant because the victim was "mentally incapable." On appeal, defendant argues that a plain reading of the statute indicates that the statute only prohibits sexual relations with persons who are unable to understand the physical nature of the act because of mental disease or defect. This is an issue of first impression in this jurisdiction.

At the close of the prosecution's case, defendant moved for a directed verdict on the basis that the prosecution had not proved that the victim was incapable of "appraising the nature of his conduct" in light of the fact that the victim stated that he knew what defendant was going to do to him each time they were alone but that he did not have the power to stop it. Defendant argued that whether the victim could comprehend the moral consequences of the sexual acts he engaged in with defendant was irrelevant, as long as the victim knew that the acts were occurring and was doing nothing to stop them. The prosecution argued that the victim could not appreciate the moral consequences of the acts, there was testimony to this effect, and therefore this element was proved. The trial court concluded that the legislative intent of the statutory language in question was to protect mentally incapable individuals because of their inherent inability to consent to sexual relations and found that without an understanding of the moral quality of the act, a person cannot intelligently and truly consent to such an act.

We agree with the conclusion reached by the trial court. First, we note that defendant does not cite any authority in support of his position that "ability to appraise the nature of his or her conduct" is limited to an awareness that the physical act is occurring. Defendant's position is also inconsistent with a logical interpretation of the statute. In essence, it would limit the protections of the statute to those individuals who are so divorced from reality that they are not even aware of what is happening to them physically. However, that small group of individuals would be covered under one of the other designations of either "mentally incapacitated" or, more appropriately, "physically helpless," which includes persons who are unconscious, asleep, or for any other reason physically unable to communicate unwillingness to participate in an act. MCL 750.520a(i); MSA 28.788(1)(i). Thus, to construe the statutory language in the manner advocated by defendant would strip the statute of the protection that the Legislature intended for those individuals, like the victim, who know what is happening to them but are incapable of protesting or protecting themselves because of a severely diminished intellectual capacity.

In construing statutory language substantially similar to our own[2] and on facts very similar to those in the present case, the New York Court of Appeals in *People v Easley*, 42 NY2d 50, 56-57; 396 NYS2d 635; 364 NE2d 1328 (1977), held as follows:

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[2] Subdivision 5 of § 130.00 of the New York Penal Law states that "mentally defective" means a person who "suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct."

An ability to "appraise" is, of course, a qualitative matter, all the more so when the appraisal is one to be made of the "nature" of "conduct," with the variety of factors that the one "appraising" may have to take into account for such purposes. Cognitive understanding is involved. In a case such as the one before us, it includes being substantially able to understand what she was doing. An understanding of coitus encompasses more than a knowledge of its physiological nature. An appreciation of how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important. In that sense, the moral quality of the act is not to be ignored.

This is to be distinguished, however, from the participating woman's personal sense of morality. Whether her character is exemplary or depraved is beside the point. The object is not to probe the degree of her conformity or nonconformity to the norms of society. A knowing defiance of social mores, a mere yielding to temptation or passion, even an inclination to vice, these are not the concern of this statute.

But to flaunt society or to arraign oneself against its view is entirely different from having an understanding, or the capacity to understand, that one is doing so. Whether there is an awareness of the social or other cost of one's conduct is a legitimate area of inquiry in determining whether one is so mentally defective that the protective shield of section 130.05 of the Penal Law is invoked. Such inquiry should of course include the question of whether the person whose mentality is being judged has insight into the "consequences" of conduct for which the law exacts criminal penalties.

But that is not enough. The law does not mirror all prevailing moral standards. Therefore, there also needs to be inquiry as to whether there is a capacity to appraise the nature of the stigma, the ostracism or other noncriminal sanctions which society levies for conduct it labels only as immoral even while it yet "struggles to make itself articulate in law." Put in terms of this case, in its determination of [the victim's] capacity to appraise the sexual act, its signifi-

> cance and its consequences, the jury may well have been required to consider the "moral quality" of the act as it would be measured by society and to assess as well her ability to appreciate that fact. [Citations omitted.]

We find persuasive, and therefore adopt, the reasoning contained in the *Easley* decision and hold that the statutory language in question is meant to encompass not only an understanding of the physical act but also an appreciation of the nonphysical factors, including the moral quality of the act, that accompany such an act. This conclusion is bolstered by this Court's prior indications that the rationale behind the statutes prohibiting sexual relations with a mentally incapable person is that such a person is presumed to be incapable of truly consenting to the sexual act. See *People v Davis*, 102 Mich App 403; 301 NW2d 871 (1980); *People v Khan*, 80 Mich App 605; 264 NW2d 360 (1978).

In this case, psychologist George Starrett testified that he did not believe that the victim, whom he described as "mentally retarded," was capable of making an informed decision about whether to engage in sexual relations because he would not understand the long-term ramifications of safe sex or of engaging in a homosexual relationship. Dr. Starrett stated that the victim did not have a basic understanding of the nature of a romantic relationship and that he was a trusting individual who would quickly make a person his friend and do anything that person asked him to do. Dr. Starrett opined that the victim would be unable to make personality or character judgments about people and would be unable to tell a moral person from an immoral person. From the testimony presented at trial, it is clear to us that the vic-

tim was unable to appraise the nature of the sexual activity in this case as either morally right or wrong. Nor did the victim understand that others could not engage in sexual activity with him without his consent. Thus, contrary to defendant's claim, the prosecution proved that the victim suffered from a mental disease or defect that rendered him incapable of appraising the nature of his conduct.

Next, defendant claims that the evidence was insufficient to convince a rational trier of fact beyond a reasonable doubt that an act of sexual penetration occurred in the victim's house in Kalamazoo County between July 21, 1993, and September 12, 1993. We disagree.

Due process requires the prosecution in a criminal case to introduce sufficient evidence to justify a trier of fact in its conclusion that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Jacques*, 215 Mich App 699, 702-703; 547 NW2d 349 (1996).

In this case, viewing the evidence in a light most favorable to the prosecution, we believe that sufficient evidence was introduced, including the testimony from the victim, the victim's sister, and the victim's brother, to indicate that defendant sexually assaulted the victim in Kalamazoo County. Furthermore, the victim specified that "rape" meant that

defendant would put his penis in the victim's anus, that it happened in the victim's house during the time when the victim's niece was in town, which was approximately July 20, 1993, and the "rapes" stopped occurring in September of 1993, after the victim reported defendant's misconduct to the police. In fact, contrary to defendant's claim, we believe that the evidence was more than sufficient to support defendant's conviction. *Wolfe*, *supra* at 515.

Lastly, defendant claims that the trial court abused its discretion in determining that the victim was a competent witness under MRE 601. According to defendant, the victim did not have sufficient mental capacity or sense of obligation to testify truthfully or understandably. We disagree.

The determination of the competency of a witness is a matter within the discretion of the trial court. *People v Burch*, 170 Mich App 772, 774; 428 NW2d 772 (1988). Such determination will be reversed only for an abuse of discretion. *Id.* MRE 601 states the general rule of competency of witnesses.[3] In applying MRE 601, "the test of competency of a witness does not focus on whether a witness is able to tell right from wrong but, rather, on whether a witness has the capacity and sense of obligation to testify truthfully and understandably." *Burch*, *supra* at 774. Under MCL 600.2163; MSA 27A.2163,[4] the statute governing

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[3] MRE 601 states as follows: "Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules."

[4] MCL 600.2163; MSA 27A.2163 provides as follows:

> Whenever a child under the age of 10 years is produced as a witness, the court shall by an examination made by itself publicly, or

a child witness' competency to testify, the court must ascertain whether the witness has sufficient intelligence and sense of obligation to tell the truth.[5]

Under either standard, the victim was competent to testify. During extensive questioning by the trial court, the victim exhibited sufficient intelligence and a sense of obligation to testify truthfully and understandably. The fact that he became confused at some points during the questioning was a sign that his mental capacity was less than normal; however, despite this incapacity, the victim clearly showed that he understood the obligation to testify truthfully, and in fact, he became upset when he felt that he was being accused of lying. The trial court did not abuse its discretion in determining that the victim was competent to testify in this matter. *Burch*, *supra* at 774.

Affirmed.

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separate and apart, ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify; and in such case such testimony may be given on a promise to tell the truth instead of upon oath or statutory affirmation, and shall be given such credit as to the court or jury, if there be a jury, it may appear to deserve.

[5] Although the mentally impaired victim was sixty-seven years old, according to expert testimony the victim had a mental age of approximately seven years. This Court has suggested that in a case in which the witness is over the age of ten but mentally impaired, it is appropriate for the trial court to engage in the type of questioning mandated by MCL 600.2163; MSA 27A.2163. *Burch*, *supra* at 775.

PEOPLE v DJORDJEVIC

Docket No. 204847. Submitted April 14, 1998, at Detroit. Decided June 26, 1998, at 9:00 A.M. Leave to appeal sought.

Dragan Djordjevic and Saso Savich were bound over to the Recorder's Court for the city of Detroit on charges of second-degree murder, burning real property, burning insured property, and conspiracy to burn insured property. The court, Gershwin A. Drain, J., granted the defendants' motion to dismiss the second-degree murder charges, finding that the evidence supported a finding of accidental death only and did not establish the requisite malice requirement. The murder charge was based on the death of a person the defendants had hired to burn down their building and who died during the fire as a result of soot and smoke inhalation. The prosecution appealed by leave granted.

The Court of Appeals *held*:

There was sufficient evidence to establish probable cause to believe that the defendants committed second-degree murder. The district court did not abuse its discretion in binding the defendants over for trial. The evidence establishes probable cause to believe that death or great bodily harm was the natural tendency of the defendants' act. A reasonable jury could conclude that the danger to the arsonist, neighbors, or fire fighters was sufficiently high to allow for the conclusion that death or great bodily harm was the natural tendency of the act. The court erred in removing this determination from the province of the jury. The order dismissing the murder charges must be reversed and the matter must be remanded for reinstatement of the charges.

Reversed and remanded.

HOMICIDE — SECOND-DEGREE MURDER — MALICE.

The malice element of second-degree murder is satisfied by a showing that the defendant possessed the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with the knowledge that death or great bodily harm would be the probable result; malice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm; the creation of a high risk of death or great bodily

harm where death or great bodily harm is the natural tendency of the act satisfies the malice element (MCL 750.317; MSA 28.549).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *John D. O'Hair*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Carolyn M. Breen*, Assistant Prosecuting Attorney, for the people.

Cornelius Pitts, for Dragan Djordjevic.

John F. Royal, for Saso Savich.

Before: SAWYER, P.J., and BANDSTRA and J. B. SULLIVAN*, JJ.

SAWYER, P.J. The prosecution appeals by leave granted from an order of the Recorder's Court dismissing second-degree murder charges, MCL 750.317; MSA 28.549, against defendants. We reverse and remand.

This case presents a novel question, namely, whether the death of a coconspirator during an arson provides the requisite malice for second-degree murder. The lower court dismissed the charges against defendants, concluding that there was insufficient evidence to establish the mens rea for second-degree murder. We disagree.

Defendants owned a bar, Slap Shots, in Detroit. The bar was insured against fire loss and, in December 1995, defendants offered to pay the decedent, Allen Lowery, to burn down the bar. During the early morning hours of December 31, 1995, Lowery did just that. Unfortunately for Lowery, however, he was killed

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

during the fire as a result of soot and smoke inhalation.

Defendants were charged with second-degree murder, on the basis of the death of Lowery in the fire, as well as burning real property, burning insured property, and conspiracy to burn insured property. The district court bound defendants over on these charges, but the Recorder's Court quashed the second-degree murder charges, concluding that the evidence supported only a finding of accidental death and did not establish the requisite malice requirement.

We review the trial court's decision to quash an information de novo. *People v Flowers*, 191 Mich App 169; 477 NW2d 473 (1991). The district court's decision to bind defendants over for trial should be reviewed for an abuse of discretion. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991). Unlike the trial court, we are not convinced that the district court abused its discretion in binding defendants over for trial.

This appears to be a question of first impression in Michigan. Furthermore, decisions in other states are not particularly helpful because our sister states are split on the issue. See, e.g., *Commonwealth v Bolish*, 381 Pa 500; 113 A2d 464 (1955), which supports the prosecutor's position, and *People v Jennings*, 243 Cal App 2d 324; 52 Cal Rptr 329 (1966), which supports defendants' position. Furthermore, those cases are distinguishable from the case at bar inasmuch as they were first-degree felony-murder cases.

The malice element of second-degree murder is satisfied by showing that the defendant possessed the intent to kill, to do great bodily harm, or to create a

high risk of death or great bodily harm with the knowledge that death or great bodily harm would be the probable result. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Malice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. *People v Aaron*, 409 Mich 672, 729; 299 NW2d 304 (1980).

The parties agree that defendants did not act with the intent to kill or do great bodily harm. The prosecutor argues that it was foreseeable that either a fire fighter, Lowery, or a person in a nearby home could have been injured or killed by the fire. Defendants argue that the evidence reflects only an intent to burn the bar, not to injure anyone in the process.

First, we note that the decision to bind a defendant over for trial is not based upon a determination of guilt beyond a reasonable doubt, but that the evidence is sufficient to establish a reasonable belief that the defendant is guilty. See *People v Justice (After Remand)*, 454 Mich 334, 343; 562 NW2d 652 (1997).

Second, we note that this Court, in *People v Baker*, 216 Mich App 687; 551 NW2d 195 (1996), rev'd 457 Mich 442 (1998), distinguished between involuntary manslaughter and second-degree murder (based upon the creation of a high risk of death or great bodily harm) by whether death or great bodily harm is the natural tendency of the act (second-degree murder) or whether the defendant merely acted in wanton disregard that death or great bodily harm may follow (manslaughter).

We are satisfied that the evidence establishes probable cause to believe that death or great bodily harm

was the natural tendency of defendants' act. That is, while it would not be unreasonable for a jury to conclude that defendants acted only in wanton disregard that death or great bodily harm might follow, a jury could also reasonably conclude that death or great bodily harm was the natural tendency of defendants' act. A fire was set in a building with gasoline, with residences nearby. A reasonable jury could conclude that the danger to the arsonist, neighbors, or fire fighters was sufficiently high to allow for the conclusion that death or great bodily harm was the natural tendency of the act. The trial court erred in removing that determination from the province of the jury.

In short, there was sufficient evidence to establish probable cause to believe that defendants committed second-degree murder and, therefore, the district court did not abuse its discretion in binding defendants over for trial. Whether the evidence is sufficient to establish guilt beyond a reasonable doubt is to be determined by the jury.[1]

Reversed and remanded to the trial court with instructions to reinstate the charges of second-degree murder against defendants. We do not retain jurisdiction.

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[1] Defendants' reliance on *People v Austin*, 370 Mich 12; 120 NW2d 766 (1963), is misplaced. *Austin* does not, as defendants suggest, create a rule that the death of a criminal participant cannot constitute the crime of murder with respect to the remaining participants. The rule in *Austin* is narrower: The *justifiable* killing of a criminal participant cannot establish a felony murder against a coparticipant. The case at bar involves neither felony murder nor a justifiable killing.

PEOPLE v KOWALSKI

Docket No. 190352. Submitted October 8, 1997, at Detroit. Decided June 26, 1998, at 9:05 A.M.

Stanley Kowalski was convicted in 1975 by a jury in the Oakland Circuit Court, John N. O'Brien, J., of first-degree murder. The defendant and a codefendant had confessed to shooting fatally two victims during a robbery. The codefendant's confession had come first. The defendant had asked to speak to an attorney when, during a police interview, he was advised of his rights pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). About ninety minutes later, a police detective had informed the defendant that the codefendant had made a statement. The detective had asked the defendant whether he still wanted an attorney. The defendant had replied that he no longer wanted an attorney. An assistant prosecutor, before taking the defendant's confession, had readvised the defendant of his *Miranda* rights. In 1976, the defendant's appointed appellate counsel filed a timely motion for a new trial, arguing that the trial court had erred in denying the defendant's pretrial motion for suppression of evidence of his confession, arguing that the confession had been obtained in violation of the defendant's right to counsel. A hearing on the motion was adjourned and no new date for hearing was set. In 1991, the defendant wrote a letter to the trial court to inform it of his unsuccessful efforts to contact his counsel and to inquire about the status of his case. The matter was assigned to Judge Hilda R. Gage, who appointed new counsel for the defendant. That counsel filed a "supplement" to the 1976 motion for a new trial, arguing that the defendant's confession had been obtained in violation of *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), which was given limited retroactive effect in *Shea v Louisiana*, 470 US 51; 105 S Ct 1065; 84 L Ed 2d (1985). Judge Gage denied the motion for a new trial, ruling that the defendant had abandoned the motion. The defendant appealed by leave granted.

The Court of Appeals *held*:

1. Under the law in effect at the time of the suppression hearing and trial, the trial court did not err in admitting the defendant's confession into evidence. Consistent with the requirements of *Miranda*, *supra*, as construed in *Hill v Whealon*, 490 F 2d 629 (CA

6, 1974), interrogation of the defendant immediately ceased when the defendant asked to speak to an attorney, and without further prompting or coercion, the defendant later indicated that he wished to waive his right to an attorney and give a statement. The defendant was again advised of his *Miranda* rights before confessing. The defendant's right to cut off reinitiated questioning was scrupulously honored as required by *Michigan v Mosley*, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975).

2. Assuming without deciding that *Edwards*, *supra*, applies to this case, the confession was not obtained in violation of *Edwards*. Pursuant to *Edwards*, an accused who has requested an attorney is not subject to further police interrogation in the absence of counsel, unless the accused initiates further communication. Words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect are the functional equivalent of interrogation. Here, after the defendant invoked the right to counsel, the detective, when informing the defendant of the codefendant's statement and asking the defendant whether he still wanted an attorney, did not resume interrogation of the defendant. It was the defendant who initiated communication that led to the confession when he unequivocally indicated that he no longer wanted an attorney and that he wished to give a statement.

Affirmed.

CORRIGAN, C.J., concurring, stated that the defendant abandoned his original motion for a new trial by failing to establish an evidentiary foundation for neglect by his original appellate counsel or to otherwise pursue the motion, that the trial court did not err in admitting the defendant's confession under the controlling law at the time of the suppression hearing and trial, which law required a demonstration by the prosecution that the defendant was advised of his rights and knowingly and voluntarily waived them, and that *Edwards* does not apply retroactively to this case because this case was not pending when *Edwards* was decided. If the United States Supreme Court's establishment of the prophylactic rule in *Edwards* were legitimate, and if *Edwards* were to apply to this case, the defendant's confession would have been obtained in violation of *Edwards* because interrogation resumed when the detective informed the defendant of the codefendant's statement and asked the defendant whether he still wanted an attorney.

1. CRIMINAL LAW — EVIDENCE — CONFESSIONS — SUPPRESSION — APPEAL.

The Court of Appeals, when reviewing a trial court ruling on a motion to suppress evidence of a confession, reviews the record de novo

but gives deference to the trial court's findings, which will not be disturbed unless they are clearly erroneous.

2. CRIMINAL LAW — POLICE INTERROGATIONS — RIGHT TO COUNSEL.

A suspect under police interrogation, upon invoking the right to counsel, is not subject to further interrogation in the absence of counsel unless the suspect initiates further communication by which the suspect unequivocally indicates that counsel is no longer wanted and that the suspect wishes to give a statement; interrogation is not resumed where the police merely inquire into whether the suspect continues to want counsel.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Richard H. Browne*, Acting Chief, Appellate Division, and *Thomas Richards*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*), for the defendant on appeal.

Before: CORRIGAN, C.J., and GRIFFIN and HOEKSTRA, JJ.

PER CURIAM. On December 18, 1975, defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548. He was sentenced on January 22, 1976, to life imprisonment. He now appeals by leave granted from an order denying his motion for a new trial. We affirm.

I

This case has an unusual procedural history. Defendant's conviction arises from the November 30, 1974, shooting deaths of two gasoline station attendants. At trial, the prosecutor introduced a police confession in which defendant admitted that he and a codefendant, Ronald Sands, shot the two attendants

during a robbery. Codefendant Sands was tried separately and also found guilty of first-degree murder.[1]

The pertinent facts surrounding defendant's police confession are not in dispute.[2] On the morning of November 30, 1974, the police questioned defendant and codefendant Sands about a shooting that occurred earlier that morning at a Tulsa gasoline station. Sands was a former employee of the gasoline station and had been observed in the vicinity of the gasoline station in the company of defendant. Defendant was advised of his *Miranda*[3] rights, and he denied any knowledge of the offense, following which he was released. Later that day, defendant and codefendant Sands returned to the police station for further questioning.

At 2:13 P.M., an assistant prosecutor, Richard Thompson, interviewed defendant in the presence of Detective Robert Lister. After being advised of his *Miranda* rights, defendant asked to speak to an attorney. The questioning immediately ceased, and Thompson informed defendant that they would not talk to him until he had an attorney. Defendant was then taken to another office and left alone. He had access to a telephone, but was not free to leave. While waiting in the office, defendant used the telephone to call a friend to ask for assistance in locating an attorney. The friend apparently informed defendant that he would call back, but defendant never received a return telephone call. In the meantime, the police

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[1] See *People v Sands*, 82 Mich App 25; 266 NW2d 652 (1978).

[2] In his brief, defendant acknowledges that "there is no conflict over the facts of what occurred during the two interrogations of Mr. Kowalski on November 30, 1974."

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

obtained a statement from codefendant Sands describing what occurred at the Tulsa gasoline station.

Shortly before 3:40 P.M., Detective Lister returned to the office where defendant was located, informed defendant that codefendant Sands had given a statement, and asked him if he "would still like to talk to an attorney." Lister did not discuss the substance of Sands' statement with defendant or mention what effect, if any, the statement might have on defendant's case. Defendant told Lister, "if Ron [Sands] didn't want an attorney, neither did he and he would give a statement." Lister then contacted Thompson, telling him that defendant was now willing to waive his rights and give a statement. Thompson returned and conducted a second recorded interview. Before asking any questions about the offense, Thompson once again advised defendant of his *Miranda* rights and inquired specifically whether he wished to speak to an attorney. Defendant told Thompson that he understood his rights and was now willing to waive his rights and give a statement.[4] Defendant thereafter told

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[4] The following colloquy occurred between Thompson and defendant:

Mr. Thompson: Mr. Kowalski, I know that I gave you your Miranda warnings before and that you wanted to speak to a lawyer before answering any questions.

Defendant: Uh-huh.

Mr. Thompson: You do know that Mr. Ron Sands has talked to us concerning the incident at the Tulsa gas station?

Defendant: Uh-huh.

Mr. Thompson: And as I understand it at this time you wish to waive your rights and you will make a statement as to what happened.

Defendant: Yes.

Mr. Thompson: There's been no threats or promises made to you.

Defendant: No.

Thompson that he and codefendant Sands shot the two gasoline station attendants during a robbery. Defendant stated that one of the attendants had "smarted off" to Sands, whereupon Sands shot the attendant with a rifle. Sands then handed the rifle to defendant, and defendant reloaded the rifle and shot the other attendant.

Mr. Thompson: For the record, I'm going to read you your rights again and we'll go through the same procedure that I went through before. One, you have a right to remain silent. Two, anything you say can and will be used against you in a court of law. Three, you have a right to talk to a lawyer before answering any questions and you have a right to have a lawyer present with you while you are answering any questions. Four, if you can not afford to hire a lawyer one will be appointed to represent you before any questioning if you wish one; and five, you have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned. Do you understand each of these rights?

Defendant: (Shaking head yes)

Mr. Thompson: Would you speak audibly so she can take down your answer? Do you understand those rights?

Defendant: Right.

Mr. Thompson: Do you wish to talk to a lawyer before any questions?

Defendant: If Ron ain't going to talk to one, I ain't either.

Mr. Thompson: In other words, you waive that right.

Defendant: Yes.

Mr. Thompson: And will you waive your right to remain silent and answer any questions?

Defendant: (Shaking head yes)

Mr. Thompson: Yes or no?

Defendant: What do you mean by that?

Mr. Thompson: Will you waive your right to remain silent and will you answer any questions we might ask you?

Defendant: I guess I'll talk. You can ask me the questions then.

Mr. Thompson: You will talk to us then?

Defendant: Yes.

Mr. Thompson: To make a voluntary statement?

Defendant: Yes.

Mr. Thompson: Just tell us what happened.

Defendant brought a pretrial motion challenging the admissibility of his confession, maintaining that it was involuntary and obtained in violation of his right to counsel. Following an evidentiary hearing, the trial court denied the motion to suppress, ruling:

> Mr. Kowalski did exercise his rights. It is the view of this Court after reviewing all of the physical circumstances that occurred after that, that he decided on his own to waive these rights, and I can find no coercion either implied or psychological or otherwise that caused him to do so. It appears to this Court it was a decision made entirely by himself without any outside or undue pressure.

On March 11, 1976, defendant's appointed appellate attorney timely filed a motion for a new trial, alleging error in the denial of the pretrial motion to suppress defendant's confession. Although a hearing on the motion was scheduled for March 24, 1976, the record indicates that the matter was adjourned without a new hearing date being set. For reasons that are unclear, no further action was taken on the motion, nor was a decision on the motion ever entered.

More than fifteen years later, in 1991, defendant wrote a letter to the court inquiring about the status of his case. The letter mentioned several unsuccessful attempts by defendant to contact his appointed attorney regarding the case during the preceding fifteen years. Because the judge who presided over defendant's 1975 suppression hearing and trial had retired, the matter was assigned to a new judge, who thereupon appointed a new attorney to represent defendant. Defendant's new attorney subsequently filed a "supplement" to the 1976 motion for a new trial, taking the position that the 1976 motion was "still pending" because it had never been withdrawn or other-

wise resolved. The supplemental motion alleged that defendant's police confession was obtained in violation of *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981). Although *Edwards* was decided more than four years after defendant was convicted, it was given limited retroactive effect in *Shea v Louisiana*, 470 US 51, 59; 105 S Ct 1065; 84 L Ed 2d 38 (1985), to cases that were pending on direct review at the time it was decided. Defense counsel took the position that defendant's case was pending on direct review at the time *Edwards* was decided because the issue of the admissibility of defendant's police confession had been raised in a timely filed motion for a new trial, which motion was never withdrawn or otherwise resolved.

After a series of delays that are not relevant to this appeal, the trial court issued a decision on May 4, 1995, denying defendant's motion for a new trial. In doing so, the trial court found that the 1976 motion for a new trial had been abandoned and, therefore, *Edwards* was inapplicable to defendant's case. The trial court then proceeded to address the admissibility of defendant's police confession under the law in effect at the time of defendant's suppression hearing and concluded that the confession was properly obtained. This appeal followed.

II

Defendant argues that the trial court should have suppressed his police confession because it was obtained in violation of his right to counsel.

On appeal from a ruling on a motion to suppress evidence of a confession, deference must be given to the trial court's findings. *People v Cheatham*, 453

Mich 1, 29-30 (BOYLE, J), 44 (WEAVER, J); 551 NW2d 355 (1996). We review the record de novo but will not disturb the trial court's factual findings unless the findings are clearly erroneous. *Id.*

A

We will first address whether defendant's police confession was properly admitted under the law in effect at the time of defendant's suppression hearing and trial.

We begin our analysis with the United States Supreme Court's decision in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). In *Miranda*, the Supreme Court established a set of prophylactic rules to safeguard a suspect's Fifth Amendment privilege against compulsory self-incrimination. The Court held that a suspect in police custody must be informed specifically of the suspect's right to remain silent and to have an attorney present before being questioned. *Id.* at 479. The Court further held that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. Furthermore, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475.

The *Miranda* decision did not state under what circumstances, if any, a resumption of questioning was permitted after a person in custody invoked the rights under *Miranda*. Moreover, the law in this area remained unsettled in the immediate aftermath of the

Miranda decision. At defendant's suppression hearing, the trial court relied on the decision of the Sixth Circuit Court of Appeals in *Hill v Whealon*, 490 F2d 629 (CA 6, 1974), in concluding that defendant's confession was properly obtained. We agree that *Hill* supports the trial court's decision to admit defendant's confession.

In *Hill*, *supra* at 632, the police immediately ceased interrogating the defendant after the defendant stated that he did not wish to waive his rights. Approximately ninety minutes later another officer approached the defendant, informed him that a codefendant had made a statement, and inquired of the defendant whether he had anything he wished to say. *Id.* Without "any further prompting, cajoling, harassment, threats or inducements," the defendant said that he wanted to talk, whereupon he was taken to an interrogation room and fully advised of his rights, following which he gave a statement. *Id.* In addressing whether the defendant's statement was obtained in violation of *Miranda*, the Sixth Circuit Court of Appeals joined the majority of other federal and state courts presented with the issue and refused to construe *Miranda* as creating a proscription of any further interrogation once a suspect declined to make a statement. The court instead adopted the position of the Second Circuit Court of Appeals in *United States v Collins*, 462 F2d 792, 802 (CA 2, 1972), which held:

> "[We] are agreed that what *Miranda* requires is that 'interrogation must cease' until new and adequate warnings have been given and there is a reasonable basis for inferring that the suspect has voluntarily changed his mind." [*Hill*, *supra* at 635.]

The court in *Hill* held that the defendant's statement was admissible because, "under the facts of this case, the prosecution has sustained its 'heavy burden' of demonstrating that Hill was effectively advised of his rights and that he knowingly and voluntarily declined to exercise them." *Id.* at 635.

The facts of this case are strikingly similar to those in *Hill*. Here, Thompson immediately ceased all questioning after defendant asked for an attorney. Approximately ninety minutes later Detective Lister approached defendant to inform him that codefendant Sands had given a statement and to inquire whether defendant still wanted an attorney. Without any evidence of further prompting or coercion, defendant indicated that he wished to waive his right to an attorney and give a statement. Afterwards, defendant was fully advised of his *Miranda* rights before any further questioning was conducted, following which he repeated his desire to waive his right to an attorney and give a statement.

The foregoing facts demonstrate that, in compliance with *Hill*, defendant was given a new set of *Miranda* warnings before any further questioning was conducted. Moreover, the trial court, upon considering "all of the physical circumstances that occurred after" defendant initially invoked his right to an attorney, concluded that there was "no [police] coercion either implied or psychological or otherwise" regarding defendant's decision to give a statement, and that the decision to give a statement without an attorney was "made entirely by [defendant] without any outside or undue pressure." Our independent review of the record convinces us that the trial court's conclusions are not clearly erroneous.

We disagree with defendant's claim that suppression of his police confession was required by this Court's decision in *People v Mosley*, 51 Mich App 105; 214 NW2d 564 (1974). In *Mosley*, *id.* at 107, the police advised the defendant of his *Miranda* rights and began questioning him about some robberies. The defendant asserted his right to remain silent and the interrogation ceased. *Id.* Approximately two hours later, another police officer again advised the defendant of his *Miranda* rights and began questioning him about an unrelated murder, following which the defendant gave an incriminating statement. *Id.* Although this Court concluded that the statement was obtained in violation of *Miranda*, this Court's decision was subsequently reversed by the United States Supreme Court in *Michigan v Mosley*, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975).

The Supreme Court in *Mosley* addressed the issue of police reinitiation of questioning of a defendant who has indicated a desire to remain silent. The Court acknowledged that *Miranda* "does not state under what circumstances, if any, a resumption of questioning is permissible." *Mosley*, 423 US 101. With regard to this issue, the Court observed, on the one hand, that "[t]o permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned." *Id.* at 102. The Court also observed:

> At the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irra-

> tional obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. [*Id.*]

After concluding that *Miranda* could not "sensibly be read to create a per se proscription of indefinite duration" upon any further police questioning after a person in custody has indicated a desire to remain silent, the Court stated its holding as follows:

> We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored." [*Id.* at 104.]

The Supreme Court decided *Mosley* after the trial court's suppression ruling in this case but before the date of defendant's trial. Although *Mosley* only involved a defendant's assertion of the right to remain silent, not an assertion of the right to counsel, we conclude that the decision to admit defendant's police confession is consistent with the Supreme Court's analysis in *Mosley*. The facts of this case reveal that the police immediately ceased any further questioning after defendant asserted his right to an attorney. Detective Lister did not reapproach defendant until after the passage of a significant period, and after codefendant Sands gave a statement. When defendant expressed a willingness to give a statement upon being informed that Sands had given a statement, a fresh set of *Miranda* warnings was given before any further questioning was conducted, and Thompson also inquired separately whether defendant wanted to speak to an attorney. These facts demonstrate that defendant's right to insist on the presence of an attor-

ney was "scrupulously honored" in this case, consistent with the Supreme Court's holding in *Mosley*.

Accordingly, in view of the foregoing discussion, we conclude that the trial court did not err in admitting defendant's police confession under the law in effect at the time of defendant's suppression hearing and trial.

B

We now turn to a consideration of defendant's claim that relief is warranted under the Supreme Court's subsequent decision in *Edwards*, *supra*. Defendant must overcome two hurdles in order to be entitled to relief on the basis of *Edwards*. Not only must defendant demonstrate that his confession was obtained in violation of *Edwards*, but he must also demonstrate that *Edwards* may be properly applied to his case. Failing either, appellate relief is not warranted. We conclude that even if defendant were to succeed in convincing us that *Edwards* applies to this case, he has failed to convince us that his confession was obtained in violation of *Edwards*.[5] For this reason, we find that appellate relief is not warranted.

In *Edwards*, *supra* at 479, following some initial police questioning, the defendant invoked his right to counsel, and the interrogation ceased. The next morn-

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[5] As noted previously, in *Shea*, *supra* at 59, the Supreme Court held that *Edwards* applies retroactively to cases that were pending on "direct review" when *Edwards* was decided. The difficulty here is determining whether defendant's case was pending on "direct review" at the time *Edwards* was decided in 1981. Resolution of this issue depends, in turn, on whether defendant's unresolved motion for a new trial properly can be deemed to have been "still pending" at the time *Edwards* was decided, or whether the motion was abandoned beforehand. Because we conclude that the facts of this case fail to establish a violation of *Edwards* in any event, we find it unnecessary to decide this latter issue.

ing, police officers went to the county jail and asked to see the defendant. The defendant refused to speak to them, but was told that "he had" to talk. *Id.* The officers informed defendant of his *Miranda* rights, following which he gave a statement implicating himself. Realizing that additional safeguards were necessary to protect an accused's request for counsel, the Supreme Court in *Edwards* established a second layer of prophylaxis for the *Miranda* right to counsel:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. [*Edwards*, *supra* at 484-485.]

With respect to the case at hand, we reject defendant's suggestion that *Edwards* prohibits all communication between the police and a suspect who has requested an attorney. Rather, a careful reading of *Edwards* reveals that what is prohibited is further "police-initiated custodial interrogation." The decision states that an accused who has requested an attorney is not subject to "further interrogation" in the absence of counsel, unless the accused himself "initiates" further communication. Thus, the holding in *Edwards* rests upon the concepts of "initiation" and "interrogation."

In this case, Detective Lister returned shortly before 3:40 P.M. and informed defendant that Sands had given a statement and inquired whether defendant "would still like to talk to an attorney." At that point, defendant told Lister, "if Ron [Sands] didn't want an attorney, neither did he and he would give a statement." Lister then summoned Thompson and, when Thompson returned, defendant repeated his desire to waive his right to an attorney and give a statement. Thompson again advised defendant of his *Miranda* rights, following which defendant confessed. In the context of this case, we must determine whether Detective Lister's statements to defendant shortly before 3:40 P.M. constituted "interrogation" and, if not, whether defendant himself "initiated" the subsequent questioning that led to his confession.

For purposes of *Miranda*, interrogation refers to express questioning or its "functional equivalent." *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *People v Anderson*, 209 Mich App 527, 532, 533; 531 NW2d 780 (1995). The "functional equivalent" of interrogation includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, *supra* at 301.

As a general principle, a mere inquiry into whether an accused has changed his mind about wanting to speak without an attorney present is not considered "interrogation" within the meaning of *Edwards*. Justice Powell, in his concurring opinion in *Edwards*, touched upon this subject when distinguishing

between permissible custodial communications and custodial interrogation:

> Communications between police and a suspect in custody are common-place. It is useful to contrast the circumstances of this case with typical, and permissible, custodial communications between police and a suspect who has asked for counsel. For example, police do not impermissibly "initiate" renewed interrogation by engaging in routine conversations with suspects about unrelated matters. *And police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney.* E.g., *State v Turner*, 32 Or App 61, 65; 573 P2d 326, 327 (1978); see *State v Crisler*, 285 NW2d 679, 682 (Minn, 1979); *State v Marcum*, 24 Wash App 441, 445-446; 601 P2d 975, 978 (1979). It is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk. Nothing in the Constitution erects obstacles that preclude police from ascertaining whether a suspect has reconsidered his original decision. [*Edwards*, *supra* at 490 (emphasis added).]

Other states, relying on Justice Powell's concurring opinion in *Edwards*, have held that inquiries aimed at determining whether a suspect has had a change of mind about wanting to speak to an attorney do not constitute police-initiated interrogation within the meaning of *Edwards*. In *Moulds v State*, 429 So 2d 1176, 1176-1177 (Ala Crim App, 1983), the accused invoked her right to counsel but was unable to contact her attorney after being given an opportunity to do so. A police sergeant thereafter spoke to the accused for a few minutes and then told her that her attorney would tell her not to make a statement. *Id.* at 1177. The accused responded that she "wanted to go ahead and talk anyway." *Id.* The court rejected the argument that the sergeant's actions constituted inter-

rogation. *Id.* at 1178. The court further held that "[t]he defendant's assertion that she was ready to make a statement, even if made in response to an officer's inquiry of whether she had 'changed her mind about speaking to them without an attorney,' constitutes a communication initiated by the accused under *Edwards*." *Id.* at 1179.

In *Commonwealth v D'Entremont*, 36 Mass App 474, 475; 632 NE2d 1239 (1994), the defendant was arrested for rape and placed in a jail cell after invoking his right to remain silent and to have counsel present. A detective subsequently interviewed the victim and then went to the defendant's cell. *Id.* The detective informed the defendant that she had interviewed the victim and that she knew the defendant had advised the police earlier that he did not want to talk, but if he changed his mind, then she would be willing to speak with him. The defendant informed the detective that he wanted to tell his side of the story. *Id.* The detective advised the defendant of his *Miranda* rights and the defendant subsequently gave a statement. *Id.* 476. The court held that the detective's statements at the jail cell did not constitute interrogation. *Id.* at 479-480. The court further determined that the defendant, by stating that he wanted to tell his side of the story, " 'initiated' further conversation in the ordinary dictionary sense of that word." *Id.* at 480.

Similarly, in *Bunch v Thompson*, 949 F2d 1354, 1361 (CA 4, 1991), the court held that a defendant's statement was not the product of "police-initiated interrogation" where it followed an inquiry that "amounted to nothing more than an effort to ascertain if Bunch had changed his mind about wanting an

attorney." See also *McCall v State*, 501 So 2d 496, 500 (Ala Crim App, 1986) (holding that although interrogation may not continue after a suspect has requested counsel, the police legitimately may inquire whether the suspect has changed his mind about speaking to them without an attorney); *State v Acquin*, 187 Conn 647, 669-670; 448 A2d 163 (1982) (finding that inquiries about counsel do not constitute interrogation); *Foster v Commonwealth*, 8 Va App 167, 174; 380 SE2d 12 (1989) (holding that once a suspect has invoked his right to counsel, police may still legitimately inquire whether the suspect has changed his mind about speaking to them without an attorney).

In light of the foregoing authorities, we conclude that Detective Lister's inquiry into whether defendant "would still like to talk to an attorney" did not constitute police-initiated interrogation within the meaning of *Edwards*.

We further conclude that Detective Lister's remark informing defendant that codefendant Sands had given a statement did not constitute interrogation. The remark did not involve any express questioning, but merely described an event that transpired since Lister last saw defendant. Significantly, Detective Lister made no attempt to discuss the substance of Sands' statement with defendant or to discuss what effect, if any, Sands' statement might have on defendant's case. In this context, the remark was not likely to elicit an incriminating response. In *People v McCuaig*, 126 Mich App 754, 759-760; 338 NW2d 4 (1983), this Court found that a similar remark, which was made under similar circumstances, did not constitute interrogation. In *McCuaig*, *supra* at 757, the defendant invoked his right to an attorney while

being questioned. The officer responded that he would comply with the request and that no further questioning would be conducted. *Id.* However, the officer then advised the defendant of the nature of the charge against him and described the circumstances that led the police to believe that the defendant was the culprit. *Id.* The defendant responded by stating that the officer had been fair with him and that he had changed his mind and wished to give a statement. *Id.* This Court held that the defendant's statement was not made in response to further interrogation by the police:

> In our opinion, the statements made by the police officer, which merely advised defendant of the crime with which he was charged and which described the events which led to that charge, cannot be characterized as further interrogation by the officer or its functional equivalent. See *Rhode Island v Innis*, [*supra*]. The nature of the statements were not such that it can be said that they were intended to elicit a response. Furthermore, the record does not support a finding that the officer should have known that defendant was likely to change his mind in response to the statement. On the contrary, the statement was made in connection with the officer's acknowledgment that he would comply with defendant's request to see an attorney and that no further questioning would occur. Defendant responded by unequivocally indicating that he had changed his mind and that he wished to speak with the officer. [*McCuaig*, *supra* at 760.]

Accordingly, under the facts of this case, we hold that defendant was not subject to further police-initiated interrogation before he gave his police confession. Furthermore, we hold that defendant, by unequivocally indicating that he no longer wanted an attorney and he wished to give a statement, initiated

the conversation that ultimately led to his confession. No attempt was made to discuss the case with defendant before he made that statement. As the court observed in *Moulds*, *supra* at 1179, "defendant's assertion that [he] was ready to make a statement, even if made in response to an officer's inquiry of whether [he] had 'changed [his] mind about speaking to them without an attorney,' constitutes a communication initiated by the accused under *Edwards*."

C

In sum, we hold that the decision to admit defendant's confession was proper under the law in effect at the time of defendant's 1975 suppression hearing and trial. We further hold that the circumstances under which the confession was obtained did not violate the Supreme Court's subsequent decision in *Edwards*, *supra*. Accordingly, admission of the confession at defendant's trial did not constitute error.

Affirmed.

CORRIGAN, C.J. (*concurring*). I part company with the majority because I believe the police interrogation violated *Edwards*[1] prohibition against further police-initiated interrogation, if defendant is entitled to the retroactive application of *Edwards*. I would not, however, apply *Edwards* retroactively to this case because it should not be considered as on direct review. I would affirm the result below on the ground that the trial court correctly concluded that defendant abandoned his original motion for a new trial. Having made this determination, the trial court need not have reached the substantive issues. Defendant should

[1] *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

have been relegated to the remedies available under MCR 6.500 *et seq.*

I

Unlike the majority, I find it necessary to reach the abandonment issue. I would hold that the trial court correctly concluded that defendant abandoned his motion for a new trial.

The record reflects that the trial judge, Oakland Circuit Judge John N. O'Brien, entered the judgment of conviction on January 22, 1976. Judge O'Brien appointed appellate counsel for defendant five days later. Counsel then timely filed a motion for a new trial on March 11, 1976, and noticed it for hearing on March 24, 1976. The court thereafter adjourned the hearing without setting a new hearing date. On January 18, 1977, the court reporter filed the transcripts of the suppression hearing. On March 3, 1977, the clerk transmitted the lower court file to this Court for use with codefendant Sands' appeal. This Court returned the file to the circuit court approximately six months later, and the clerk notified defense counsel of that action in a letter dated September 27, 1977.

The record reflects that defendant made no attempt whatsoever to pursue his motion for a new trial during the next fifteen years. Defendant eventually moved for appointment of new appellate counsel in March 1992. Defendant asserted in a letter that he had contacted the court and his original counsel several times during the 1970s and 1980s regarding his motion and appeal. Nevertheless, on March 5, 1992, Judge O'Brien dispensed with oral argument and denied the motion for lack of merit because he had appointed counsel for defendant in 1976. The Chief

Judge of the Oakland Circuit Court, however, acting almost contemporaneously, appointed the State Appellate Defender Office (SADO) as counsel for defendant on March 3, 1992.

Two years later, in April 1994, defense counsel filed a "supplemental" brief in support of defendant's motion for a new trial, explaining that his difficulty in locating the transcripts of the trial and other records caused the delay in preparing the brief. Counsel did not move for an evidentiary hearing to provide support for defendant's allegation that original appellate counsel neglected this matter. Thus, the record contains no evidence to support this assertion because defendant's letter is not a sworn affidavit. MCR 2.119(B)(1), 2.611(D)(1), 6.001(D). Defense counsel's representations regarding defendant and original appellate counsel do not support a motion for a new trial even if contained in an affidavit because counsel cannot testify competently to those facts. MCR 2.119(B)(1)(c).

Then Oakland Circuit Chief Judge Hilda Gage heard defendant's motion in December 1994, because Judge O'Brien had died during the interim. Judge Gage issued her opinion on August 24, 1995. In all, over nineteen years had elapsed since defendant's conviction.

Judge Gage initially opined that defendant had abandoned his motion for a new trial. This holding was correct. Generally, a party may abandon a motion by failing to proceed with respect to it. 60 CJS, Motions & Orders, § 42, p 63. In this case, although defendant timely filed and noticed his motion for a new trial within sixty days of the order appointing appellate counsel, GCR 1963, 803.1, he

failed to fulfill his obligation to call the motion to the court's attention.[2] *Forest v Parmalee (On Rehearing)*, 60 Mich App 401, 405; 231 NW2d 378 (1975), aff'd 402 Mich 348; 262 NW2d 653 (1978). The trial court must ordinarily preside over a hearing on a motion for a new trial. 8A Michigan Law & Practice, Criminal Law, § 570, p 241. "A motion for a new trial is a court proceeding, and may, after due notice, be heard at any time when the court is in session." *People v Sanford*, 252 Mich 240, 246; 233 NW 192 (1930). Here, the trial court never presided over a hearing on the motion, nor did it take the motion under advisement by adjourning the hearing.[3] The parties were apparently waiting for this Court's decision in codefendant Sands' appeal challenging the admissibility of his confession on grounds that the police allegedly lacked probable cause to arrest him and defendant Kowalski. Defendant failed to renotice his motion for a new trial after this Court affirmed the trial court's decision in codefendant's appeal. *People v Sands*, 82 Mich App 25, 34-35; 266 NW2d 652 (1978). Therefore, defendant mistakenly argues that his motion remained pending

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[2] In 1976, the court rules did not require that the court decide a motion for a new trial upon its mere filing. See GCR 1963, 527. By contrast, the present court rules provide that the "trial court shall hear and decide the motion within 28 days of filing," when a defendant files the motion within 56 days after commencement of the period for filing his brief in this Court. MCR 7.208(B)(3).

[3] In *Forest*, *supra* at 403, this Court quoted 2A CJS, Advisement, p 130, regarding the significance of the court's action in taking a motion under advisement:

> "Consideration; consultation; deliberation; the act of a judge or justice in taking time to consider his judgment before rendering the same; the consultation of the court after argument by counsel, and before delivering the opinion."

before the trial court. In fact, the motion was never submitted for decision.

Further, when a trial court fails to rule on a motion, an appellate court presumes that the movant has abandoned the motion unless the circumstances indicate otherwise. *People v Kelly*, 237 Ill App 3d 829, 831; 178 Ill Dec 528; 604 NE2d 1051 (1992). The instant case does not rebut this presumption because defendant provided no evidentiary support whatsoever for his allegation that his original appellate counsel neglected this matter. Generally, the appellant bears the burden of both laying an evidentiary foundation to support his request for a new trial and furnishing this Court with a record that supports any argument for reversal. *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993); *Lemanski v Ford Motor Co*, 82 Mich App 244, 251-252; 266 NW2d 775 (1978). Moreover, the defendant must create a testimonial record to support his claim of ineffective assistance of counsel unless the record already contains sufficient detail to support it. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). Where the defendant fails to request an evidentiary hearing and the record does not support his claim, this Court will not conclude that he was denied effective assistance of counsel. See *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). Here, defendant most likely elected not to pursue his motion after learning of this Court's decision to affirm codefendant's conviction. Defendant had more than two years after the appointment of well-qualified SADO counsel to develop a record to support his assertion to the contrary. During that time, however, defendant never moved for an evidentiary hearing alleging

incompetence of counsel. I would, therefore, affirm Judge Gage's proper conclusion that defendant abandoned his original motion for a new trial.

II

I agree with the majority that the trial court did not err in admitting defendant's confession under the controlling law at the time of defendant's suppression hearing and trial. This case is virtually identical to *Hill v Whealon*, 490 F2d 629 (CA 6, 1974), in which the Sixth Circuit Court of Appeals declined to construe *Miranda*[4] as creating a proscription on further interrogation after a suspect invokes his right to counsel. The court determined that *Miranda* requires interrogation to cease until the interrogator provides new and adequate warnings and a reasonable basis exists for inferring that the suspect has voluntarily changed his mind. *Hill*, *supra* at 635. *Hill* and the instant case involve defendants who elected to resume speaking with the police only after an officer advised them that a codefendant had made a statement. Under the construction of *Miranda* adopted in *Hill*, I agree with the majority that the prosecution demonstrated that the police effectively advised defendant of his rights and he knowingly and voluntarily declined to exercise them.

The majority also concludes that, assuming that *Edwards* applies to this case, *Edwards* does not mandate a different result. The majority operates under a faulty assumption. My conclusion that defendant abandoned his motion for a new trial disposes of the question whether *Edwards* applies to this case. In

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[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Shea v Louisiana, 470 US 51; 105 S Ct 1065; 84 L Ed 2d 38 (1985), the United States Supreme Court considered the retroactivity of *Edwards*, *supra*, and held that its decision applied to cases pending on "direct review" when it rendered that decision. Thus, *Edwards* applies to those defendants whose convictions were not yet final when the Court issued its opinion. For purposes of retroactive application of a decision, a conviction is "final" under the following circumstances:

> [A] judgment of a conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. [*Griffith v Kentucky*, 479 US 314, n 6, 321; 107 S Ct 708; 93 L Ed 2d 649 (1987).]

Accordingly, the determination whether *Edwards* applies under the circumstances of this case turns on whether defendant's motion for a new trial was still pending when the Court decided *Edwards*. That issue, in turn, hinges on whether defendant abandoned his original motion for a new trial. The record reveals that defendant abandoned his motion for a new trial and did not pursue his appeal of right during 1977 and 1978. Hence, *Edwards* does not apply because defendant's conviction became final at least three years before the Supreme Court rendered its decision. I would therefore affirm the trial court's decision to deny defendant's motion for a new trial.

I cannot, however, join the majority's conclusion that *Edwards* does not mandate a different result than that reached under *Hill*, *supra*. I would hold that if *Edwards* applies to this case, defendant's confession must be suppressed because the police vio-

lated his prophylactic right to counsel under *Miranda*.

In *Edwards*, the Supreme Court promulgated additional safeguards to protect the right to counsel under *Miranda*. The Court held that the authorities may not interrogate a suspect who asserts his right to counsel until counsel has been made available to him, "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, *supra* at 485. Once invoked, a valid waiver of the right to counsel "cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.* at 484. Accordingly, assuming *Edwards* applies, the question is whether Detective Lister's statements to defendant constituted "interrogation." If they did, the police violated the *Edwards* rule.

The Supreme Court defined "interrogation" for purposes of *Miranda* one year before it issued its opinion in *Edwards*:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. [*Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980).]

Contrary to the majority, I would hold that Detective Lister's act of informing defendant that codefendant Sands had made a statement and inquiring whether defendant "would still like to talk to an attorney" constituted interrogation. Detective Lister should have known that his words were reasonably likely to elicit

an incriminating response.[5] The extensive authority

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[5] Detective Lister testified that he ceased questioning defendant when defendant initially asserted his right to counsel. He stated that approximately an hour and a half later he approached defendant in the area where defendant was being confined. He described his exchange with defendant as follows:

> *Q.* [by the prosecutor] Did you have an opportunity to speak to Mr. Kowalski again at sometime shortly before 3:40 P.M. or shortly before that?
>
> *A.* Yes. I went into the Fire Chief's office and advised Mr. Kowalski that we had received a statement of what had transpired earlier and asked him if he would still like to talk to an attorney?
>
> *Q.* Did you tell him who you received that statement from?
>
> *A.* Yes, sir.
>
> *Q.* Who was that?
>
> *A.* From Ronnie Sands.
>
> *Q.* Okay. And what did Mr. Kowalski say to you?
>
> *A.* He said if Ron didn't want an attorney, neither did he and he would make a statement.
>
> * * *
>
> The Court: When you went back to Mr. Kowalski with the news of what Mr. Sands had done what did you say?
>
> [Defense Counsel]: Yes, pardon me.
>
> *Q.* [By Defense Counsel]: Yes, correct me if I am wrong, but is it not true, when you went back to Mr. Kowalski and indicated Mr. Sands had given a statement about his participation in the crime and waived his rights, then Mr. Kowalski said—if Sands doesn't want to speak to an attorney, neither do I. Now is that true or not true?
>
> *A.* That's basically what I said.
>
> * * *
>
> *Q.* Did you indicate to Mr. Kowalski what the effect of Mr. Sands' statement to the police and the Prosecutor would be at that time, that is prior to Mr. Kowalski giving his second statement?
>
> *A.* You mean did I tell Kowalski what Sands had said?
>
> *Q.* When you went back and talked to him after Sands had indicated he wanted to give a statement, at that point, when Mr. Kowalski said—since Sands doesn't want to speak to an attorney, neither do I, prior to that, did you indicate to him in any manner what the effect of Sands' statement might have on his case?
>
> *A.* No, I don't think I did.

relied on by the majority does not control here. The flaw in the majority's analysis stems in part from treating Detective Lister's remark and question in isolation rather than as contemporaneous, sequential statements. Viewed together, Detective Lister's remark and question subjected defendant to "interrogation" under *Innis*, *supra*.

The Supreme Judicial Court of Massachusetts considered police conduct similar to that involved in the instant case in *Commonwealth v Brant*, 380 Mass 876; 406 NE2d 1021 (1980). In *Brant*, Florida police officers arrested the defendant and his codefendant after a high-speed chase involving the exchange of gunfire. Eight days later, an assistant prosecutor from Massachusetts contacted a deputy sheriff in Florida to request an interview with the defendant and his codefendant regarding a robbery that had occurred two months earlier. The deputy sheriff then interviewed the codefendant, eventually obtaining an incriminating statement regarding the robbery. The deputy sheriff reported the codefendant's confession to the Massachusetts authorities and, a few days later, the Massachusetts assistant district attorney and two detectives flew to Florida. The codefendant subsequently signed a written transcription of his oral statement. The defendant and codefendant were then arraigned on charges arising from the Florida incident. After arraignment, the deputy sheriff and the Massachusetts authorities sought to question the

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The Court: Did you tell him anything about the substance of what Sands had told you?

Detective Lister: No, I don't believe I said anything, I just asked him if he wanted to make a statement.

defendant and his codefendant regarding the Massachusetts crime. Defendant unequivocally asserted his right to counsel, whereupon one of the Massachusetts authorities interjected that the codefendant had made a statement. The deputy sheriff confirmed the existence of the statement. After privately conversing with his codefendant, the defendant informed the authorities that he desired to make a statement. He then incriminated himself in response to questioning by the deputy sheriff.

In *Brant*, the Supreme Judicial Court of Massachusetts reversed the trial court's denial of the defendant's motion to suppress. Although the Massachusetts court decided *Brant* before the United States Supreme Court's decision in *Edwards*, its application of *Miranda* is consistent with *Edwards*. The court construed *Miranda* as requiring that when a suspect states that he desires an attorney, the police must cease interrogating the suspect until an attorney is present. *Brant*, *supra* at 882. The court explained:

> Not all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." [*Miranda*, *supra* at 478.] A "compelling influence" is not necessarily in the form of express questions. The inquiry here is whether the authorities used any words or actions, other than those normally attendant to arrest and custody, that they should have known were reasonably likely to elicit an incriminatory response from the suspect. [*Innis*, *supra* at 301.] The test is an objective one. [*Id.* at 883.]

Applying the *Innis* definition of "interrogation," the court determined that the defendant was interrogated

in violation of *Miranda* when, after he asserted his right to counsel, the authorities informed him that his codefendant had made a statement. *Id.*

Similarly, Detective Lister's statement to defendant that codefendant Sands had given a statement, followed by his inquiry whether defendant still desired counsel, constituted interrogation under *Innis*. Detective Lister's action in informing defendant of Sands' statement cannot be deemed conduct relating to the routine incidents of arrest and custody. *Innis*, *supra* at 301; *Oregon v Bradshaw*, 462 US 1039, 1045; 103 S Ct 2830; 77 L Ed 2d 405 (1983). It comes as no surprise that defendant reconsidered his decision not to speak with authorities upon learning that Sands had given a statement about the robbery. Although not dispositive, Detective Lister unquestionably intended this result. No other reason exists for informing defendant of Sands' action. Therefore, if *Edwards* applies to this case, the trial court erred in not suppressing defendant's inculpatory statement because Detective Lister should have known that his words were reasonably likely to elicit an incriminating response from defendant.

The intricate dance exemplified in the majority opinion reflects the struggle of state courts to respond to Supreme Court decisions of questionable legitimacy. In my view, the Supreme Court in *Miranda* and again in *Edwards* improperly thrust prophylactic rules on the state courts, exercising supervisory powers it does not possess over general issues of state criminal procedure. *Connecticut v Barrett*, 479 US 523, 528; 107 S Ct 828; 93 L Ed 2d 920 (1987). It is beyond peradventure that defendant Kowalski's confession was voluntary; it was not even

arguably the product of compelled self-incrimination. The instant case, therefore, aptly demonstrates the prophylactic nature of the *Miranda* and *Edwards* rules, because *Miranda* rules were violated without violating the constitution. *New York v Quarles*, 467 US 649, 654-655; 104 S Ct 2626; 81 L Ed 2d 550 (1984). The legitimacy of these rules depends on the existence of either Supreme Court authority to legislate rules that go beyond constitutional requirements or supervisory authority over state courts. Grano, *Confessions, Truth, and the Law* (Ann Arbor: The University of Michigan Press, 1993), pp 173-198. Neither the Fifth nor the Fourteenth Amendment grants the Supreme Court the power to legislate prophylactic rules for state courts. The Court itself recognized this principle of federalism long ago, rejecting the notion that the grant of jurisdiction authorizes the federal court to promulgate a federal general common law. *Erie R Co v Tompkins*, 304 US 64, 78; 58 S Ct 817; 82 L Ed 1188 (1938).

In the absence of lawmaking power, the Supreme Court's authority to establish prophylactic rules must rest on the existence of supervisory power over state judicial proceedings. The Supreme Court has held that it has no such supervisory power absent a constitutional violation. *Smith v Phillips*, 455 US 209, 221; 102 S Ct 940; 71 L Ed 2d 78 (1982). Accordingly, its decision in *Edwards* is illegitimate. Grano, pp 173-198.

It comes as no surprise, then, that state courts struggle to avoid the effect of prophylactic rules when no true Fifth Amendment violation exists. The instant case exemplifies the perverse results that follow from applying a prophylactic rule—a correct

application of *Edwards* would require the suppression of a voluntary statement that not even defendant maintains was obtained in violation of his Fifth Amendment protection against compulsory self-incrimination. The majority has responded to this unjust result by drawing unconvincing distinctions to avoid the reach of *Edwards*. I cannot join the majority's effort to avoid the consequences of the Supreme Court's decision in *Edwards*, but I question the United States Supreme Court's underlying authority to dictate this result.

HOSHOWSKI v GENAW

Docket No. 200080. Submitted April 22, 1998, at Lansing. Decided June 26, 1998, at 9:10 A.M. Leave to appeal denied, 459 Mich ___.

Michael Hoshowski brought an action in the St. Clair Circuit Court against Christina Genaw, seeking an order of filiation declaring him to be the father of the defendant's daughter. The court, Daniel J. Kelly, J., entered an order of filiation, despite a defense objection that the plaintiff lacked standing to seek an order of filiation pursuant to the Paternity Act, MCL 722.711 *et seq.*; MSA 25.491 *et seq.*, because the defendant had been a married woman during the entire term of her pregnancy. The defendant appealed by leave granted.

The Court of Appeals *held*:

Before 1994 it was necessary for a putative father to bring an action under the Paternity Act before he could seek custody or parenting time pursuant to the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.* In 1994, however, § 4 of the Paternity Act was amended by the addition of a new subsection 2, MCL 722.714(2); MSA 25.494(2), which clearly and unambiguously provided that an action under the Paternity Act was not required if the child's father had acknowledged paternity pursuant to § 111 of the Revised Probate Code, MCL 700.711; MSA 27.5111. Subsection 9 of § 111, MCL 700.711(9); MSA 27.5111(9), which was also added in 1994, provided that an acknowledgment of paternity that has been executed in accordance with that section was presumed to establish paternity of a man for all purposes unless he was shown not to be the father by clear and convincing evidence. Because the plaintiff and the defendant executed an acknowledgment of paternity in 1995 when the child was born, the plaintiff's paternity was established for all purposes. Accordingly, because the plaintiff's paternity had already been established, he was not required to proceed under the Paternity Act.

Affirmed.

PARENT AND CHILD — PATERNITY ACT — CHILD CUSTODY ACT — PUTATIVE FATHERS.

A putative father who has executed a valid acknowledgment of paternity pursuant to the Revised Probate Code does not have to proceed under the Paternity Act before bringing an action under the

Child Custody Act (MCL 700.111, 722.714[2], 722.21 *et seq.*; MSA 27.5111, 25.494[2], 25.312[1] *et seq.*).

McIntosh, McColl, Carson, McNamee, Strickler & Rickel (by *Nancy Bates Rickel*), for the plaintiff.

Heyboer & Floyd, P.L.L.C. (by *David R. Heyboer*), for the defendant.

Before: HOLBROOK, JR., P.J., and GRIBBS and R. J. DANHOF*, JJ.

GRIBBS, J. Defendant appeals by leave from an order of filiation that deemed plaintiff to be the father of defendant's daughter. Defendant claimed in her application for leave that plaintiff lacked standing to seek the order of filiation pursuant to the Paternity Act, MCL 722.711 *et seq.*; MSA 25.491 *et seq.*, and the Supreme Court's ruling in *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991), because she was a married woman from the time of conception to the birth of the child. In granting leave, this Court requested that the parties address the effects of the 1994 amendment of the Revised Probate Code that added subsection 9 to MCL 700.111; MSA 27.5111 and the 1994 amendment of the Paternity Act that added a new subsection 2 to MCL 722.714; MSA 24.494, including the question whether an acknowledgment of paternity under these amendments presumptively establishes paternity for all purposes, relieving the putative father of the need to file a complaint under the Paternity Act. We hold that the parties' properly executed affidavit of parentage establishes plaintiff as a parent under the Revised Probate Code and that plaintiff was not required to file an action under the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Paternity Act before seeking custody and parenting time under the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.* Accordingly, we affirm.

Defendant argues that this action is controlled by the Paternity Act, because defendant's child was not a "child born out of wedlock" as defined under the act. MCL 722.711(a); MSA 25.491(a). We do not agree. Before the 1994 amendments of the Revised Probate Code and the Paternity Act, a proper action under the Paternity Act was necessary before a complaint could be filed under the Child Custody Act. *Afshar v Zamarron*, 209 Mich App 86, 89, 92, n 7; 530 NW2d 490 (1995). However, subsection 2 of § 4 of the Paternity Act, MCL 722.714(2); MSA 25.494(2), a provision that was added as part of its 1994 amendment, provided during the period here relevant:

> An action is not required to be brought under this act if the child's father acknowledges paternity under section 111 of the revised probate code, Act No. 642 of the Public Acts of 1978, being section 700.111 of the Michigan Compiled Laws, or if the child's paternity is established under the law of another state.[1]

Subsection 9 of § 111 of the Revised Probate Code, MCL 700.111(9); MSA 27.5111(9), added in 1994,[2] provided during the period here relevant:

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[1] See also 1996 PA 305, the Acknowledgment of Parentage Act, specifically § 4, MCL 722.1004; MSA 25.604. Section 2 of the Paternity Act was amended at the same time by 1996 PA 308 by replacing the reference to an acknowledgment of paternity under the Revised Probate Code with a reference to an acknowledgment of paternity under the Acknowledgment of Parentage Act.

[2] Subsection 9 of § 11 of the Revised Probate Code was subsequently deleted by 1996 PA 306, which was enacted in conjunction with the enactment of 1996 PA 305, the Acknowledgment of Parentage Act.

> An acknowledgment of paternity executed as provided in this section is presumed to establish paternity *for all purposes*. The acknowledgment may be set aside by the circuit court in the county where it is filed only if the man is proven not to be the father by clear and convincing evidence. [Emphasis added.]

The amended statute also provided a specific procedure for executing and filing an acknowledgment of paternity.

The statutory amendments are clear and unambiguous. Because plaintiff and defendant properly executed an affidavit of paternity when the child was born in 1995, plaintiff's paternity was established "for all purposes" unless he was proved not to be the father by clear and convincing evidence. Because his paternity has already been established, plaintiff is not required to proceed under the Paternity Act before seeking parenting time and custody of his child.

Affirmed.

PEOPLE v STEVENS

Docket No. 194685. Submitted February 4, 1998, at Detroit. Decided June 30, 1998, at 9:00 A.M.

Stanley C. Stevens was convicted by a jury in the Wayne Circuit Court, Michael J. Callahan, J., of ethnic intimidation. The defendant appealed.

The Court of Appeals *held*:

There was sufficient evidence to support the conviction. There was ample evidence that the defendant threatened, by word and act, to cause physical contact with the complainant and strong circumstantial evidence that the defendant's motive was racist. The court did not abuse its discretion in allowing the prosecution to introduce additional evidence during the redirect examination of a prosecution witness.

Affirmed.

1. CRIMINAL LAW — ETHNIC INTIMIDATION.

A person is guilty of ethnic intimidation if the person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, causes physical contact with the other person, or damages, destroys, or defaces any real or personal property of the other person, or threatens, by word or act, to do such an act, if there is reasonable cause to believe that the act will occur; the ethnic intimidation statute is satisfied only when there is evidence of an underlying predicate criminal act committed because of racial animosity (MCL 750.147b; MSA 28.344[2]).

2. TRIAL — EVIDENCE.

Decisions regarding the order and mode of presentation of evidence are within the discretion of the trial court; the court may permit a party to introduce additional evidence during the redirect examination of the party's witness (MRE 611).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *John D. O'Hair*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research,

Training, and Appeals, and *James M. Surowiec*, Assistant Prosecuting Attorney, for the people.

Ronald Varga, for the defendant.

Before: SAAD, P.J., and WAHLS and GAGE, JJ.

WAHLS, J. Following a jury trial, defendant Stanley Stevens was convicted of ethnic intimidation, MCL 750.147b; MSA 28.344(2). Defendant was sentenced to sixty days in jail.[1] Defendant now appeals as of right. We affirm.

Defendant's conviction arose from an incident at a Taco Bell restaurant in the city of Wayne. On March 1, 1995, the complainant was in the restaurant with her two daughters and a friend. The complainant's cousin was the cashier at the restaurant that day. One of the complainant's daughters, a four year old, went to the counter to ask for the restroom key. At about the same time, defendant entered the restaurant and was preparing to place his order. When the little girl asked for the restroom key, the cashier told her to wait. As defendant tried to place his order, the little girl insisted that she had to use the bathroom. Defendant, apparently agitated, said "I'm trying to make an order here." However, the little girl continued to talk, chanting "I gotta pee." Defendant apparently became upset and asked the four year old to "shut the fuck up." At this point, the complainant approached defendant and told him "You don't have to talk to my daughter like that." While defendant disputes the exact wording and tone of the ensuing conversation, the complain-

[1] The trial court offered to suspend defendant's sentence if he paid a fine immediately after sentencing. It is not clear from the record whether defendant took advantage of this offer.

ant testified that the following exchange occurred in raised voices:

Defendant: Why don't you control the bastard child then.

Complainant: You don't have to talk to my daughter like that.

Defendant: Well tell her to shut the fuck up.

Complainant: She said she had to go to the bathroom, she don't have to shut the fuck up.

Defendant: Why don't you sit the nigger child down then, you crazy ass bitch.

Complainant: You mother-fucker.

Defendant: I'm going to beat your ass (at this point, defendant raised his fists).

Complainant: (raising her fists) You want to fight me?

Defendant: I'll whip your fat ass.

Defendant apparently threw a punch, but did not hit the complainant. The complainant also testified that defendant referred to her as "crazy bitch" more than once and that he called her a "fat bitch" and a "fat ass." There was also evidence that defendant referred to the complainant as a "black bitch" and that he remarked "you people shouldn't be allowed in here." The restaurant manager eventually called the police, who came and stopped the argument.

Defendant raises two arguments on appeal. First, he argues that there was insufficient evidence to sustain a conviction of ethnic intimidation. We disagree. In determining a question regarding the sufficiency of evidence, we review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proved beyond a reasonable doubt. *People v Moseler*, 202 Mich App 296, 297-298; 508 NW2d 192 (1993).

The ethnic intimidation statute, MCL 750.147b; MSA 28.344(2), provides, inter alia:

> (1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:
>
> (a) Causes physical contact with another person.
>
> (b) Damages, destroys, or defaces any real or personal property of another person.
>
> (c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.

As a previous panel of this Court has observed, "[t]he statute is satisfied only when there is evidence of an underlying predicate criminal act committed because of racial animosity." *People v Richards*, 202 Mich App 377, 379; 509 NW2d 528 (1993).

Here, there was ample evidence that defendant threatened, by word *and* act, to cause physical contact with the complainant. In addition, defendant's act of throwing a punch at the complainant provided reasonable cause to believe that physical contact would occur. Testimony regarding defendant's words and acts also provided abundant circumstantial evidence that defendant's threat was made maliciously and with specific intent to intimidate or harass the complainant. Defendant does not appear to dispute these points. Instead, defendant argues that there was insufficient evidence to support a finding that the threat was made because of the complainant's race or gender. Defendant argues that this was simply "an argument over an unruly child which became very heated and very ugly." However, defendant's argument

ignores the strong circumstantial evidence that his motive was racist.

We recognize that, in the absence of other evidence, the fact that defendant started a heated argument over a trivial matter would probably not be sufficient to allow a jury to find defendant guilty of ethnic intimidation beyond a reasonable doubt. Here, however, defendant's words provided strong evidence of a racist motive. Defendant's use of the word "nigger," his reference to the complainant as a "black bitch," and his remark that "you people shouldn't be allowed in here" explained his otherwise inexplicable actions. Taken in the light most favorable to the prosecution, this evidence was sufficient to allow the jury to conclude that defendant was guilty beyond a reasonable doubt.

Defendant's only other argument is that the trial court improperly allowed the prosecutor to impeach her own witness. We find no merit in this contention. Defendant acknowledges that a party may impeach its own witnesses. MRE 607. However, defendant argues that the prosecutor in this case improperly introduced substantive evidence under the guise of impeachment. Defendant ignores the fact that the prosecutor never indicated that she was trying to impeach the witness. Indeed, it appears that the prosecutor was simply trying to introduce additional evidence that she had failed to elicit on direct examination:

> *Q.* We are discussing you. Did he say anything to you about your race?
>
> *A.* Not that I can recall.
>
> * * *

Q. Did you tell the judge at the preliminary exam, I told him to shut up and then he said, "you black bitch" and I said, "yep I'm black and proud to be black"?

A. Yes, I did.

Q. Did he call you a black bitch?

A. Yes, he did.

Defendant never raised a hearsay objection to this evidence,[2] nor did he raise any other argument regarding the admissibility of the testimony as substantive evidence. Instead, he seemed to argue that the prosecutor's questioning went beyond the scope of the cross-examination. However, decisions regarding the order and mode of presentation of evidence are within the discretion of the trial court. MRE 611. A trial court may permit open redirect examination. See *Bates v Genesee Co Rd Comm*, 133 Mich App 738, 745; 351 NW2d 248 (1984). In light of the fact that defense counsel was given the opportunity to conduct recross-examination, we fail to see how introduction of this evidence on redirect examination was unfair to defendant.[3] Under these circumstances, we find no abuse of discretion.

Affirmed.

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[2] Even had defendant raised such an objection, the prosecutor easily could have overcome the objection, either by (1) simply instructing the complainant to read the pertinent part of the preliminary examination transcript to herself, then asking whether it refreshed her recollection, and then asking her whether defendant called her a "black bitch" or (2) asking the complainant whether defendant called her a "black bitch" first, and, if the complainant responded in the negative, asking her about her preliminary examination testimony, see MRE 801(d)(1)(A).

[3] We cannot imagine how a party could gain any tactical advantage by waiting to introduce evidence on redirect examination.

PEOPLE v GODBOLD

Docket No. 194171. Submitted June 14, 1997, at Detroit. Decided June 30, 1998, at 9:05 A.M. Leave to appeal sought.

Markello Godbold was convicted following a bench trial in the Recorder's Court for the city of Detroit, Terrance K. Boyle, J., of armed robbery, assault with intent to rob while armed, and possession of a firearm during the commission of a felony. The court thereafter denied the defendant's motion for a new trial. The defendant appealed, alleging that the prosecutor impermissibly shifted the burden of proof during closing argument, that there was insufficient evidence to support the convictions, and that the defendant's waiver of the right to a jury trial was not voluntary because it was based on defense counsel's representation that if the defendant proceeded with a jury trial and was convicted, he would receive a harsher sentence than he would receive following conviction in a bench trial.

The Court of Appeals *held*:

1. The advice defense counsel gave the defendant, that there was a high probability of conviction before either a jury or a judge, that the judge had substantial sentencing discretion within the guidelines range and usually sentenced within the guidelines, and that choosing a bench trial would save the defendant some time in prison, was based on reality and is neither uncommon nor improper. The advice was not the equivalent of a warning that the defendant will be penalized for opting for a jury trial and does not render a resulting bench trial involuntary or the product of coercion. Such a waiver is informed, not coerced.

2. The record supports the trial court's statement that it was the court's practice to provide a sentence concession to defendants who waive a jury trial and it was not the court's practice to penalize defendants at sentencing for exercising the right to a jury trial. The trial court did not base the defendant's sentence on any factor other than proper sentencing considerations.

3. The prospect of leniency if a right is waived is not the equivalent of a penalty for exercise of that right. Where, as here, there is no express or implied threat of punishment for exercising the constitutional right to a jury trial, such a threat does not

emerge solely from the expectation of leniency, based on the trial court's sentencing practice in this case, where the right is waived. While the consequence of exercising the right to a jury trial before a judge who has such a sentencing practice may be the imposition of a greater individualized sentence than the individualized sentence that would have been imposed had the right to a jury trial been waived, it does not follow that the greater sentence is a punishment or penalty.

4. Unless the encouragement to waive the right to a jury trial unnecessarily burdens the exercise of the right, it is permissible. The articulated sentencing practice is analogous to the accepted practice of extending leniency in exchange for a guilty plea and is not constitutionally infirm. The trial court did not coerce the defendant's waiver because there is no indication that the defendant would have faced retaliatory sentencing had the defendant opted for a jury trial and the court's sentencing practice does not needlessly encourage waiver of the right to a jury trial.

5. The prosecutor's comment during closing argument that the failure of a defense witness to appear at trial was "convenient" was not error. It is permissible for a prosecutor to observe that the evidence against the defendant is uncontroverted or undisputed even if the defendant has failed to call corroborating witnesses. Although a defendant does not have a burden to produce any evidence, once the defendant advances evidence or a theory, argument with regard to the inferences created does not shift the burden of proof.

6. The evidence was sufficient to sustain the convictions.

Affirmed.

JANSEN, J., dissenting in part, stated that the defendant's convictions should be reversed and the matter should be remanded for a new trial on the basis that the trial court's procedure, whereby the defendant would have been punished for exercising his right to a jury trial by receiving a harsher sentence, needlessly chills a defendant's right to a trial by jury and renders involuntary any waiver of that constitutional right. A defendant has a constitutional right to a trial by jury and cannot be penalized for exercising that right. A trial court determining a defendant's sentence may not take into consideration the fact that the defendant pleaded guilty or refused to plead guilty or waived a jury trial or refused to waive one. Rewarding a defendant with a more lenient sentence for waiving a jury trial necessarily punishes the defendant for exercising the right to a jury trial by giving that defendant a harsher sentence. The coerced waiver of the right to a trial by jury is a structural

defect in the constitution of the trial mechanism that cannot be regarded as harmless.

1. SENTENCES — CONSTITUTIONAL LAW — ALTERNATIVE SENTENCING POSSIBILITIES.

A court in passing sentence may not consider factors that violate a defendant's constitutional rights; a court must not state or imply to a defendant alternative sentencing possibilities based on the defendant's future procedural choices, such as an exercise of the right to a trial by jury or the choice of a bench trial.

2. ATTORNEY AND CLIENT — CRIMINAL LAW — WAIVER OF JURY TRIAL.

Defense counsel does not provide improper advice by informing the defendant that conviction is likely in either a jury trial or a bench trial, that most judges, including the one presiding in the defendant's case, will provide a sentence concession to a defendant who elects a bench trial, and that the particular judge will provide a fair trial; although such advice might cause the defendant to waive the constitutional right to be tried by a jury, the advice is not the equivalent of a warning that the defendant will be penalized for opting for a jury trial and does not render a resulting bench trial involuntary or the product of coercion; such a waiver of the right to a jury trial is informed, not coerced.

3. CRIMINAL LAW — CONSTITUTIONAL LAW — WAIVER OF JURY TRIAL.

The prospect of leniency if a right is waived is not the equivalent of a penalty for the exercise of the right; where there is no express or implied threat of punishment for exercising the constitutional right to a jury trial, such a threat does not emerge solely from a defendant's expectation of leniency, based on the trial court's practice of exercising leniency in sentencing defendants who waive the right to a jury trial and receive a bench trial, where the right is waived.

4. SENTENCES — CONSTITUTIONAL LAW — WAIVER OF JURY TRIAL — ALTERNATIVE SENTENCING POSSIBILITIES.

A trial court's sentencing practice whereby the court sentences a defendant convicted by a jury to a valid sentence and does not engage in retaliatory sentencing for the defendant's decision to have a trial by a jury, but exercises leniency by reducing an otherwise valid sentence for a defendant who waives the right to a jury trial and opts for a bench trial, does not needlessly encourage waiver of the right to a jury trial or coerce the defendant's waiver and is not constitutionally infirm.

5. CRIMINAL LAW — TRIAL — PROSECUTORIAL COMMENTS.

A prosecutor may state that the evidence against the defendant is uncontroverted or undisputed even if the defendant did not call corroborating witnesses.

6. CRIMINAL LAW — EVIDENCE — BURDEN OF PROOF.

A criminal defendant has no burden to produce any evidence; however, once the defendant advances evidence or a theory, prosecutorial argument regarding the inferences created by the evidence or theory does not shift the burden of proof.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *John D. O'Hair*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *James Surowiec*, Assistant Prosecuting Attorney, for the people.

Craig A. Daly, P.C. (by *Craig A. Daly*), for the defendant.

Before: MARKEY, P.J., and JANSEN and WHITE, JJ.

WHITE, J. Following a bench trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of four to twenty years' imprisonment for the armed robbery and assault with intent to rob while armed convictions, and the mandatory two-year consecutive term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

At approximately 10:00 P.M. on March 6, 1995, a man later identified as defendant approached a car occupied by Ricky Gray and Veda Parker. Defendant took out a handgun, tapped on the driver's side window of the car, and demanded that the car door be opened. When the door was opened, defendant demanded Gray's wallet, Parker's purse, and their jewelry and any other personal belongings. Gray handed his wallet to defendant. Gray told the defendant that Parker's

purse was in the trunk and opened the trunk. Defendant then went to take Parker's purse from the trunk. At that point, a police car entered the parking lot, and defendant fled. The police apprehended defendant, and Gray identified him as the robber.

I

Defendant first contends that his waiver of the constitutional right to a jury trial was not voluntary because it was based on defense counsel's representation to him that if he proceeded with a jury trial, he would receive a harsher sentence.[1] We disagree.

A valid waiver of the constitutional right to a trial by jury must be voluntary. MCR 6.402(B); *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993). A court in passing sentence may not consider factors that violate a defendant's constitutional rights. *People v Miller*, 179 Mich App 466, 469; 446 NW2d 294 (1989). A court must not state or imply alternative sentencing possibilities based on future procedural choices, such as an exercise of the right to a trial by jury or by the court. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

Following his convictions and sentencing, defendant moved for a new trial, challenging the voluntariness of his waiver of a jury trial. The transcript of the hearing regarding defendant's motion for a new trial supports the trial court's findings that defendant's

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[1] Defendant does not argue that the trial court failed to comply with MCR 6.402(B), and the transcript shows that the trial court complied with that rule. Defendant acknowledged to the court that he had signed the form stating that he was voluntarily relinquishing his right to a trial by jury and electing to be tried by the court. The court advised defendant of his constitutional right to a trial by jury and ascertained that defendant knew what a jury trial was and that he wanted the court to hear the case.

trial counsel advised defendant that there was a high probability of conviction before either a jury or a judge, that the judge had substantial sentencing discretion within the guidelines range and usually sentenced within the guidelines, and that choosing a bench trial would save defendant some time in prison. The trial court rejected defendant's testimony that trial counsel told him that a conviction by a jury would result in a maximum sentence.

Defendant and the dissenting judge argue that an implied promise of leniency if a jury trial is waived is the equivalent of an implied threat of punishment if the right to a jury trial is exercised. There is a certain logical symmetry to that premise, but, in the words of Justice Oliver Wendell Holmes, "[t]he life of the law has not been logic: it has been experience." Holmes, The Common Law (1881), p 1.

The advice defense counsel gave defendant was based on reality and is neither uncommon nor improper. See, e.g., LaFave & Israel, Criminal Procedure (Hornbook Series, 2d ed), § 22.1(h), p 961 (noting with regard to waiver of a jury trial that "[j]ury waiver tends to vary depending upon the offense category, and the pattern is similar to that for guilty pleas, suggesting that the motivations are similar: the expectation of a lesser sentence"); *Carter v Holt*, 817 F2d 699, 700 (CA 11, 1987) (holding that the defendant was not denied effective assistance of counsel although defense counsel advised the defendant to waive a jury trial in part on the basis of his belief that "the likely punishment would be less in a bench trial").

To be sure, informing a defendant that he is likely to be convicted in either a jury trial or a bench trial,

that most judges, including the one presiding in the defendant's case, will provide a sentence concession to a defendant who elects a bench trial, and that the particular judge hearing the case will provide a fair trial, might, indeed, cause the defendant to waive the constitutional right to be tried by a jury. That advice, however, is not the equivalent of a warning that the defendant will be penalized for opting for a jury trial, and it does not render a resulting bench trial involuntary or the product of coercion. Such a waiver is informed, not "coerced."

The trial judge's statements at the posttrial hearing regarding defendant's motion for a new trial made clear that it was the judge's practice to provide a sentence concession to defendants who waive a jury trial, but it was not the judge's practice to penalize defendants at sentencing for exercising the right to a jury trial.[2] The judge said:

> The fact is if any trial Judge ever punished somebody for the exercise of the right to a trial by jury, such trial Judge ought to be barred from ever being a trial Judge again. I am not so dumb as to think that there may [sic] be some Judges who do that. I doubt that there are as many as the literature—I don't mean the legal literature—as the public might think or that sometimes defense lawyers may claim. But I think on occasion it's occurred. It certainly has never occurred in my courtroom ever. . . .
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> * * *
>
> . . . [W]hen I sentence somebody who has a jury trial in front of me, I owe them nothing except what the law gives them. . . . I consider the seriousness of the offense, the background of the offender, I read the Pre-sentence Report,

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[2] Just as the Court did in *People v Earegood*, 383 Mich 82; 173 NW2d 205 (1970), we take the trial judge at his word.

I myself determine what I think an appropriate sentence is, then I score the guidelines. If the sentence I've determined is within guidelines that becomes the sentence the defendant gets. If the sentence I determine is above guidelines then I strive mightily to bring it down within guidelines. If the sentence is below guidelines I don't strive as mightily to raise it, but I do on occasion raise it to put it within guidelines. But that's actually functionally how I sentence. But if it is a bench trial and I score it, then I lower the sentence to reflect the fact—before I even score the guidelines—to reflect the fact that is [sic] been a bench trial. And somebody may say why do you do that? That's easy. And here's where I get to the semantics issue with Mr. Daly [defendant's appellate counsel]. When I first was on the bench 85 percent of my trials were jury trials. So I would conduct 50 trials a year, 40 or more of which were jury trials. Then we progressed to being able to try 75 cases per year because maybe 35 were jury and 40 were bench. I can now try on average 100 cases a year because 20 will be jury trials and 80 will be bench trials. For the last year that I kept all of the collected statistics, that was for the full year of 1994, I had 104 trials, 19 were juries, four of which were hung. And well, the remainder would all be bench trials. . . . And my docket now is current. I'm among the most current Judges in this bench. . . . *And why do defendant's* [sic] *waive? Because their attorneys tell them precisely what Mr. Evelyn* [defendant's trial counsel] *said he told Mr. Godbold in this case. The attorney makes a judgment about the likelihood of winning or losing either before a bench trial or a jury trial. I want attorneys to tell defendants. I've never told them to tell them that, but I do want attorneys to tell defendants that they're going to get a sentence confession* [sic concession] *for a bench trial if they do. That does not mean the flip side, that they get punished for exercising their right to trial because they do not. It is simply that the Court owes the defendant nothing for saving the Court time.*

. . . Now, the United States Supreme Court and the Michigan Supreme Court have recognized where parties come together and they plea bargain, a Judge is perfectly right to

> lower sentences in light of the saving of court time. If that is recognized in a plea based system, it certainly ought to be recognized in a waiver based system . . . .

The sentencing transcript does not suggest, nor does defendant argue, that the trial court based defendant's sentence on any factor other than proper sentencing considerations. Thus, the question is whether a system that allows judges to reduce otherwise valid sentences for defendants who opt for bench trials necessarily punishes defendants who opt for jury trials, or needlessly encourages waiver.[3] *United States v Jackson*, 390 US 570; 88 S Ct 1209; 20 L Ed 2d 138 (1968).

To find that defendant's waiver was coerced, one must conclude either that defendant would have been punished for opting for a jury trial or that defendant's receiving a lesser sentence after a waiver of a jury trial is the equivalent of punishing him for the exercise of the right to a jury trial. As discussed above, there is no basis for concluding that, had defendant exercised his right to a jury trial, the court would have considered his exercise of his right to a jury trial

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[3] Defendant waived his right to a trial by jury through a waiver proceeding that was proper on its face. He received a sentence concession for the waiver and presumably does not challenge his sentence as too lenient. He did not exercise his right to a jury trial and so cannot complain that he was penalized for the exercise of that right. To the extent he asserts that the consideration for the waiver was illusory because no definite sentence was discussed, he has not shown that he did not receive a concession and, further, defense counsel made an informed prediction, not a promise, and defendant made a choice on the basis of sound advice, rather than a promise. No more is required. Thus, having waived the right to trial by jury in a proper proceeding, defendant's only cognizable challenges are that the waiver was coerced because the promise of leniency if the right to a jury trial is waived is the equivalent of punishment for exercising the right, or that the promise of leniency unnecessarily encourages the waiver of the right.

as a factor in fashioning defendant's sentence after conviction by a jury. The record is to the contrary.[4]

The prospect of leniency if a right is waived is not the equivalent of a penalty for exercise of that right. *Corbitt v New Jersey*, 439 US 212, 219-220; 99 S Ct 492; 58 L Ed 2d 466 (1978). The analysis of the dissenting opinion would suggest that the multitude of defendants who have waived jury trials or pleaded guilty on the basis of expectation of some degree of leniency in sentencing have done so involuntarily, as the result of coercion. The sentencing practice articulated by the judge in the instant case is common, and is either infirm or not, without regard to whether the judge candidly acknowledges the practice. An appeal in a jury waiver case cannot hinge on whether a particular trial judge articulated the judge's practice on the record. We hold that where there is no express or implied threat of punishment for exercising the constitutional right to a jury trial, such a threat does not emerge solely from the expectation of leniency, based on such a sentencing practice, where the right is waived.

While the consequence of exercising the right to a jury trial before a judge who has such a sentencing practice may be the imposition of a greater individualized sentence than the individualized sentence that would have been imposed had the right to a jury trial been waived, it does not follow that the greater sentence is a punishment or penalty. If the practice as described by the judge in the instant case were truly

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[4] In the cases the dissent relies on, the Court proceeded on the premise that retaliation or punishment for the exercise of a constitutional right was involved.

to be eliminated,[5] then all defendants would, at least in theory, receive an individualized sentence as fashioned by the trial judge based on the offense and the offender, without regard to whether a jury is waived. Under such a system, this defendant would have received the necessarily higher individualized sentence—necessarily higher because there would be no concession for a jury waiver—whether he waived a trial by jury or not. Thus, in such a regime, all defendants would receive, as would this defendant had he opted for a jury trial, a greater sentence not because of the exercise of the right to a jury trial, but because it is the proper sentence according to the law applicable to sentencing decisions.

In order to find that the practice as articulated by the trial judge here imposes a penalty on the exercise of the right to a trial by jury, one must conclude that defendant was entitled to a sentence concession without regard to whether he waived his right to a trial by jury. Thus, this Court must be prepared to hold that all defendants—those who waive a trial by jury and those who do not—have the right to the sentence concession afforded defendant here, so that a trial judge who has heretofore afforded sentence concessions to defendants who waive the right to a trial by jury must now afford the same concessions to those who do not. All defendants would then be entitled to an individualized sentence that is lower than the individualized sentence that is based solely on the offender and the offense. It is only by recognizing a right to a sentence concession in all defendants that

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[5] Also implicated is the practice wherein a jury is waived in the expectation of being convicted of a lesser offense.

the Court can reach the conclusion that defendant would have been penalized had he opted for a jury trial. The Michigan Supreme Court might choose to impose such a requirement in the exercise of its supervisory power, but the constitution does not so require. See *Corbitt, supra.*

The question remains whether the articulated sentencing practice is unconstitutional because it needlessly encourages defendants to waive the right to a trial by jury. In *Corbitt, supra,* the United States Supreme Court upheld a New Jersey statute under which a defendant found guilty by a jury of first-degree murder faced a mandatory life sentence, but which permitted defendants facing such a charge to invoke a procedure permitting them to enter a non vult plea pursuant to which the trial judge was not obliged to fix the degree of murder between first and second degree and had the discretion to sentence the defendant either to mandatory life imprisonment or to a lesser term of years as provided for second-degree murder. The Court explained

> that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no *per se* rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. [439 US 218-219.]

The Court further observed that "it is not [constitutionally] forbidden to extend a proper degree of leniency in return for guilty pleas," *id.*, p 223, and that its prior decisions "unequivocally recognize the constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those

who have not demonstrated those attributes on which leniency is based." *Id.*, p 224.[6]

As in *Corbitt*, defendant asserts that the promise of leniency if the right is waived needlessly encourages the waiver of the right. *Corbitt* recognizes that defendants are often put to difficult choices because the system offers opportunities to minimize risks by waiving rights. Unless the encouragement unnecessarily burdens the exercise of the right, it is permissible. We conclude that the sentencing practice here is analogous to the accepted practice regarding guilty pleas and is not constitutionally infirm.[7]

In sum, because there is no indication that had defendant opted for a jury trial, he would have faced "retaliatory sentencing," *People v Atkinson*, 125 Mich App 516, 518; 336 NW2d 41 (1983), and the practice does not needlessly encourage waiver of the right to a trial by jury, we conclude that the trial court did not coerce defendant's waiver. The trial court's statement, three months after trial, of its views and sentencing practices pertaining to the advantages to defendants

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[6] In *Siers v Ryan*, 773 F2d 37, 41-43 (CA 3, 1985), the court rejected a constitutional challenge to the Philadelphia judicial assignment system under which the defendant asserted that he was forced to choose between a guilty plea before a lenient-sentencing waiver judge or a jury trial before a heavy-sentencing jury judge. See *id.*, p 41, n 4. The court concluded that the defendant's claim "must fail because the law is clear that a state 'is not forbidden to extend a proper degree of leniency in return for guilty pleas.' " *Id.* p 43, quoting *Corbitt, supra.* See also *United States v Narramore*, 36 F3d 845, 847 (CA 9, 1994), and *United States v Villasenor-Cesar*, 114 F3d 970, 975-976 (CA 9, 1997), involving claims that the application of the federal Sentencing Guidelines penalized the defendants for the exercise of protected constitutional rights.

[7] The dissent, *post*, p 528, n 3, assumes that guilty pleas always involve negotiated and known outcomes. However, this is not always the case; defendants often plead guilty without a charge concession or an express agreement regarding a particular sentence.

of opting for a bench trial did not render defendant's otherwise valid waiver involuntary.

II

Defendant next argues that the prosecutor denied him a fair trial when the prosecutor impermissibly shifted the burden of proof during closing argument by stating that the failure of a defense witness to appear at trial was "convenient."[8]

Defendant failed to object to the comment at trial. Appellate review of allegedly improper prosecutorial remarks is generally precluded absent an objection at trial because the trial court is otherwise deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.*

Upon review of the prosecutor's remarks in their proper context, we find no error. The prosecutor was merely attacking the weaknesses in defendant's version of what occurred. It is permissible for a prosecutor to observe that the evidence against the defendant is uncontroverted or undisputed even if the defendant has failed to call corroborating witnesses. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Further, although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument with regard to the inferences created does not shift the burden of proof. *Id.*

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[8] The prosecution stated in closing argument that defendant "claims that he got a—he was with a friend who is conveniently not here."

III

Defendant's final argument is that there was insufficient evidence presented to sustain the trial court's verdict. Defendant claims that the evidence was insufficient because defendant was not seen wearing the clothing worn by the robber as described by the complainants, no fingerprints were found on the gun used in the robbery, and defendant was identified only by his voice.

When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992).

Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to sustain defendant's identity as the robber and the trial court's verdict. Defendant matched the general description given of the robber (tall and slim), defendant was seen on a cold March night without a jacket coming from behind a building where the robber's jacket, weapon, and Gray's wallet were thereafter found, and defendant's voice was immediately identified by Gray and Parker as that of the robber when the police found defendant. Because the building was surrounded by an open field, the jury could infer that if there had been another person fleeing, the person could easily have been seen. Defendant was identified by the complainants in court and in the parking lot where the offense occurred. This evi-

dence, and all reasonable inferences drawn from it, was sufficient to sustain defendant's convictions of armed robbery, *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995), assault with intent to rob while armed, *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991), and felony-firearm, *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

Affirmed.

MARKEY, P.J., concurred.

JANSEN, J. (*concurring in part and dissenting in part*). I concur with parts II and III of the majority's opinion that the prosecutor did not impermissibly shift the burden of proof during closing argument by stating that the failure of a defense witness to appear at trial was "convenient," and that there was sufficient evidence presented at trial to sustain the trial court's verdict. I must dissent, however, from the majority's decision to sanction the trial court's stated policy of giving defendants lower sentences for having a bench trial. I believe that such a policy should not be institutionalized because it punishes defendants who exercise their constitutional right to a jury trial.

Defendant's argument is that his constitutional right to a jury trial was not voluntarily waived because the waiver was based on defense counsel's representation to him that if he proceeded with a jury trial, he would receive a harsher sentence.

Following his convictions and sentencing, defendant moved through appellate counsel for a new trial, challenging the voluntariness of his waiver of a jury trial. An evidentiary hearing was conducted on March 22, 1996, and March 26, 1996. At the hearing held on

March 22, 1996, defense counsel admitted that he told defendant that if he elected to have a bench trial he would receive a less harsh sentence.[1] Specifically, defense counsel stated the following in response to questions by defendant's appellate counsel:

> *A.* I was concerned about the nature of the proofs against him, and I indicated to him on other occasions that we didn't have the strongest case in my view. . . . And I told him that if he had a trial by jury and was convicted, I felt that he would get a higher sentence. If he had a trial and was convicted with a Judge—I think the term I used was something in the nature of a safety net. I said that with regard to sentencing, it's the practice of most Judges—I felt that Judge Boyle would be no different—that if he had a non-jury trial in this case and if he was convicted—I also said that Judge Boyle would give him a fair trial. I said if

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[1] Justice LEVIN has written rather forcefully regarding this practice in his dissenting statement when the Court denied leave to appeal in *People v Green*, 445 Mich 894; 519 NW2d 853 (1994):

> It is common, or common-place, for defendants to waive jury trial in Recorder's Court in expectation that the judge will find, or reward them with a finding of, guilt of a lesser offense, or with a reduced sentence on the charged offense, or both. It appears that with relatively few exceptions, the expectation is fulfilled. The practice is so endemic that it has become a factor in the decisional process whether to grant leave to appeal.
>
> In the instant case, we should grant leave to appeal to consider whether a trial judge must, at least in a first-degree murder case, affirmatively disabuse the defendant of any such expectation.
>
> We should also grant leave to appeal to consider whether the trial judge should have granted defendant Louis Green's motion to disqualify the judge from presiding at the posttrial hearing on Green's motion for a new trial, which asserted that his trial lawyer had promised that, if he would waive a jury trial, the judge would convict him of an offense less than first-degree murder.

On the basis of this statement, it appears that the majority will find support from our Supreme Court; however, the institutionalizing of this procedure has serious constitutional and social implications. Herding criminal defendants through trial courts under the guise of efficiency does not equate to justice.

they didn't have enough proof to convict him, he would be found not guilty, but if he were convicted, I felt that his sentence would have [sic] less than it would have been if he were convicted by a jury.

* * *

Q. You told him that there may be a difference in the sentence he could received [sic] if he was convicted by a trial with a jury or a trial with a Judge?

A. Yes.

Q. And specifically, you said that it was your opinion that he would get more time if convicted before a jury?

A. In effect, I told him that he would get less time if he were convicted by a Judge.

Q. That was the message you were trying to convey to him essentially, that if he got convicted after a trial by a jury, he could get more time; is that correct?

A. I was explicit about that, yes.

At the hearing conducted on March 26, 1996, defendant testified that his trial counsel told him that if he had a jury trial and was found guilty, the trial court would give him the maximum possible sentence. However, if defendant elected a bench trial, then he would receive a sentence within the guidelines range. Defendant maintained that he wanted a jury trial, that he was innocent of the charges against him, and that he elected a bench trial only because of trial counsel's representations to him concerning sentencing. Although the trial court denied defendant's motion for a new trial, it made the following observations on the record:

But if it is a bench trial and I score [the sentencing guidelines], then I lower the sentence to reflect the fact . . . that [it] is [sic] been a bench trial. . . . And my docket now is current. I'm among the most current Judges in this bench. I am consistently within the top if you exclude the four

> Judges—there are three or four of us that compete to be at the top and have the most timely dockets, and the reason I am able to do that is because defendant's [sic] waive. And why do defendant's [sic] waive? Because their attorneys tell them precisely what [defense counsel] said he told Mr. Godbold in this case. The attorney makes a judgment about the likelihood of winning or losing either before a bench trial or a jury trial. I want attorneys to tell defendants. I've never told them to tell them that, but I do want attorneys to tell defendants that they're going to get a sentence con[c]ession for a bench trial if they do. That does not mean the flip side, that they get punished for exercising their right to trial because they do not. . . .
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> * * *
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> . . . Now, the United States Supreme Court and the Michigan Supreme Court have recognized where parties come together and they plea bargain, a Judge is perfectly right to lower sentences in light of the saving of court time. If that is recognized in a plea based system, it certainly ought to be recognized in a waiver based system . . . . That there's nothing wrong with creating a legal and cultural mill in which defense lawyers can tell [a] client, "You're going to get convicted by a jury, and you're going to get convicted by a Judge and that's my professional advise [sic]." However, it will lower the sentence if it's a bench trial.

It is a well-established rule that a trial court may not take into consideration the fact that the defendant pleaded guilty or waived a jury trial in determining the term of the sentence. *People v Earegood*, 383 Mich 82, 85; 173 NW2d 205 (1970). A trial court may not take into consideration a defendant's decision to exercise his constitutional right to a jury trial, or a defendant's refusal to plead guilty, in determining the term of the sentence. *People v Snow*, 386 Mich 586; 194 NW2d 314 (1972); *People v Mosko*, 190 Mich App 204, 211; 475 NW2d 866 (1991), aff'd on other grounds

441 Mich 496; 495 NW2d 534 (1992); *People v Hogan*, 105 Mich App 473, 486; 307 NW2d 72 (1981); *People v Travis*, 85 Mich App 297, 303; 271 NW2d 208 (1978); *People v Bottany*, 43 Mich App 375, 385; 204 NW2d 230 (1972). As succinctly stated in *People v Atkinson*, 125 Mich App 516, 518; 336 NW2d 41 (1983), "no accused person should face the dilemma of either waiving trial or facing retaliatory sentencing as a consequence of insisting on a trial." Moreover, in *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993), our Supreme Court held that to avoid the potential for coercion, a trial court must not state or imply alternative sentencing possibilities that could result from the defendant's future procedural choices, such as an exercise of the defendant's right to a trial by jury or by the court.[2]

The constitutional right to a trial by jury, US Const, Am VI; Const 1963, art 1, § 14, "is among the most fundamental rights provided by our judicial system." *People v Rodgers*, 119 Mich App 767, 771; 327 NW2d 353 (1982). A defendant's waiver of the constitutional right to a trial by jury must be voluntary. MCR 6.402(B); *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993). The courts will not permit a procedure that needlessly chills the exercise of a constitutional right, such as the right to a trial by jury. *Rodgers*, *supra*, p 770. Further, courts indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson v Zerbst*, 304 US

[2] The majority, *ante*, p 517, n 4, criticizes my reliance on these cases involving claims of retaliation or punishment for the exercise of a constitutional right. This appears to be a distinction with no real difference. If a defendant is threatened with receiving a harsher sentence for opting for a jury trial, then this serves to effectively chill exercising the right to a trial by jury.

458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). I would conclude that the trial court's stated procedure of giving a more lenient sentence if the defendant waives the right to a jury trial rendered defendant's waiver in this case to be involuntary. The trial court's procedure needlessly chills a defendant's right to a trial by jury.

In a case such as this, involving the waiver of a trial by jury, there is no bargaining between the defendant and the prosecutor such as in a plea bargain. In a plea bargain situation, the defendant and the prosecutor will bargain for the exchange of the defendant's constitutional rights with a reduction in the charges or the waiver of certain charges, or with a specific sentence agreement probably representing a fairly lenient sentence. In a plea bargain situation, the defendant knows exactly what he will receive, and bargains openly with the prosecutor for the outcome. When a defendant waives his right to a jury trial, there is no such exchange between the defendant and the prosecutor. The prosecutor offers the defendant nothing in exchange for waiving the right to a jury trial. Therefore, I disagree with the majority's attempt to analogize a guilty plea situation with a bench trial situation. The two are simply not analogous. In a bench trial situation, the defendant bargains for nothing; the trial court decides both the verdict and the sentence. Therefore, a defendant does not know, or participate in, the outcome of a bench trial.[3]

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[3] The majority's reliance on *Corbitt v New Jersey*, 439 US 212; 99 S Ct 492; 58 L Ed 2d 466 (1978), is misplaced because *Corbitt* involved a guilty plea situation. Guilty pleas involve participation and negotiation by the defendants, and the defendants know exactly what they will receive at the end of that negotiation.

The majority's assertion that the "analysis of the dissenting opinion would suggest that the multitude of defendants who have waived jury trials or pleaded guilty on the basis of the expectation of some degree of leniency in sentencing have done so involuntarily, as the result of coercion," *ante*, p 517, is simply not correct. As has been stated, there is a very real difference between a guilty plea and a bench trial. Rather, the real issue is whether it is inherently coercive to inform defendants that they will receive a harsher sentence if they exercise their constitutional right to a jury trial thereby rendering their waiver of that right to be involuntary. Therefore, the majority's insistence that the trial court based defendant's sentence on proper sentencing considerations does not address defendant's principal argument.

Further, the trial court's claim that it will give a more lenient sentence to the defendant if the defendant elects a bench trial is actually illusory to the defendant because the trial court does not state before trial what the sentence will be if the defendant chooses a bench trial or if the defendant continues with a jury trial. Therefore, there is no record support for the defendant that he would receive a more lenient sentence if he elects a bench trial because the defendant has no idea what the sentence might be either way. As such, it is difficult to know whether the defendant truly received a "benefit" in this case. There is no benefit to the defendant where the defendant does not know the exact sentencing consequences of waiving his right to a jury trial other than the trial court's assertion that the sentence will be lower.

I cannot sanction the trial court's actions in this case. To do so would effectively punish a defendant for exercising his constitutional right to a jury trial. Legal scholars have commented on the institutionalization of differentiating between jury trials and bench trials:

> Jury waiver, although largely a matter of regional custom, tends to vary depending upon the offense category. The pattern is similar to that for guilty pleas, suggesting that the motivations are similar. "Paramount is the expectation of a lesser sentence if the conviction comes in a bench trial rather than from a jury, just as the plea of guilty carries a lesser sentence than the verdict of guilty. The defendant who does not want to wholly deprive himself of the possibility of an acquittal, but wants to assure a modicum of leniency in case of conviction, might be moved to waive the jury. There is some modest evidence that jury waiver may accomplish this." [LaFave & Israel, Criminal Procedure (Criminal Practice Series, 1984), § 21.1(h), p 704, quoting Kalven & Zeisel, The American Jury (1966), pp 26-27.]

However, as LaFave & Israel have stated, institutionalizing this differential is unconstitutional. See Kalven & Zeisel, *id.*, pp 26-27; *United States v Jackson*, 390 US 570; 88 S Ct 1209; 20 L Ed 2d 138 (1968) (a statute declaring that a defendant can receive the death penalty only if recommended by a jury, and that the penalty can be avoided by waiving a jury trial or by pleading guilty, is unconstitutional because the inevitable effect is to discourage the assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial); *State v Dansinger*, 521 A2d 685 (Me, 1987) (even absent a statutory scheme such as in *Jackson*, a trial court's action expressly basing a higher sentence

on the defendant's exercise of the right to a jury trial is constitutionally impermissible).

The trial court's conclusion that rewarding a defendant for electing a bench trial that saves the court's time does not necessarily translate to punishing a defendant for exercising the constitutional right to a jury trial is incongruous. It, of course, necessarily follows that rewarding a defendant with a more lenient sentence for waiving a jury trial punishes the defendant for exercising the right to a jury trial by giving that defendant a more harsh sentence. A defendant has the constitutional right to a jury trial and cannot be penalized for exercising that right. *Mosko*, *supra*, p 211.

I would hold that defendant's waiver of his right to a jury trial was involuntary in this case. Defendant was told by defense counsel that the trial court would consider at sentencing whether defendant waived a jury trial and that defendant would receive a more lenient sentence if he waived a jury trial and was convicted. Defendant also stated that he wanted a jury trial and waived it only because of these representations by counsel. The trial court's statements on the record show that defendant would indeed have been punished for exercising his right to a jury trial by receiving a more harsh sentence.[4] Such conduct chills a defendant's right to a jury trial and renders any waiver of that constitutional right involuntary. The

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[4] The majority's assertion that there is no basis to conclude that defendant's exercise of his right to a jury trial would have been considered in fashioning the sentence after a conviction by a jury is incorrect. The trial court stated at the evidentiary hearing on March 26, 1996, "There's no question in my mind Mr. Godbold would have been convicted in five minutes by a jury in this case and the sentence would have been higher than the sentence I imposed."

coerced waiver of the right to a trial by jury is a structural defect in the constitution of the trial mechanism that cannot be regarded as harmless. *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994); *Rodgers*, *supra*, p 771.

I would reverse and remand for a new trial.

JAMES v COMMERCIAL CARRIERS, INC

Docket No. 197697. Submitted February 4, 1998, at Detroit. Decided June 30, 1998, at 9:10 A.M.

Jimmy R. and Helen J. James brought an action in the Wayne Circuit Court against Commercial Carriers, Inc., seeking damages for injuries suffered by Jimmy James (hereinafter plaintiff) when he was struck by a motor home chassis operated by an employee of the defendant. The accident took place at a Michigan facility owned and operated by the defendant while motor home chassis were being loaded on the plaintiff's truck for his delivery to an out-of-state concern. At the time of the accident, the plaintiff was an employee of Fleet Carrier Corporation, a wholly owned subsidiary of Ryder System, Inc. The defendant was also a wholly owned subsidiary of Ryder System. The plaintiff sought worker's disability compensation benefits from Fleet, and he received weekly compensation from Ryder Automotive Operations, Inc., which is another wholly owned subsidiary of Ryder System that is responsible for administering all worker's compensation claims for Ryder System and its subsidiaries. The defendant moved for summary disposition on the basis that the court lacked subject-matter jurisdiction because of the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1). The court, J. Phillip Jourdan, J., after analyzing the employment relationship in light of the factors of the economic-reality test, concluded that the defendant and Fleet were not coemployers of the plaintiff such that the defendant was entitled to the protection of the exclusive remedy provision the WDCA and denied the defendant's motion for summary disposition. The defendant appealed by leave granted.

The Court of Appeals *held*:

1. A determination whether an employment relationship exists for the purpose of the WDCA involves consideration of all the facts of the employment relationship under the four basic factors of the economic-reality test: (1) control of the worker's duties; (2) payment of wages; (3) the right to hire, fire, and discipline; and (4) performance of the duties toward the accomplishment of a common goal.

2. Where a court has determined through the application of the economic-reality test that a parent corporation should be considered the employer of a worker for its subsidiary for purposes of the WDCA, the court may engage in a "reverse-piercing" of the parent corporation's corporate veil and extend to the parent corporation the protection of the exclusive remedy provision of the WDCA.

3. Although the circuit court was correct in its observation that the economic-reality test has not heretofore been used to find that two wholly owned subsidiaries were each deemed for purposes of the WDCA to be an employer of the employees of the other such that each was entitled to the protection of the exclusive remedy provision, under the totality of the circumstances of the present case, the defendant and Fleet must be considered components of the same employer, the parent corporation, Ryder System, such that each is entitled to assert the exclusive remedy provision of the WDCA with respect to the plaintiffs' claims for damages arising out of the alleged negligence of the defendant's employee.

Reversed and remanded.

WORKER'S COMPENSATION — SUBSIDIARY CORPORATIONS — ECONOMIC-REALITY TEST — EXCLUSIVE REMEDY.

Two wholly owned subsidiary corporations may through the application of the economic-reality test under appropriate circumstances be considered components of the same employer, the parent corporation, and thus each be deemed to be an employer of the workers of the other such that both subsidiaries are entitled to the protection of the exclusive remedy provision of the Worker's Disability Compensation Act with respect to an action for damages for a personal injury suffered in the course of employment brought by a worker for either subsidiary (MCL 418.131[1]; MSA 17.237[131][1]).

Joseph R. Lobb and *Larry A. Smith*, for the plaintiffs.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Brian Einhorn*, *Timothy G. Orlando*, and *Barbara H. Goldman*), for the defendant.

Before: SAAD, P.J., and WAHLS and GAGE, JJ.

GAGE, J. Defendant appeals by leave granted from an order denying its motion for summary disposition. We reverse and remand.

Plaintiff was an over-the-road truck driver hauling class five and class eight trucks for Fleet Carrier Corporation (Fleet).[1] Fleet and defendant are wholly owned subsidiaries of Ryder System, Inc. (Ryder). Both are part of the Ryder Automotive Carrier Group (RACG), which is a holding corporation for Ryder's wholly owned subsidiaries within the Automotive Carrier Division.

On September 17, 1993, Fleet's dispatch directed plaintiff to drive to defendant's location in Detroit and pick up motor home chassis to deliver to Forest City, Iowa. Defendant owns and operates a commercial yard located next to a General Motors plant. The factory manufactured truck chassis, which were stored at and shipped from defendant's yard. Plaintiff alleged that while he was at defendant's yard loading chassis onto trucks for transportation, he was struck by a chassis operated by an employee of defendant. As a result, plaintiff's dominant left arm is paralyzed. He also suffered traumatic capsilitis and tendonitis of his left hip joint, producing marked atrophy of his left lower extremity. After his injury, plaintiff applied for worker's compensation benefits from Fleet. He received weekly compensation from Ryder Automotive Operations, Inc., which is another wholly owned subsidiary of Ryder responsible for administering all worker's compensation claims for Ryder and its subsidiaries. The worker's compensation check indicated that the insured was Fleet. Plaintiff subsequently filed suit against defendant, alleging that defendant was

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[1] Plaintiff Helen James sought damages for loss of support, services, society, companionship, and consortium, and because she must provide care and support for her husband. Because her claims are derivative, the word "plaintiff" refers to Jimmy R. James throughout the opinion.

negligent and breached its duty of reasonable care to plaintiff as a business invitee on its premises.

Defendant moved for summary disposition on plaintiff's claim pursuant to MCR 2.116(C)(4), contending that the circuit court lacked subject-matter jurisdiction because plaintiff's claim was barred by the exclusive remedy provision of the worker's compensation act. The circuit court denied defendant's motion. We review a trial court's ruling on a motion for summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

MCL 418.131(1); MSA 17.237(131)(1) of the Worker's Disability Compensation Act provides in pertinent part: "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." The standard for deciding a motion for summary disposition based on the issue whether a company is an employer under the WDCA was set forth by a panel of this Court in *Kenyon v Second Precinct Lounge*, 177 Mich App 492, 497; 442 NW2d 696 (1989):

> Whether a company is a particular worker's "employer," as that term is used in the workers' compensation act, is a question of law for the courts to decide if the evidence on the matter is reasonably susceptible of but a single inference. *Nichol v Billot*, 406 Mich 284, 302-303; 279 NW2d 761 (1979), (quoting *Flick v Crouch*, 434 P2d 256 [Okla, 1967]). Only where the evidence bearing on the company's status is disputed, or where conflicting inferences may reasonably be drawn from the known facts, is the issue one for the trier of fact to decide. *Id.*

We apply the economic-reality test to determine whether employment exists for purposes of the WDCA, which involves considering all the facts surrounding the employment relationship. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 647; 364 NW2d 670 (1984); *Isom v Limitorque Corp*, 193 Mich App 518, 521; 484 NW2d 716 (1992). The test involves four basic factors: (1) control of the worker's duties; (2) payment of wages; (3) the right to hire, fire, and discipline; and (4) performance of the duties toward the accomplishment of a common goal. *Hoste v Shanty Creek Management, Inc*, 221 Mich App 144, 149; 561 NW2d 106 (1997). In applying these factors, the totality of the circumstances surrounding the work must be examined, with no single factor controlling. *Id.* In reviewing an employee-employer relationship under the economic-reality test for purposes of the WDCA, we must "examine the work performed, whether it is part of a common objective integral to the employer's business, and whether this work would normally follow the usual path of an employee." *Kidder v Miller-Davis Co*, 455 Mich 25, 34; 564 NW2d 872 (1997). In evaluating all the circumstances, courts analyze the employment situation in relation to the statutory scheme of worker's compensation law with the goal of preserving and securing the rights and privileges of all the parties. No one factor controls. *Wodogaza v H & R Terminals, Inc*, 161 Mich App 746, 752-753; 411 NW2d 848 (1987).

When, through application of the economic-reality test, a court determines that a parent corporation is the employer for purposes of the WDCA, the result is a "reverse-piercing" of the parent corporation's corporate veil. *Wells, supra* at 650. In *Wells*, the plaintiff

worked at Muskegon Firestone, a wholly owned subsidiary of Firestone Tire and Rubber Company (Firestone). He was injured when a truck rim manufactured by Firestone blew apart. Firestone carried the worker's compensation coverage for all of its local branches, including its subsidiary, Muskegon Firestone. The plaintiff received worker's compensation benefits from Firestone's insurer. Subsequently the plaintiff filed a products liability suit against Firestone. The trial court found that the plaintiff was not an employee of Firestone, and his suit was thus not barred by the exclusive remedy provision. *Id.* at 645-646. The Supreme Court recognized "the general principle that in Michigan separate entities will be respected." *Id.* at 650. "[E]ven though Firestone is the parent company of Muskegon Firestone, its separate existence will be respected, unless doing so would subvert justice or cause a result that would be contrary to some other clearly overriding public policy." *Id.* at 650. For public policy reasons, the Supreme Court found that Firestone was the plaintiff's employer for purposes of the WDCA.

> Our disregard of the separate corporate entities of Firestone and its wholly owned subsidiary is premised upon our recognition of the important public policies underlying the Michigan Worker's Disability Compensation Act and our belief that a contrary determination would be inequitable under the facts of this case. The statutory workers' compensation scheme was enacted for the protection of both employees and employers who work and do business in this state. The system assures covered employees that they will be compensated in the event of employment-related injuries. In addition, employers are assured of the parameters of their liability for such injuries. By agreeing to assume responsibility for all employment-related injuries, employers protect themselves from the possibility of potentially exces-

> sive damage awards. In order to effectuate these policies, the statute has been liberally construed to provide broad coverage for injured workers. . . .
>
> If the statute is to be construed liberally when an employee seeks benefits, it should not be construed differently when the employer asserts it as a defense to a tort action brought by the employee who claimed and accepted benefits arising from that employment relationship. [*Id.* at 651.]

A salient factor in determining an employee-employer relationship in the parent-subsidiary context is the use of a combined worker's compensation insurance policy by both parent and subsidiary. *Verhaar v Consumers Power Co*, 179 Mich App 506, 509; 446 NW2d 299 (1989). Combined bookkeeping and accounting, together with income tax treatment that regards the corporations as a single entity, has also been a persuasive factor in supporting the conclusion that two corporations should be treated as one for the purposes of the exclusive remedy provision. *Id.* In some cases, the parent company has been directly responsible for hiring and firing, but in *Verhaar* and *Wells*, there was nothing more than unity of personnel policy. *Id.*

This Court reached a similar result in *Isom, supra.* The plaintiff worked for a Kentucky Fried Chicken franchise and was injured by a deep fryer built by KFC Manufacturing Corporation. When the fryer was built, KFC Manufacturing was a wholly owned subsidiary of Kentucky Fried Chicken Corporation, but when the plaintiff was injured it had ceased to exist as a separate entity and was part of KFC National Management Company, a subsidiary of KFC Corporation, which was itself a wholly owned subsidiary of Kentucky Fried Chicken Corporation. This Court

affirmed the trial court's grant of summary disposition to KFC Manufacturing based on the exclusive remedy provision of the worker's disability act. A significant factor in this Court's determination was that Kentucky Fried Chicken Corporation paid for worker's compensation insurance for all of its employees, including the employees of its subsidiaries. The plaintiff was not able to establish that KFC Manufacturing was not included in the coverage that resulted in the payment of benefits to him. *Id.* at 521-522. This Court indicated that even if KFC Manufacturing was a separate legal entity from the parent corporation, under the facts of the case, KFC Manufacturing would be entitled to a "reverse-piercing" of its corporate veil. *Id.* at 522.

> The statutory workers' compensation scheme was enacted for the protection of both employees and employers. The statute is to be construed liberally when an employee seeks benefits, and it should not be construed differently when the employer asserts it as a defense to . . . [an] action brought by the employee who claimed and accepted benefits arising from that employment relationship. [*Id.* at 522-523.]

In the present case, plaintiff particularly relies on this Court's holding in *Wodogaza, supra*, in which a panel of this Court ruled that the exclusive remedy provision did not bar the plaintiff's suit. The *Wodogaza* plaintiff was employed by Preston Trucking Company, Inc., the parent corporation. He was injured on the premises of defendant H & R Terminals, Inc., a wholly owned subsidiary of his employer, by a tractor owned by S & P Equipment, Inc., another wholly owned subsidiary. Plaintiff received worker's compensation benefits from Preston and then filed

suit against the two subsidiaries. The circuit court granted summary disposition to the defendants, finding that the parent corporation had dominion over all operations and, therefore, the exclusive remedy provision applied. *Id.* at 748-750. This Court reversed on the basis of its analysis of the economic-reality test as well as "certain equitable considerations." *Id.* at 748. The panel found that H & R was organized solely for the purpose of owning land and leasing it back to Preston, while S & P was organized for the purpose of owning equipment and leasing it back to Preston. Neither had any employees other than their statutorily required officers, and their offices and activities were controlled by Preston. Neither carried worker's compensation coverage. No one other than the parent corporation exercised any control over the plaintiff, paid his wages, or was responsible for any disciplinary actions. Under these circumstances, this Court found that the parent corporation, not the subsidiaries, was the plaintiff's employer. *Id.* at 753-754.

> Most significantly, the subsidiaries in this case are seeking to shield themselves from tort liability without having assumed any concomitant liability for the payment of workers' compensation benefits. Defendants never accepted any responsibility for the work-related injuries of their parent's employees. Second, . . . the general principle in Michigan is that separate corporate identities will be respected, and thus corporate veils will be pierced only to prevent fraud or injustice. In the present case, defendants point to no injustice resulting from our recognition of their nonemployer status, as determined under an economic reality test analysis. Liability alone constitutes no such injustice. . . . Third, we are not unmindful that . . . the vast majority of states do not extend the reach of the exclusive remedy provision of a workers' compensation act by treating parent and subsidiary corporations as a single entity. [*Id.* at 756.]

We find *Wodogaza* distinguishable from the facts of the present case. Fleet and defendant are not mere shell corporations as were the subsidiaries in *Wodogaza*. Although defendant is attempting to shield itself from tort liability, it has not avoided responsibility for paying worker's compensation insurance. Defendant submitted an affidavit from an executive vice president of RACG stating that defendant is self-insured for worker's compensation insurance under the same filing as Ryder and Fleet, and Ryder purchases excess worker's compensation coverage for all of its subsidiaries. Defendant's and Fleet's worker's compensation claims are all processed through Ryder Services Corporation, another wholly owned Ryder subsidiary.

The circuit court noted correctly that no appellate court of this state has yet found that two wholly owned subsidiaries were each deemed under the economic-reality test to be an employer of the workers of the other such that the subsidiary that was not the employer-in-fact would be shielded from tort liability by the exclusive remedy provision of the WDCA. However, we believe that under the totality of the circumstances of the present case, Fleet and defendant must be considered components of the same employer, their parent corporation Ryder, for purposes of the WDCA. In addition to sharing a filing for worker's compensation self-insurer status, these subsidiaries share numerous financial functions through their connection to the parent corporation. Cash management and treasury functions for all Ryder subsidiaries are performed by Ryder's central staff at its corporate headquarters in Miami. All Ryder customers send their payments to depository accounts that are dispensed into concentration accounts at the end of every day.

The money in the concentration accounts is transferred into disbursement accounts that process all Ryder's subsidiaries' disbursements. Moreover, there is a unity of management between the parent corporation Ryder and each of its subsidiaries. Defendant and Fleet share the same three directors, one who is also a director, president, and CEO of Ryder, and another who is a senior executive vice president of Ryder. Defendant has twenty-seven officers and Fleet has twenty-two officers, nineteen of which they share.

Plaintiff argues that Fleet exercised exclusive control over his work duties, paid his wages, and was charged with hiring, firing, and disciplining employees in his position. Plaintiff contends that his relationship with Fleet was created by a lease agreement, under which plaintiff leased his truck to Fleet and Fleet was given the exclusive right to supervise, control, and use the leased vehicle in its transportation business with plaintiff as the sole operator of the vehicle. As we discussed above, no one factor dominates the analysis under the economic-reality test to determine if an entity is an employer for purposes of the exclusive remedy provision of the WDCA. *Wodogaza*, *supra* at 752-753. Control is only one factor to be considered, as is payment of wages, hiring and firing, the responsibility for the maintenance of discipline, and the performance of duties as an integral part of the employer's business toward the accomplishment of a common goal. *Andriacchi v Cleveland Cliffs Iron Co*, 174 Mich App 600, 605-606; 436 NW2d 707 (1989). In the present case, as in *Verhaar* and *Wells*, the parent company was not directly responsible for hiring and firing, but there was unity of personnel policy. The general guidelines for hiring, firing, and disciplining

that both defendant and Fleet utilize are established in their union contract, which was negotiated on behalf of Ryder by the vice president of labor relations for Ryder Automotive Operations, Inc.

Plaintiff also points out that a provision in the lease agreement provided that plaintiff needed Fleet's written approval for any use of the vehicle with Fleet's competitors. Plaintiff could refuse to haul any loads except those assigned to him by Fleet. Nonetheless plaintiff went to defendant's Dearborn terminal when given the assignment by Fleet's dispatch. He also accepted the assignment at defendant's terminal to proceed to defendant's Piquette yard to load the chassis to be hauled. From our analysis of the circumstances of this case, we find that defendant and Fleet are not subsidiaries that are engaged in such unrelated commercial activity that, other than seeking to earn profit, there is no discernible "common goal" of which any particular subsidiary could form an "integral part." *Verhaar*, *supra* at 509. Defendant and Fleet are both part of the Ryder Automotive Carrier Division and engage in the same type of business for which they used to be in direct competition before their acquisition by Ryder. Plaintiff was not merely injured by defendant's product, as in *Wells*, but was actually working for defendant by hauling its freight when he was injured.

We believe that, given the totality of the circumstances, the parent corporation Ryder should be considered plaintiff's employer for purposes of the exclusive remedy provision of the WDCA. Furthermore, we hold that defendant and Fleet are each integral components of Ryder, such that defendant is also entitled to the exclusive remedy provision. Accordingly, the

trial court erred in denying defendant's motion for summary disposition.

Plaintiff has also submitted supplemental authority to this Court, which we acknowledge. In *Bitar v Wakim*, 456 Mich 428; 572 NW2d 191 (1998), the plaintiff was working for a bakery that was personally and wholly owned by the defendant, Mr. Wakim. The defendant also owned the property where the bakery was located and leased the property to the bakery. The plaintiff slipped and fell while taking trash out of the bakery to a dumpster on the property. She received worker's compensation benefits from the bakery and then brought a premises liability suit against the defendant personally. The circuit court granted summary disposition for the defendant on the basis of the exclusive remedy provision of the WDCA. This Court affirmed. The Supreme Court reversed, finding that under the equities of the case the corporate structure should not be disregarded. *Id.* at 430-431. The Court reasoned that the case "does not involve an attempt by an employee of a subsidiary company to state a cause of action against the parent corporation." *Id.* at 433. The plaintiff "injured herself on property owned by a legal entity that was not her employer. Thus, she can bring a lawsuit against the owner of that property without violating the exclusive remedy provision of the Worker's Disability Compensation Act." *Id.* at 434.

We find this authority distinguishable for the reasons stated by our Supreme Court. *Bitar* does not involve the relationship of separate corporate entities but of an individual sole shareholder to a corporate entity that he founded. There is no unity of financial identity or corporate purpose that is found in the

present case. As the Supreme Court noted in *Bitar*, "neither the policies of the [WDCA], nor the interests of justice" require that the defendant be viewed as the plaintiff's employer for purposes of the WDCA. On the other hand, we find clear public policy considerations supporting our conclusion that defendant in the present case should be granted the benefit of the exclusive remedy provision of the WDCA.

Accordingly, we reverse and remand for entry of an order granting summary disposition for defendant. We do not retain jurisdiction.

CARPENTER v CONSUMERS POWER COMPANY

CASE v CONSUMERS POWER COMPANY

Docket Nos. 191299, 191733, 196797. Submitted December 10, 1997, at Grand Rapids. Decided July 7, 1998, at 9:00 A.M. Leave to appeal sought.

Larry and Vanessa Carpenter brought a negligence action in the Barry Circuit Court against Consumers Power Company, alleging that stray voltage from the defendant's electrical service to the plaintiffs' dairy farm adversely affected their herd's milk production and seeking damages for lost milk production.

Kenneth and Diana Case, dairy farmers like the Carpenters, brought a similar action against Consumers Power in the same court.

The actions were consolidated for trial, and a jury returned verdicts and awards of damages for the plaintiffs. The court, Patrick H. McCauley, J., granted the defendant judgment notwithstanding the verdict with respect to the Carpenters, ruling that the addition of water to milk sold from the Carpenters' farm after the defendant corrected the stray voltage problem was an attempt to inflate damages and constituted wrongful conduct that served to bar the Carpenters' claim. The defendant's motion for an award of actual costs and attorney fees against the Carpenters was denied by the court. With respect to the Cases, the court granted a motion by the defendant for remittitur based on speculative expert testimony concerning the Cases' damages.

The Carpenters appealed from the order granting the defendant judgment notwithstanding the verdict, and the defendant cross appealed the denial of its motion for attorney fees (Docket No. 191299). In a second appeal, the defendant appealed from the judgment entered in favor of the Cases, and the Cases cross appealed the grant of remittitur (Docket No. 191733). In a third appeal, the defendant appealed by leave granted from an award in its favor of statutory costs but a denial of its request for actual attorney fees and costs (Docket No. 196797). The appeals were consolidated.

The Court of Appeals *held*:

1. The trial court correctly granted the defendant judgment notwithstanding the verdict with respect to the Carpenters. Brad Carpenter, son and employee of Larry Carpenter, had pleaded nolo

contendere to a charge of possession of adulterated milk. The evidence at trial supported a reasonable inference that Larry and Vanessa Carpenter were aware of the addition of water to milk produced at their farm. There was a sufficient causal nexus between the illegal conduct and the Carpenters' asserted damages.

2. The trial court correctly refused to award attorney fees for the defendant and against the Carpenters on the claimed basis that the Carpenters' action was frivolous. Although the Carpenters may have committed fraud on the court with regard to their alleged damages, their claim was not frivolous. They had a reasonable basis upon which to believe that the underlying facts of stray voltage and its adverse effects on their herd were true, and their position was not devoid of arguable legal merit.

3. The trial court did not abuse its discretion in not exercising its inherent authority under the fraud-on-the-court doctrine to award actual costs to the defendant and against the Carpenters. The trial court correctly concluded that dismissal of the Carpenters' action was an adequate sanction for their misconduct.

4. The trial court correctly instructed the jury with respect to the defendant's duty of care by telling the jury, consistent with *Schultz v Consumers Power Co*, 443 Mich 445 (1993), that the defendant had a duty to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects.

5. The trial court correctly denied the defendant's motion for judgment notwithstanding the verdict with respect to the Cases. There was sufficient evidence of a duty owed by the defendant to the Cases, a breach of that duty, and resultant injury to the Cases.

6. The trial court did not abuse its discretion in permitting an agricultural economist to testify as an expert for the plaintiffs. The witness was qualified by education and had testified as an expert on stray voltage on other occasions.

7. The trial court did not abuse its discretion in granting remittitur. The court correctly determined as not credible the expert witness' testimony that the normal output of the Case farm was thirty-five percent above average. The trial court did not err in reducing the damage award by thirty-five percent.

Affirmed.

CORRIGAN, C.J., concurring, wrote separately to urge the Supreme Court to consider whether the general standard of care imposed by *Schultz*, *supra*, on electric utilities properly applies to cases of stray voltage affecting dairy herds in light of the absence from those cases of a threat to humans of death or serious injury.

1. MOTIONS AND ORDERS — JUDGMENT NOTWITHSTANDING THE VERDICT — APPEAL.

A trial court, when deciding a motion for judgment notwithstanding the verdict, must examine the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the plaintiff; if the evidence is such that reasonable jurors could have found for the plaintiff, neither the trial court nor the Court of Appeals may substitute its judgment for that of the jury.

2. JUDGMENTS — RELIEF FROM JUDGMENTS — FRAUD, MISREPRESENTATION, OR MISCONDUCT.

A trial court may relieve a party from a final judgment, order, or proceeding on the grounds of fraud, misrepresentation, or other misconduct of the opposing party; wrongful conduct by a plaintiff must be prohibited or almost entirely prohibited under a penal or criminal statute in order to serve as a basis for barring the claim; there also must be a sufficient causal nexus between the plaintiff's illegal conduct and the plaintiff's asserted damages (MCR 2.612[C][1][c]).

3. COSTS — FRIVOLOUS ACTIONS — APPEAL.

A court that finds on motion of any party that an action was frivolous shall award the prevailing party costs and fees, including reasonable attorney fees; a claim is frivolous when the party's primary purpose was to harass, embarrass, or injure the prevailing party, the party had no reasonable basis upon which to believe the underlying facts were true, or the party's position was devoid of arguable legal merit; a trial court's finding that a claim is frivolous will not be reversed on appeal unless it is clearly erroneous (MCL 600.2591; MSA 27A.2591).

4. COSTS — FRAUD ON THE COURT.

A trial court, under the fraud-on-the-court doctrine, has discretionary authority to award actual costs to a party on the basis of the opposing party's misconduct.

5. NEGLIGENCE — ELECTRIC UTILITIES — DUTY TO INSPECT AND REPAIR.

An electric utility must exercise reasonable care to reduce potential hazards as far as practicable, including reasonably inspecting and repairing wires and other instrumentalities to discover and remedy hazards and defects.

6. WITNESSES — EXPERT WITNESSES.

A person may be qualified to testify as an expert by virtue of knowledge, skill, experience, training, or education in the subject matter of the testimony; where such testimony is speculative, it should be excluded or stricken; a trial court's decision to admit expert testi-

mony or to exclude it as speculative is reviewed on appeal for abuse of discretion (MRE 403, 702).

Martin W. Hable, for the plaintiffs.

Warner Norcross & Judd LLP (by *Roger M. Clark*), for the defendant.

Before: CORRIGAN, C.J., and DOCTOROFF and FITZGERALD, JJ.

DOCTOROFF, J. In Docket No. 191299, plaintiffs Larry and Vanessa Carpenter appeal as of right the circuit court's order granting defendant's motion for judgment notwithstanding the verdict (JNOV) and costs. Defendant cross appeals the circuit court's denial of its motion for attorney fees. In Docket No. 191733, defendant appeals the judgment entered in favor of plaintiffs Kenneth and Diana Case following a jury trial, and plaintiffs Case cross appeal the circuit court's order granting remittitur. In Docket No. 196797, defendant appeals by leave granted the postjudgment order awarding defendant statutory costs in the amount of $7,127.17, but denying defendant's request for an award of actual costs and attorney fees. We affirm.

These two cases, which were consolidated for trial, arose out of damages to plaintiffs' dairy farm operations allegedly caused by neutral to earth voltage, or NEV, from defendant's primary neutral conductor. The electrical wiring on a farm has a conductor, known as the neutral conductor, which is grounded to the earth. According to an informational pamphlet produced by defendant and the Agricultural Engineering Department at Michigan State University, NEV is any measurable level of voltage that may occur between a

metal object and the adjacent floor or earth. When NEV is found at a level that is considered to have a potential effect on animals, it is known as "stray voltage." Stray voltage on a dairy farm may cause electrical current to flow through a cow and cause it discomfort. Cows who are affected by stray voltage may become uneasy, dance from foot to foot, and will lap at their water tank like a dog instead of taking long, deep drinks. They may be reluctant to enter a building where stray voltage is present. During milking, they may kick the milking equipment and people. They will produce less milk, and will produce milk unevenly, which will leave milk in the udders, causing mastitis. Stray voltage may be corrected by separating the neutrals of the electrical system.

In 1982, milk production on the Case farm began to decrease. Plaintiff Kenneth Case installed a new milking system, but the production decreased even further. The cows were restless. They were reluctant to enter the milking parlor and would kick off the milking equipment and kick the people milking them. In 1986, Case sold his dairy herd, and in 1989 he began raising pigs and beef cattle. In 1992, a friend told Case about stray voltage, and Case realized that his cows had displayed the symptoms that his friend described. In July 1993, Case bought a small herd of twenty-four jerseys. In September 1993, defendant split the neutrals, or "isolated" the Case farm. The cows' behavior returned to normal.

The Carpenters' farm began to experience a decline in milk production in 1985. The Carpenters also noticed that the cows became agitated, were reluctant to enter the milking parlor, and would kick off the milking equipment. After plaintiff Larry Carpenter

heard of stray voltage, he contacted defendant. Defendant split the neutrals on the Carpenter farm, and the cows' behavior gradually returned to normal and production increased.

In Docket No. 191299, plaintiffs Carpenter first argue that the trial court committed error requiring reversal when it granted defendant's motion for JNOV after finding that their son, Brad Carpenter, had committed fraud on the court. Plaintiffs argue that the trial court erred in finding that Brad Carpenter's plea of nolo contendere to a charge of possession of adulterated milk constituted an admission of guilt to adding water to the milk sold from the Carpenter farm. Plaintiffs argue that Brad Carpenter is not a party to this action and that no evidence implicates plaintiffs in his wrongful conduct. Plaintiffs further argue that Brad Carpenter's alleged wrongful act had no causal connection to the stray voltage damages they suffered. We disagree.

Brad Carpenter worked as a milk hauler for the Carpenter farm and for other farms in the area. He was employed by plaintiff Larry Carpenter, who owned the truck and held the license to haul milk. During trial, defendant informed the court that there was evidence that water had been added to the bulk tank of the Carpenters' milk truck. On April 18, 1995, an employee of the Michigan Department of Agriculture tested a sample from the Carpenter truck. The test indicated that there were 2,190 pounds of water in the bulk tank when the truck started out that morning. Samples from the farm's bulk tank before the milk was transferred to the truck showed no water. Each of the other farmers who added milk to the truck also had a sample taken from their own

tanks before the milk was transferred to the bulk tank. Samples from five different days in April indicated that the bulk truck contained water that was in the Carpenter component of the load. Defendant also presented evidence of a report from the Dairy Herd Improvement Association (DHIA)[1] for January 11, 1994, that indicated that the Carpenter farm had produced 3,516 pounds of milk. However, the documentation indicated that the Carpenters sold 5,195 pounds of milk on January 12. On August 23, 1995, Brad Carpenter pleaded nolo contendere to a charge of possession of adulterated milk.

When deciding a motion for JNOV, a trial court must examine the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party. If the evidence is such that reasonable jurors could have found for the plaintiff, neither the trial court nor this Court may substitute its judgment for that of the jury. *McLemore v Detroit Receiving Hosp*, 196 Mich App 391, 395; 493 NW2d 441 (1992). A trial court may relieve a party from a final judgment, order, or proceeding on the grounds of fraud, misrepresentation, or other misconduct of the opposing party. MCR 2.612(C)(1)(c); *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995).

When a plaintiff's action is based in whole or in part on his own illegal conduct, his claim is barred. *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). The rationale behind the "wrongful-conduct rule" is that the courts should not lend their

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[1] The DHIA provides dairy farmers with management information such as production per cow, herd production, somatic cell counts, and reproductive status.

aid to a plaintiff who founded his cause of action on his own illegal conduct. *Id.* at 559. In order to implicate the wrongful-conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. Where the plaintiff's illegal act amounts only to a violation of a safety statute, such as traffic laws or laws regulating workplace safety, the plaintiff's act "does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule." *Id.* at 561. For the wrongful-conduct rule to apply, there must be a sufficient causal nexus between the plaintiff's illegal conduct and the plaintiff's asserted damages. *Id.* at 564.

The trial court did not abuse its discretion in granting JNOV to defendant. The trial court determined that the only reasonable inference from the evidence was that plaintiffs were aware that water had been added to their milk and, in fact, participated in the illegal act of adding water to their milk for the purposes of increasing their milk production in order to raise the level of their damages. Approximately 2,000 pounds of added water were found in the milk on each of the days that the milk was tested. The fact that the figures on Brad Carpenter's documentation agreed with the weight of the milk, which contained the added water, supports a finding that Brad Carpenter knew that water had been added to the milk, and that it must have been added by someone at the Carpenter farm. Brad Carpenter was an employee and agent of his father, plaintiff Larry Carpenter. Plaintiffs knew how much milk their cows were producing and how much money they were paid for the milk. Evidence indicated that the Carpenter farm was selling more

milk than it produced. The only reasonable inference from this evidence is that plaintiffs were aware that water was being added to their milk, and that they in fact deliberately added the water in order to inflate their milk sales. Furthermore, this wrongful conduct was causally related to plaintiffs' cause of action, in that it supported plaintiffs' contention that the stray voltage on their property had resulted in decreased milk production by creating the impression that, after the stray voltage had been corrected, plaintiffs' milk production increased.

Plaintiffs' claim that Brad Carpenter's nolo contendere plea was improperly admitted is also without merit. Plaintiffs rely on *Lichon v American Universal Ins Co*, 435 Mich 408; 459 NW2d 288 (1990), for the proposition that, under MRE 410, a plea of nolo contendere is inadmissible against the party in subsequent litigation. However, MRE 410 was amended in 1991 to provide that evidence of a nolo contendere plea is admissible for the same purposes as evidence of a guilty plea. Furthermore, MRE 410 only applies to bar the admission of a plea of nolo contendere in a proceeding *against the defendant who made the plea.* Brad Carpenter is not a party to this action, and therefore, MRE 410 does not apply to bar evidence of his plea.

On appeal in Docket No. 196797 and on cross appeal in Docket No. 191299, defendant argues that the trial court abused its discretion in refusing to award attorney fees after finding that plaintiffs had committed fraud on the court. We disagree.

MCL 600.2591; MSA 27A.2591 provides that, on motion of any party, if a court finds that an action was frivolous, the court shall award the prevailing

party costs and fees, including reasonable attorney fees. A claim is frivolous when (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party, or (2) the party had no reasonable basis upon which to believe the underlying facts were true, or (3) the party's position was devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a); *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 267; 548 NW2d 698 (1996). A trial court's finding that a claim is frivolous will not be reversed on appeal unless it is clearly erroneous. *Id.* at 266. If the court finds the plaintiff's claim to be frivolous, sanctions are mandatory, and the trial court does not have discretion to forgo sanctions. *Id.* at 268.

Defendant argues that plaintiffs' suit was frivolous because the underlying facts upon which it was based were proved to be false. Defendant bases its argument on the trial court's finding that plaintiffs had committed fraud on the court by watering their milk tanks in an effort to increase their damages. We disagree. There was evidence that stray voltage was present on the Carpenter farm and that the cows displayed symptoms that are known to be the result of stray voltage. Plaintiffs had a reasonable basis upon which to believe that the underlying facts were true, and their position was not devoid of arguable legal merit. Although plaintiffs committed fraud on the court with regard to the amount of their damages, we cannot say that the trial court's finding that the claim was not frivolous was clearly erroneous. Therefore, sanctions were not mandatory.

Defendant further argues that the trial court should have exercised its inherent authority to award actual costs under the fraud-on-the-court doctrine. A trial

court has inherent authority to impose sanctions on the basis of party misconduct. *Cummings v Wayne Co*, 210 Mich App 249, 251-252; 533 NW2d 13 (1995). Whether or not to impose sanctions is within the trial court's discretion. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 450; 540 NW2d 696 (1995). Under an abuse of discretion standard, considerable deference is given to the trial court. *Fletcher v Fletcher*, 200 Mich App 505, 512; 504 NW2d 684 (1993), modified 447 Mich 871 (1994). In the present case, as in *Cummings*, the trial court found that the dismissal with prejudice of plaintiffs' action was an adequate sanction. We find that this was not an abuse of discretion. To say otherwise would be to require a lower court to award attorney fees in cases that involve party misconduct other than the filing of a frivolous lawsuit, which is not the law.

In Docket No. 191733, defendant argues that the trial court committed error requiring reversal in instructing the jury regarding the duty of care owed by an electric company. The determination whether a jury instruction is applicable and accurately states the law is within the discretion of the trial court. *Szymanski v Brown*, 221 Mich App 423, 430; 562 NW2d 212 (1997). Reversal is not required if, on balance, the theories and the applicable law were adequately and fairly presented to the jury. *Id.* This court will not reverse as a result of an erroneous jury charge unless the failure to do so would be inconsistent with substantial justice. *Id.* The question whether a duty exists is a question of law for the court to decide. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). In determining whether a duty exists, a court must evaluate factors such as the relationship of the parties,

the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. *Id.*

The trial court instructed the jury as follows:

> It is well settled that electrical energy possesses inherently dangerous properties requiring expertise in dealing with its phenomena. Therefore Consumers Power Company has a duty to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects. Consumers Power Company, being engaged in the transmission of electricity, is bound to anticipate ordinary use of the area surrounding the lines and to appropriately safeguard an attendant risk. The test to determine whether a duty was owed is not whether Consumers Power Company should have anticipated a particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work or pleasure.

This instruction was based on *Schultz v Consumers Power Co*, 443 Mich 445; 506 NW2d 175 (1993). In *Schultz*, the plaintiff's decedent was electrocuted when he came into contact with an aluminum ladder that was near an uninsulated power line. The instant case involves property damage as a result of low-level stray voltage. Defendant argues that the standard announced in *Schultz* imposes a heightened duty of care that approaches strict liability and is inapplicable to the present case.

Regarding the standard of care owed by an electrical utility, our Supreme Court has stated:

> [C]ompelling reasons mandate that a company that maintains and employs energized power lines must exercise reasonable care to reduce potential hazards as far as practicable. First, electrical energy possesses inherently dangerous properties. Second, electrical utility companies possess

> expertise in dealing with electrical phenomena and delivering electricity. Lastly, although a reasonable person can be charged with the knowledge of certain fundamental facts and laws of nature that are part of the universal human experience, such as the dangerous properties of electricity, it is well settled that electricity possesses inherently dangerous properties requiring expertise in dealing with its phenomena. Therefore, pursuant to its duty, a power company has an obligation to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects. [*Schultz*, *supra* at 451 (citations omitted).]

Defendant argues that an instruction referring to the "inherently dangerous properties" of electricity is inapplicable to a case involving stray voltage, stating that "electricity itself is not inherently dangerous: the same physical phenomenon that powers an electric chair gently warms an electric blanket." We disagree with defendant's contention that electricity itself is not dangerous. Although the risks posed by live power lines differ from the risks posed by stray voltage, electricity nevertheless does require expertise in dealing with its phenomena. If the damage is reasonably foreseeable, then a duty is owed. *Schultz*, *supra* at 451-452. Therefore, in the context of stray voltage, we hold that an electrical utility has a duty to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects. Because the instruction given adequately and fairly presented this standard, reversal is not required. *Szymanski*, *supra* at 430.

Defendant next argues that the trial court erred in denying its motion for JNOV because plaintiffs failed to prove that defendant acted negligently. Defendant contends that plaintiffs merely demonstrated that

stray voltage was present, but did not demonstrate any act or omission on the part of defendant that caused harm to plaintiffs. We disagree.

To establish a prima facie case of negligence, a plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was the proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages. *Richardson v Michigan Humane Society*, 221 Mich App 526, 528; 561 NW2d 873 (1997).

As discussed above, an electric utility has a duty to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects. In the present case, the evidence indicated that defendant knew as early as the 1970s that stray voltage could have a negative effect on dairy farms. It knew in 1983 that isolation of the neutral would solve the stray voltage problem. Yet, until late 1994, defendant had a policy of waiting for a customer to complain before it would test for and correct stray voltage. Defendant did not correct the stray voltage on the Case farm until 1993, after Kenneth Case notified it of a potential problem. Therefore, there was sufficient evidence to support a finding that defendant breached its duty.

There was also sufficient evidence to support a finding that defendant's breach of its duty was the proximate cause of plaintiffs' injuries. Expert witnesses, as well as defendant's own pamphlet concerning the effects of stray voltage on dairy farms, discussed the symptoms caused by the effects of stray voltage in cows. The cows on both the Carpenter and Case farms displayed these symptoms. Furthermore,

there was evidence that plaintiffs' milk production decreased in the years before the correction of the voltage problem. Therefore, the trial court did not err in denying defendant's motion for JNOV.

Defendant next argues that the trial court erred in permitting plaintiffs' expert Michael Behr to testify with regard to damages because his testimony was based on pure speculation. We disagree.

A person may be qualified to testify as an expert witness by virtue of his knowledge, skill, experience, training, or education in the subject matter of the testimony. MRE 702; *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). Where such testimony is purely speculative, it should be excluded or stricken pursuant to MRE 403. *Id.* at 402. A trial court's decision to admit expert testimony or to exclude it as speculative is reviewed on appeal for an abuse of discretion. *Id.* at 401.

After reviewing the record, we conclude that Behr was qualified as an expert. He holds a doctorate degree in agricultural economics from the University of Wisconsin. He has testified as an expert in the area of stray voltage damages on many occasions. He explained his methods of evaluation and the data he used for his conclusions. Defendant conducted a thorough cross-examination. The weight and credibility of Behr's testimony was for the jury to determine. *Id.* Therefore, the trial court did not abuse its discretion in permitting Behr to testify.

Defendant also argues that the trial court erred in calculating the amount of damages on remittitur. However, this issue is not properly preserved. After the trial court made its calculations, it invited the parties to check its figures. All parties checked the calcu-

lations and determined that the trial court's figures were correct. Defendant did not object to the trial court's calculations at that time or present its own method of calculation. Therefore, we decline to address this issue.

Finally, plaintiffs Carpenter and Case both argue that the trial court erred in granting remittitur. Because we affirm the circuit court's order granting JNOV in favor of defendant against plaintiffs Carpenter, we will address this issue only as it pertains to the Case action.

MCR 2.611(E)(1) provides:

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for a new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

When presented with a motion for remittitur, the trial court must determine whether the jury's award is supported by the evidence. *Szymanski*, *supra* at 431. This Court reviews a trial court's ruling on a motion for remittitur for an abuse of discretion. *Id.* An abuse of discretion exists where an unprejudiced person, considering the facts on which the trial court made its decision, would conclude that there is no justification for the ruling made. *Id.*

In the Case action, the jury found that defendant was negligent, defendant's negligence was the proximate cause of plaintiffs' injury, and that the total amount of damages to plaintiffs was $4,335,620. The jury found that plaintiffs' own negligence contributed to their injury in the amount of fifty-five percent, and

the court reduced the verdict to $1,951,029. Defendant moved for remittitur, arguing that plaintiffs' proofs concerning damages were merely speculative, and that Behr's testimony was based on insufficient investigation, speculation, assumptions, and unreliable anchor points for his calculations. The trial court reviewed the evidence presented by Dr. Behr and determined that there was no support for his finding that the normal output of the Case farm was thirty-five percent above average. The court reduced the damages by thirty-five percent, from $4,335,620 to $2,818,153. The court then reduced this amount by fifty-five percent, to $1,268,168 on the basis of the jury's finding of comparative negligence.

The trial court did not abuse its discretion in granting defendant's motions for remittitur. Behr based his calculations on the years before the stray voltage, because that produced the best results. He testified that his calculations were based on information that Case gave him over the telephone. He could not identify the source of his information. We find that Behr's testimony was not credible. He did not objectively verify any information provided to him by plaintiffs, and he discounted or disregarded information that did not conform to his hypothesis. Consequently, there was no evidence to support a conclusion that the Case farm would have produced above the state average absent the stray voltage. Therefore, remittitur was appropriate.

Affirmed.

FITZGERALD, J., concurred.

CORRIGAN, C.J. (*concurring*). I join the majority's opinion regarding Docket Nos. 191299 and 196797

without reservation. I concur in its decision in Docket No. 191733, but write separately to urge our Supreme Court to consider the applicability of *Schultz v Consumers Power Co*, 443 Mich 445; 506 NW2d 175 (1993), to cases involving prolonged exposure to low levels of stray voltage that cause avoidance behavior in dairy herds.

I agree that the trial court did not err in crafting jury instructions in reliance on *Schultz*. However, I join the trial court in questioning whether *Schultz*' broad statement of the duty of care, which approaches strict liability, is appropriate where the electric current involved is not powerful and human beings face no threat of death or serious bodily harm. *Schultz*, *supra* at 451, appears to require an electric company employing energized power lines to inspect and repair those lines to reduce "potential" hazards "as far as practicable"; mere remedying of defective conditions after notice is not adequate. *Id.* at 454. Applying *Schultz*' broad formulation renders a defendant utility company negligent for failing to inspect, even where the hazard is minimal. Because the risk to be foreseen from low levels of electric current is not of the highest order, the duty should not approach strict liability. I adopt the trial court's statement regarding the problem:

> I can't conclude that the jury made a mistake, unless—unless they were improperly instructed as to the duty owed by Consumer Powers (sic) as set forth in the *Schultz* case that we discussed throughout this case.
>
> Now, the Court considered this instruction and, though having some reservations about it when I applied it in the actual trial as it applied to stray voltage—if you recall, I was concerned as a judge—I didn't quite understand the Supreme Court's rationale in that case in finding the duty

that they set forth. It seemed to me it was almost a[n] absolute liability. And I so said then and I still repeat it now, that it seems to me that this is too strong a duty to be imposed upon stray voltage cases. But I did say that I didn't know of any other duty, I couldn't find any other duty, and, under the rule of starre (sic) decisis and, of course, the Supreme Court ruling, I was bound by the ruling and the duty set forth in that case. And that's what I did. I applied that to my review of the proposed instructions and I instructed the jury based upon this.

* * *

[T]hough I was concerned about the ruling under the *Schultz* case and I personally as a judge believed as the trier of this case that a less stringent rule should apply in the stray voltage cases, but I believed it was my duty and I was bound to follow the rule set forth by the Supreme Court, that I was not in a position to overrule and/or distinguish the *Schultz* case.

* * *

It's my opinion—and I expressed my personal opinion and I don't have any reason to change anything—but I think I agree with the—Mr. Clark that in the *Schultz* case you're talking about the hazardous portion of the electrical current systems that Consumer Powers (sic) is selling to the customers. And there's no question that it is hazardous and there's no question that if you hit the high line and you get ahold of the hot line, you're gonna get electrocuted and you can be killed [sic], and it also could cause fires and damage property. We all know that there are these cases where people have been electrocuted. The *Schultz* case, *Detroit Edison* case, many other cases. We also know that many houses have burned down because of the hot wire shortages in the houses. And that is true.

But as I understand all the testimony in this case and all of the experts, that the stray voltage is not hazardous. The only way that stray voltage could be hazardous on the neutral [line] that I can see in all the testimony I've reviewed is it would have to be the hot line falling onto or connecting

> to the neutral line and in effect changing the neutral to a hot line in order to be hazardous and dangerous. That's why I think and I put this in the record—though I can't make this decision that I put it on the record hoping the appeals court will review it in light of the fact that I do not believe stray voltage is hazardous such as to put the almost too strict of a duty upon Consumers Powers (sic) or any power company as to stray voltage.

In my view, *Schultz'* articulation of a broad duty is not appropriate for all claims involving the delivery of electricity. The scope of the duty should vary with the nature of the risk.

Nonetheless, because I do not find error in the trial court's instruction under *Schultz*, I join the majority's result.

HOOVER CORNERS, INC v CONKLIN

Docket No. 200241. Submitted February 4, 1998, at Lansing. Decided July 7, 1998, at 9:05 A.M.

Luke and Janine Miller brought an action in the Gratiot Circuit Court against Hoover Corners, Inc., Thomas J. Conklin, and others, alleging in part that Hoover Corners was liable pursuant to the dramshop act, MCL 436.22(4); MSA 18.933(4), for furnishing liquor to Conklin while he was visibly intoxicated, thereby proximately causing Luke Miller's injury in an accident that involved a truck driven by Conklin. Hoover Corners filed a cross-claim against Conklin, seeking indemnification pursuant to MCL 436.22(7); MSA 18.993(7). Mediation resulted in an evaluation in favor of the plaintiffs, who accepted the evaluation with respect to Hoover Corners only. Hoover Corners accepted the evaluation and moved for the entry of judgment on the mediation evaluation with respect to the plaintiffs' claims against it. Hoover Corners also moved for summary disposition with respect to its cross-claim against Conklin. The court, Randy L. Tahvonen, J., granted Hoover Corners' motions. Conklin appealed.

The Court of Appeals *held*:

A liquor licensee against whom a judgment is entered in a dramshop action has the right to seek indemnification from the alleged visibly intoxicated person only where the judgment resulted from a determination by the trier of fact, either the court or a jury, that intoxication was a proximate cause of the damage or injury sustained by the plaintiff.

Subsection 4 of the dramshop act provides a "right to recover actual damages . . . in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death." Subsection 7 provides that "[a]ny licensee subject to the provisions of subsection (4) regarding the unlawful selling, furnishing, or giving of alcoholic liquor to a visibly intoxicated person shall have the right to full indemnification from the alleged visibly intoxicated person for all damages awarded against the licensee." The subsections, when read together, evince legislative intent that indemnification be available only where there has been an award of damages against a licensee after a determination by the

trier of fact that intoxication was a proximate cause of the damage, injury, or death. Because no such award and determination occurred in this case, indemnification is not properly available to Hoover Corners.

Reversed and remanded for further proceedings.

INTOXICATING LIQUORS — DRAMSHOP ACTIONS — INDEMNIFICATION OF LICENSEES BY INTOXICATED PERSONS.

A liquor licensee against whom a judgment is entered in a dramshop action has the right to seek indemnification from the alleged visibly intoxicated person only where the judgment resulted from a determination by the trier of fact that intoxication was a proximate cause of the damage, injury, or death sustained (MCL 436.22[4],[7]; MSA 18.933[4],[7]).

Braun Kendrick Finkbeiner P.L.C. (by *Jeffrey C. Wilson*), for Hoover Corners, Inc.

Fortino, Plaxton, Moskal & Costanzo, P.C. (by *Anthony G. Costanzo*), for Thomas J. Conklin.

Before: MARKEY, P.J., and BANDSTRA and MARKMAN, JJ.

BANDSTRA, J. Defendant/cross-defendant Thomas J. Conklin appeals as of right an order of judgment granting defendant/cross-plaintiff Hoover Corners, Inc.'s motion for summary disposition on its cross-claim for indemnification. We reverse and remand. In this case, we are asked to interpret MCL 436.22(7); MSA 18.993(7), a statutory provision in the dramshop act that allows a licensee to receive indemnification from an intoxicated person for all damages awarded against the licensee.

Plaintiff Luke Miller and defendant Conklin were at the Hoover Corners bar. Miller left to go to another bar, and Conklin, who needed a ride home, went with him. Miller was driving a truck owned by his parents, defendants Stanley and Theresa Miller. At some point, Miller decided not to drive anymore, so he and Conk-

lin switched places. Presumably Miller did not close the passenger door securely because, as Conklin went around a curve in the road, Miller fell out of the truck. When Conklin backed up to retrieve Miller, he ran over him. Miller filed this action, seeking damages from Conklin for negligent operation of the vehicle, damages from his parents, defendants Stanley and Theresa Miller, under the owner's liability statute, MCL 257.401; MSA 9.2101, and damages from Hoover Corners under the dramshop act, MCL 436.22; MSA 18.993. His wife, Janine Miller, alleged a derivative claim for loss of consortium. Hoover Corners filed a cross-claim against Conklin for indemnification pursuant to MCL 436.22(7); MSA 18.993(7). Hoover Corners claimed that there was no liability under the dramshop act because no sale to a visibly intoxicated person (allegedly Conklin) proximately caused Miller's injuries. Conklin claimed that Hoover Corners could not seek indemnity in the absence of dramshop liability by Hoover Corners.

The case was mediated on October 21, 1996. Two of the three mediators evaluated the case at $50,000 for settlement purposes, apportioning $5,000 against Hoover Corners and $45,000 against defendants Stanley and Theresa Miller and Conklin. Plaintiffs accepted the evaluation with respect to Hoover Corners only and rejected it with respect to the other defendants. Hoover Corners accepted the evaluation; Conklin rejected it.

Hoover Corners then filed motions for entry of judgment on the mediation evaluation with respect to plaintiffs' claims against it and for summary disposition on its cross-claim for indemnification pursuant to MCR 2.116(C)(10) (no genuine issue with respect to

any material fact). Conklin objected to the dispositive motion, arguing that Hoover Corners was not entitled to indemnification because the case had been resolved without a trial on the merits. Following oral argument, the court granted Hoover Corners' motions, and an order of judgment was entered. Thereafter, plaintiffs and remaining defendants settled the case, which was dismissed with prejudice.

The dramshop act prohibits a retail licensee from selling, furnishing, or giving alcohol to a visibly intoxicated person, MCL 436.22(3); MSA 18.993(3), and provides a remedy for violation of the prohibition. Specifically, the act states:

> Except as otherwise provided in this section, an individual who suffers damage or is personally injured by a . . . visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the . . . visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, . . . shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death. In an action pursuant to this section, the plaintiff shall have the right to recover actual damages in a sum of not less than $50.00 in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death. [MCL 436.22(4); MSA 18.993(4).]

If the dramshop is held liable for a violation of the act, it has a right of indemnification against the intoxicated person under subsection 7, which provides:

> Any licensee subject to the provisions of subsection (4) regarding the unlawful selling, furnishing, or giving of alcoholic liquor to a visibly intoxicated person shall have the right to full indemnification from the alleged visibly intoxi-

> cated person for all damages awarded against the licensee. [MCL 436.22(7); MSA 18.993(7).]

Conklin argues that the right of indemnification guaranteed by subsection 7 is triggered only when a judgment is entered after trial based on a determination by the trier of fact that there was an illegal sale to an intoxicated person that proximately caused injury to a third party. Conklin further argues that, in the present case, the judgment entered on a mediation acceptance is more akin to a consent judgment entered on a settlement than a judgment entered on a verdict following trial. Accordingly, because the judgment entered in this case was not a judgment entered after trial and, therefore, because the indemnification right guaranteed by subsection 7 was not triggered, Conklin argues that summary disposition was erroneously granted in favor of Hoover Corners on its claim for indemnification. Conklin's claims present questions of first impression, Michigan appellate courts never having considered subsection 7.[1]

"In enacting the dramshop act, the Legislature created a new remedy, not available at common law, and 'provided a specific action with which to achieve that remedy.' " *LaGuire v Kain*, 440 Mich 367, 374; 487 NW2d 389 (1992), quoting *Browder v Int'l Fidelity*

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[1] The only case that addresses the statute in depth is *Christian v Sanak*, 179 Mich App 9; 445 NW2d 446 (1989), in which the issue was whether subsection 7, which was added by the 1986 amendment of the dramshop act, should apply to a cause of action filed after July 1, 1986, as the Legislature provided, even though the cause of action arose before July 1, 1986. In a more recent case, three members of our Supreme Court noted the existence of subsection 7 while discussing the name-and-retain provision but did not have reason to interpret it. *Green v Wilson*, 455 Mich 342, 355; 565 NW2d 813 (1997) (KELLY, J). As Justice WEAVER noted in her separate opinion, "This Court has yet to be presented with a case interpreting the scope of the indemnification provision." *Id.* at 359.

Ins Co, 413 Mich 603, 613; 321 NW2d 668 (1982). The Legislature has attempted to keep the act internally balanced, resulting in a complete and self-contained solution to a social problem not adequately addressed at common law. *Browder*, *supra* at 614-615.

The primary purpose of statutory construction is to ascertain and give effect to the intention of the Legislature. *Id.* at 611. Statutory interpretation must begin with an examination of the words chosen by the Legislature. *LaGuire*, *supra* at 375. The statute should be construed in accordance with the ordinary and approved usage of the language employed in the statute. *Browder*, *supra* at 612. A court may consult dictionary definitions to determine the ordinary meaning of a word. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 470; 521 NW2d 831 (1994). Where the Legislature uses certain and unambiguous language, the plain meaning of the statute must be followed. *Browder*, *supra* at 611.

Subsection 7 clearly and unambiguously indicates that the right to indemnification exists only where damages are "awarded" against the licensee. With regard to when damages can be considered "awarded" for purposes of subsection 7, Black's Law Dictionary (6th ed), p 137, defines the verb "award" as follows:

> To grant, concede, or adjudge to. To give or assign by sentence or judicial determination or after careful weighing of the evidence. Thus, a jury *awards* damages; the court *awards* an injunction; one *awards* a contract to a bidder. To confer as being deserved or merited. [Emphasis in original.]

Additionally, subsection 7 grants a licensee a right to indemnification only if the licensee is "subject to the provisions of subsection (4)." Subsection 4 grants the injured individual the right to recover "actual damages . . . in each case in which the court or jury determines that intoxication was a proximate cause of the . . . injury" and resulted from an "unlawful sale." In other words subsection 4 presupposes a determination on the merits of the injured individual's damage claims and an assessment of actual damages by the trier of fact.

Reading subsections 4 and 7 together to maintain the internal balance of the act, and according the term "awarded" its plain and ordinary meaning, the language employed evinces an intent by the Legislature that damages be awarded for purposes of indemnification under subsection 7 when monetary compensation is paid to an injured individual for actual damages suffered under the conditions specified in subsection 4, as determined by a trier of fact after consideration of the merits of the injured individual's damage claims. Such a construction of subsection 7 protects the allegedly visibly intoxicated person from collusion between the injured individual and the licensee, much in the same way the name-and-retain provision protects the licensee from collusion between the injured individual and the visibly intoxicated person. *Browder*, *supra* at 615. This construction of subsection 7 also discourages a party from negotiating away its legitimate defenses, as Conklin claims Hoover Corners did here, because it is assured of indemnification from a third party.

Here, the $5,000 judgment against Hoover Corners was entered pursuant to MCR 2.403(M)(2), which

provides that a judgment shall enter only with regard to those opposing parties who have accepted the portions of the mediation evaluation that apply to them. Although an accepted mediation evaluation serves as a final adjudication of the claims mediated and is binding on the accepting parties, the acceptance of a mediation award is not analogous to a judgment entered after a trial and a verdict by a judge or jury. *Vermilya v Carter Crompton Site Development Contractors, Inc*, 201 Mich App 467, 472; 506 NW2d 580 (1993); *Espinoza v Thomas*, 189 Mich App 110, 117; 472 NW2d 16 (1991). Instead, a mediation proceeding that ends with the parties' acceptance of the mediators' evaluation is like a consent judgment reached after negotiation and settlement, *Espinoza, supra*, because

> the process used to arrive at a mediation evaluation differs from the trial process in that under the mediation rule no fact finding is necessary, no formal opinion is issued, and the parties are significantly limited in the presentation of evidence. See, generally, MCR 2.403. In arriving at a mediation evaluation, the mediation panel considers factors similar to those considered in the settlement process; for example, the mediators may consider insurance policy limits, the certainty of the claim, and the likelihood of recovery from the defendants. Thus, the dollar figure suggested in a mediation panel's evaluation does not constitute the actual valuation of the plaintiff's damages, but, instead, suggests a settlement figure that is reached by considering the plaintiff's damages as one of several factors. [*Vermilya, supra* at 473.][2]

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[2] The accuracy of the *Vermilya* Court's characterization of a mediation panel's evaluation is clearly demonstrated in the present case where two of the three mediators specifically noted that, in their opinion, the "damages sustained without regard to liability is [sic] greater than" the $50,000 that was being recommended for "settlement purposes." In other words,

Because a judgment entered on a mediation acceptance is not akin to a judgment entered following a trial and a verdict by a judge or jury, and because a mediation evaluation does not reflect the amount of actual damages suffered by the injured individual, the $5,000 judgment entered in this case on the mediation acceptance does not constitute damages awarded against Hoover Corners for purposes of subsection 7.

This conclusion is analogous to the recent decision in *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154; 561 NW2d 445 (1997), which involved a dispute between no-fault and medical insurance carriers. The plaintiff paid no-fault benefits on behalf of a person injured in an automobile accident and sought reimbursement from another no-fault carrier, defendant State Farm, and medical insurance carrier, defendant Omega. State Farm, in turn, filed a cross-claim for indemnification against Omega. After the plaintiff and State Farm settled pursuant to mediation, State Farm sought judgment on its indemnification claim, which the trial court granted. On appeal, this Court reversed in part because State Farm "voluntarily paid plaintiff $24,000 in settlement of any claims plaintiff may have had against it as a result of the $24,000 mediation award entered in favor of plaintiff and against State Farm." *Id.* at 165-166. This Court reasoned that "[p]ursuant to MCR 2.403(M)(2), State Farm and plaintiff could enter into a judgment between themselves because they accepted the portions of the mediation evaluation that applied to them. . . . The acceptance of a mediation evaluation is

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these mediators did not consider $50,000 to be the measure of plaintiff's damages but evaluated the claim at this level for settlement purposes in consideration of problems plaintiff might encounter proving liability.

legally equivalent to a consent judgment reached after negotiation and settlement. . . . For all practical purposes, the parties entered into a settlement agreement under the mediation rules." *Id.* at 166 (citation omitted).

We recognize that the mediation process and Michigan law generally favor settlement of disputes. We also note that dramshops will be less likely to settle claims brought by injured persons if there is no automatic right to indemnification against the person whose intoxication allegedly caused the injury. Nevertheless, the language of the statute and principles of basic fairness prevent the allegedly intoxicated person from being bound by a settlement reached between the other parties.[3]

We reverse the decision of the trial court granting Hoover Corners' motion for summary disposition. Hoover Corners had no right to indemnification from Conklin for the amount paid to plaintiffs absent a determination that Hoover Corners was, in fact, liable to plaintiffs under subsection 4. We remand for further proceedings to determine the merits of the claim against Hoover Corners wherein Conklin shall be afforded the right to raise defenses that Hoover Corners might have raised had the underlying dramshop action proceeded to trial. We do not retain jurisdiction.

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[3] Obviously, the policy in favor of settlement can be satisfied in these cases if all parties involved agree to a settlement of both the dramshop and indemnification claims.

PEOPLE v DAVENPORT

Docket No. 204980. Submitted May 13, 1998, at Detroit. Decided July 7, 1998, at 9:10 A.M. Leave to appeal sought.

Bruce Davenport, Jr., was convicted by a jury in the Oakland Circuit Court, Rudy J. Nichols, J., of carjacking. The court granted the defendant's motion for a new trial, ruling that the court should have instructed the jury that carjacking is a specific intent crime. The prosecution appealed by leave granted.

The Court of Appeals *held*:

Carjacking is a general intent crime that requires for conviction proof that the defendant took a motor vehicle from another person, that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and that the defendant did so by force or violence, by threat of force or violence, or by putting the other person in fear. Carjacking does not require proof of specific intent to deprive the victim of the motor vehicle or of specific intent to put the victim in fear. The carjacking statute, MCL 750.529a(1); MSA 28.797(a)(1), does not use words like "knowingly," "willfully," "purposely," or "intentionally," which would indicate legislative intent to require proof of specific intent. Also, the legislative history of the statute does not indicate that the Legislature intended to require proof of specific intent for conviction.

Order granting new trial vacated; case remanded for sentencing.

CRIMINAL LAW — CARJACKING.

Carjacking is a general intent crime that requires for conviction proof that the defendant took a motor vehicle from another person, that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and that the defendant did so by force or violence, by threat of force or violence, or by putting the other person in fear (MCL 750.529a[1]; MSA 28.797[a][1]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Richard H. Browne*, Chief, Appellate

Division, and *John S. Pallas*, Assistant Prosecuting Attorney, for the people.

Mark E. Bredow, for the defendant on appeal.

Before: HOOD, P.J., and MACKENZIE and DOCTOROFF, JJ.

PER CURIAM. Defendant was charged with carjacking, MCL 750.529a; MSA 28.797(a). At trial, the defense requested a jury instruction on specific intent, contending that the carjacking statute implicitly required a showing of specific intent (1) to deprive the victim of the automobile, and (2) to put the victim in fear. The trial court initially refused to give a specific intent instruction. Following defendant's conviction, however, the trial court granted defendant's motion for a new trial on the basis that it should have instructed the jury on the element of specific intent. The prosecution appeals by leave granted. We vacate the order granting a new trial and remand for sentencing.

The sole issue before us is whether the statutory offense of carjacking is a specific intent crime. We conclude that it is not. The carjacking statute, MCL 750.529a(1); MSA 28.797(a)(1), provides:

> A person who by force or violence, or by threat of force or violence, or by putting in fear robs, steals, or takes a motor vehicle as defined in [MCL 750.412; MSA 28.644] from another person, in the presence of that person or the presence of a passenger or in the presence of any other person in lawful possession of the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment of life or for any term of years.

Thus, in order to sustain a carjacking conviction, the prosecution must prove (1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear. *People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998).

From these elements, defendant posits two forms of specific intent necessary to sustain a carjacking conviction. The first, related to the taking element, is the intent to deprive the victim permanently of possession of the vehicle taken. This Court has previously rejected an identical argument, reasoning that the plain language of the carjacking statute does not require an intent to deprive permanently. *People v Terry*, 224 Mich App 447, 454-455; 569 NW2d 641 (1997); *Green*, *supra*, p 696. We agree with that conclusion.

The second form of specific intent that defendant claims is necessary to sustain a carjacking conviction relates to the coercion element of the offense: the specific intent to put the victim in fear. Neither *Terry*, *supra*, nor *Green*, *supra*, addressed this particular aspect of the offense.

Specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself. *People v Lardie*, 452 Mich 231, 240; 551 NW2d 656 (1996). To determine if a criminal statute requires specific intent, this Court looks to the mental state set forth in the statute. *People v American Medical*

Centers of Michigan, Ltd, 118 Mich App 135, 153; 324 NW2d 782 (1982). Read as a whole, the language of the carjacking statute does not support the proposition that the Legislature intended specific intent to be an element of the crime. Words typically found in specific intent statutes include "knowingly," "willfully," "purposely," and "intentionally." *Id.*, *People v Norman*, 176 Mich App 271, 275; 438 NW2d 895 (1989). Those words are absent from the carjacking statute.

Additionally, the legislative history of the carjacking statute indicates that the Legislature did not intend that carjacking prosecutions include the burden of proving specific intent. As explained in the Senate Fiscal Agency Bill Analysis, SB 773, February 17, 1994:

> The bill would make it easier for prosecutors to try carjackers and to show that an offender committed a felony. *Robbery and assault offenses typically include elements of intent that can make it difficult to prosecute individuals on those charges.* As a result, many of those initially charged with armed assault or robbery enter into plea bargain agreements and, consequently, are punished for less serious offenses. . . . *Carjacking charges would more likely be tried on their merits rather than plea bargained, because the elements of the proposed offense would be easier to prove than those of robbery or assault.* [Emphasis added.]

On the basis of this analysis, it seems clear that the Legislature purposely omitted any element of specific intent in the crime of carjacking in order to make it simpler to convict offenders. Reading a specific intent element into the statute would negate that objective.

The clear language of the carjacking statute indicates that no intent is required beyond the intent to

do the act itself, that is, using force, threats, or putting in fear in order to take a vehicle from a person in lawful possession and in that person's presence. As such, carjacking is a general intent crime. *Lardie, supra*, p 240; *People v Laur*, 128 Mich App 453, 455; 340 NW2d 655 (1983).

The trial court appears to have believed that, in the absence of a specific intent element, the carjacking statute impermissibly creates a strict liability offense. We disagree. Generally, strict liability statutes are designed to protect the public welfare by placing the burden of protecting society on a person " 'otherwise innocent but standing in responsible relation to public danger.' " *Lardie, supra*, p 254, quoting *People v Quinn*, 440 Mich 178, 187; 487 NW2d 194 (1992). The carjacking statute does not seek to regulate the conduct of a person who is otherwise innocent; instead, it punishes a person's voluntary act of using force or fear to take another person's vehicle. Compare *Lardie, supra*, p 255. Moreover, the penalties for strict liability crimes generally are relatively small. *Id.* Carjacking is punishable by imprisonment for life or any term of years. We therefore conclude that the statute does not impose strict liability, but requires a general intent or mens rea.

Vacated and remanded for sentencing. We do not retain jurisdiction.

WAATTI & SONS ELECTRIC COMPANY v DEHKO

Docket No. 197851. Submitted April 23, 1998, at Detroit. Decided July 7, 1998, at 9:15 A.M. Leave to appeal sought.

Waatti & Sons Electric Company brought an action in the Macomb Circuit Court against Shaya Construction Company, Inc., alleging claims of open account, breach of contract, and unjust enrichment, and obtained a default judgment against the defendant. When the principal defendant, Shaya Construction, was unable to pay the judgment, the plaintiff served a writ of garnishment on Tarik Dehko, seeking money allegedly still owed by the garnishee defendant to the principal defendant under a construction contract. The garnishee defendant filed disclosures denying that he was indebted to the principal defendant. The court, Michael D. Schwartz, J., granted summary disposition for the garnishee defendant on the basis that on the date that the garnishee defendant was served with the writ of garnishment there was no fixed amount of any debt owed by the garnishee defendant to the principal defendant. The court, thereafter, denied the plaintiff's motion for rehearing and reconsideration, rejecting the plaintiff's argument that the damages arising from a garnishee defendant's breach of contract need not be reduced to a judgment to be a proper subject of garnishment as long as they were ascertainable from the contract. The plaintiff appealed.

The Court of Appeals *held*:

1. Although the garnishee defendant is correct in his assertion that the plaintiff's claim of appeal was not timely filed, under these circumstances and as a matter of discretion, the plaintiff's appellate pleadings will be treated as an application for leave to appeal, and leave to appeal will be granted so that the issue on appeal can be resolved on the merits.

2. MCL 600.4011; MSA 27A.4011 provides that a court's garnishment power extends to any obligation owed to a principal defendant if the garnishee defendant is subject to the court's jurisdiction and that the court's exercise of that garnishment power must be in accordance with the Michigan Court Rules. MCR 3.101(G)(1)(d) provides that a garnishee defendant is liable for all debts, whether or not due, owing by the garnishee defendant to a principal defend-

ant on the date the writ of garnishment was served on the garnishee defendant, except for debts evidenced by negotiable instruments or representing the principal defendant's earnings. Debts due in the future are those that are already fixed in amount or are capable of being so fixed and that do not depend for their validity or amount on anything to be done or earned in the future or on a continued liability that may be changed by events.

3. Where an obligation of a garnishee defendant to a principal defendant arises out of a contract under which the garnishee defendant's debt is capable of being fixed but the garnishee defendant has asserted that there is no further indebtedness, a court should try the issue of the garnishee defendant's liability in the same manner as other civil actions. Because the garnishee defendant admitted that he had contracted with the principal defendant to have a house built at a set price, that the principal defendant had performed some, if not all, of the contracted services, and that on the date he was served with the writ of garnishment he had paid to the principal defendant less than the contract price, the court could have ascertained the amount of any debt still owing under the contract in light of the proffered evidence. Accordingly, the court erred in granting summary disposition for the garnishee defendant.

Reversed and remanded.

1. GARNISHMENT — PRESENT DEBTS — FUTURE DEBTS.

A garnishee defendant is liable for all debts, whether or not due, owing by the garnishee defendant to a principal defendant on the date the writ of garnishment was served on the garnishee defendant, except for debts evidenced by negotiable instruments or representing the principal defendant's earnings; debts due in the future are those that are already fixed in amount or are capable of being so fixed and that do not depend for their validity or amount on anything to be done or earned in the future or on a continued liability that may be changed by events (MCL 600.4011[1][b]; MSA 27A.4011[1][b]; MCR 3.101[G][1][d]).

2. GARNISHMENT — CONTRACTS — EXTENT OF LIABILITY — TRIAL.

A court should try the issue of a garnishee defendant's liability in the same manner as other civil actions where the obligation of the garnishee defendant to a principal defendant arises out of a contract under which the garnishee defendant's debt is capable of being fixed but the garnishee defendant has asserted that there is no further indebtedness.

Donald P. Howard & Associates, P.C. (by *Donald P. Howard*), for the plaintiff.

Peter J. Lucido, P.C. (by *Peter J. Lucido*), for the defendant.

Before: JANSEN, P.J., and KELLY and MARKEY, JJ.

PER CURIAM. Plaintiff appeals as of right from the trial court's order granting garnishee defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff filed the underlying action against Shaya Construction Company, Inc., alleging claims of open account, breach of contract, and unjust enrichment and obtained a default judgment against Shaya Construction for $30,480.32, with costs, on February 3, 1994. Shaya Construction was unable to pay the judgment. Shaya Construction, a general contractor, had contracted with garnishee defendant to construct garnishee defendant's home. Garnishee defendant paid Shaya Construction approximately $239,500 of the $300,000 construction contract. Therefore, plaintiff served a writ of garnishment on garnishee defendant on September 15, 1995. In response, garnishee defendant filed disclosures denying that he was indebted to Shaya Construction. On July 1, 1996, the trial court granted garnishee defendant's motion for summary disposition, stating that on the date the writ of garnishment was served there was no fixed amount of any debt owed by garnishee defendant to Shaya Construction. On its motion for rehearing and reconsideration, plaintiff argued that the damages arising from garnishee defendant's breach of contract need not be reduced to judgment in order to be the proper subject of garnishment, as long as they were readily ascertainable from the contract. The trial

court disagreed, and thus denied the motion for rehearing and reconsideration.

On appeal, we first choose to address garnishee defendant's argument that we do not have jurisdiction over this matter because plaintiff failed to timely file its appeal of right. We agree with garnishee defendant that plaintiff's filing was untimely because it failed to comply with the timing requirements as set forth in MCR 7.204. However, we may, in our discretion, accept the pleadings as an application for leave to appeal, grant the appeal, and resolve the appealed issue on the merits. *Guzowski v Detroit Racing Ass'n, Inc*, 130 Mich App 322, 324; 343 NW2d 536 (1983). Under the circumstances, we so choose. By now, the parties and this Court have invested a great deal of time in this matter. Because the trial court was incorrect in granting garnishee defendant's motion for summary disposition, it would be unfair to deny plaintiff's recovery on a mere procedural error.

We now turn to the primary issue presented on appeal, which is whether the trial court erred in granting garnishee defendant's motion for summary disposition. MCR 2.116(C)(10) permits summary disposition of a claim where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any

material fact exists to warrant a trial. *Id.* A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Id.* Additionally, resolution of the issue on appeal involves interpretation of the court rules. Interpretation of the court rules presents a question of law, which is reviewed de novo. *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 598; 552 NW2d 523 (1996).

The parties' arguments principally concern whether any debt was "owing" by garnishee defendant to Shaya Construction at the time plaintiff served garnishee defendant with the writ of garnishment. Plaintiff contends that the trial court erred in granting garnishee defendant's motion for summary disposition because the evidence it submitted showed that garnishee defendant owed Shaya Construction for payments not yet received pursuant to the parties' contract. Defendant counters by arguing that plaintiff failed to establish that garnishee defendant was indebted to Shaya Construction in any amount, primarily because the debt had not been reduced to judgment at the time plaintiff served garnishee defendant with the writ of garnishment. We hold that the trial court erred in granting garnishee defendant's motion for summary disposition because the debt garnishee defendant owed to Shaya Construction when garnishee defendant was served with the writ of garnishment was ascertainable from the parties' contract and other competent evidence.

MCL 600.4011(1); MSA 27A.4011(1) states, in pertinent part:

> [T]he court has power by garnishment to apply the following property or obligation, or both, to the satisfaction of a claim evidenced by contract, judgment of this state, or

> foreign judgment, whether or not the state has jurisdiction over the person against whom the claim is asserted.
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> * * *
>
> (b) An obligation owed to the person against whom the claim is asserted if the obligor is subject to the judicial jurisdiction of the state.

Pursuant to MCL 600.4011(2); MSA 27A.4011(2), the court may exercise its garnishment power only in accordance with the Michigan Court Rules. In turn, MCR 3.101(G)(1)(d), the court rule on which the trial court relied in granting garnishee defendant's motion for summary disposition,[1] provides in pertinent part:

> Subject to the provisions of the garnishment statute and any setoff permitted by law or these rules, the garnishee is liable for
>
> * * *
>
> (d) all debts, whether or not due, owing by the garnishee to the defendant when the writ is served on the garnishee, except for debts evidenced by negotiable instruments or representing the earnings of the defendant.

The trial court erred in concluding that MCR 3.101(G)(1)(d) required that the debt garnishee defendant owed to Shaya Construction must be reduced to judgment before the writ of garnishment was served in order to qualify as a "debt owing." In

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[1] The trial court also cited MCR 3.101(G)(1)(g) in its opinion and order granting garnishee defendant' motion for summary disposition. MCR 3.101(G)(1)(g) states that the garnishee is liable for "all judgments in favor of the defendant against the garnishee in force when the writ is served on the garnishee." There is no evidence that Shaya Construction had obtained a judgment against garnishee defendant before service of the writs. It did, however, obtain a binding arbitration award in its favor after service of the writs.

Chayka v Brown, 92 Mich App 360, 367; 284 NW2d 530 (1979), this Court interpreted GCR 1963, 738.5(4), the former court rule governing the garnishment of debts owed to defendants:

> GCR 1963, 738.5(4) further provides that the garnishee defendants are liable for all debts they owed to the principle defendants at the time of the service of the writ "whether or not they are due." In its interpretation of this clause, Michigan is in accord with the majority of jurisdictions which hold that for a garnishment to be effective there must be an existing debt. Debts due in the future then refer to claims which are already fixed in amount or capable of being so fixed, and which do not depend for their validity or amount on anything to be done or earned in the future, or a continued liability which may be changed by events.

Here, the trial court erred in granting garnishee defendant's motion for summary disposition simply because garnishee defendant denied liability to Shaya Construction and the debt garnishee defendant owed Shaya Construction was otherwise not fixed. Where a garnishee defendant denies liability, the proper course is for the trial court to try the issue of the garnishee defendant's liability "in the same manner as other civil actions." MCR 3.101(M)(1); see also *Rutter v King*, 57 Mich App 152, 170-171; 226 NW2d 79 (1974). Here, the debt, which arose from a contract between Shaya Construction and garnishee defendant, was capable of being fixed, and its validity did not depend on any future action to be taken by the parties to the contract. See *Talbert v Solventol Chemical Products, Inc*, 304 Mich 557, 562-563; 8 NW2d 637 (1943) (garnishment proper where damages ascertainable from terms of contract and additional testimony); see also *Rutter*, *supra*, pp 169-170.

Thus, the issue in garnishee defendant's motion for summary disposition was, in accordance with MCR 2.116(C)(10), whether plaintiff submitted sufficient evidence to provide factual support for its claim that garnishee defendant owed a debt to Shaya Construction at the time plaintiff served the writ of garnishment on garnishee defendant. As garnishee defendant admits, before plaintiff served either writ of garnishment, Shaya Construction performed some, if not all, of the service it contracted to perform for garnishee defendant pursuant to their 1992 contract. The original contract obligated garnishee defendant to pay approximately $300,000 to Shaya Construction for its services. Evidence showed that garnishee defendant paid only a portion of that amount, or $239,500.[2] Thus, the debt could have been fixed with reference to the parties' contract and other competent evidence. Because plaintiff submitted evidence from which the trial court could ascertain the amount of the debt garnishee defendant owed Shaya Construction, the trial court erred in granting garnishee defendant's motion for summary disposition.

Reversed and remanded for a determination of the amount owed by garnishee defendant to Shaya Construction. We do not retain jurisdiction.

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[2] Moreover, we note that plaintiff's counsel during oral argument conceded that plaintiff would be limited to recovery of $21,340.43.

PEOPLE v WILSON

Docket No. 194715. Submitted February 3, 1998, at Lansing. Decided July 7, 1998, at 9:20 A.M. Leave to appeal sought.

Charles E. Wilson was convicted by a jury in the Saginaw Circuit Court, William A. Crane, J., of discharging a firearm at a dwelling, possession of a firearm during the commission of a felony, and possession of a firearm by a person convicted of a felony. He also pleaded guilty of being a second-offense habitual offender. The defendant appealed.

The Court of Appeals *held*:

1. The evidence showing that the defendant shot a firearm toward or in the direction of a house, although above the house, was sufficient to support the convictions of discharging a firearm at a dwelling or occupied structure and possession of a firearm during the commission of a felony. The term "at" in the statute prohibiting the intentional discharge of a firearm at a dwelling or occupied structure can also convey the meaning of "above."

2. The statute prohibiting the discharge of a firearm at a dwelling is not unconstitutionally vague. The statute sufficiently placed the defendant on notice that his discharge of a firearm aimed close to the building in order to place the inhabitants in fear for their safety was prohibited and did not confer on the jury unstructured and unlimited discretion to determine whether an offense was committed in the context of the charged conduct. The statute does not use terms that require persons of common intelligence to guess at its meaning and differ regarding its application to the facts of a case.

3. Double jeopardy principles were not violated when the trial court used evidence of the defendant's prior felony conviction both to establish the crime of possession of a firearm by a person convicted of a felony and to enhance the maximum sentence for the conviction of possession of a firearm by a person convicted of a felony under the habitual offender act.

Affirmed.

1. CRIMINAL LAW — DISCHARGE OF FIREARM AT DWELLING — WORDS AND PHRASES — AT.

The statute prohibiting the intentional discharge of a firearm at a dwelling prohibits the discharge of a firearm toward or in the direc-

tion of a dwelling, including close to or above the dwelling (MCL 750.234b; MSA 28.431[2]).

2. CRIMINAL LAW — CONSTITUTIONAL LAW — STATUTES — DISCHARGE OF FIREARM AT DWELLING.

The statute prohibiting the intentional discharge of a firearm at a dwelling is not unconstitutionally vague and does not use terms that require persons of common intelligence to guess at the meaning of the statute and differ regarding its application to the facts of a case; the statute sufficiently places a person on notice that the discharge of a firearm aimed close to a building in order to place the inhabitants in fear for their safety is prohibited and does not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense was committed (MCL 750.234b; MSA 28.431[2]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *Catherine Langevin Semel*, Assistant Prosecuting Attorney, for the people.

Douglas W. Baker, for the defendant on appeal.

Before: MARKEY, P.J., and BANDSTRA and MARKMAN, JJ.

BANDSTRA, J. Following a jury trial, defendant was convicted of discharging a firearm at a dwelling, MCL 750.234b; MSA 28.431(2), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and possession of a firearm by a person convicted of a felony, MCL 750.224f; MSA 28.421(6). Defendant also pleaded guilty of being a second-offense habitual offender, MCL 769.10; MSA 28.1082. He was sentenced to two years' imprisonment for the felony-firearm conviction, to be followed by six months' to four years' imprisonment for the discharging a firearm at a dwelling conviction, and six months' to 7½ years' imprisonment for the felon in possession of a firearm conviction. Defendant's convictions stem from defendant's shooting bullets

"above" a house, without actually hitting the house. Defendant now appeals as of right. We affirm.

I

Defendant first argues that the evidence was insufficient to support his conviction of the crime of discharging a firearm at a dwelling or occupied structure because the evidence showed that defendant fired "above," not "at" a house. MCL 750.234b(1); MSA 28.431(2)(1) provides that "an individual who intentionally discharges a firearm at a facility that he or she knows or has reason to believe is a dwelling or an occupied structure is guilty of a felony . . . ."

A basic rule of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994). The first criterion in determining intent is the specific language of the statute. *People v Pitts*, 216 Mich App 229, 232; 548 NW2d 688 (1996). Because the Legislature did not define the word "at" as used in § 234b(1), its ordinary meaning applies. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 469-470; 521 NW2d 831 (1994). Reference to a dictionary is appropriate to determine the ordinary meaning of a word. *Id.* at 470. As used in the present context, *The American Heritage Dictionary: Second College Edition* (1982), p 137, defines the word "at" as "[t]o or toward the direction of." Further, *Random House Webster's College Dictionary* (1997), p 83, defines "at" as "in, on, or near." Thus, contrary to defendant's argument, "at," according to the above definitions, can convey the meaning of "above."

In this case, the evidence showed that defendant was shooting toward or in the direction of the house.

Although one victim in the house thought that defendant was shooting too high to hit the house, that same victim testified that he feared for his life thinking that defendant was shooting "at [his] house." Another victim testified that she also feared for her life. Thus, the evidence, viewed in a light most favorable to the prosecutor, would allow a rational trier of fact to find that the essential elements of the crime of discharging a firearm at a dwelling or occupied structure were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Further, because there was sufficient evidence to find defendant guilty of discharging a firearm at a dwelling or occupied structure, this offense could serve as the underlying felony for the felony-firearm conviction. *People v Guiles*, 199 Mich App 54, 59; 500 NW2d 757 (1993).

II

Defendant next argues that the statute prohibiting the discharge of a firearm at a dwelling, as applied in this case in which defendant aimed and fired a gun closely "over" a dwelling, offends state and federal constitutional protections against unduly vague statutes. Although defendant should have challenged the constitutionality of the statute in the trial court to preserve the issue for appellate review, we may still consider this constitutional question absent a challenge below. *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507 NW2d 744 (1993). We review vagueness challenges in light of the facts at issue. *People v Perez-DeLeon*, 224 Mich App 43, 47; 568 NW2d 324 (1997). Further, we are obligated to construe a statute as constitutional unless its unconstitu-

tionality is clearly apparent. *People v Hubbard (After Remand)*, 217 Mich App 459, 483-484; 552 NW2d 493 (1996). We review de novo a challenge to a statute's constitutionality under the void-for-vagueness doctrine. *Id.* at 484.

Defendant argues that the statute is unconstitutionally vague because it does not provide fair notice of the conduct proscribed and because it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed. We disagree. Our conclusion above that the statute prohibiting intentional discharge of a firearm at a dwelling prohibits the discharge of a firearm in the direction of a dwelling was based on commonly accepted meanings of the word "at." Accordingly, we consider this meaning of the statute to be sufficiently definite to withstand defendant's vagueness challenge. *People v Vronko*, 228 Mich App 649; 653; 579 NW2d 138 (1998). Given the commonly accepted meanings as found in the dictionary, the statute (1) sufficiently placed defendant on notice that his discharge of a firearm aimed close to the building in order to place the inhabitants in fear for their safety was prohibited and (2) did not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense was committed in the context of the charged conduct. *Id.* at 652. The statute does not "use terms that require persons of common intelligence to guess at the statute's meaning and differ regarding its application" to the facts of this case. *Sanchez v Lagoudakis (On Remand)*, 217 Mich App 535, 555; 552 NW2d 472 (1996).

III

Defendant next argues that the prosecutor caused a miscarriage of justice when he erroneously commented that felonious assault is a more serious offense than discharging a firearm at a dwelling, thereby inviting a compromise guilty verdict with regard to the latter charge.

> Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error. An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. [*Stanaway, supra* at 687 (citations omitted).]

A miscarriage will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely curative instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Because a proper curative instruction could have eliminated any prejudicial effect of the prosecutor's remarks, we decline to address the issue.

IV

Defendant finally argues that the trial court violated double jeopardy principles in using evidence of defendant's prior felony conviction both to establish the crime of possession of a firearm by a person convicted of a felony, MCL 750.224f; MSA 28.421(6), and then, again, under the habitual offender act, MCL 769.10; MSA 28.1082, to enhance his maximum sentence for the felon in possession conviction to 7½ years. Absent the habitual offender enhancement, the maximum sentence would have been five years. MCL 750.224f(3); MSA 28.421(6)(3). However, this did not

constitute a violation of double jeopardy principles. *People v Phillips*, 219 Mich App 159, 163; 555 NW2d 742 (1996).

We affirm.

PEOPLE v DARDEN

Docket No. 196697. Submitted April 14, 1998, at Detroit. Decided July 10, 1998, at 9:05 A.M. Leave to appeal sought.

Charles M. Darden was convicted following a bench trial in the Detroit Recorder's Court, Wendy M. Baxter, J., of voluntary manslaughter and possession of a firearm during the commission of a felony. The defendant appealed.

The Court of Appeals *held*:

1. The information, which charged the defendant with premeditated murder, gave adequate notice to the defendant that he had to defend himself against a charge of voluntary manslaughter. A charge of first-degree murder requires consideration of the lesser included offense of second-degree murder, and voluntary manslaughter is a cognate lesser included offense of murder.

2. There was sufficient evidence of provocation as a mitigating factor such that the defendant was properly convicted of voluntary manslaughter instead of second-degree murder.

3. Review of the defendant's claims of ineffective assistance of counsel is limited to mistakes apparent on the record in the absence of a motion for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). Defense counsel, in not moving to quash or dismiss the information and in not moving for a directed verdict, did not render ineffective assistance. Those motions would have been frivolous or meritless in light of the evidence produced against the defendant. Defense counsel's failure to introduce into evidence a prior statement by the defendant was not ineffective assistance, because the statement was inadmissible hearsay.

4. The defendant is not entitled to a new trial on the basis of claimed newly discovered evidence consisting of a police report that allegedly was not made available to the defendant. The record does not support the defendant's claim, the defendant did not move in the trial court for a new trial, and the police report contained the prior statement by the defendant that is inadmissible as hearsay and would therefore not entitle the defendant to a new trial.

Affirmed.

1. HOMICIDE — VOLUNTARY MANSLAUGHTER — INFORMATION CHARGING FIRST-DEGREE MURDER — ADEQUATE NOTICE.

An information that charges a defendant with first-degree murder provides adequate notice to the defendant of the need to defend against a charge of voluntary manslaughter arising out of the same conduct; a charge of first-degree murder requires consideration of the lesser included offense of second-degree murder, and voluntary manslaughter is a cognate lesser included offense of murder (MCL 750.321; MSA 28.553).

2. HOMICIDE — VOLUNTARY MANSLAUGHTER — PROVOCATION.

A conviction of voluntary manslaughter requires proof sufficient to sustain a conviction of second-degree murder, along with evidence of provocation as a mitigating factor (MCL 750.321; MSA 28.553).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *John D. O'Hair*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Thomas M. Chambers*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Desiree M. Ferguson*), for the defendant on appeal.

Before: SAWYER, P.J., and BANDSTRA and J. B. SULLIVAN* , JJ.

PER CURIAM. Defendant appeals as of right from his bench trial convictions of voluntary manslaughter, MCL 750.321; MSA 28.553,[1] and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to five to fifteen years' imprisonment for his voluntary manslaughter conviction and two years' imprisonment for his felony-firearm conviction. We affirm.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

[1] Defendant was charged with first-degree, premeditated murder, MCL 750.316; MSA 28.548, but was convicted of the lesser included offense of voluntary manslaughter.

The victim, Curren McCollum, was shot and killed while trying to steal a transmission from defendant's yard. McCollum and another man, Roy Lee Tubbs, were picking up metal scrap for salvaging purposes. As McCollum and Tubbs were driving their pickup truck through an alley, McCollum noticed a transmission located inside a chain-link fence. There was a hole in the fence that allowed the men access to the transmission. As the men were taking the transmission out of the yard, defendant opened a second-floor window and pointed a handgun at them. While there was contradictory testimony regarding the exact events that followed, it is clear that defendant and the two men argued. Tubbs then jumped into the pickup truck and began to drive away. Tubbs heard a gunshot, and, when he looked back, he saw McCollum lying in the alley. It is undisputed that the victim died as the result of a gunshot fired by defendant.

Defendant first claims that the trial court improperly convicted him of voluntary manslaughter because he received inadequate notice that he would have to defend against that charge. We disagree. Defendant first suggests that the trial court erred in considering the charge of voluntary manslaughter when neither the prosecution nor the defense requested such an instruction. There is absolutely no merit to this contention. A trial court may consider lesser offenses sua sponte. *People v Chamblis*, 395 Mich 408, 417; 236 NW2d 473 (1975), overruled in part by *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982).[2]

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[2] We recognize that *Chamblis* addressed this question in the context of a jury trial, rather than a bench trial. However, the reasoning behind the Court's conclusion in *Chamblis* applies equally in either context. See

Defendant also argues that the information charging him with first-degree murder was insufficient to give him notice that he would have to defend against a charge of voluntary manslaughter. Again, defendant's argument is without merit.

We review constitutional issues de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence." *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948). A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment. See *People v Jones*, 395 Mich 379, 388; 236 NW2d 461 (1975).

Here, we begin by noting that the information in this case charged defendant with first-degree, premeditated murder. A charge of first-degree murder requires consideration of the lesser included offense of second-degree murder. *People v Jenkins*, 395 Mich 440, 442; 236 NW2d 503 (1975). Thus, the information served to notify defendant that he would have to defend charges of first- and second-degree murder. We also note that voluntary manslaughter is a cognate lesser included offense of murder. *People v Etheridge*, 196 Mich App 43, 55; 492 NW2d 490 (1992). The Michigan Supreme Court has addressed the constitutional notice requirement in the context of lesser included offenses: In order "[t]o assure defendant's due-

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Chamblis, supra at 417; *People v Quinn*, 136 Mich App 145, 147-148; 356 NW2d 10 (1984).

process rights to fair notice, the trial judge may not instruct on lesser included offenses over defendant's objection unless the language of the charging document 'be such as to give the defendant notice that he could at the same time face the lesser included offense charge.' "[3] *Chamblis*, *supra* at 418, quoting *United States v Whitaker*, 144 US App DC 344, 350; 447 F2d 314 (1971). Thus, an instruction about a cognate lesser included offense could, at least theoretically, violate a defendant's right to adequate notice. *Chamblis*, *supra* at 418.[4] Lack of adequate notice violates a defendant's right to due process and mandates reversal. *People v James*, 142 Mich App 225, 229-230; 369 NW2d 216 (1985).

Contrary to defendant's arguments, the constitutional notice requirement is not some abstract legal technicality requiring reversal in the absence of a perfectly drafted information. Instead, it is a practical requirement that gives effect to a defendant's right to know and respond to the charges against him. Here, defendant does not argue that he was misled regarding the nature or severity of the charges against him;

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[3] In this case, defendant did not have an opportunity to object to consideration of the charge of voluntary manslaughter, because this was a bench trial and the trial court considered the charge sua sponte. However, defendant did object at sentencing, which was essentially his first opportunity. Under these circumstances, we are compelled to give defendant the benefit of the doubt and assume that he would have made a timely objection had he had the opportunity. The trial court could have avoided this problem by simply informing the parties that it was going to consider voluntary manslaughter and asking if either party objected.

[4] The Supreme Court has placed a practical limitation on the number and type of lesser included offenses that a jury may consider. *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982) (overruling *Chamblis*, *supra*, in part). This limitation is not at issue here and, in any event, it does not apply in bench trials. *Id.* at 260; *People v Cazal*, 412 Mich 680, 689; 316 NW2d 705 (1982).

clearly, the information in this case was sufficient to give him notice regarding the events that formed the basis of those charges.[5] Instead, defendant argues that the lack of notice regarding the charge of voluntary manslaughter somehow prejudiced his defense.[6]

Defendant's argument ignores the fact that there are no additional defenses to voluntary manslaughter beyond those available for second-degree murder. Put differently, a voluntary manslaughter conviction requires proof sufficient to sustain a conviction of second-degree murder, along with evidence of provocation as *a mitigating factor*. See *People v Pouncey*, 437 Mich 382, 388-389; 471 NW2d 346 (1991); *People v Van Wyck*, 402 Mich 266, 269; 262 NW2d 638 (1978); *People v Jones*, 151 Mich App 1, 4; 390 NW2d 189 (1986). The absence of this mitigating factor is not a defense to voluntary manslaughter. Instead, the absence of this factor turns voluntary manslaughter into second-degree murder. Thus, the failure to

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[5] The information included the date and location of the incident and informed defendant that he was charged with killing Curren McCollum.

[6] Indeed, prejudice is essentially a prerequisite to any claim of inadequate notice. See *People v Traughber*, 432 Mich 208, 215; 439 NW2d 231 (1989) ("[T]he dispositive question is whether the defendant knew what acts he was being tried for so he could adequately put forth a defense. Put another way, was the defendant prejudiced by the information[?]"); *United States v Gonzales*, 121 F3d 928, 941 (CA 5, 1997) ("we will not invalidate an indictment for purely technical errors, but only for errors that mislead the defendant to his prejudice"); *Burris v Farley*, 845 F Supp 636, 657 (ND Ind, 1994), quoting *Bae v Peters*, 950 F2d 469, 478 (CA 7, 1991) (" 'A vague indictment . . . or a last-minute change in the charge could prejudice a defendant's opportunity to defend himself; if that prejudice is severe enough, a due process violation could occur.' "); *State v Mancinone*, 15 Conn App 251, 258; 545 A2d 1131 (1988) (requiring "a clear and specific showing of prejudice to the defense"). See also *In re Ruffalo*, 390 US 544; 88 S Ct 1222; 20 L Ed 2d 117 (1968) (holding that the addition of charges after the defendant had testified deprived him of procedural due process where the added charges stemmed from admissions in his testimony).

include a charge of voluntary manslaughter in an information charging first- or second-degree murder will never prejudice a defendant's defense.[7] Under these circumstances, defendant was not denied adequate notice of the charges against him.

Defendant also argues that there was insufficient evidence to sustain his conviction of voluntary manslaughter. Defendant contends that there was no evidence of adequate provocation. This is a very curious argument. Logically, if there was insufficient evidence of adequate provocation, defendant is guilty of second-degree murder. However, defendant attempts to argue that his conviction of voluntary manslaughter was an acquittal of second-degree murder and that double jeopardy would bar retrial on either second-degree murder or voluntary manslaughter. This argument defies common sense; what doctrine would require a court to set a man free because his conviction was erroneously mitigated to a lesser offense?[8] In any event, we need not address this question, because

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[7] There is, in other words, a " 'logical connection' " between the two offenses that undermines defendant's notice argument. *Chamblis, supra* at 418, quoting *United States v Brewster*, 165 US App DC 1, 14, n 32; 506 F2d 62 (1974). Additionally, the murder and voluntary manslaughter statutes at issue here are both found within the same chapter of the Michigan Compiled Laws and are not " 'remote textually' " from one another. *Id.*

[8] We note that a prior panel of this Court reversed a conviction of voluntary manslaughter because there was insufficient evidence of provocation. See *People v Moore*, 189 Mich App 315, 320-321; 472 NW2d 1 (1991). Another panel held that, under some circumstances, insufficient evidence of provocation does not warrant reversal of a voluntary manslaughter conviction. See *People v Buck*, 197 Mich App 404, 419-423; 496 NW2d 321 (1992), rev'd in part on other grounds sub nom *People v Holcomb*, 444 Mich 853 (1993). Neither of these panels addressed the question whether a defendant can be retried on a charge of second-degree murder after his voluntary manslaughter conviction is reversed. While the United States Supreme Court has held that double jeopardy bars retrial for murder after a voluntary manslaughter conviction, *Price v Georgia*, 398 US 323; 90 S Ct 1757; 26 L Ed 2d 300 (1970), we are not convinced that the same result

there was sufficient evidence to support a finding of adequate provocation in this case.

Provocation, or the absence of provocation, is not an element of the prosecutor's case. *People v Deason*, 148 Mich App 27, 33; 384 NW2d 72 (1985). Thus, provocation need not be proved beyond a reasonable doubt. *Id.*; *People v Doss*, 406 Mich 90, 98-99; 276 NW2d 9 (1979). Indeed, there need only be "a modicum" or "slight but sufficient" evidence of provocation to create a question for the trier of fact. *People v King*, 98 Mich App 146, 152; 296 NW2d 211 (1980). While we have not found any cases that expressly so state, we conclude that there must be sufficient evidence to allow a rational trier of fact to find adequate provocation by a preponderance of the evidence.

Here, the evidence showed that defendant shot at two men who were stealing a transmission from his yard. There was also evidence of a verbal confrontation between defendant and the two men, and testimony that defendant thought that one of the men had a gun.[9] We conclude that this evidence was sufficient to support a finding of adequate provocation. See *id.* at 152-153.

Next, defendant argues that he was denied the effective assistance of counsel. Because defendant failed to move for a *Ginther*[10] hearing below, our review is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667

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would be required where the basis for reversal is a defendant's claim that there was insufficient evidence of a mitigating factor.

[9] Defendant argues that the trial court specifically disbelieved his testimony that one of the thieves had a gun. The trial court made no such finding. Instead, the trial court specifically disbelieved that defendant acted in justifiable self-defense.

[10] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

(1996). Defendant argues that his counsel erred in failing to move to quash or dismiss the information and in failing to move for a directed verdict at the close of the prosecution's proofs. These arguments are without merit. There was sufficient evidence at both the preliminary examination and the trial to defeat these motions. Defense counsel is not required to make frivolous or meritless motions. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Defendant also argues that his trial counsel erred in failing to introduce one of defendant's prior statements that was consistent with his trial testimony. However, this statement was inadmissible as hearsay. MRE 802.[11] Thus, defendant could not show that he was prejudiced by his attorney's failure to move for its admission. Defendant's other allegations of ineffective assistance of counsel are not apparent on the record; therefore, we may not review them.

Finally, defendant argues that the prosecutor may have failed to turn over the police report containing his statement and that the statement constitutes newly discovered evidence entitling him to a new trial. Defendant's argument finds no support in the record.[12] In addition, a motion for a new trial on the

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[11] Defendant argues that his statement would fall within the exception to the hearsay rule outlined in MRE 801(d)(1)(B). However, we conclude that this exception does not apply. A prior consistent statement is admissible to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. MRE 801(d)(1)(B). Here, however, the evidence defendant sought to rebut with his prior consistent statement involved his actions at the time he was arrested. Defendant made his prior consistent statement several hours after these events. Thus, his statement would not serve to rebut the prosecutor's evidence. See *People v Lewis*, 160 Mich App 20, 29-30; 408 NW2d 94 (1987).

[12] There is no evidence in the record below or on appeal indicating whether the police report was provided to defense counsel, nor is there any evidence to indicate when defendant became aware of the report.

basis of newly discovered evidence must first be brought in the trial court in accordance with the Michigan Court Rules. See MCR 2.611, 2.612. Finally, as noted above, the prior consistent statement found in the report would not have been admissible, and this evidence, even if newly discovered, would not entitle defendant to a new trial.

IRELAND v EDWARDS

Docket No. 194726. Submitted April 14, 1998, at Detroit. Decided July 10, 1998, at 9:10 A.M.

Jennifer Ireland brought an action in the Wayne Circuit Court against Sharon-Lee Edwards, alleging defamation, false light invasion of privacy, and intentional infliction of emotional distress as a result of statements the defendant made to the media during the course of a child custody dispute between the plaintiff and a third party who was represented by the defendant, an attorney, in the custody dispute. The court, Michael J. Callahan, J., granted the defendant's motion for summary disposition and dismissed the action. The plaintiff appealed.

The Court of Appeals *held*:

1. To establish her defamation claim with regard to statements not protected by the First Amendment, the plaintiff must show that the defendant made a false and defamatory statement concerning the plaintiff, an unprivileged publication to a third party, fault amounting at least to negligence on the part of the publisher, and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. In addition, the plaintiff, a limited-purpose public figure because of the media attention the custody dispute generated, must establish by clear and convincing evidence that the defendant made the statements with actual malice. Actual malice exists where the publication was made with knowledge of the falsity of the statements or with reckless disregard of their truth or falsity.

2. A statement of opinion must be provable as false to be actionable. Therefore, statements regarding an objectively verifiable event could be actionable while subjective assertions would not be actionable. The defendant's statements regarding the plaintiff's fitness as a mother are subjective, not provable as false, and not actionable.

3. Certain statements, although factual on their face and provable as false, that cannot be interpreted by a reasonable listener or reader as stating actual facts about a plaintiff are not defamatory. Here, many of the defendant's statements, read or heard in context, could not reasonably be understood as stating actual facts about

the plaintiff. The defendant's statements regarding the amount of time the plaintiff spent with the child are not actionable for that reason.

4. The statement that the child suffered a fractured arm because of the plaintiff's negligence is not actionable because there is no dispute that the child suffered a fractured arm or wrist while under the plaintiff's supervision and the question whether the injury was the result of the plaintiff's negligence can only be answered subjectively and is not provable as false.

5. There is a genuine issue of material fact regarding whether the remaining statements are false. However, because the plaintiff did not show any evidence of actual malice, summary disposition with regard to those statements was appropriate. Summary disposition was properly granted with regard to the plaintiff's defamation claim.

6. The First Amendment limitations on actionability in defamation claims, that the statements must be provable as false, that they must be understandable as stating actual facts about the plaintiff, and, in the case of a public-figure plaintiff, that the plaintiff must prove actual malice by clear and convincing evidence, are not exclusive to defamation claims and apply to all of the plaintiff's claims in this case. Because all the claims are based on the same statements and the plaintiff cannot overcome the First Amendment limitations regarding the statements, summary disposition was properly granted with regard to all the claims.

Affirmed.

1. LIBEL AND SLANDER — APPEAL — CONSTITUTIONAL LAW.

Appellate courts addressing defamation claims implicating First Amendment freedoms must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection (US Const, Am I).

2. LIBEL AND SLANDER — ACTIONS.

A communication is defamatory if, considering all the circumstances, it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with the individual; not all defamatory statements are actionable; the First Amendment protects a communication that cannot be reasonably interpreted as stating actual facts about an individual (US Const, Am I).

3. LIBEL AND SLANDER — ACTIONS — LIMITED-PURPOSE PUBLIC FIGURES.

A plaintiff may establish a defamation claim regarding statements by a defendant that are not protected by the First Amendment by showing a false and defamatory statement concerning the plaintiff, an unprivileged publication to a third party, fault amounting at least to negligence on the part of the publisher, and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication; in addition, where the plaintiff is a limited-purpose public figure, the plaintiff must establish by clear and convincing evidence that the defendant made the statement with actual malice; actual malice exists where the publication was made with knowledge of the falsity of the statement or with reckless disregard of its truth or falsity (US Const, Am I).

4. LIBEL AND SLANDER — STATEMENTS OF OPINION.

A statement of opinion must be provable as false in order for the statement to support a defamation action; an opinion regarding an objectively verifiable event may be proved to be false while an opinion containing a subjective assertion is not provable as false.

5. LIBEL AND SLANDER — ACTIONS.

Statements, although factual on their face and provable as false, that cannot be interpreted by a reasonable listener or reader as stating actual facts about a plaintiff in a defamation action and statements that, when read in context, are not capable of defamatory interpretation do not support an action for defamation.

6. LIBEL AND SLANDER — ACTIONS.

A court in an action for defamation may decide as a matter of law whether a statement is actually capable of defamatory meaning and may grant summary disposition where no such meaning is possible.

7. LIBEL AND SLANDER — MALICE — QUESTIONS OF LAW.

Whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law.

8. LIBEL AND SLANDER — ACTIONS — FIRST AMENDMENT LIMITATIONS ON ACTIONABILITY.

The First Amendment limitations on the actionability of statements alleged to be defamatory that provide that the statement must be provable as false, the statement must be understandable as stating actual facts about the plaintiff, and in the case of a public-official or public-figure plaintiff, the plaintiff must prove actual malice by clear and convincing evidence are not exclusive to defamation claims and may be applied to the plaintiff's claims of false light

invasion of privacy and intentional infliction of emotional distress based on the same statements (US Const, Am I).

Neal Bush and *Karen Russell*, for the plaintiff.

Plunkett & Cooney, P.C. (by *Christine D. Oldani* and *Patrick M. Barrett*), for the defendant.

Before: SAWYER, P.J., and BANDSTRA and J. B. SULLIVAN* , JJ.

J. B. SULLIVAN, J. Plaintiff Jennifer Ireland appeals as of right from the trial court's order granting defendant Sharon-Lee Edwards' motion for summary disposition of plaintiff's defamation and false light invasion of privacy claims, pursuant to MCR 2.116(C)(10), and her intentional infliction of emotional distress claim, pursuant to MCR 2.116(C)(8). We affirm.

This case represents, we hope, the dying embers of a highly publicized battle between plaintiff and Steven Smith for the custody of their daughter, Maranda. The custody matter was apparently resolved through a settlement, but not before almost four years of acrimonious litigation, including a six-day custody trial, an appeal to this Court,[1] an appeal to the Michigan Supreme Court,[2] and an additional four-month trial. Because this case arises from the underlying custody matter, we will briefly address the facts involved there.[3]

Defendant is the attorney who represented Smith in the custody dispute. After the first custody trial,

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

[1] See *Ireland v Smith*, 214 Mich App 235; 542 NW2d 344 (1995).

[2] See *Ireland v Smith*, 451 Mich 457; 547 NW2d 686 (1996).

[3] The facts in the underlying matter are more fully set forth in the Supreme Court's decision. See *Ireland*, n 2, *supra* at 458-461.

Macomb Circuit Judge Raymond Cashen awarded physical custody of Maranda to Smith. Judge Cashen found that plaintiff and Smith were equal with regard to all factors considered under the Michigan Child Custody Act, MCL 722.23; MSA 25.312(3), with the exception of factor e. Judge Cashen found that factor e, regarding the permanence, as a family unit, of the existing or proposed custodial homes, favored Smith. Judge Cashen's conclusion regarding factor e was premised on his finding that plaintiff planned to enroll Maranda in a day-care center while she attended classes at the University of Michigan, while Smith planned to care for Maranda in his parents' home, with their help. After the release of Judge Cashen's decision, the custody battle became the subject of much media attention, and both parties' attorneys made statements to the press.

While the custody matter was winding its way through the appellate system, plaintiff filed the current suit alleging defamation, false light invasion of privacy, and intentional infliction of emotional distress, based on twenty statements defendant made to the media. Defendant made the alleged statements on several different occasions; some were made at a press conference called by defendant, some were made during the taping of various television programs, and one was apparently made to a newspaper reporter. Four of the statements concerned plaintiff's fitness as a mother: "The fact is, this evidence overwhelmingly showed that Ireland was not a fit mother"; "[t]his case is about a woman who is not fit to raise her child and never spent any time with her child"; "[t]his woman has never been a mother"; and "Ireland is an unfit mother." Eight of the alleged state-

ments involved the amount of time plaintiff spent with Maranda: "Ireland never spent a moment with the child"; "Ireland was never home with the child"; "[t]he trial evidence all showed that Ireland was never with Maranda"; "Ireland abdicated all responsibility for the care and raising of this child to everybody"; "[i]f the child were with her mother, as she has been in the past, that means the child would never be with her mother"; "[t]hat mother was never with her child"; "[i]t doesn't matter whether she stays home and takes college credits by telephone, she's still never going to be wit [sic] hr [sic] child. She never was"; and "Ireland was never with Maranda for the first three years of Maranda's life." Five of the alleged statements indicated that plaintiff was violent and abused Maranda: "Ireland abused her child"; "Ireland was violent and assaultive"; "Ireland has a history of violence and child abuse"; "Maranda suffered a fractured arm because of Ireland's neglect"; and "Ireland hit Maranda hard enough to leave bruises on Maranda's thigh, hip and other parts of Maranda's body." The remaining alleged statements were: "Ireland did not want to take Maranda to the University of Michigan with her"; "Ireland was a pathological liar"; and "Ireland is limiting her interviews because she is holding out for the tabloids to offer her big bucks for her tale."

Plaintiff first argues that the trial court erred in granting summary disposition of her defamation claim pursuant to MCR 2.116(C)(10). We disagree. An order granting summary disposition is reviewed de novo on appeal. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests

whether there is factual support for a claim. *Michigan Mut*, at 85. The motion may be granted when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence presented. *Id.* Giving the benefit of the doubt to the nonmoving party, the court must determine whether a record might be developed that would leave open an issue on which reasonable minds might differ. *Id.* When First Amendment freedoms are involved, this Court's role takes on added importance:

> When addressing defamation claims implicating First Amendment freedoms, appellate courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection. [*Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 322; 539 NW2d 774 (1995).]

Thus, we recognize that we must consider society's interest in free expression, in addition to the interests of the individual parties. We also recognize that summary disposition is an essential tool in the protection of First Amendment rights.[4] We begin our review of the relevant law with these principles in mind.

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[4] This Court and others have recognized this principle:

> "Summary judgment is particularly appropriate at an early stage in cases where claims of libel or invasion of privacy are made against publications dealing with matters of public interest and concern. In recognition of the constitutional privilege of free expression secured by the First and Fourteenth Amendments, the

A communication is defamatory if it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with that individual. *New Franklin Enterprises v Sabo*, 192 Mich App 219, 221; 480 NW2d 326 (1991). However, not all defamatory statements are actionable. If a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment. *Milkovich v Lorain Journal Co*, 497 US 1, 20; 110 S Ct 2695; 111 L Ed 2d 1 (1990); *Garvelink v Detroit News*, 206 Mich App 604, 608-609; 522 NW2d 883 (1994). Thus, at least some expressions of opinion are protected. *Milkovich*, at 18-20.

Where a defendant's statements are not protected by the First Amendment, a plaintiff can establish a defamation claim by showing: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). *New Franklin Enter-*

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courts in libel actions have recognized the need for affording summary relief to defendants in order to avoid the 'chilling effect' on freedom of speech and press." [*Lins v Evening News Ass'n*, 129 Mich App 419, 425; 342 NW2d 573 (1983), quoting *Meeropol v Nizer*, 381 F Supp 29, 32 (SD NY, 1974).]

"Summary judgment is an integral part of the constitutional protection afforded defendants in actions such as this. Plaintiff has purposely been given the heavy burden of proving actual malice . . . . When it has been established . . . that he cannot meet it, the First Amendment makes it incumbent upon the Court to grant defendant's motion for summary judgment." [*Hayes v Booth Newspapers, Inc*, 97 Mich App 758, 775; 295 NW2d 858 (1980), quoting *Cerrito v Time, Inc*, 302 F Supp 1071, 1075-1076 (ND Cal, 1969).]

prises, *supra* at 221. Furthermore, because the parties here agree that plaintiff is a limited-purpose public figure,[5] she must establish that defendant made the statements with actual malice. *Id.* at 222. Actual malice exists where the publication was made with knowledge of the falsity of the statements or with reckless disregard of their truth or falsity. *Id.* at 221. Plaintiff bears the burden of showing actual malice by clear and convincing evidence. *Milkovich*, *supra* at 15; *Garvelink*, *supra* at 608.

Before addressing the alleged defamatory statements, we note that both parties make it a point to accuse the other of starting and encouraging the media frenzy in this case. Indeed, defendant asserted this as a defense below, arguing that she was entitled to respond after plaintiff's attorney made disparaging remarks about her client. While we understand that an attorney may feel compelled to respond to media attacks on her client, an attorney is never justified in knowingly making false statements about an opposing party. In short, "he started it" is not a valid defense to a defamation claim where a plaintiff can show actual malice.[6]

In granting summary disposition for defendant, the trial court concluded that plaintiff would be unable to establish that defendant made any of the alleged

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[5] Plaintiff conceded in the trial court that she is a limited-purpose public figure. In addition, the trial court specifically found that plaintiff is a limited-purpose public figure. Plaintiff has not challenged this finding on appeal, and, in any event, the facts support a conclusion that plaintiff is a limited-purpose public figure. See *Hayes*, n 4, *supra* at 774.

[6] A party's interaction with the media may, however, be relevant in determining whether that party is a "public figure." See *Hayes*, n 4, *supra* at 773-774. In this case, as already noted, plaintiff conceded in the trial court that she is a limited-purpose public figure.

defamatory statements with actual malice. The trial court apparently reasoned that, because defendant's statements found support in the custody trial record, plaintiff would be unable to show that defendant made the statements knowing they were false or with reckless disregard of their truth or falsity. We agree with this reasoning with regard to some of the alleged statements. However, we conclude that the statements cannot all be grouped together and that plaintiffs claims regarding different statements fail for different reasons.

WHICH STATEMENTS ARE ACTIONABLE?

One of the difficulties in addressing defamation issues lies in determining whether specific statements are actionable. The United States Supreme Court has rejected the idea that all statements of "opinion" are protected. Instead, the Court has directed that a statement must be "provable as false" to be actionable. *Milkovich, supra* at 17-20.[7] By way of example, the Court suggested that the statement "In my opinion Mayor Jones is a liar" would be potentially actionable, while the statement "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin" would not be actionable. *Id.* at 20. The Court apparently intended these examples to illustrate the difference between an objectively verifiable event, such as lying, and a subjective assertion like "shows his abysmal ignorance . . . ." See *id.* at 21-22.

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[7] The Supreme Court has applied this rule where the plaintiff is a public official or a public figure, or where the defendant is part of the media. *Milkovich, supra* at 20, n 6.

After reviewing the alleged defamatory statements in this case, we conclude that several of them are not provable as false. The question whether someone is a "fit mother," like the question whether someone is abysmally ignorant, is necessarily subjective. Thus, defendant's statements regarding plaintiff's fitness as a mother are not actionable.[8]

The Supreme Court has also recognized that certain *types* of speech are protected. *Id.* at 16-17. While the Court has not given any precise test for determining whether particular statements are protected, the reasoning appears to be that certain statements, although factual on their face, and provable as false, could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff. See *Hustler Magazine, Inc v Falwell*, 485 US 46, 50; 108 S Ct 876; 99 L Ed 2d 41 (1988); *Milkovich*, *supra* at 16-17. Thus, parodies, political cartoons, and satires are generally entitled to protection. *Garvelink*, *supra* at 610. However, protection is not limited to these forms. In *Greenbelt Cooperative Publishing Ass'n, Inc v Bresler*, 398 US 6; 90 S Ct 1537; 26 L Ed 2d 6 (1970), the Supreme Court recognized that some statements, read in context, are not capable of defamatory interpretation. There, a real estate developer was involved in two simultaneous negotiations with the city of Greenbelt, Maryland. One negotiation involved the developer's desire to obtain a zoning

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[8] Those statements are: "The fact is, this evidence overwhelmingly showed that Ireland was not a fit mother"; "[t]his case is about a woman who is not fit to raise her child and never spent any time with her child"; "[t]his woman has never been a mother"; and "Ireland is an unfit mother." Just as the words "In my opinion . . ." do not make the phrase that follows a pure opinion, the words "The fact is . . ." do not make the phrase that follows an objectively provable fact.

variance for some of his property, while the other negotiation involved the city's desire to purchase certain other land from him. *Id.* at 7. The concurrent negotiations provided both parties with significant bargaining leverage, and some community members described the developer's bargaining position as "blackmail." *Id.* After a local newspaper printed two articles using the term "blackmail," the developer sued, claiming that the articles effectively charged him with the crime of blackmail. The Supreme Court rejected this argument:

> [W]e hold that the imposition of liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word "blackmail" in these circumstances was not slander when spoken, and not libel when reported . . . .
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> . . . [E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable. [*Id.* at 13-14.]

Thus, statements must be viewed in context to determine whether they can reasonably be understood as stating actual facts about the plaintiff.

Here, many of the alleged defamatory statements, read or heard in context, could not reasonably be understood as stating actual facts about plaintiff. In particular, the statements regarding the amount of time plaintiff spent with Maranda amount to "rhetori-

cal hyperbole."[9] These were obviously expressions of disapproval regarding the amount of time plaintiff spent with her child, and, taken literally, they are patently false. However, any reasonable person hearing these remarks in context would have clearly understood what was intended. Under these circumstances, these statements are not actionable. *Id.* at 14.

As a final preliminary matter, a court may decide as a matter of law whether a statement is actually capable of defamatory meaning. *Sawabini v Desenberg*, 143 Mich App 373, 379; 372 NW2d 559 (1985). Where no such meaning is possible, summary disposition is appropriate. *Id.* A communication is defamatory if, considering all the circumstances, it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Id.* at 379-380. After reviewing the remaining statements, we conclude that they are at least potentially capable of defamatory meaning. The statements that suggested that plaintiff abused her child are clearly defamatory, as is the statement that plaintiff was a liar. The two remaining statements, "Ireland did not want to take Maranda to the University of Michigan with her"; and "Ireland is limiting her interviews because she is holding out for the tabloids to offer her big bucks for her

[9] The specific statements are: "Ireland never spent a moment with the child"; "Ireland was never home with the child"; "[t]he trial evidence all showed that Ireland was never with Maranda"; "Ireland abdicated all responsibility for the care and raising of this child to everybody"; "[i]f the child were with her mother, as she has been in the past, that means the child would never be with her mother"; "[t]hat mother was never with her child"; "[i]t doesn't matter whether she stays home and takes college credits by telephone, she's still never going to be wit [sic] hr [sic] child. She never was"; and "Ireland was never with Maranda for the first three years of Maranda's life."

tale," are not so clearly defamatory. However, considering the context, we decline to hold as a matter of law that they are incapable of defamatory meaning. Thus, these statements are at least potentially actionable.

WAS SUMMARY DISPOSITION PROPERLY GRANTED WITH REGARD TO THE REMAINING STATEMENTS?

With regard to the potentially actionable statements identified above, our next task is to determine whether there was a genuine issue of material fact regarding plaintiff's defamation claim.

One of the potentially actionable defamatory statements can be found not to be actionable when we consider the undisputed facts. There is no dispute that Maranda suffered a fractured arm or wrist[10] while under plaintiff's supervision at a playground. Thus, the falsity of the statement that "Maranda suffered a fractured arm because of Ireland's neglect" is disputed only with regard to whether the fall was due to neglect. However, this question, like the question whether someone is a fit mother, or whether someone is abysmally ignorant, can only be answered subjectively. We conclude that this portion of the statement is not provable as false and, thus, that it is protected opinion. *Milkovich, supra* at 17-22. As the Supreme Court has observed, "[h]owever pernicious an opinion may seem, we depend for its correction

[10] Plaintiff does not dispute as irrelevant the fact that Maranda may have suffered a fractured wrist, rather than a fractured arm. In Michigan, substantial truth may be a defense: "Under the test, minor differences are immaterial if the literal truth produces the same effect." *Koniak v Heritage Newspapers, Inc (On Remand)*, 198 Mich App 577, 580; 499 NW2d 346 (1993).

not on the conscience of judges and juries but on the competition of other ideas."[11]

As noted above, the remaining potentially actionable statements are capable of defamatory interpretation. In addition, defendant stipulated, at least for summary disposition purposes, that she made the statements to a third party. Finally, in her motion for summary disposition below, defendant did not raise any question regarding the necessity or absence of special harm.[12] Thus, the only elements that could support the grant of summary disposition are falsity and actual malice.

We believe that there is a genuine issue of material fact regarding whether the statements are false. While defendant has pointed to evidence in the record from the custody proceedings to support each of her statements, plaintiff vigorously disputed their accuracy. Indeed, both sides find some support in the various depositions, affidavits, and trial testimony. This obviously presents a genuine issue of material fact for the jury. See *Locricchio v Evening News Ass'n*, 438 Mich 84, 137; 476 NW2d 112 (1991) (CAVANAGH, J., concurring) (The Supreme Court has "consistently viewed the determination of truth or falsity in defamation cases as a purely factual question which should generally be left to the jury."). Thus, in this case, sum-

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[11] Justice Brandeis expressed the same idea using language that is slightly ironic in the context of this case: "the fitting remedy for evil counsels is good ones." *Whitney v California*, 274 US 357, 375; 47 S Ct 641; 71 L Ed 1095 (1927).

[12] Even had defendant raised this issue below, it seems clear that plaintiff's claim could have survived a motion for summary disposition on this point. See *Hall v Citizens Ins Co of America*, 141 Mich App 676, 686; 368 NW2d 250 (1985).

mary disposition would not be appropriate with regard to the question of falsity.

Despite the existence of a factual dispute regarding the falsity of the alleged defamatory statements, we still conclude that summary disposition was properly granted for defendant. As noted above, plaintiff must show actual malice in order to maintain her claim of defamation. *New Franklin Enterprises*, *supra* at 222. A prior panel of this Court addressed the definition of "actual malice":

> Actual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. "Reckless disregard" is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published. [*Grebner v Runyon*, 132 Mich App 327, 332-333; 347 NW2d 741 (1984) (citations omitted).]

Whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law. *Id.* In considering a motion for summary disposition, a court must consider whether the evidence is sufficient to allow a rational finder of fact to find actual malice by clear and convincing evidence. *Anderson v Liberty Lobby, Inc*, 477 US 242, 254; 106 S Ct 2505; 91 L Ed 2d 202 (1986).[13]

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[13] It appears that there was a conflict of opinion in this Court on this subject. Compare *Spreen v Smith*, 153 Mich App 1, 7; 394 NW2d 123 (1986) (clear and convincing evidence not required to withstand a motion

Here, plaintiff has not pointed to any evidence of actual malice.[14] In contrast, defendant filed an affidavit stating that she made the statements believing them to be true, based on the record evidence in the custody dispute. Thus, summary disposition would appear to be proper on this basis. Plaintiff argues, however, that summary disposition was premature, because there has been no discovery. Plaintiff ignores the fact that there was extensive discovery in the underlying custody case, much of which bears directly on the truth or falsity of the statements at issue. In addition, plaintiff has not described any type of discovery that could possibly uncover evidence of actual malice. Summary disposition is appropriate where no fair chance exists that further discovery will result in factual support for the nonmoving party. *Northland Wheels*, *supra* at 329-330. Here, we do not believe that there is any fair chance that further discovery would uncover sufficient evidence to show actual malice by clear and convincing evidence. Thus,

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for summary disposition), with *Lins*, n 4, *supra* at 433-434 (clear and convincing evidence required). However, *Anderson* clearly resolved this conflict, finding the clear and convincing evidence standard relevant to the resolution of a motion for summary disposition. *Anderson*, *supra* at 254. We believe that some Michigan cases decided before *Anderson* are now of questionable precedential value regarding the quantum of evidence necessary to establish actual malice, because they failed to apply the clear and convincing evidence standard. See, i.e., *Steadman v Lapensohn*, 408 Mich 50, 54-55; 288 NW2d 580 (1980).

[14] Plaintiff argues that Judge Cashen's original opinion, finding that plaintiff and Smith were both equally capable of raising Maranda, put defendant on notice that all her subsequent statements were false. We find no merit in this contention. Nothing in Judge Cashen's opinion made any reference to the specific issues addressed in defendant's statements. Under these circumstances, it cannot be said that, on the basis of Judge Cashen's opinion, defendant knew or should have known that her subsequent statements were false. See *Swenson-Davis v Martel*, 135 Mich App 632, 637-638; 354 NW2d 288 (1984).

summary disposition was properly granted with regard to plaintiff's defamation claim. We recognize that this result effectively protects statements that may very well have been false. However, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v Robert Welch, Inc*, 418 US 323, 341; 94 S Ct 2997; 41 L Ed 2d 789 (1974); *Locricchio, supra* at 121.

PLAINTIFF'S CLAIMS ALLEGING FALSE LIGHT INVASION OF PRIVACY AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The Supreme Court has made it clear that the above limitations on actionability (statements must be provable as false, statements must be understandable as stating actual facts about the plaintiff, and, in the case of public-official or public-figure plaintiffs, the plaintiffs must prove actual malice by clear and convincing evidence) are First Amendment limitations. *Hustler Magazine, supra.* It is clear that these limitations are not exclusive to defamation claims. *Id.* We conclude that these limitations apply to all of plaintiff's claims in this case.[15] Thus, because all of plaintiff's claims are based on the same statements, and because she cannot overcome the First Amendment limitations regarding these statements, summary

[15] As the Supreme Court noted in *New York Times Co v Sullivan*, 376 US 254, 269; 84 S Ct 710; 11 L Ed 2d 686 (1964), an action for libel "can claim no talismanic immunity from constitutional limitations." We do not believe that actions for false light invasion of privacy or intentional infliction of emotional distress have any greater right to such immunity. Indeed, any other conclusion would allow a plaintiff to circumvent the First Amendment limitations, and would effectively eliminate the "breathing space" required for freedom of expression. *Hustler Magazine, supra* at 52.

disposition was properly granted with regard to all of plaintiff's claims.[16]

Affirmed.

[16] We recognize that the trial court granted summary disposition on different grounds than we rely on here. However, we will not reverse where a trial court reaches the right result for the wrong reason. *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993).

PEOPLE v SHIVELY

Docket No. 190319. Submitted April 23, 1998, at Detroit. Decided July 10, 1998, at 9:15 A.M. Leave to appeal sought.

Dennis L. Shively was convicted following a bench trial in the Detroit Recorder's Court, Cynthia D. Stephens, J., of two counts of uttering and publishing and one count of larceny by false pretenses in excess of $100. The defendant appealed.

The Court of Appeals *held*:

1. The defendant's trial counsel did not render ineffective assistance in failing to present the testimony of a handwriting analyst and in advising the defendant not to testify. The strong presumption that both instances involved sound trial strategy was not overcome by the defendant. Counsel's representation did not prejudice the defendant so as to deprive him of a fair trial in view of the defendant's inability to demonstrate that there was a reasonable probability that, but for the alleged errors of counsel, the result of the proceeding would have been different.

2. The convictions of uttering and publishing and of larceny by false pretenses do not violate federal and state constitutional protections against double jeopardy. The defendant was not multiply punished for the same offense. The convictions of uttering and publishing arose out of the defendant's forgery of quitclaim and warranty deeds in an effort to show the complainant that he was the owner of properties that the complaint thought he was buying from the defendant, and the conviction of larceny by false pretenses arose out of the defendant's presentation of the forged documents to the complainant in a successful effort to obtain money from the complainant. Moreover, the statute that proscribes uttering and publishing and the statute that proscribes larceny by false pretenses prohibit separate and distinct acts that do not have to occur together in the same criminal transaction.

Affirmed.

1. CRIMINAL LAW — INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant, in order to prove a claim of ineffective assistance of counsel, must show that counsel's performance fell below an objective standard of reasonableness and the representation prejudiced the defendant so as to deprive the defendant of a fair trial; in order

to show that counsel's performance was deficient, the defendant must overcome the presumption that counsel's assistance constituted sound trial strategy; to demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

2. CRIMINAL LAW — UTTERING AND PUBLISHING — ELEMENTS.

The elements of uttering and publishing are knowledge on the part of the defendant that the instrument involved was false, an intent to defraud, and presentation of the forged instrument for payment (MCL 750.249; MSA 28.446).

3. CRIMINAL LAW — LARCENY BY FALSE PRETENSES — ELEMENTS.

The elements of larceny by false pretenses are a false representation concerning an existing fact, knowledge by the defendant of the falsity of the representation, use of the representation with the intent to deceive, and detrimental reliance by the victim on the false representation (MCL 750.218; MSA 28.415).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *John D. O'Hair*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Janet Napp* and *Mary Dufour Morrow*, Assistant Prosecuting Attorneys, for the people.

State Appellate Defender (by *C. Joseph Booker*), for the defendant on appeal.

Before: JANSEN, P.J., and KELLY and MARKEY, JJ.

PER CURIAM. Following a bench trial, defendant was convicted of two counts of uttering and publishing, MCL 750.249; MSA 28.446, and one count of larceny by false pretenses in excess of $100, MCL 750.218; MSA 28.415. He was subsequently sentenced to two years of probation, with the last thirty days to be spent in jail. Defendant appeals as of right, and we affirm.

Defendant first argues that he was denied the effective assistance of counsel. In order to prove a claim

of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and the representation prejudiced defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). In order to show that counsel's performance was deficient, defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To demonstrate prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*, pp 678-688.

Defendant contends that counsel was ineffective for failing to present the expert testimony of an available handwriting analyst to show that someone else had forged the deeds and for advising defendant not to testify at trial. With regard to the question of the handwriting analyst, there is no record evidence indicating that the expert would have testified that defendant did not forge the deeds or that someone else forged the deeds.[1] Indeed, counsel did obtain a handwriting expert and requested a two-week adjournment to call the expert. After being granted the adjournment, counsel decided not to call the expert at trial. Counsel's decision was clearly a matter

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[1] No separate evidentiary hearing was held below with regard to defendant's claim of ineffective assistance of counsel. Therefore, our review of this issue is limited to the lower court record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). The affidavit attached to defendant's appellate brief will not be considered by this panel to resolve this issue because it was not part of the lower court record. MCR 7.210(A)(1); *Long v Chelsea Community Hosp*, 219 Mich App 578, 588; 557 NW2d 157 (1996).

of trial strategy. It is just as reasonable to assume that counsel's decision was based on a finding by the expert that was not favorable to defendant. Therefore, defendant has failed to show that counsel's decision was prejudicial and fell below an objective standard of reasonableness.

With regard to the question of advising defendant not to testify, defendant has again failed to show that counsel's decision was prejudicial and fell below an objective standard of reasonableness. Counsel's strategic decision in this regard, *People v Alderete*, 132 Mich App 351, 360; 347 NW2d 229 (1984), has not been overcome by any showing in the record that counsel's decision was in any way deficient. Therefore, we conclude that defendant has failed to show through record evidence that counsel was ineffective in representing him at trial.

Defendant next argues that his convictions of both uttering and publishing and larceny by false pretenses violates the prohibition against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. Although this constitutional issue was not raised below, we will review it to determine whether the alleged error was decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

There is no double jeopardy violation in this case because defendant's convictions arise out of wholly separate transactions. In this case, the complainant, Frederick McClure, testified that he dealt with defendant, a real estate agent, concerning two parcels of land in the city of Southfield. Defendant told complainant that the properties were available for sale and that the owners, the Vemulapallis, were in the process of foreclosing the properties because the cur-

rent occupants were behind on their land contract payments. Defendant told complainant that he could buy the properties by paying the current occupants $3,000 for their equity in the property and by entering into a land contract with the Vemulapallis for another $15,000.

Complainant then made payments to defendant. Defendant told complainant that he (defendant) had acquired the properties from the Vemulapallis by a quitclaim deed and that defendant owned the properties through his company, Michigan Enterprises, Inc. Defendant told complainant to make all subsequent checks to defendant personally. Later, defendant and complainant signed a contract in which Michigan Enterprises promised to convey to complainant the two lots in question. Complainant continued to pay defendant personally for the properties.

After being asked to pay the taxes on the properties and after requesting title from defendant, complainant investigated the properties with the register of deeds. Complainant discovered that defendant had not recorded the quitclaim deed or the land contract with the register of deeds. According to the register of deeds, the Vemulapallis still owned the properties. Complainant went to the police, at which point defendant presented a warranty deed to complainant and said that he would provide complainant with the warranty deed and title insurance if complainant would withdraw the complaint. At trial, the Vemulapallis denied ever signing the quitclaim deed, and Mr. Vemulapalli denied conveying the properties to defendant.

Here, the uttering and publishing convictions arose out of defendant's forged signing of the quitclaim and

warranty deeds. The larceny by false pretenses conviction stems from defendant's presentation of these fraudulent documents to complainant and subsequently collecting money from him purporting to "sell" the properties to him. Thus, this case in fact involves two separate offenses: forging the two deeds (uttering and publishing), and acquiring money by falsely representing that defendant owned the property. Therefore, there is no double jeopardy implication because defendant is not facing multiple punishments for the *same* offense. See *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997) (the guarantee against double jeopardy protects against multiple prosecutions and multiple punishments for the same offense).

Our holding is underscored by the fact that the two statutes in question proscribe separate and distinct acts that do not have to occur together in the same criminal transaction. See *People v Kaczorowski*, 190 Mich App 165, 170; 475 NW2d 861 (1991). The two offenses share only one common element, the intent to defraud or deceive. The elements of uttering and publishing are: (1) knowledge on the part of the defendant that the instrument was false; (2) an intent to defraud; and (3) presentation of the forged instrument for payment. *Id.*, p 171. The elements of larceny by false pretenses, on the other hand, are: (1) a false representation concerning an existing fact; (2) knowledge by the defendant of the falsity of the representation; (3) use of the representation with the intent to deceive; and (4) detrimental reliance by the victim on the false representation. *People v Reigle*, 223 Mich App 34, 37-38; 566 NW2d 21 (1997). One need not utter and publish to also be guilty of larceny by false

pretenses. Moreover, larceny by false pretenses is not a lesser offense of uttering and publishing. See, e.g., *Kaczorowski*, *supra*, pp 171-172 (the offenses of forgery and uttering and publishing are distinctly different and do not constitute the same offense); *People v Mann*, 49 Mich App 454, 465; 212 NW2d 282 (1973) (obtaining money under false pretenses, forgery, uttering forged notes, drawing a no-account check, and attempted uttering and publishing are not lesser included offenses of uttering and publishing).

Accordingly, we conclude that the Legislature intended to create two distinct multiple punishments by enacting the uttering and publishing statute and the larceny by false pretenses statute. *Kaczorowski*, *supra*, pp 168-169. We find no double jeopardy violation in this case where defendant was convicted of violating each of these statutes.

Affirmed.

FLYNN v FLINT COATINGS, INC

Docket No. 200742. Submitted April 14, 1998, at Detroit. Decided July 10, 1998, at 9:20 A.M. Leave to appeal sought.

James Flynn and Flynn & Associates, Inc., brought an action in the Genesee Circuit Court against Flint Coatings, Inc., seeking payment of sales commissions. The plaintiffs thereafter sought the retroactive application of the sales representatives' commissions act (SRCA), MCL 600.2961; MSA 27A.2961, to their claim for sales commissions already owed by the defendant to the plaintiffs when the SRCA took immediate effect upon its passage by the Legislature. The court, Thomas C. Yeotis, J., granted partial summary disposition for the defendant, ruling that the SRCA cannot retroactively apply to the plaintiffs' claim. The plaintiffs appealed by leave granted.

The Court of Appeals *held*:

Statutes related to remedies or modes of procedure that do not create new, or take away vested, rights, but operate only in furtherance of a remedy or confirmation of rights already existing, operate retrospectively and apply to all actions accrued, pending, or future. The SRCA is such a statute because it does not create a new obligation or impose a new duty beyond that which the common law imposes on employers with respect to the payment of sales commissions. The SRCA simply alters the remedy available to plaintiffs who have been denied their justly earned commissions.

Reversed.

BANDSTRA, J., dissenting, stated that retroactive application of the SRCA implicates constitutional concerns of impairment of contract inasmuch as the plaintiffs rely on a contract between them and the defendant in seeking payment, and that immediate effect of the SRCA upon its passage evidenced legislative intent that the SRCA is to have prospective application only. The trial court's order granting partial summary disposition for the defendant should be affirmed.

1. STATUTES — RETROACTIVE APPLICATION.

Four rules guide the determination whether a statute can be applied retroactively: is there specific language in the act that states that it should be given retrospective or prospective application; a statute is not regarded as operating retrospectively solely because it relates to an antecedent event; a retrospective law is one that takes

away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past; a remedial or procedural act that does not destroy a vested right will be given effect where the injury is antecedent to the enactment of the statute.

2. STATUTES — SALES REPRESENTATIVES' COMMISSIONS ACT — RETROACTIVE APPLICATION.

The sales representatives' commissions act retroactively applies to claims for sales commissions that were already owed when the act took effect (MCL 600.2961; MSA 27A.2961).

Cross Wrock, P.C. (by *John C. Louisell* and *Russ E. Boltz*), for the plaintiffs.

Loyst Fletcher, Jr., for the defendant.

Before: SAWYER, P.J., and BANDSTRA and J. B. SULLIVAN*, JJ.

J. B. SULLIVAN, J. In this interlocutory appeal, plaintiffs appeal by leave granted from an order granting partial summary disposition for defendant. The trial court held that the provisions of the sales representatives' commissions act (SRCA), MCL 600.2961; MSA 27A.2961, were not available to plaintiffs because the act took effect after plaintiffs' cause of action had accrued. We reverse.

The underlying facts are not at issue here and can be briefly summarized as follows. Plaintiff James Flynn is a manufacturer's representative in the automotive industry and the owner of plaintiff Flynn & Associates, Inc., a manufacturers' representative agency. Plaintiffs engage in direct representation of suppliers to the automotive industry. Apparently,

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

defendant hired plaintiffs in 1987 and agreed to pay them five percent of all sales they generated. This arrangement continued until August of 1990, when defendant terminated its relationship with plaintiffs. In August of 1991, plaintiffs filed the current suit, alleging that they are owed commissions on sales that took place after their termination.

The only question before us on appeal is whether the SRCA should be applied retroactively. The relevant portions of the act provide:

> (4) All commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination. Commissions that become due after the termination date shall be paid within 45 days after the date on which the commission became due.
>
> (5) A principal who fails to comply with this section is liable to the sales representative for both of the following:
>
> (a) Actual damages caused by the failure to pay the commissions when due.
>
> (b) If the principal is found to have intentionally failed to pay the commission when due, an amount equal to 2 times the amount of commissions due but not paid as required by this section or $100,000.00, whichever is less.
>
> (6) If a sales representative brings a cause of action pursuant to this section, the court shall award to the prevailing party reasonable attorney fees and court costs. [MCL 600.2961; MSA 27A.2961.]

The SRCA was passed and became immediately effective on June 29, 1992. Thus, at the time the SRCA became effective, plaintiffs' claim had already accrued[1] and this suit had already been filed.

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[1] It appears that plaintiffs are also claiming entitlement to commissions on sales that were not consummated until after the SRCA became effective. Theoretically, the SRCA might apply to those commissions even if it could

The Michigan Supreme Court has outlined four rules regarding the retroactive application of statutes. The Court summarized the rules as follows:

> First, is there specific language in the new act which states that it should be given retrospective or prospective application. See headnote no. 1, *Hansen-Snyder Co v General Motors Corp*, 371 Mich 480; 124 NW2d 286 (1963). Second, "[a] statute is not regarded as operating retrospectively [solely] because it relates to an antecedent event". *Hughes v Judges' Retirement Board*, 407 Mich 75, 86; 282 NW2d 160 (1979). Third, "[a] retrospective law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past". *Hughes*, *supra*, p 85; *Ballog v Knight Newspapers, Inc*, 381 Mich 527, 533-534; 164 NW2d 19 (1969). Fourth, a remedial or procedural act which does not destroy a vested right will be given effect where the injury or claim is antecedent to the enactment of the statute. *Rookledge v Garwood*, 340 Mich 444; 65 NW2d 785 (1954). [*In re Certified Questions (Karl v Bryant Air Conditioning Co)*, 416 Mich 558, 570-571; 331 NW2d 456 (1982).]

Here, there is no specific language in the SRCA regarding whether it should be applied retroactively. In addition, it is clear that the second rule does not apply. See *id.* at 571. Thus, the question in this case is whether the SRCA is a rule three or a rule four case. If it "creates a new obligation and imposes a new duty," it is a rule three case, and it may not be applied retroactively. *Id.* at 572. On the other hand, under rule four, "[s]tatutes related to remedies or modes of procedure which do not create new or take away vested

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not be applied retroactively. However, because the parties did not raise this issue, we decline to address it.

rights, but only operate in furtherance of a remedy or confirmation of rights already existing will . . . be held to operate retrospectively and apply to all actions accrued, pending or future. . . ." *Id.*, quoting headnote 1 of *Hansen-Snyder*, *supra*.

We do not believe that the SRCA creates any new duty on the part of employers. Under the SRCA, as under the common law, an employer is obligated to pay sales commissions when they are due. MCL 600.2961(4); MSA 27A.2961(4); *Sorenson v Charlevoix Rock Product Co*, 191 Mich 86; 157 NW 349 (1916). Thus, an employer who was not liable under the common law is not liable under the SRCA. Clearly, then, although the SRCA changes the remedy for failure to pay sales commissions, it does not create a new obligation or impose a new duty. This leads us to the conclusion that this is a rule four case and that the SRCA is properly applied retroactively. See *In re Certified Questions*, *supra* at 577-578.

Defendant argues for affirmance on the ground that the SRCA creates a new cause of action. Defendant cites two differences between the SRCA and the common law. First, defendant notes that a cause of action under the SRCA does not accrue until forty-five days after termination, or until forty-five days after the commission becomes due, MCL 600.2961(4); MSA 27A.2961(4), while a common-law cause of action accrues immediately after payment is due. However, we conclude that this difference is procedural and does not bar retroactive application of the statute. See *Hansen-Snyder*, *supra* at 485.

In further support of its argument that the SRCA creates a new cause of action, defendant cites the fact that the SRCA increases an employer's liability for a

prior transaction. Defendant's argument is essentially that parties have vested rights in the particular remedy authorized by law when a cause of action accrues.[2] Thus, defendant argues, the treble damages provision of the SRCA may not be applied retroactively. This argument has been rejected by our Supreme Court. As the Court noted in *In re Certified Questions*, *supra* at 575-576 (citing *Rookledge*, *supra*): "[T]he fact that the new statute changes the legal consequences of a prior act does not prevent a retrospective application of that statute, since that statute is remedial in nature."[3] Indeed, our Supreme Court has left no doubt that a statute that increases or decreases the damages available to a plaintiff may still be applied retroactively. See *In re Certified Questions*, *supra*; *Rookledge*, *supra*; *Ballog*, *supra*.

Because the SRCA does not create a new obligation or impose a new duty, and because it simply alters the remedy available to plaintiffs who have been denied their justly earned commissions, it is properly applied retroactively. Thus, the trial court erred in holding that the provisions of the SRCA were not available to plaintiffs in this case.

Reversed.

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[2] Defendant's only authority for this position is *Lewis v Grand Rapids Plastics, Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 11, 1995 (Docket No. 162962). However, unpublished opinions are not binding, and we decline to follow *Lewis*.

[3] Here, as in *Rookledge*, there can be no doubt that the Legislature, in enacting this statute, intended to remedy an existing injustice. The Senate bill analysis notes that some employers withhold commissions, knowing that many sales representatives will accept distress settlements or forgo remuneration entirely in order to avoid costly and time-consuming litigation. The SRCA was intended to ensure that sales representatives receive the commissions to which they are entitled. See Senate Legislative Analysis, SB 717, June 15, 1992. Thus, the SRCA is properly regarded as remedial in nature. See *Rookledge*, *supra* at 453.

SAWYER, P.J., concurred.

BANDSTRA, J. (*dissenting*). I respectfully dissent.

Plaintiffs allege that, in early 1987, the parties entered into a contract under which defendant would pay five percent commissions on sales procured by plaintiffs. Plaintiffs procured sales for defendant resulting in commission payments averaging $125,000 a year for the next three years. In August of 1990, defendant terminated the agreement and discontinued making commission payments. About a year later, plaintiffs filed this lawsuit alleging that, notwithstanding the termination of the agreement, defendant was still obligated to pay commissions on later sales. Defendant took the position that sales after the termination were not subject to the commission agreement.

After this lawsuit was commenced and long after defendant discontinued making commission payments, the sales representatives' commissions act (SRCA), MCL 600.2961; MSA 27A.2961, was passed by the Legislature in the summer of 1992. It became effective on June 29, 1992. On that date, according to the majority, defendant became potentially liable to pay up to an additional $100,000, beyond normal damages allowable under contract law principles, because of its alleged intentional failure to pay commissions within forty-five days of their becoming due.[1] Clearly, neither side contemplated that potential liability when they entered into their agreement in 1987. It is also

[1] One hundred thousand dollars is the statutory maximum penalty provided by MCL 600.2961(5)(b); MSA 27A.2961(5)(b). Plaintiffs' brief argues that the total commissions at issue to date are about $600,000, making defendant's potential liability $700,000, plus interest.

clear that defendant could not have contemplated this potential liability when it first failed to make a commission payment to plaintiffs following termination of the agreement in 1990. Plaintiffs argue that, nonetheless, defendant's failure to make commission payments was sufficient to impose the new liability created by the Legislature two years later. The majority agrees.

I find this to be fundamentally unfair to defendant. I also conclude that this result is not required or authorized by the precedents cited by the majority.

None of the cases the majority relies on considered a statute that, applied retrospectively, would substantially change the rights established by parties through a contract. *In re Certified Questions (Karl v Bryant Air Conditioning Co)*, 416 Mich 558; 331 NW2d 456 (1982) (question was whether the products liability statute adopting comparative negligence could be applied to a common-law cause of action); *Ballog v Knight Newspapers, Inc*, 381 Mich 527; 164 NW2d 19 (1969) (considered amendments of the judgment interest statute); *Hansen-Snyder Co v General Motors Corp*, 371 Mich 480; 124 NW2d 286 (1963) (considered amendments of the mechanics' lien statute); *Rookledge v Garwood*, 340 Mich 444; 65 NW2d 785 (1954) (worker's compensation act amendments affected common-law action against third-party tortfeasor).[2] This is an important difference. In *In re Certified Questions*, *supra* at 573, the Supreme Court recognized "a distinct cleavage" between contract cases

[2] The majority also cited *Hughes v Judges' Retirement Bd*, 407 Mich 75; 282 NW2d 160 (1979),but the Supreme Court did not reach the retrospectivity question, determining instead that "plaintiffs seek only prospective application of the amendment." *Hughes*, *supra* at 87.

and cases where the retrospective application of a statute would affect some other kind of right. When retrospective application of a statute would affect contract rights, constitutional "impairment of contract" concerns are implicated. *Campbell v Judges' Retirement Bd*, 378 Mich 169, 180; 143 NW2d 755 (1966); see, also, *Byjelich v John Hancock Mut Life Ins Co*, 324 Mich 54, 61; 36 NW2d 212 (1949). Accordingly, our Supreme Court has stated the general rule that "[a] statute cannot be retroactive so as to change the substance of a contract previously entered into." *Id.*, quoting *Guardian Depositors Corp v Brown*, 290 Mich 433, 439; 287 NW 798 (1939). Similarly, the Supreme Court cited with apparent approval "the general proposition that absent a clearly expressed legislative intent to the contrary, it is to be presumed that the legislature intended an enactment to have prospective effect only," a proposition "especially true when giving a statute retroactive operation will interfere with an existing contract, destroy a vested right, create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed." *Hansen-Snyder Co*, *supra* at 484.

The statute applied retrospectively here will certainly "change the substance" of the parties' agreement. It will "interfere with" their contract by "creat[ing] a new liability in connection with a past transaction."[3] Accordingly, the provisions of the SRCA should not be available to plaintiffs in this lawsuit.

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[3] Even if this were not a contract case, I find the majority's analysis problematic. Under normal contract principles, plaintiffs would be entitled only to actual damages flowing from even an intentional failure to make commission payments. The statute allows for an additional and sig-

This approach would be consistent with legislative intent. "The question whether a statute operates retrospectively, or prospectively only, is one of legislative intent." 73 Am Jur 2d, Statutes, § 350, p 487. Thus, "the general rule against retrospective operation of statutes," *Hansen-Snyder Co, supra* at 485, is based on a judicial presumption "that the legislature intended an enactment to have prospective effect only," *id.* at 484. The opposite presumption applies with respect to statutes considered to be procedural or remedial. *Id.* at 484-485. However, regardless of these usual rules of statutory construction, legislative intent is the governing principle. A statute that would ordinarily be applied prospectively only will be applied retrospectively if that is the "clearly expressed legislative intent." *Id.* at 484. Conversely, with respect to the issue before us, procedural or remedial statutes are applied retrospectively but only where there is no legislative action showing a contrary intent. *Id.* at 485. See, also, e.g.: *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992) ("Statutes that operate in furtherance of a remedy . . . are held to operate retrospectively *unless a different intention is clear.*") (emphasis added); *Franks v White Pine Copper Division*, 422 Mich 636, 672; 375 NW2d 715 (1985) ("statutes which operate in furtherance of a remedy or mode of procedure . . . are generally held to operate retrospectively *unless a contrary legisla-*

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nificant penalty to be imposed. I find it difficult to conceive how this does not "create[] a new obligation and impose[] a new duty" but, instead, "only operate[s] in furtherance of a remedy . . . already existing" under the rules enunciated in the precedents on which the majority relies. *Ante* at 636-637. The statute, in effect, creates a new cause of action to recover a penalty that is unavailable under common-law contract damages principles.

tive intention is manifested") (emphasis added); *Selk v Detroit Plastic Products*, 419 Mich 1, 10; 345 NW2d 184 (1984) ("Statutes which operate in furtherance of a remedy . . . are held to operate retrospectively, *unless a contrary legislative intention is manifested.*") (emphasis added). We must be "reluctant to apply" the remedial/procedural exception to the rule against retrospectivity "without extensive exploration of legislative intent." *Franks*, *supra* at 673.

Retrospective application of the SRCA is inconsistent with legislative intent as that intent was evidenced upon the passage of the act. The Legislature was not content to let the new law take effect ninety days after the end of the 1991-92 legislative session. Instead, the Legislature voted by a two-thirds majority to make the SRCA effective immediately on June 29, 1992. Const 1963, art 4, § 27. This would have been an unnecessary exercise if the legislators intended that the new law would be applied retrospectively. With retrospective application, regardless of the effective date, the new act was applicable to all sales representative agreement contracts, no matter when they were entered into. The legislative action in giving the SRCA immediate effect clearly evidenced an intent that the new law was to have only prospective application. "The fact that a statute [is made] effective immediately, which would be unnecessary if its operation were retrospective, is an indication that the statute was intended to operate prospectively only." 73 Am Jur 2d, statutes, § 352, p 489.

I would affirm.

PEOPLE v ST JOHN

Docket No. 200533. Submitted April 21, 1998, at Grand Rapids. Decided July 10, 1998, at 9:25 A.M. Leave to appeal sought.

Eugene A. St. John was convicted by a jury in the Calhoun Circuit Court, James C. Kingsley, J., of first-degree home invasion and involuntary manslaughter. The defendant was sentenced to consecutive prison terms of six to twenty years for the home invasion conviction and ten to fifteen years for the involuntary manslaughter conviction. The defendant appealed.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by making the sentences consecutive. The home invasion statute, MCL 750.110a(6); MSA 28.305(a)(6), provides that a court may, in its discretion, order a term of imprisonment imposed for first-degree home invasion to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction. Contrary to the defendant's claim, this statute does not require that an information charging a person with first-degree home invasion give notice of the possibility of consecutive sentencing when another criminal offense arising from the same transaction is involved. The information against the defendant in this case complied with MCR 6.112(D) by providing notice of the maximum twenty-year sentence for first-degree home invasion.

2. The trial court erred in scoring a sentence for home invasion under the sentencing guidelines for breaking and entering. However, the error was harmless because the sentencing guidelines do not apply to home invasion.

3. The sentences imposed are not disproportionate. The sentence for involuntary manslaughter is within the sentencing guidelines range and is therefore presumptively proportionate. The sentence for first-degree home invasion is proportionate to the seriousness of that crime and the defendant's prior criminal record.

Affirmed.

1. SENTENCES — FIRST-DEGREE HOME INVASION — CONSECUTIVE SENTENCES.

A court sentencing a defendant convicted of first-degree home invasion and any other criminal offense arising from the same transaction may order that a term of imprisonment imposed for first-

degree home invasion be served consecutively to any term of imprisonment imposed for the other offense (MCL 750.110a[6]; MSA 28.305[a][6]).

2. CRIMINAL LAW — FIRST-DEGREE HOME INVASION — INFORMATIONS — CONSECUTIVE SENTENCES.

The first-degree home invasion statute does not require that a defendant charged with first-degree home invasion and any other criminal offense arising from the same transaction be given notice in the information of the possibility that sentences of imprisonment could be consecutive (MCL 750.110a[6]; MSA 28.305[a][6]).

3. SENTENCES — CONSECUTIVE SENTENCES — PROPORTIONALITY.

The cumulative length of consecutive sentences is not considered when determining the proportionality of the sentences; each sentence must be proportionate to the seriousness of the crime for which it was imposed and proportionate to the defendant's prior criminal record.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Susan Mladenoff*, Prosecuting Attorney, and *James B. Jenkins*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Desiree M. Ferguson*), for the defendant on appeal.

Before: CORRIGAN, C.J., and HOEKSTRA and YOUNG, JJ.

PER CURIAM. This case arises from defendant and a codefendant breaking and entering into a home with the intent to steal property and rob the elderly victim who lived there, codefendant's grandfather. A jury convicted defendant of involuntary manslaughter, MCL 750.321; MSA 28.553, and first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2). The lower court sentenced defendant to ten to fifteen years' imprisonment for the involuntary manslaughter conviction and six to twenty years' imprisonment for the first-degree home invasion conviction. Pursuant to MCL 750.110a(6); MSA 28.305(a)(6), the court also

ordered that defendant serve the sentences consecutively. Defendant appeals as of right. We affirm.

Defendant raises three issues on appeal regarding his sentences. First, defendant argues that the lower court abused its discretion in imposing consecutive sentences because the information failed to provide him with notice of such penalty as required by MCR 6.112(D). The court rule states, in pertinent part, that the information "must set forth the substance of the accusation against the defendant and the name, statutory citation, and penalty of the offense allegedly committed." MCR 6.112(D). The information in this case stated that the penalty for the home invasion charge against defendant was "20 Years and/or $5,000.00," which is the maximum penalty for a first-degree home invasion conviction as provided at MCL 750.110a(4); MSA 28.305(a)(4).

In Michigan, concurrent sentencing is the norm, and a court may impose consecutive sentences only if authorized by statute. *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). Here, the statute prohibiting home invasion states that a court may, in its discretion, "order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." MCL 750.110a(6); MSA 28.305(a)(6); *People v Hill*, 221 Mich App 391, 394; 561 NW2d 862 (1997). The jury found that defendant's acts during the home invasion in this case rendered him guilty not only of first-degree home invasion, but also of involuntary manslaughter. Accordingly, the court exercised its discretion and ordered that defendant

consecutively serve the sentences for the two offenses.

To support his claim that a defendant must receive notice of the possibility of consecutive sentences, defendant analogizes the sentence enhancement provision of the home invasion statute to a provision of the habitual offender statutes, MCL 769.13; MSA 28.1085, which requires the prosecuting attorney seeking sentence enhancement to first accuse the defendant of the previous convictions. See *Brinson v Genesee Circuit Judge*, 403 Mich 676, 680-684; 272 NW2d 513 (1978); *People v Sunday*, 183 Mich App 504, 506; 455 NW2d 321 (1990). Likewise, defendant cites the habitual offender provision of the statute prohibiting driving while under the influence of intoxicating liquor or a controlled substance, MCL 257.625(14); MSA 9.2325(14), which requires the prosecuting attorney to provide notice of the intent to seek sentence enhancement and to list the defendant's prior convictions. See *People v Eason*, 435 Mich 228, 247, n 31; 458 NW2d 17 (1990). See also MCR 6.112(C) (regarding the time for filing a supplemental information charging the defendant with being an habitual offender).

Our primary goal in interpreting statutes and court rules is to ascertain and facilitate the intent of the Legislature. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994) (statutory interpretation); *People v Baker*, 215 Mich App 606, 610; 547 NW2d 62 (1996) (interpretation of court rules). The first criterion in determining legislative intent is the specific language of the statute. *People v Pitts*, 216 Mich App 229, 232; 548 NW2d 688 (1996). On its face, the home invasion statute is distinguishable from those statutes

cited by defendant. The home invasion statute does not contain a provision allowing the prosecutor to seek an enhanced sentence on the basis of defendant's prior convictions. Instead, the Legislature placed the decision of sentence enhancement within the court's discretion. The statute clearly states "*the court may* order a term of imprisonment . . . to be served consecutively." MCL 750.110a(6); MSA 28.305(a)(6) (emphasis added).

Thus, unlike the habitual offender statutes and the statute prohibiting driving while under the influence of liquor, the home invasion statute does not require a prosecutor to provide notice to a defendant that the court may order the defendant to serve his sentences consecutively. Here, the prosecutor complied with the requirements of MCR 6.112(D) by properly identifying in the information the maximum penalty for the conviction of first-degree home invasion as provided by statute. Had the Legislature intended for the prosecutor to provide notice to defendant of the possibility of consecutive sentences, the statutes defendant cites are evidence that the Legislature could have so included that requirement. We will not read anything into a statute that is not within the manifest intention of the Legislature as gathered from the act itself; rather, the Legislature is presumed to have intended the meaning it plainly expressed. *People v Tolbert*, 216 Mich App 353, 359; 549 NW2d 61 (1996). Accordingly, we are not persuaded by defendant's argument that the information in this case mandates our finding that the lower court abused its discretion in sentencing him. We find no abuse of discretion and no reason to order resentencing on this basis.

Second, defendant argues that the lower court abused its discretion in sentencing him for his home invasion conviction because the court miscalculated the sentencing guidelines for breaking and entering. We disagree. Although the court erred in applying the sentencing guidelines for breaking and entering to defendant's home invasion conviction, the error was harmless because the sentencing guidelines do not apply to all offenses and are inapplicable to home invasion. Michigan Sentencing Guidelines (2d ed, 1988), p 1; *People v Edgett*, 220 Mich App 686, 690; 560 NW2d 360 (1996). Moreover, a defendant is not entitled to have a sentence vacated on the basis of an alleged miscalculation of the sentencing guidelines score. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). Therefore, resentencing is not required on this basis.

Last, defendant argues that his sentences are disproportionate. We disagree. Our review is limited to determining whether the sentencing court abused its discretion by violating the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Id.* Here, the lower court sentenced defendant to ten to fifteen years' imprisonment for the involuntary manslaughter conviction to be followed by six to twenty years' imprisonment for the first-degree home invasion conviction. In determining the proportionality of an individual sentence, this Court is not required to consider the cumulative length of consecutive sentences. *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). Rather, our inquiry is whether each sentence is proportionate. *Id.*

Defendant's sentence for involuntary manslaughter is within the applicable sentencing guidelines range; therefore, it is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant argues that the term of imprisonment is disproportionate because he was younger than codefendant, the alleged leader in the offenses, and only played a "minimal" role. However, a defendant's minimum culpability is not an unusual circumstance that overcomes the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

The maximum term of imprisonment defendant will serve for his first-degree home invasion conviction is twenty years, which is the maximum term provided in the statute. MCL 750.110a(4); MSA 28.305(a)(4). In so sentencing defendant, the court properly considered the trauma to the elderly victim's family, *People v Girardin*, 165 Mich App 264, 266-277; 418 NW2d 453 (1987), as well as the nature and severity of the crime, *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989), and defendant's criminal history, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). The lower court did not abuse its discretion in sentencing defendant because the sentences are proportionate to the seriousness of the crimes and defendant's prior record.

Affirmed.

VORVA v PLYMOUTH-CANTON COMMUNITY SCHOOL DISTRICT

Docket No. 206096. Submitted June 2, 1998, at Lansing. Decided July 10, 1998, at 9:30 A.M. Leave to appeal sought.

Jerry Vorva, on behalf of himself and 716 unknown voters of the Plymouth-Canton Community School District, brought an action in the Wayne Circuit Court against the Plymouth-Canton Community School District and the Board of Canvassers for the Plymouth-Canton Community School District, seeking a writ of mandamus and injunctive relief. In March 1997, an election was held concerning whether the defendant school district should issue bonds for the purpose of constructing and improving school facilities. The bond issue was authorized by a margin of less than one hundred votes out of the slightly more than twelve thousand votes cast. Because of the more than seven hundred votes that had been declared invalid as a result of them having been cast without an indication whether the voter was for or against the proposal and because of the belief the votes indicating no choice were the result of a malfunction of the UniLect Corporation electronic voting equipment that was used for the election, the plaintiff and others sought a recount or a special election. The Wayne County Board of Canvassers conducted a recount, which resulted in the same result as the original count. The Board of Canvassers for the Plymouth-Canton Community School District, after simulating an election, concluded that the UniLect System machines were neither defective nor malfunctioning and denied the petition for a special election. The court, James J. Rashid, J., granted summary disposition for the defendants. The plaintiff appealed.

The Court of Appeals *held*:

1. Mandamus is proper where the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, the defendant has the clear legal duty to perform the act, and the act is ministerial, involving no exercise of discretion or judgment. Mandamus is an extraordinary remedy that may lie to compel the exercise of discretion, but not to compel its exercise in a particular manner.

2. A board of canvassers is authorized to order a special election if it is shown that an elector cannot cast a valid vote by reason of a defect or mechanical malfunction of a voting machine, voting

device, ballot, or other election equipment or material. MCL 168.831 *et seq.*; MSA 6.1831 *et seq.* Because the defendant board of canvassers tested the voting equipment used in the disputed election and concluded that there were no defects or mechanical malfunctions and the plaintiff presented no evidence to the contrary, the defendant board of canvassers had no legal obligation to order a special election.

3. The plaintiff's argument that the voting system used was defective not because of a mechanical malfunction but rather because the electorate was not properly instructed in the use of the machines does not establish a basis for the issuance of a writ of mandamus against the defendant board of canvassers, because such a "defect" is not contemplated by the provisions of MCL 168.831 *et seq.*; MSA 6.1831 *et seq.*, and review of the substantive quality of the instructional materials accompanying a voting machine lies with the Secretary of State, not with a local board of canvassers. Accordingly, the plaintiff failed to establish that he was entitled to a writ of mandamus directing the defendant board of canvassers to hold a special election.

4. The court properly granted summary disposition with respect to the plaintiff's claim that the defendant school district failed to comply with the mandate of MCL 168.770a; MSA 6.1770(1) by failing to secure the approval of the Secretary of State to use the UniLect System. The court properly found that the UniLect System, being an electronic system, was subject to the provisions §§ 794 through 799a of the Michigan Election Law, MCL 168.794-168.799a; MSA 6.1794-6.1799(1), rather than the provisions of MCL 168.770a; MSA 6.1770(1).

5. MCL 168.795a; MSA 6.1795(1) provides that an electronic voting system may not be used until it has been approved by the Board of State Canvassers and that, after such a system is approved, any improvement or change in the system must be submitted to the Board of State Canvassers for its approval. Although the UniLect System had been approved for use by the Board of State Canvassers, the system used in the bond election had a change that had not been approved by the Board of State Canvassers. Accordingly, there was technical noncompliance with the mandate of § 795a. However, the trial court properly found that the change, which related to recounts, did not affect the casting or tabulation of votes and that the defendant school district's noncompliance with the mandate of § 795a did not render the election invalid.

6. Because there was no allegation of intentional or purposeful discrimination and the 716 voters whose votes were declared inva-

lid were given an equal opportunity to participate in the election, there was no denial of equal protection of the law.

Affirmed.

1. MANDAMUS — CONDITIONS FOR ISSUANCE — MINISTERIAL ACT — EXERCISE OF DISCRETION.

A writ of mandamus is properly issued where the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, the defendant has the clear legal duty to perform the act, and the act is ministerial, involving no exercise of discretion or judgment; mandamus is an extraordinary remedy that may lie to compel the exercise of discretion, but not to compel its exercise in a particular manner.

2. ELECTIONS — BOARDS OF CANVASSERS — SPECIAL ELECTIONS — DEFECTIVE BALLOT OR EQUIPMENT.

A board of canvassers is authorized to order a special election if it is shown that an elector cannot cast a valid vote by reason of a defect or mechanical malfunction of a voting machine, voting device, ballot, or other election equipment or material (MCL 168.831 *et seq.*; MSA 6.1831 *et seq.*).

3. ELECTIONS — ELECTRONIC VOTING SYSTEMS — BOARD OF STATE CANVASSERS — SECRETARY OF STATE.

Approval of an electronic voting system lies with the Board of State Canvassers pursuant to § 795a of the Michigan Election Law rather than with the Secretary of State pursuant to § 770a of the Michigan Election Law (MCL 168.770a, 168.795a; MSA 6.1770[1], 6.1795[1]).

4. ELECTIONS — ELECTRONIC VOTING SYSTEMS — APPROVAL OF SYSTEMS.

The use of an electronic voting system that has been approved by the Board of State Canvassers but for which the required approval of a change to the system has not been secured will not invalidate an election where the use of the changed system did not impair the electorate's right to vote or affect the outcome of the election (MCL 168.795a; MSA 6.1795[1]).

Sempliner, Thomas & Boak (by *Stephen H. Boak*), for the plaintiff.

Thrun, Maatsch and Nordberg, P.C. (by *Robert M. Thrun, Beverly J. Bonning*, and *Timothy R. Winship*), for Plymouth-Canton Community Schools.

DeBiasi & Associates, P.C. (by *William J. DeBiasi*), for Plymouth-Canton Community School District Board of Canvassers.

Before: SAWYER, P.J., and KELLY and DOCTOROFF, JJ.

PER CURIAM. Plaintiff appeals as of right from the circuit court's order granting summary disposition for defendants pursuant to MCR 2.116(C)(8) and (C)(10). We affirm.

On March 22, 1997, the Plymouth-Canton Community School District held a special election to authorize a bond issue in the amount of $79,795,000. The school district sought to borrow this sum of money for the purposes of constructing and improving school facilities. After the polls closed, the Board of Canvassers for the Plymouth-Canton Community School District canvassed the returns of the election and concluded that there were 5,733 votes in favor of the bond proposal, 5,637 votes against it, and 721 invalid votes.

After the election, several individuals, including plaintiff, filed petitions with the school district calling for a recount or a special election because there had been mechanical malfunctions in the UniLect Corporation voting equipment,[1] which "disenfranchised"

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[1] At the election, the school district used an electronic voting system developed by UniLect Corporation. The UniLect System was approved for use in Michigan by the Board of State Canvassers on March 11, 1994, and had been used on four prior occasions for township and school district elections. The system permits the voter to touch a "yes" or "no" rectangular box on a touch sensitive screen to enter the vote. When the desired box is touched, it becomes illuminated. However, if that box is touched for a second time, the illumination shuts off and the voter has, effectively, withdrawn that selection. After the selection is made, the voter must touch an "end all voting" box to record the vote. If the voter's selection is not illuminated when the "end all voting" box is touched, no vote is

over seven hundred voters. The Board of Canvassers for the Plymouth-Canton Community School District convened to consider the petitions for a recount and the petitions for a special election. The petitions were accepted, which resulted in the Wayne County Board of Canvassers conducting a recount on April 15, 1997, which was then followed by a testing of the UniLect System for mechanical defects.

After the recount, the Wayne County Board of Canvassers concluded that the bond issue had passed by a vote of 5,733 "yes" to 5,637 "no." The Board of Canvassers for the Plymouth-Canton Community School District, after simulating an election and reviewing the results, concluded that the UniLect System machines were not defective or malfunctioning. Therefore, the petitions for a special election were denied. Thereafter, plaintiff filed a complaint for mandamus and injunctive relief.

Plaintiff first contends that the trial court erred in denying his request for a writ of mandamus compelling the board of canvassers to void the election and order a special election. We disagree.

Issuance of a writ of mandamus is proper where (1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has the clear legal duty to perform such act, and (3) the act is ministerial, involving no exercise of discretion or judgment. *Bingo Coalition for Charity—Not Politics v Bd of State Canvassers*, 215 Mich App 405, 413; 546 NW2d 637 (1996). Mandamus is an extraordinary remedy that may lie to compel the

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recorded. Consequently, if a voter makes his initial selection, then touches the selection for a second time, and then does not make an alternative selection before touching "end all voting," no vote has been recorded.

exercise of discretion, but not to compel its exercise in a particular manner. *Teasel v Dep't of Mental Health*, 419 Mich 390, 409-410; 355 NW2d 75 (1984).

The board of canvassers is authorized to order a special election if it has been shown that an elector cannot cast a valid vote at an election because of a defect or mechanical malfunction of a voting machine, voting device, ballot, or other election equipment or material. MCL 168.831 *et seq.*; MSA 6.1831 *et seq.* The board of canvassers conducted an examination of the voting machines and concluded that there were no defects or mechanical malfunctions, and plaintiff has presented no evidence to the contrary. Consequently, defendant board had no legal obligation to order a special election, therefore, a writ of mandamus may not ensue.

In further support of his position, plaintiff argues that the voting system was defective, not by virtue of a mechanical malfunction of the machines themselves, but because the electorate was not properly instructed in the use of the machines. This type of "defect" is not contemplated by the provisions of MCL 168.831 *et seq.*; MSA 6.1831 *et seq.*, because it is not within the purview of a local board of canvassers to review the substantive quality of the instructional materials accompanying the machine. The Secretary of State is charged with the responsibility of providing instructions for the use of electronic voting machines to local election officials. MCL 168.31; MSA 6.1031, MCL 168.795a(2); MSA 6.1795(1)(2). We find no merit in plaintiff's request for a writ of mandamus.

Next, plaintiff argues that the trial court erred in dismissing count I of the complaint wherein plaintiff alleged that the school board violated the mandates

of MCL 168.770a; MSA 6.1770(1) because it failed to seek the approval of the Secretary of State before using the UniLect System in the March 22, 1997, election. We disagree. Section 770a, in general, requires the approval of the Secretary of State before a new voting system may be used. However, the UniLect System was an *electronic* voting system. Use of systems of this nature are specifically addressed in §§ 794 through 799a of the Election Law.[2] MCL 168.795a; MSA 6.1795(1) requires that the board of canvassers approve electronic voting systems. In this case, the Board of State Canvassers approved the UniLect System for use in Michigan in March 1994. Further, MCL 168.794c; MSA 6.1794(3) specifically provides that §§ 794 to 799a control with respect to elections where electronic voting systems are used. The trial court properly found that § 795a, not § 770a, governed the use of the UniLect System. Thus, we find no error in the court's dismissal of count I of plaintiff's complaint.

Although the court granted summary disposition with respect to count I of plaintiff's complaint, it granted plaintiff leave to amend his complaint to allege that the school board failed to comply with the provisions of § 795a. As addressed above, § 795a requires that electronic voting systems be approved by the Board of State Canvassers before use in an election. In addition, that section requires that if the approved electronic voting system is improved or changed, it must be submitted in its improved or changed form for recertification by the Board of State Canvassers. It is the alleged violation of this later pro-

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[2] MCL 168.794; MSA 6.1794 through MCL 168.799a; MSA 6.1799(1).

vision that plaintiff pleaded in his amended complaint.

After the amendment was made, defendants renewed their motions for summary disposition. At that time, because plaintiff could not establish that the alleged statutory violation affected the outcome of the election, or that it was the cause of the 716 invalid votes, and the UniLect System still met the minimum standard for certification, the court granted summary disposition with respect to plaintiff's claims of statutory noncompliance. We find no error in this ruling.

Under the circumstances of the present case, noncompliance with the statute does not render the election results invalid. In *Noel v Oakland Co Clerk*, 92 Mich App 181, 188-189; 284 NW2d 761 (1979), this Court quoted 29 CJS, Elections, § 67:

> "Ordinarily, provisions of an election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; *but after an election such provisions are directory only, in support of the result, unless they are of such a character that their violation would effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless they affect an essential element of the election, or it is expressly declared by statute that compliance with them is essential to the validity of the election.*" [Emphasis added.]

See, also, *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 208; 452 NW2d 471 (1989). Further, "[i]t has been repeatedly held by [the Michigan Supreme Court] that irregularities in the conducting of an election will not invalidate the action taken unless it appears that the result was, or may have

been, affected thereby." *Rosenbrock v School Dist No 3, Fractional*, 344 Mich 335, 339; 74 NW2d 32 (1955).

In this case, plaintiff cannot show that the school board's alleged violation obstructed the free and intelligent casting of the vote, or the ascertainment of the results, or that it affected an essential element of the election. Plaintiff cannot show the presence of any of these factors because even in its changed state, the UniLect System still met the minimum requirements for certification and the "change" that plaintiff contends warranted recertification is unrelated to the ability of the voter to cast his vote. The "change" was solely related to the ability to ascertain results in the event of a recount. In this regard, the machine was still able to perform a recount, indeed it was required to do so in this case, it just lacked the capacity to do so from two separate sources. Because plaintiff's challenge came after an election, the statutory provisions became purely directory. *Noel*, *supra* at 188-189. As such, statutory noncompliance does not render the election invalid. *Id.*

Finally, plaintiff alleges that he and the unidentified 716 voters were denied the equal protection of the law. We disagree. Plaintiff's claims are not of the nature recognized by the Equal Protection Clause of either the federal or the state constitution. The equal protection guarantee requires that persons under similar circumstances be treated alike. *El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987). "United States Supreme Court precedents consistently indicate that the United States Constitution's Equal Protection Clause reaches only intentional or purposeful discrimination." *Harville v State Plumbing*

& Heating, Inc, 218 Mich App 302, 306; 553 NW2d 377 (1996).

In this case, plaintiff did not allege any intentional or purposeful discrimination or that similarly situated individuals were treated differently. Indeed, it does not appear from the record that there was any differential treatment of the voters. Each voter was given an opportunity to vote under the same circumstances. Unfortunately, because of voter error or a conscious decision not to cast a vote while in the booth, 716 votes were invalid. In *Hadley v Junior College Dist of Metropolitan Kansas City, Mo*, 397 US 50, 56; 90 S Ct 791; 25 L Ed 2d 45 (1970), the United States Supreme Court recognized that the "Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . . ." Because each voter was given an equal opportunity to cast his vote, and over eleven thousand electors were successful in this endeavor, no equal protection violation has occurred.

Affirmed.

DYE v ST JOHN HOSPITAL AND MEDICAL CENTER

Docket No. 192292. Submitted November 3, 1997, at Detroit. Decided July 10, 1998, at 9:35 A.M. Leave to appeal sought.

Moira K. Dye brought an action in the Wayne Circuit Court against St. John Hospital and Medical Center, Arturo F. Paz-Esquerre, M.D., also known as Arturo Paz, M.D., and Arturo Paz, M.D., P.C., alleging injury resulting from Dr. Paz' malpractice and that St. John was negligent in extending staff privileges to Dr. Paz. The court, John A. Murphy, J., entered an order requiring St. John to produce certain documents from the credentials file of Dr. Paz that was compiled by the hospital's credentials committee when Dr. Paz sought staff privileges. The Court of Appeals granted St. John leave to appeal from the court's order and stayed the proceedings below.

The Court of Appeals *held*:

1. The information sought by the plaintiff is privileged and not subject to court subpoena pursuant to MCL 333.20175(8); MSA 14.15(20175)(8) and MCL 333.21515; MSA 14.15(21515). The statutes protect against disclosure of information relating to Dr. Paz' application for staff privileges.

2. The materials in the file sought were collected for or by the credentials committee and the confidentiality provisions of subsection 20175(8) and § 21515 apply.

3. 1967 PA 270 does not generally mandate disclosure of any information by a review entity and does not provide authority in this case for the proposition that disclosure of the credentials file is mandatory. Even if Act 270 could be interpreted as mandating disclosure, disclosure would be required only with respect to information released for one of the purposes found within § 2 of the act, as amended. MCL 333.532; MSA 14.57(22). The subsection of § 2 that the plaintiff alleges requires disclosure of the file, subsection 2(e), refers only to the release of information for the purpose of assisting a health care facility in determining whether a health care professional has the qualifications, competence, and performance needed to be selected and appointed to a medical staff position. Subsection 2(e) has nothing to do with the release of information to a plaintiff in a malpractice or negligent hiring lawsuit. The order

requiring disclosure must be vacated and the matter must be remanded for further proceedings.

Vacated and remanded.

CAVANAGH, J., dissenting, stated that MCL 331.532(e); MSA 14.57(22)(e) clearly provides that records relating to a review entity's decision whether to grant a doctor staff privileges may be released for review of the doctor's qualifications, competence, and performance. In addition, the evaluation of the claim that St. John was negligent in extending staff privileges to Dr. Paz specifically calls for a review of the qualifications, competence, and performance of a health care professional with respect to the selection and appointment of the health care professional to the medical staff of a health facility, making the release of the review entity's records appropriate under subsection 2(e). The court did not err in ordering production of the documents, and the matter should be remanded for further proceedings.

1. HOSPITALS — PHYSICIANS AND SURGEONS — RECORDS — REVIEW ENTITIES.

The Legislature has imposed a comprehensive statutory ban on the disclosure of any information collected by, or records of the proceedings of, committees assigned a professional review function within hospitals and health facilities; materials relating to the provision of staff privileges are not outside the purview of the statutes (MCL 333.20175[8], 333.21515; MSA 14.15[20175][8], 14.15[21515]).

2. HOSPITALS — PHYSICIANS AND SURGEONS — RECORDS — REVIEW ENTITIES.

Materials submitted to a review entity of a hospital or health facility by a doctor or submitted on the doctor's behalf by colleagues, references, and so forth, as part of the review entity's requirements with respect to the materials it seeks to review before granting the doctor staff privileges are "collected for or by" the review entity for purposes of MCL 333.20175(8), 333.21515; MSA 14.15(20175)(8), 14.15(21515).

3. HOSPITALS — PHYSICIANS AND SURGEONS — RECORDS — REVIEW ENTITIES.

Disclosure of information by a review entity of a hospital or health facility generally is not mandated by 1967 PA 270; the act immunizes from liability an entity that chooses to disclose information where the disclosure is for one of the purposes enumerated in MCL 331.532; MSA 14.57(22); the disclosure authorized by subsection 2(e) refers only to the release of information for the purpose of assisting a health care facility in determining whether a health care professional has the qualifications, competence, and performance needed to be selected and appointed to a medical staff position and is not concerned with the release of information to a plaintiff bring-

ing a malpractice or negligent hiring lawsuit against a hospital and a doctor granted staff privileges by the hospital.

Kepes, Wine & McNeilage, P.C. (by *Carol A. McNeilage*) (*Donald M. Fulkerson*, of Counsel), for the plaintiff.

Kitch, Drutchas, Wagner & Kenney, P.C. (by *Susan Healy Zitterman* and *Terese L. Farhat*), for St. John Hospital and Medical Center.

Before: BANDSTRA P.J., and CAVANAGH and MARKMAN, JJ.

BANDSTRA, P.J. Defendant[1] St. John Hospital and Medical Center appeals by leave granted the trial court's order requiring it to produce certain documents from the credentials file of Dr. Arturo Paz-Esquerre, also known as Dr. Paz. We vacate and remand.

Plaintiff Moira Dye first consulted Dr. Paz with complaints of pain in her head and neck, tinnitus in her left ear, and dizziness. Dr. Paz diagnosed Arnold-Chiari malformation and performed surgery on plaintiff at defendant hospital. Following the surgery, plaintiff began experiencing spasms in the back of her head, decreased sensation in her left foot, persistent numbness in her left leg, and difficulty walking. Plaintiff continues to suffer from a lack of sensation in her left leg and recurrent hydrocephalus and therefore requires additional medical and surgical treatment.

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[1] Both St. John Hospital and Medical Center and Dr. Arturo Paz-Esquerre are defendants in this lawsuit. However, because the doctor is not a party to this appeal, we will use the term defendant to refer exclusively to St. John Hospital and Medical Center.

Plaintiff filed the present lawsuit against defendant and Dr. Paz. Plaintiff alleged that she had been injured as a result of Dr. Paz' negligent acts. Plaintiff further alleged that defendant had been negligent in extending staff privileges to Dr. Paz. Plaintiff served defendant with a request for the production of a "[c]opy of Dr. Paz's personnel/privileges file including application for staff privileges, recommendations, medical school record, and credentials, etc." Defendant objected to plaintiff's request, contending that the information sought was not subject to discovery under various provisions of the Public Health Code, MCL 333.1101 *et seq.*; MSA 14.15(1101) *et seq.*

Plaintiff filed a motion to compel the production of Dr. Paz' personnel/credentials file. In its response to plaintiff's motion, defendant attached a copy of its bylaws and affidavits of Dr. Frank Wilson, its senior vice president of medical affairs. According to these uncontested documents, Dr. Wilson is in charge of physician credentialing on behalf of defendant's credentials committee, which was established pursuant to the hospital's bylaws "to review the professional practices in the hospital for the purpose[s] of reducing morbidity and mortality, improving the care provided patients in the hospital, and to insure that physicians are granted privileges consistent with their individual training, experience and other qualifications." The functions of the credentials committee include review of the qualifications, competence, and performance of health care professionals seeking to work at defendant hospital. Dr. Paz' credentials file consists of letters of recommendations, peer evaluations, and other information collected by or for the

members of the credentials committee as part of this review.

At a hearing regarding plaintiff's motion, the trial court ordered defendant to submit the credentials file for an in camera review. After that review, the trial court ordered defendant to produce twenty-four documents from the file, reasoning only that they were not "in the category of peer review material."[2] The documents ordered produced included questionnaires and reference letters prepared by persons who evaluated Dr. Paz' qualifications, competence, and performance in relation to his seeking and maintaining staff privileges with defendant hospital. Defendant's motions for reconsideration and for a stay of the production order were denied by the trial court. Defendant filed an emergency application for leave to appeal, which this Court granted along with a stay of the proceedings below.

Whether production of the documents at issue is barred by statute is a question of law that we review de novo. See *In re Jagers*, 224 Mich App 359, 362; 568 NW2d 837 (1997). Defendant primarily asserts that the materials sought by plaintiff are privileged pursu-

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[2] On the basis of this short explanation, we conclude that the trial court may have erred in its reasoning. Under the statutory provisions we discuss more fully below, the relevant question is whether Dr. Paz' personnel/credentials file contains information "collected for or by individuals or committees assigned a professional review function . . . ." MCL 333.20175(8); MSA 14.15(20175)(8). If it does, the statute protects it from discovery. The statutory purpose, to facilitate the frank exchange of information in the important task of overseeing medical personnel and assuring patient care, would be undermined if particular information properly collected for or by a review entity was later subject to disclosure upon a determination that, for some unanticipated reason, it was deemed not to be "in the category of peer review material."

ant to two sections of the Public Health Code.[3] Under MCL 333.20175(8); MSA 14.15(20175)(8),[4] "[t]he records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena." Similarly, MCL 333.21515; MSA 14.15(21515) provides that "[t]he records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena."

Defendant contends that the statutory sections quoted above demonstrate that the Legislature has imposed a comprehensive ban on the disclosure of any information collected by, or records of the proceedings of, committees assigned a professional review function within hospitals and health facilities. Therefore, defendant asserts, because the requested materials were collected by or for its credentials committee, which exercises a professional review func-

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[3] Defendant also relies upon § 3 of 1967 PA 270, as amended, which provides that data collected by or for a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding. MCL 331.533; MSA 14.57(23). To the contrary, plaintiff argues that Act 270 requires production of the credentials file. We discuss Act 270 below in relation to plaintiff's argument and agree with defendant that, under the facts of this case, Act 270 is another source of protection against disclosure with respect to the credentials file.

[4] At the time the present case was filed, this section was codified at MCL 333.20175(6); MSA 14.15(20175)(6).

tion,[5] the materials sought by plaintiff are not subject to discovery. The plain meaning of the statutory language would support that conclusion. *McCready v Hoffius*, 222 Mich App 210, 215; 564 NW2d 493 (1997).

Plaintiff advances two arguments why these statutory sections should not apply to the credentials file at issue here. Plaintiff first argues that the statutes apply only to documents gathered for "retrospective" analysis of a past incident or issue raising concerns about medical personnel or hospital procedures. Plaintiff argues that the statutes do not apply to the "prospective" issue addressed by the credentials committee here, whether to extend staff privileges to Dr. Paz. Thus, plaintiff contends the statutes do not provide confidentiality to Dr. Paz' application or the supporting documents within the file at issue.

Plaintiff bases this argument on *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 769; 431 NW2d 90 (1988), where a panel of our Court stated that "[i]n determining whether the information . . . is privileged, the court should consider . . . whether the committee's function is that of retrospective review for purposes of improvement and self-analysis and thereby protected, or part of current patient care." The Court in *Gallagher* cited *Monty v Warren Hosp Corp*, 422 Mich 138, 147; 366 NW2d 198

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[5] The trial court reasoning does not suggest a factual finding that Dr. Wilson and the credentials committee are not "individuals or committees" assigned a review function under the statutory sections at issue here. On the basis of our review of the affidavit submitted by Dr. Wilson and its explanation of the hospital bylaws relating to the credentials committee, we conclude that Dr. Wilson and the credentials committee are within the purview of the statutes. See *Monty v Warren Hosp Corp*, 422 Mich 138, 147; 366 NW2d 198 (1985).

(1985), which similarly stated that "in deciding whether a particular committee was assigned a review function so that information it collected is protected, the court may wish to consider . . . whether the committee's function is one of current patient care or retrospective review. Compare *Davidson v Light*, 79 FRD 137 (D Colo, 1978), with *Bredice v Doctors Hospital, Inc*, 50 FRD 249 (D DC, 1970), aff'd without opinion 156 US App DC 199; 479 F2d 920 (1973)."

Comparing the *Davidson* and *Bredice* precedents, as directed by *Monty*, we reject plaintiff's conclusion that materials relating to the provision of staff privileges are outside the purview of the statutes. The only import of these precedents is that certain "current patient care" issues are so pressing and immediate that the provision of confidentiality is unnecessary to facilitate open discussion by a reviewing committee. In *Davidson*, for example, the plaintiff sought production of an "Infection Control Report" prepared following discovery of an outbreak of gangrene at the defendant hospital:

> The committee involved here does not evaluate hospital policy generally, but presumably is called upon only when an infection problem exists, as was the case here. At such times, the source of an infection is investigated and activity is undertaken to eradicate the infection. This role is not such as to be susceptible to inhibition due to the discoverability of the committee's reports. [*Davison, supra* at 140.]

Monty and *Gallagher* might be construed as creating an exception to the statutes' confidentiality provisions for information relating to the investigation and remediation of a specific and immediate health care

crisis.[6] That exception, however, would not apply to the materials gathered by the credentials committee in this case with respect to Dr. Paz' qualifications and the extension of staff privileges.

This conclusion finds support in *Attorney General v Bruce*, 422 Mich 157; 369 NW2d 826 (1985) (hereafter *Bruce)*, a decision handed down by our Supreme Court shortly after *Monty*.[7] The Court in *Bruce* noted that hospitals are required by statute to establish peer review committees and that "[i]ncluded in their duties is the obligation to review the professional practices of licensees, granting staff privileges consistent with each licensee's qualifications." *Id.* at 169. After discussing the rationale for protecting the confidentiality of peer review committees involved in the extension of staff privileges, the Court specifically noted that "[i]n enacting §§ 20175(5) and 21515, the Legislature provided a strong incentive for hospitals to carry out their statutory duties." *Id.* at 169-170. Although arguably dicta, we find this reasoning persuasive; we conclude that the statutes at issue here, the same statutes discussed in *Bruce*,[8] protect against disclosure of information relating to Dr. Paz' application for staff privileges at defendant hospital.

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[6] Because we conclude that any exception would not apply under the facts of this case, we need not consider whether the language plaintiff relies on from *Monty* and *Gallagher* is dicta or the propriety of grafting an exception onto Michigan statutes on the basis of foreign precedents having nothing to do with those statutes.

[7] Our decision is also consistent with precedents from other jurisdictions. See, e.g., *Memorial Hosp-The Woodlands v McCown*, 927 SW2d 1 (Tex, 1996); *McGee v Bruce Hosp System*, 312 SC 58; 439 SE2d 257 (1993); *Alexander v Superior Court*, 5 Cal 4th 1218; 859 P2d 96 (1993); *Cruger v Love*, 599 So 2d 111 (Fla, 1992).

[8] At the time *Bruce* was decided, the current subsection 20175(8) of the Public Health Code was codified at subsection 20175(5). *Bruce*, *supra* at 168.

Plaintiff also argues that the statutory sections are inapplicable because materials in the credentials file relating to Dr. Paz' application for employment were not "collected for or by" a review entity. Plaintiff relies upon *Marchand v Henry Ford Hosp*, 398 Mich 163; 247 NW2d 280 (1976). In *Marchand*, the plaintiff sought records compiled by a doctor regarding a "hyperalimentation" feeding technique employed by the defendant hospital. The doctor kept records regarding the feeding technique on his own initiative, for his own education and enlightenment, and not at the request of anyone at the hospital. *Id.* at 167-168. The Supreme Court reasoned that, accordingly, "the information sought by [the plaintiff] was not collected pursuant to a directive from" a review entity under the statute and the fact that the information was subsequently presented at a general hospital staff meeting did not satisfy the "collection" criteria of the statute. *Id.* at 168.

We find *Marchand* to be distinguishable. Plaintiff argues that documents supporting Dr. Paz' original application for staff privileges and the continuing review of those privileges were not "collected for or by" the credentials committee, having been submitted by others. However, Dr. Paz submitted these materials, or had them submitted on his behalf by colleagues, references, and so forth, pursuant to expectations or directives of the credentials committee. As in any situation regarding application for professional employment, Dr. Paz was aware of the requirements of the committee with respect to the credentials, endorsements, and other materials it wanted to review before granting staff privileges. In that sense, materials in the file relating to Dr. Paz' application for

privileges were "collected for or by" the committee and the confidentiality provisions of the statutes apply.

Plaintiff further argues that, notwithstanding the protections afforded to the credentials file by subsection 20175(8) and § 21515 of the Public Health Code, 1967 PA 270 explicitly mandates release of the documents at issue here. MCL 331.531 *et seq.*; MSA 14.57(21) *et seq.* Plaintiff cites § 3 of 1967 PA 270, as amended by 1992 PA 216, which states, in pertinent part, that "[e]xcept as otherwise provided in section 2, the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding." MCL 331.533; MSA 14.57(23). Plaintiff argues that one of the provisions of § 2 of Act 270, MCL 331.532; MSA 14.57(22), applies to the credentials file here, a contention we address below, and that therefore § 3 of Act 270 mandates disclosure of that file.[9]

We disagree, first, because Act 270 does not generally mandate disclosure of any information by a review entity. An argument similar to plaintiff's was rejected by our Supreme Court in *Bruce, supra* at 171-172. The Court reasoned that Act 270 "protects persons, organizations, and entities that *choose* to disclose information . . . ." *Id.* at 171-172 (emphasis in original). They are "immunized from liability" as long

[9] In effect, plaintiff thus argues that Act 270 overrides the Public Health Code sections discussed above. Because we reject plaintiff's argument that Act 270 mandates disclosure, we also conclude that it presents no conflict with the Public Health Code confidentiality provisions.

as disclosure is for one of the purposes enumerated in § 2 of Act 270. MCL 331.532; MSA 14.57(22). *Id.* at 172. Authorizing and immunizing a disclosure from liability is not, however, the same as mandating disclosure:

> The subpoena indeed may have requested information for permissible purposes [under § 2 of the statute] . . . . Release of such information, however, is clearly discretionary according to MCL 331.531; MSA 14.57(21) which provides that "[a] person, organization or entity *may* provide information." The act does not provide authority for the proposition that disclosure to the department is mandatory. [*Id.* (emphasis in original).]

For the same reason, Act 270 does not provide authority in this case for the proposition that disclosure of the credentials file is mandatory.[10]

Plaintiff's argument also fails for a second reason. Even if, notwithstanding *Bruce*, Act 270 might somehow be interpreted as mandating disclosure, disclosure would only be required with respect to informa-

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[10] We read *Bruce* as meaning that the entire Act 270 imposes no disclosure obligation but, instead, provides protection from liability for the voluntary release of information. While the Supreme Court considered all three sections of Act 270 in *Bruce*, it came to that conclusion stressing the word "may" in § 1. Application of *Bruce* to this case is, therefore, somewhat problematic. The "may" language in § 1, as amended by 1992 PA 215, has to do with providing information "to a review entity" whereas the question here concerns the release of information by a review committee. Sections 2 and 3 of Act 270 are applicable to that question and they do not have the permissive "may" language. However, we find nothing within §§ 2 or 3 that places a duty on a review entity to release information. Instead, § 3 provides confidentiality protection. That protection is subject to exceptions listed in § 2. Thus, a disclosure falling within one of specified purposes of § 2 does not run afoul of the confidentiality provisions of § 3. Nothing within these sections, however, mandates the release of information within a category excepted from the confidentiality protection. It is one thing to exempt information from guaranteed confidentiality but quite another to require disclosure of that information.

tion released for one of the purposes found within § 2 of the act, as amended. MCL 331.532; MSA 14.57(22). Plaintiff argues that the application for staff privileges and related documents fall within the § 2 provision stating:

> The release or publication of a record of the proceedings or of the reports, findings, and conclusions of a review entity shall be for 1 or more of the following purposes:
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> * * *
>
> (e) To review the qualifications, competence, and performance of a health care professional with respect to the selection and appointment of the health care professional to the medical staff of a health facility. [MCL 331.532(e); MSA 14.57(22)(e).]

We disagree. We conclude, on the basis of the plain and ordinary meaning of this language, that the disclosure authorized is only for the purpose of reviewing the qualifications, competence, and performance of a health care professional during the process of determining whether the health care professional should be selected for and appointed to the medical staff of a health facility. In other words, subsection 2(e) refers only to the release of information for the purpose of assisting a health care facility in determining whether a health care professional has the qualifications, competence, and performance needed to be selected and appointed to a medical staff position. We conclude that it has nothing to do with the release of information to a plaintiff in a malpractice or negligent hiring lawsuit.

We vacate the trial court's order that required the disclosure of documents contained within Dr. Paz'

credentials file.[11] We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

MARKMAN, J., concurred.

CAVANAGH, J. (*dissenting*). I respectfully dissent. As the majority states, pursuant to MCL 331.533; MSA 14.57(23), the data collected by or for a review entity are confidential, are not public records, and are not discoverable. However, the Legislature has established several exceptions to this general rule. See MCL 331.532; MSA 14.57(22). In particular, MCL 331.532; MSA 14.57(22) provides:

> The release or publication of a record of the proceedings or of the reports, findings, and conclusions of a review entity shall be for 1 or more of the following purposes:
>
> * * *
>
> (e) To review the qualifications, competence, and performance of a health care professional with respect to the selection and appointment of the health care professional to the medical staff of a health facility.

The Legislature did not specify to whom the review entity materials could be released; it stated only that release "shall" be for the purposes set forth in the statute.

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[11] Plaintiff is free to pursue discovery of information contained in the credentials file if it is available from other sources. Our analysis of the statutes at issue here indicates a legislative intent to prohibit litigants from using the files of a review entity like the credentials committee as a "clearinghouse" of information facilitating easy discovery; however, placement of a document within such a file does not protect against its discovery if available from another source.

The majority reads this language to mean that disclosure is authorized only for the purpose of reviewing the qualifications, competence, and performance of a health care professional during the process of determining whether the health care professional should be selected for and appointed to the medical staff of a health facility. Under the majority's construction, the provision allows a review entity that has completed an evaluation of a health care professional to release its records or reports only to itself or another health care facility.

In my view, this restrictive interpretation is not supported by the text of the statute. The statute clearly provides that records relating to a review entity's decision whether to grant a doctor staff privileges may be released for review of the doctor's qualifications, competence, and performance.[1] Judicial construction of a statute is not permitted where the plain and ordinary meaning of the language is clear. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996).

Moreover, the majority ignores the fact that, in addition to her claim of malpractice, plaintiff also alleges that defendant St. John Hospital and Medical Center was negligent in extending staff privileges to Dr. Paz. The evaluation of this claim specifically calls for a review of "the qualifications, competence, and performance of a health care professional with

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[1] The majority relies on *Attorney General v Bruce*, 422 Mich 157; 369 NW2d 826 (1985), in which the Court noted that "[i]n enacting [MCL 333.20175(5); MSA 14.15(20175)(5) and MCL 333.21515; MSA 14.15(21515)], the Legislature provided a strong incentive for hospitals to carry out their statutory duties." *Id.* at 169-170. However, the Supreme Court decided *Bruce* before the enactment of MCL 331.532(e); MSA 14.57(22)(e) in 1992 PA 215.

respect to the selection and appointment of the health care professional to the medical staff of a health facility." Accordingly, I would conclude that the trial court did not err in ordering defendant to produce documents from Dr. Paz' personnel/credentials file.

The trial court found that approximately half of the documents in Dr. Paz' personnel/credentials file were subject to discovery. However, because the record does not reflect that the trial court considered MCL 331.532; MSA 14.57(22) in making its ruling, I would remand so that the trial court could conduct another in camera review with the provisions of that statute in mind.

PEOPLE v PARKER

Docket No. 199568. Submitted February 10, 1998, at Grand Rapids. Decided July 14, 1998, at 9:00 A.M. Leave to appeal sought.

Wade S. Parker was convicted by a jury in the Berrien Circuit Court, Casper O. Grathwohl, J., of second-degree murder, possession of a firearm by a person convicted of a felony (felon in possession), and possession of a firearm during the commission of a felony (felony-firearm). He was sentenced to consecutive sentences of thirty to ninety years' imprisonment for the murder conviction and two years for the felony-firearm conviction. The record does not indicate a sentence for the felon in possession conviction. The defendant appealed.

The Court of Appeals *held*:

1. The court did not abuse its discretion in repeating, at the jury's request, the instructions regarding first- and second-degree murder but not repeating the instructions regarding manslaughter and self-defense that were not covered in the jury's specific request.

2. The trial court was mistaken to the extent that it ruled that a proffered witness could not testify about an alleged prior inconsistent statement made by another witness, who had already testified and was cross-examined, on the basis of the assumption that the testimony of the proffered witness was not admissible until and unless the other witness was given the opportunity to explain or deny the alleged prior statement. However, the court's ultimate exclusion of the proffered testimony was not an abuse of discretion. MRE 613(b) provides that a witness need only be provided with the opportunity to address the alleged inconsistency at some point during the trial. The rule does not provide that the court must admit extrinsic evidence of a prior inconsistent statement before the statement is presented to the witness. Here, where the defendant knew about the prior inconsistent statement before the witness testified but did not ask the witness about it and the witness could not thereafter be found to have him offer further testimony, the court did not abuse its discretion in ruling that the proffered testimony would not be allowed.

3. The defendant was properly convicted of possession of a firearm by a person convicted of a felony. The defendant's conviction

of attempted possession of a controlled substance less than five years before the present offense qualifies as a "specified felony" under MCL 750.224f; MSA 28.421(6) and made the defendant subject to the statute's five-year prohibition regarding possessing a firearm.

4. The defendant waived his right to proceed to trial within ninety days of the order denying his pretrial release by agreeing that the trial would commence on a date more than ninety days after the order.

5. Although the prosecution failed to present at the preliminary examination any evidence regarding the defendant's prior conviction to support the charge of felon in possession, the error was harmless because sufficient evidence was adduced at trial to convict the defendant.

6. The defendant's Fourteenth Amendment due process rights and Sixth Amendment right to confront witnesses were not violated when the defendant and his counsel were not allowed to be present during a hearing concerning the prosecution's petition to hold two individuals as material witnesses where the subject matter of the hearing was the witnesses' fear of testifying against the defendant and no other matters were discussed and no substantive evidence was taken from the witnesses.

7. The convictions and sentences must be affirmed and the matter must be remanded for imposition of a sentence for the felon in possession conviction.

Affirmed and remanded.

1. CRIMINAL LAW — JURY INSTRUCTIONS.

A trial court does not abuse its discretion in failing to repeat jury instructions addressing areas not covered by the jury's specific request for the repeat of other instructions.

2. TRIAL — WITNESSES — PRIOR INCONSISTENT STATEMENTS.

A trial court maintains control of the order in which parties will adduce proof; the traditional approach whereby a prior inconsistent statement made by a witness could not be offered until and unless the witness was presented with the inconsistent statement was modified by MRE 613(b), which provides that the witness need only be provided with the opportunity to address the alleged inconsistency at some point during the trial; the rule does not indicate that a court must admit extrinsic evidence of a prior inconsistent statement before the statement is presented to the witness; a proponent of the testimony who fails to follow the traditional approach runs the risk that the court will properly exercise its discretion not to allow the admission of the prior statement.

3. CRIMINAL LAW — POSSESSION OF FIREARM BY PERSON CONVICTED OF A FELONY — WORDS AND PHRASES — FELONY — SPECIFIED FELONY.

MCL 750.224f; MSA 28.421(6) establishes two separate periods during which it is unlawful for a convicted felon to carry a firearm; a three-year period applies to individuals convicted of a "felony," as defined in the statute; a five-year period applies to individuals convicted of a "specified felony," as defined in the statute; the two categories overlap and a "specified felony" is merely a particularized subcategory of the category "felony"; the definition of "felony" also applies to the definition of "specified felony" although additional requirements must be met in order for a felony to also be a specified felony; the attempted unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance is a "specified felony" for which the five-year prohibition applies.

4. CRIMINAL LAW — TRIAL — PRETRIAL RELEASE — DENIAL — SPEEDY TRIAL — WAIVER.

A defendant who is denied pretrial release and agrees to a trial date that is more than ninety days later waives the right to proceed to trial within ninety days (MCR 6.106[B]).

5. CRIMINAL LAW — CONSTITUTIONAL LAW — DUE PROCESS — RIGHT TO CONFRONT WITNESSES.

A defendant has a right to be present during any stage of a trial where the defendant's substantial rights might be adversely affected; a defendant's due process rights are not violated where the defendant and defense counsel are excluded from a hearing concerning the prosecution's petition to hold individuals as material witnesses where the only matter discussed is the witnesses' fear of testifying against the defendant and no substantive evidence is taken from the witnesses; because a defendant's Sixth Amendment right to cross-examine witnesses applies only when witnesses provide evidence of substance that bears on the outcome of the trial, that right also is not violated by the exclusion of the defendant and defense counsel from the hearing (US Const, Ams VI, XIV).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Angela Pasula*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Lyle N. Marshall*) and Wade S. Parker, in propria persona.

Before: GRIFFIN, P.J., and HOLBROOK, JR., and NEFF, JJ.

PER CURIAM. Defendant was charged with first-degree murder, MCL 750.316; MSA 28.548, possession of a firearm by a person convicted of a felony (hereinafter felon in possession), MCL 750.224f; MSA 28.241(6), and possession of a firearm during the commission of a felony (hereinafter felony-firearm), MCL 750.227b; MSA 28.424(2). Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, felon in possession, and felony-firearm. He was sentenced to consecutive terms of thirty to ninety years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. There is no indication in the record that defendant was sentenced for his felon in possession conviction. Defendant appeals as of right. We affirm, but remand for the imposition of a sentence for defendant's felon in possession conviction.

Defendant was charged in connection with the shooting death of Michael Hadley. In the early evening hours of May 15, 1995, defendant and Hadley got into a heated argument in the front yard of a home located in Benton Harbor. Defendant ultimately left the scene and walked across the street. Sometime later, defendant approached Hadley from behind as the decedent stood talking to his cousin. From close range, defendant fired four bullets into Hadley's head. Hadley died at the scene. The prosecution argued at trial that the killing was premeditated and unprovoked, whereas defendant argued that he shot Hadley in self-defense after Hadley had threatened defendant with a handgun Hadley had taken from his waistband.

Defendant first contends that the trial court erred in repeating for the jury its instructions regarding first- and second-degree murder, but failing to repeat the court's instructions regarding manslaughter and self-defense. We disagree. While the jury specifically requested supplemental instructions regarding first- and second-degree murder, no similar request was made with regard to the manslaughter and self-defense instructions. It is not an abuse of discretion for a trial court to fail to repeat instructions addressing areas not covered by a jury's specific request. *People v Bonham*, 182 Mich App 130, 134-135; 451 NW2d 530 (1989); *People v Darwall*, 82 Mich App 652, 663; 267 NW2d 472 (1978).

Defendant next claims that the trial court erred in not allowing David Jose to testify about an alleged prior inconsistent statement made by Nathan Magee, a witness to the shooting, who was called to testify on behalf of the prosecution. Magee testified that after defendant shot Hadley, defendant removed a nine-millimeter handgun from underneath Hadley's shirt. During cross-examination, Magee acknowledged that on the day after the shooting the police found a black ten-millimeter handgun underneath a mattress in Magee's home. However, he denied knowing either how the gun got there or who it belonged to. Magee also denied knowing Jose. We note that although defense counsel asked Magee on cross-examination if he knew Jose, counsel never directly questioned Magee about the alleged prior statement.

When the issue of Jose's testimony was raised after Magee had been cross-examined, defense counsel represented to the court that Jose would testify that Magee had told him, while the two were in the Ber-

rien County Jail, that Hadley possessed a ten-millimeter handgun and that the gun that was found at Magee's home the day after the shooting was Hadley's gun. The trial court indicated that defendant would not be allowed to call Jose until he had first asked Magee about the alleged statement. After attempts to locate Magee to have him reappear at the trial proved unsuccessful, the trial court ruled that Jose could not be called because defendant had failed to satisfy the foundational requirements for the introduction of Jose's testimony. To the extent that the trial court's ruling was based on the assumption that Jose's testimony was not admissible until and unless Magee was first given the opportunity to explain or deny the alleged prior statement, we conclude that the trial court was mistaken. Nevertheless, the ultimate exclusion of Jose's testimony does not evidence an abuse of discretion.

The trial court maintains control of " 'the order in which parties will adduce proof.' " *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996), quoting *Geders v United States*, 425 US 80, 86; 96 S Ct 1330; 47 L Ed 2d 592 (1976). Traditionally, extrinsic evidence of a prior inconsistent statement made by a witness could not be offered until and unless the witness was presented with the inconsistent statement. The traditional approach was modified somewhat by MRE 613(b),[1] which provides that the witness need

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[1] MRE 613(b) reads, in pertinent part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

only be provided with the opportunity to address the alleged inconsistency at some point during the trial. "The rule contains no particular sequence or timing so long as the witness has the opportunity to explain the statement." *Westphal v American Honda Motor Co, Inc*, 186 Mich App 68, 71; 463 NW2d 127 (1990).

However, while under MRE 613(b) it is no longer necessary to follow the traditional foundational requirements, there is nothing in the language of the subrule that indicates that a trial court *must* admit extrinsic evidence of a prior inconsistent statement before the statement is presented to the witness. In fact, although MRE 613(b) allows for more flexibility, the traditional method of presenting the alleged inconsistent statement to the witness on cross-examination is still preferred. See *Wammock v Celotex Corp*, 793 F2d 1518, 1522 (CA 11, 1986) (observing that FRE 613(b), which is identical to MRE 613(b), "does not supplant the traditional method of confronting a witness with his inconsistent statement prior to its introduction into evidence as the *preferred* method of proceeding"). In circumstances like those present here, where the prior statement was not "given under oath subject to the penalty of perjury," MRE 801(d)(1)(A), the traditional method helps to assure that the prior statement will not be incorrectly interpreted by a jury as substantive evidence.[2]

The record makes clear that defendant knew about the prior inconsistent statement before Magee was called to testify. Even though Magee did not have to

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[2] If the proponent of the extrinsic evidence does not confront the witness on cross-examination with the prior statement, we believe the best course of action would be for the proponent to excuse the witness subject to recall. This procedure was not followed in the case at bar.

be confronted with the prior statement before Jose could be called to testify, we conclude that under the circumstances the trial court did not abuse its discretion in ruling that the traditional sequence would be followed. Further, because Magee could not subsequently be located and consequently would not be given the opportunity to explain the prior statement, the exclusion of Jose's testimony altogether was not an abuse of discretion.[3] See *Wammock*, *supra* at 1522 (observing that "where the proponent of the testimony fails to [follow the traditional method] . . . , the proponent runs the risk that the court will properly exercise its discretion to not allow the admission of the prior statement").

Defendant next contends that he was erroneously convicted of felon in possession because, under the terms of MCL 750.224f; MSA 28.421(6), he was prevented from carrying a firearm for only three years after his 1988 conviction of attempted possession of cocaine, not five years as the trial court had concluded. MCL 750.224f; MSA 28.421(6) reads in pertinent part:

> (1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:
>
> * * *
>
> (2) A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or

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[3] Furthermore, defendant has not established that the "interests of justice otherwise require" us to conclude that the trial court abused its discretion.

> distribute a firearm in this state until all of the following circumstances exists:
>
> (a) The expiration of 5 years after all of the following circumstances exist:
>
> * * *
>
> (5) As used in this section, "felony" means a violation of a law of this state, or of another state, or of the United States that is punishable by imprisonment for 4 years or more, or an attempt to violate such a law.
>
> (6) As used in subsection (2), "specified felony" means a felony in which 1 or more of the following circumstances exist:
>
> * * *
>
> (ii) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.

Defendant contends that because subsection 6(ii) does not include a reference to attempted possession of a controlled substance, his 1988 conviction does not meet the definition of a "specified felony." Rather, defendant argues that because subsection 5 specifically defines "felony" as "an attempt to violate" the laws of Michigan, his 1988 conviction is classified as a felony under the statutory scheme. Defendant claims, therefore, that he is subject to the three-year statutory limit imposed by subsection 1 and not the five-year limit imposed by subsection 2(a).

Defendant's argument is predicated on an erroneous reading of MCL 750.224f; MSA 28.421(6). "Statutory interpretation is a question of law reviewed de novo on appeal." *People v Williams*, 226 Mich App 568, 570; 576 NW2d 390 (1997). The overriding goal guiding judicial interpretation of statutes is to discover and give effect to legislative intent. *Tryc v*

Michigan Veterans' Facility, 451 Mich 129, 135; 545 NW2d 642 (1996); *Williams*, *supra* at 570; *Knight v Limbert*, 170 Mich App 410, 413; 427 NW2d 637 (1988). "Unless defined in the statute, every word or phrase therein should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *People v Hack*, 219 Mich App 299, 305; 556 NW2d 187 (1996).

MCL 750.224f; MSA 28.421(6) establishes two separate periods during which it is unlawful for a convicted felon to carry a firearm. The first period lasts for three years, and it applies to individuals convicted of a felony, as that term is defined by the statute. The second period lasts for five years, and it applies to individuals convicted of a specified felony, as that phrase is defined by the statute. The problem with defendant's reading of the statute is that it is based on an erroneous assumption that the categories "felony" and "specified felony" exist independently of each other. In plain and unambiguous language, the statute indicates that a specified felony is merely a particularized subcategory of the category felony. Subsection 5 clearly indicates that the definition of felony applies throughout the statute. MCL 750.224f(5); MSA 28.421(6)(5) ("As used in this *section* . . . ."). Accordingly, the definition of felony provided in subsection 5 also applies to the definition of specified felony found in subsection 6. Subsection 6 simply outlines what *additional* requirements must be met in order for a felony to also be a specified felony. In other words, subsections 5 and 6 are overlapping categories, not discrete classifications, with the specified felony category being entirely subsumed within the felony category. Thus, if an individual is convicted of the

attempted violation of law, and that attempt involved "the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance," then such an individual has been convicted of a specified felony under MCL 750.224f; MSA 28.421(6). Because defendant's 1988 conviction of attempted possession of cocaine meets these criteria, he is subject to the five-year limit.

We also reject two related arguments raised by defendant. First, defendant contends that the trial court erred in admitting into evidence a judgment of probation addressing defendant's 1988 conviction. Initially, we note that defendant failed to preserve the issue for appeal by raising a timely and specific objection to the exhibit when it was offered by the prosecution at the close of its case-in-chief or to the lack of any limiting instruction in the trial court's final jury instructions. *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). In any event, we conclude that defendant's argument lacks merit given that it is predicated on his erroneous conclusion that the 1988 conviction is not a specified felony. Second, defendant argues that MCL 750.224f; MSA 28.421(6) is unconstitutional in that it (1) infringes on his right to keep and bear arms under the Michigan Constitution[4] and (2) violates the Ex Post Facto Clauses of the federal and state constitutions.[5] Both of these arguments were rejected by this Court in *People v Swint*, 225 Mich App 353, 363, 375; 572 NW2d 666 (1997).

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[4] Const 1963, art 1, § 6 reads: "Every person has a right to keep and bear arms for the defense of himself and the state."

[5] US Const, art I, § 10 reads in pertinent part: "No State shall . . . pass any . . . ex post facto Law . . . ." Const 1963, art 1, § 10 reads in pertinent part: "No . . . ex post facto law . . . shall be enacted."

Defendant next argues that his convictions must be vacated because he was held in custody in excess of ninety days before commencement of his trial. The ninety-day limit is established by both Const 1963, art 1, § 15 and MCR 6.106(B)(3). While we agree that defendant was held beyond the ninety-day time limit,[6] we find that vacation of his convictions is unwarranted.

MCR 6.106(B) states in pertinent part:

> (1) The court may deny pretrial release to
> (a) a defendant charged with
> (i) murder or treason . . .
>
> * * *
>
> (3) If the court determines as provided in subrule (B)(1) that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense, within which trial must begin or the court must immediately schedule a hearing and set the amount of bail.

The lower court record includes a criminal scheduling order that indicates that defendant agreed that the trial would commence on April 23, 1996. The trial began as scheduled. The defendant, having agreed to the April 23 date, effectively waived his right to proceed to trial within ninety days. Hence, we conclude defendant's argument to be without merit.

Defendant also argues that the trial court lacked jurisdiction with regard to the charge of felon in possession because the prosecution presented no evi-

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[6] Defendant was arraigned in the district court on January 16, 1996. At that time defendant was ordered to be held without bond. His jury trial began on April 23, 1996, well in excess of the ninety-day limit.

dence at the preliminary examination regarding defendant's 1988 conviction. Although we agree that an error was made, we conclude that it was harmless given that sufficient evidence was adduced at trial to convict defendant of the charge. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989).

Defendant next claims he was denied his right to due process as guaranteed by the Fourteenth Amendment of the federal constitution[7] when he and his counsel were not allowed to be present at a hearing concerning the prosecution's petition to hold two individuals as material witnesses. We disagree. "A defendant has a right to be present during . . . any . . . stage of trial where the defendant's substantial rights might be adversely affected." *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). The subject matter of the hearing at issue was the witnesses' fear of testifying against defendant. No other matters were discussed, and no substantive evidence was taken from the witnesses. Therefore, defendant's exclusion from the hearing was not error. *Id.*; *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982).

Defendant also claims that his Sixth Amendment right to confront the witnesses against him[8] was violated when he was not afforded the opportunity to cross-examine the two material witnesses at the hearing. "[T]he principal protection provided by the [Sixth Amendment's] Confrontation Clause to a criminal defendant is the right to conduct cross-examination."

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[7] US Const, Am XIV reads in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

[8] US Const, Am VI reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

People v Gearns, 457 Mich 170, 186; 577 NW2d 422 (1998) (BRICKLEY, J.). A criminal defendant's right to cross-examine, however, comes into play only when a witness has provided evidence of substance that bears on the outcome of the criminal trial. *Id.* at 187. Again, that was not the case with regard to the matters discussed at the hearing. Therefore, no violation of defendant's Confrontation Clause rights occurred. As for defendant's contention that the prosecution failed to disclose any consideration or inducements offered to the two witnesses, there is nothing in the record that supports this allegation.

Finally, defendant claims that his convictions should be reversed because the prosecutor knowingly presented perjurious testimony. See *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Again, we conclude that defendant's claim is not supported by the record. While it is true that some of the details of the testimony given by the prosecutor's res gestae witnesses did conflict, there is no evidence that the prosecutor attempted to conceal these contradictions. Further, while the testimony of some of the witnesses conflicted with statements they had given to the police immediately after the shooting, there is no evidence that the prosecutor attempted to keep the contents of those previous statements from defendant. See *People v McWhorter*, 150 Mich App 826, 831-832; 389 NW2d 499 (1986). Indeed, defense counsel was afforded ample opportunity to impeach the witnesses' credibility at trial with the prior statements. See *People v Thornton*, 80 Mich App 746, 751-752; 265 NW2d 35 (1978).

Defendant's convictions and sentences are affirmed. We remand for imposition of a sentence for

the felon in possession conviction. We do not retain jurisdiction.

HOWARD v CLINTON CHARTER TOWNSHIP

Docket No. 201203. Submitted March 5, 1998, at Detroit. Decided July 14, 1998, at 9:05 A.M.

Donald P. Howard brought an action in the Macomb Circuit Court against Clinton Charter Township, the Clinton Township Treasurer, and the Macomb County Treasurer, seeking declaratory and injunctive relief and a writ of mandamus to prevent the defendants from collecting installment payments of a special assessment that was secured by a lien against property he acquired at a tax sale. The plaintiff contended that the special-assessment lien was canceled when he took title by tax deed pursuant to MCL 211.72; MSA 7.117, which at the time the plaintiff purchased the property and before its amendment by 1993 PA 202 provided: "[t]he tax deeds shall convey an absolute title to the land sold, and constitute conclusive evidence of title, in fee, in the grantee, subject, however, to all taxes assessed and levied on such lands subsequent to the taxes for which the same was bid off." The plaintiff argued that postsale installments of special assessments are not "taxes assessed and levied . . . subsequent to the taxes for which the same was bid off" and that he was entitled to take title to the property free and clear of the unpaid installments of the special assessment. The court, Lido V. Bucci, J., dismissed the action on the defendants' motion for summary disposition. The plaintiff appealed.

The Court of Appeals *held*:

1. The preamendment statute does not provide for cancellation of future installments of special assessments. Such cancellation cannot be inferred or implied inasmuch as the plaintiff did not meet his burden of proving that the Legislature had intended such cancellation.

2. In view of an express and clear provision for the cancellation of unpaid special assessments under another provision of the tax statute, MCL 211.67; MSA 7.112, the Legislature would have clearly and unambiguously provided for similar cancellation under the preamendment version of MCL 211.72; MSA 7.117 had it been its intent to do so.

3. The Legislature intended, as a general rule, for property owners who benefit from an improvement paid for by special assess-

ment to incur the financial burden of that assessment. It would be contrary to public policy to interpret MCL 211.72; MSA 7.117 as canceling future installments of special assessments because the entire community would be forced to bear the financial burden for an improvement that specifically benefited the plaintiff's property.

4. The 1993 amendment of MCL 211.72; MSA 7.117 merely clarified the language of the statute and did not effect a substantive change in law that was applied retroactively to the plaintiff's detriment.

Affirmed.

TAXATION — TAX SALES — INSTALLMENTS OF SPECIAL ASSESSMENTS.

Installments of a special assessment secured by a lien on property sold at a tax sale are not canceled upon conveyance of the property by tax deed and were not even before October 19, 1993, the effective date of an amendment of the applicable statute to specifically so provide (MCL 211.72; MSA 7.117).

Donald P. Howard & Associates, P.C. (by *Donald P. Howard*), for Donald P. Howard.

York, Dolan & Ciaramitaro, P.C. (by *Timothy D. Tomlinson*), for Clinton Charter Township and Clinton Township Treasurer.

Frank Krycia, Assistant Corporation Counsel, for Macomb County Treasurer.

Before: HOLBROOK, JR., P.J., and WHITE and J. W. FITZGERALD* , JJ.

PER CURIAM. Plaintiff appeals as of right from the trial court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff purchased a tax lien on the subject property at a tax sale on May 5, 1992. At the time of the sale, plaintiff paid the outstanding taxes as well as the past due special assessments against the property,

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

which were included in the purchase price. He was not required to pay the future installments on the existing special assessment at that time. The owner of the property failed to redeem the property and plaintiff took title by tax deed pursuant to MCL 211.70; MSA 7.115 and MCL 211.72; MSA 7.117 on June 17, 1993. The future installments on the special assessment were secured by a lien against the property. Plaintiff paid future installments under protest, claiming that all special assessment liens on the property were canceled when he received title to the property and that the lien was illegal.

At the time plaintiff purchased the property, MCL 211.72; MSA 7.117 provided, in pertinent part:

> The tax deeds shall convey an absolute title to the land sold, and constitute conclusive evidence of title, in fee, in the grantee, subject, however, to all taxes assessed and levied on such lands subsequent to the taxes for which the same was bid off.

The statute was amended pursuant to 1993 PA 202, effective October 19, 1993, to provide:

> The tax deeds convey an absolute title to the land sold, and constitute conclusive evidence of title, in fee, in the grantee, subject, however, to all taxes assessed and levied on the land subsequent to the taxes for which the land was bid off. *This title also is subject to unpaid special assessments and unpaid installments of special assessments.*

Plaintiff argues that future installments of special assessments are not included in "taxes assessed and levied on [the land] subsequent to the taxes for which the [land] was bid off" under the pre-amendment statute, and, therefore, he was entitled to take title to the

property free of the unpaid installments of the existing special assessment. We disagree.

This case presents an issue of statutory interpretation. The first criterion in determining legislative intent is the specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). If the language is clear and unambiguous, judicial construction is neither required nor permitted, and the court must apply the statute as written. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). However, if reasonable minds could differ regarding the meaning of a statute, judicial construction is appropriate. *Dep't of Social Services v Brewer*, 180 Mich App 82, 84; 446 NW2d 593 (1989).

Here, the preamendment statute did not specifically address future installments of existing special assessments, but rather provided for absolute title to pass "subject, however, to all taxes assessed and levied on such lands subsequent to the taxes for which the same was bid off." Because reasonable minds could differ with regard to whether unpaid future installments of special assessments are canceled because they were not "assessed and levied on [the land] subsequent to the taxes for which the [land] was bid off," the statute is ambiguous and judicial construction is appropriate. To conduct this inquiry, we must look to the object of the statute and apply a reasonable construction that best accomplishes its purpose. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994).

On review de novo, we conclude that plaintiff's interpretation of the statute is insupportable. First, the preamendment statute did not expressly provide

for cancellation of future installments of special assessments. In this context, where plaintiff is seeking cancellation of an otherwise valid special assessment, we find the rules of statutory construction regarding tax exemptions to be helpful. In *Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948), our Supreme Court quoted the following from 2 Cooley on Taxation (4th ed), § 672, p 1403:

> "An intention on the part of the legislature to grant an exemption from the taxing power of the State will never be implied from language which will admit of any other reasonable construction. . . . Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it."

Here, the Legislature did not clearly and unambiguously provide for cancellation of unpaid future special assessments on property sold at a tax sale, and plaintiff has not met his burden of proof that such an interpretation is reasonable.

Second, contrasted with the language of § 72, we note that the Legislature has expressly and clearly provided for cancellation of unpaid special assessments under another provision of the tax statutes. Where property is bid into the state and not redeemed, absolute title is vested in the state. MCL 211.67; MSA 7.112. When this occurs, all taxes and

special assessments that are charged against or are liens on the property at the time title becomes absolute in the state are canceled,[1] the property is removed from the tax rolls, and the state and its inferior taxing units must bear the loss. MCL 211.67a(2); MSA 7.112(1)(2); *Wayne Co Chief Executive v Mayor of Detroit*, 211 Mich App 243, 244; 535 NW2d 199 (1995). The property is again subject to taxation and special assessment immediately after it is offered for sale and a bid is accepted. MCL 211.67a(2); MSA 7.112(1)(2). Had the Legislature intended to cancel unpaid installments of special assessments for property that is sold at a tax sale and not redeemed, we believe it would have done so in clear and unambiguous language as it did in § 67a. See *Amway Corp v Dep't of Treasury*, 176 Mich App 285, 291; 438 NW2d 904 (1989), modified on other grounds 433 Mich 908 (1989). Moreover, the policy underlying the cancellation of taxes and assessments for property bid into the state pursuant to § 67a is "to attract prospective buyers and ultimately restore the property to the tax rolls." *Wayne Co Chief Executive*, *supra* at 247. That policy has no import where, as here, the property is sold at a tax sale and thereby returned to the tax rolls, rather than bid into the state. Hence, we conclude that the legislative scheme contemplates that the property owner who redeems or the purchaser at a tax sale will pay an amount suf-

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[1] Certain special assessments are not actually canceled, but are deferred. If the property is later sold by the state, these special assessments are due and payable as part of the purchase price of the property. MCL 211.67a(3); MSA 7.112(1)(3). If the Legislature intended that these assessments would ultimately be paid by the purchaser of the property from the state, there is no reason to believe that it intended to relieve the purchaser at the tax sale of this burden.

ficient to cover the taxes and charges owed, and that the redemption or sale will be subject to all subsequent tax liabilities.

Third, we find that the Legislature intended, as a general rule, for property owners who benefit from an improvement paid for by a special assessment to incur the financial burden of that assessment. See *Carmichael v Village of Beverly Hills*, 30 Mich App 176, 180; 186 NW2d 29 (1971). Thus, it would be contrary to public policy to interpret § 72 as canceling future installments of special assessments because the entire community would be forced to bear the financial burden for an improvement that specifically benefited plaintiff's property. *Id.*

Finally, contrary to plaintiff's argument, we find that the 1993 amendment of § 72 did not effect a substantive change in the law that was applied retroactively to plaintiff's detriment. This finding is supported by the House Legislative Analysis and Senate Fiscal Agency Bill Analysis of 1993 PA 202, which indicate that the 1993 amendment was merely intended to clarify the language of the statute, rather than to effect a substantive change in the law. See *Ettinger v Lansing*, 215 Mich App 451, 455; 546 NW2d 652 (1996).

Given the foregoing, we hold that plaintiff was not entitled to have the future installments of the special assessment on the subject property canceled pursuant to MCL 211.72; MSA 7.117. Accordingly, summary disposition was properly granted to defendant.

PEOPLE v BONE

Docket No. 206372. Submitted June 10, 1998, at Detroit. Decided July 14, 1998, at 9:10 A.M. Leave to appeal sought.

Christopher S. Bone was convicted by a jury in the Oakland Circuit Court, Robert C. Anderson, J., of third-degree criminal sexual conduct. The defendant appealed, claiming that he was denied a fair trial because the trial court allowed the victim to testify that she had been a virgin before her alleged rape by the defendant and allowed the prosecutor to refer to the victim's virginity in remarks during opening statement, direct examination of the victim, and closing argument.

The Court of Appeals *held*:

MRE 404(a) provides generally that evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion; however, one of the four exceptions to the general rule provides that in a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease may be admissible. MRE 404(a)(3). This exception precludes the use of evidence of a victim's virginity as circumstantial proof of the victim's unwillingness to consent to the sexual act. The erroneous admission of such evidence in this case was not harmless because it affected the jury's determination of the credibility of the victim and of the strength and weight of the untainted evidence.

Reversed and remanded for a new trial.

RAPE — CRIMINAL SEXUAL CONDUCT — EVIDENCE — VIRGINITY.

Evidence of a victim's virginity as circumstantial proof of the victim's unwillingness to consent to a sexual act is not admissible in a prosecution for criminal sexual conduct (MRE 404[a][3]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Richard H. Browne*, Chief, Appellate

Division, and *Rae Ann Ruddy*, Assistant Prosecuting Attorney, for the people.

Hardig Parsons & Pedersen, PLLC (by *Bradley S. Stout*), for the defendant.

Before: WAHLS, P.J., and HOLBROOK, JR., and FITZGERALD, JJ.

PER CURIAM. Defendant was charged with two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(c); MSA 28.788(4)(1)(c).[1] Following a jury trial, he was convicted of one count of third-degree CSC[2] and was sentenced to a prison term of three to fifteen years. He appeals as of right. We reverse and remand for a new trial.

On appeal, defendant contends that the prosecutor's references to the victim's virginity violated MRE 404(a)(3) and denied him a fair trial. We agree and, therefore, reverse defendant's conviction.

On September 6, 1996, the sixteen-year-old victim and her younger sister were home in the care of their nineteen-year-old brother, Brian, while their parents were out of town. Brian had some friends visit that evening, including defendant, whom the victim had never met. Throughout the course of the evening Brian and his friends remained primarily in the basement of the house and the victim and her sister were in the victim's upstairs bedroom watching television. Defendant offered the victim a beer on two different occasions, and at one point defendant put his arm around the victim's waist and indicated that he was

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[1] One count charged vaginal penetration and one count charged rectal penetration.

[2] Defendant was convicted of the count charging vaginal penetration.

going to help her up the stairs. The victim declined his offer of assistance and went to her room with her sister to watch television.

The victim fell asleep, fully clothed, on top of the bed covers while watching television. She testified that the next thing she remembered was waking up to the sensation of someone kissing her. She realized at that point that she had no clothing on and, when she opened her eyes, she observed defendant, who was naked from the waist down. The victim testified at trial that she pretended to be asleep while defendant penetrated her both vaginally and rectally. She testified that she consented to none of these acts, but that she did not scream or resist because she had never had sexual intercourse and was afraid that defendant would hurt her.

According to police, defendant initially denied any sexual contact with the victim, but subsequently admitted having consensual sexual intercourse with the victim. Although defendant did not testify at trial, the testimony of witnesses who testified on his behalf and his closing argument were directed toward establishing the defense of consent.

On appeal, defendant argues that the victim's testimony and the prosecution's repeated references to the victim's virginity denied him a fair trial. He asserts that MRE 404(a)(3) prohibits the admission of such evidence for the purpose of refuting a defense of consent. We agree.

MRE 404(a)(3) states:

> *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

* * *

(3) *Character of victim of sexual conduct crime.* In a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

We interpret MRE 404(a)(3) to preclude the use of evidence of a victim's virginity[3] as circumstantial proof of the victim's current unwillingness to consent to a particular sexual act.[4]

Here, the prosecutor sought to admit evidence of the victim's virginity for the limited purpose of explaining inconsistencies in the victim's testimony regarding what she told police following the incident. However, the context of the prosecutor's opening statement, direct examination of the victim, and closing argument shows that the prosecutor used evidence of the victim's virginity to demonstrate to the jury that because the victim had no prior sexual experience, she was less likely to have consented to sexual relations with defendant on the night of the incident.

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[3] We note, however, that evidence introduced for some other relevant purpose does not become inadmissible merely because it tends to show that the victim was a virgin.

[4] The prosecution urges this Court to follow *People v Mooney*, 216 Mich App 367; 549 NW2d 65 (1996), nullified 454 Mich 904 (1997). Not only is *Mooney* of no precedential value, but also the issue presented in *Mooney* is not the same issue presented in this case. In *Mooney*, the Court held that the rape-shield statute, MCL 750.520j(1); MSA 28.788(10)(1), afforded no protections to the accused and, therefore, a rape victim is not prohibited from testifying about her lack of prior sexual activity. Here, defendant does not contend that the rape-shield statute barred evidence of the victim's virginity, but rather that such evidence is inadmissible under MRE 404(a) and MRE 403. The majority opinion in *Mooney* did not address this issue.

In her opening statement, the prosecutor stated that the victim "never even kissed a boy before. She was not kissing him back. She was doing nothing to encourage him whatsoever."[5] On direct examination, when the victim could not describe the size of defendant's penis or how deeply he penetrated her, the prosecutor asked the victim whether she ever had sex before, to which the victim answered "No."[6] During closing argument, the prosecutor stated, "She's gonna voluntar[il]y give it up to him when she's been waiting? I don't think so. That's not credible evidence." The prosecutor contended that the victim would not consent to sexual activity because she had never done so previously, essentially arguing that the victim was acting in conformity with her prior lack of sexual activity. Evidence of the victim's virginity is barred for this purpose under MRE 404(a)(3).

We must determine whether the erroneous admission of the evidence was harmless. An error is harmless if it is highly probable that, in light of the strength and weight of the untainted evidence, the tainted evidence did not contribute to the verdict. *People v Gearns*, 457 Mich 170, 205-207 (BRICKLEY, J.), 218-220 (CAVANAGH, J.); 577 NW2d 422 (1998).

As in many sexual assault cases, the principal issue confronting the jury in determining whether the victim consented to sexual relations with defendant was the credibility of the victim. Because the strength and

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[5] It is important to note that the victim had not yet testified, and therefore there was no need at this point for the prosecutor to explain any inconsistencies in her testimony.

[6] Contrary to the prosecutor's contention, there is no indication in the victim's testimony that her inability to describe defendant's penis and how deeply he penetrated her was due to her lack of sexual experience.

weight of the untainted evidence depended on the jury's determination of the credibility of the victim, we cannot conclude that admission of evidence of the victim's virginity, and the prosecutor's suggestion that because the victim was chaste she would not have consented to sexual relations with defendant, was harmless. Indeed, defendant's first trial, where evidence of the victim's virginity was not admitted, resulted in a hung jury on the count of vaginal penetration and an acquittal on the count of rectal penetration. Our review of the transcripts of both trials reveals that the only significant difference in the evidence presented at the two trials was the admission in the present trial of evidence of the victim's virginity.

Reversed and remanded for a new trial. Jurisdiction is not retained.

HATCH v GRAND HAVEN CHARTER TOWNSHIP

Docket No. 202063. Submitted May 12, 1998, at Grand Rapids. Decided July 14, 1998, at 9:15 A.M. Leave to appeal sought.

Terry M. Hatch brought an action in the Ottawa Circuit Court against Grand Haven Charter Township, alleging liability under the highway exception to governmental immunity, MCL 691.1402(1); MSA 3.996(102)(1), for the plaintiff's injuries resulting from a fall from a bicycle when the front tire of the bicycle struck a hole in a paved bicycle path that runs parallel and adjacent to Lakeshore Drive in the defendant township. The court, Calvin L. Bosman, J., granted summary disposition for the defendant, finding that the path was not a sidewalk on a highway within the meaning of MCL 691.1401(e); MSA 3.996(101)(e). The plaintiff appealed.

The Court of Appeals *held*:

1. The phrase "sidewalks . . . on any highway" in MCL 691.1401(e); MSA 3.996(101)(e) denotes a paved way dedicated to the use of pedestrians that runs alongside and adjacent to a public roadway and within the right of way of the roadway. Here, the path is located within the right of way of Lakeshore Drive and, at the point where the plaintiff fell, runs alongside and adjacent to Lakeshore Drive. The path is on the highway within the meaning of subsection e.

2. The path, at the point where the plaintiff fell, qualifies as a sidewalk for purposes of the highway exception to governmental immunity. The path, although created as a "bicycle path" by the defendant, was used by both pedestrians and bicyclists and the defendant did not post the path as being for bicycle use only or restrict access to the path to bicyclists only.

Reversed and remanded.

1. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — SIDEWALKS.

MCL 691.1401(e); MSA 3.996(101)(e) defines "highway" for purposes of governmental immunity to include sidewalks on any public highway; the phrase "sidewalks . . . on any highway" denotes a paved way dedicated to the use of pedestrians that runs alongside and adjacent to a public roadway and within the right of way of the roadway; a sidewalk is part of a highway for which a governmental agency may be held liable for personal injury or property damage

pursuant to the highway exception to governmental immunity, MCL 691.1402(1); MSA 3.996(102)(1), where the sidewalk is adjacent to or alongside the highway.

2. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — SIDEWALKS — BICYCLE PATHS.

A paved path used by both pedestrians and bicyclists may be found to be a sidewalk on a public highway within the defective highway exception to governmental immunity where it runs alongside and adjacent to the highway and within the right of way of the highway and where, even though the path was created as a "bicycle path" by the governmental agency having jurisdiction over the path, the agency neither posted the path as being for bicycle use only nor restricted access to the path to bicyclists only (MCL 691.1401[e], 691.1402[1]; MSA 3.996[101][e], 3.996[102][1]).

Scheuerle & Zitta (by *John R. Scheuerle*), for the plaintiff.

Plunkett & Cooney, P.C. (by *Christine D. Oldani* and *Andrew C. Vredenburg*), for the defendant.

Before: FITZGERALD, P.J., and HOLBROOK, JR., and CAVANAGH, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). We reverse and remand.

On September 12, 1995, plaintiff was riding his bicycle on a paved bicycle path that runs parallel and adjacent to Lakeshore Drive in defendant Grand Haven Charter Township when the front tire of his bike struck a hole in the path, causing him to fall to the pavement. Plaintiff's injuries included a fractured arm and hip.

Photographic exhibits in the record show a snow-covered path running through wooded lots and parallel to Lakeshore Drive. At the site of plaintiff's fall, the eight-foot-wide path is located between Lakeshore

Drive and a private drive, within the one-hundred-foot road right of way, and approximately thirty feet from Lakeshore Drive. The path is separated from the roadway by trees, brush, and other forms of vegetation.

On November 10, 1995, plaintiff commenced a negligence action, seeking damages for his injuries. Plaintiff alleged that defendant negligently maintained the path and that he was entitled to recover for his injuries pursuant to the highway exception to governmental immunity, MCL 691.1402; MSA 3.996(102).

Defendant moved for summary disposition under MCR 2.116(C)(7) on the ground that the highway exception did not apply because the path is outside the improved portion of the highway designed for vehicular travel. MCL 691.1402(1); MSA 3.996(102)(1). The trial court denied the motion without prejudice on the ground that the factual record was not sufficient to decide the motion.

Following discovery, defendant renewed its motion on the ground that the highway exception did not apply because the path is not a sidewalk on a highway within the meaning of MCL 691.1401(e); MSA 3.996(101)(e). The trial court concluded that the path was not a sidewalk within the meaning of the statute and therefore granted defendant's motion for summary disposition. Plaintiff's motion for reconsideration was denied.

MCR 2.116(C)(7) provides that summary disposition is proper when a claim is barred because of immunity granted by law. When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. The motion

should not be granted unless no factual development of the record could provide a basis for recovery. *MS Development, Inc v Auto Plaza of Woodhaven (After Remand)*, 220 Mich App 540, 545; 560 NW2d 62 (1996), rev'd on other grounds 456 Mich 931 (1998).

The highway exception is a narrowly drawn exception to the broad grant of immunity for governmental units. *Scheurman v Dep't of Transportation*, 434 Mich 619, 630; 456 NW2d 66 (1990). No action may be maintained under the highway exception unless it is clearly within the scope and meaning of the statute. *Id.* For purposes of the highway exception, the term includes "sidewalks . . . on any highway." Thus, the narrow issue of first impression presented for our consideration is whether the bicycle path at issue is a "sidewalk" within the meaning of the highway exception to governmental immunity.[1]

A panel of this Court recently addressed the meaning of the phrase "sidewalks . . . on any highway." In *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363; 579 NW2d 374 (1998), this Court was asked to determine whether a paved path designated as a "Hike-Bike Trail" that meandered through the Stoney Creek Metropolitan Park, in some

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[1] Although our Supreme Court has twice visited the question whether the highway exception extends to bicycle paths, see *Gregg v State Hwy Dep't*, 435 Mich 307; 458 NW2d 619 (1990), and *Roy v Dep't of Transportation*, 428 Mich 330; 408 NW2d 783 (1987), these opinions are inapposite because neither case addresses whether a bicycle path is a sidewalk. Instead, these cases address whether a bicycle path constitutes an installation outside the improved portion of the highway designed for vehicular traffic. The liability of the state and counties is limited under MCL 691.1402(1); MSA 3.996(102)(1) to only the improved portions of highways designed for vehicular traffic. *Cox v Dearborn Heights*, 210 Mich App 389, 392; 534 NW2d 135 (1995); *Davis v Chrysler Corp*, 151 Mich App 463, 468-469; 391 NW2d 376 (1986).

places running parallel to the road, in other locations running through the wooded interior of the park, and at some points crossing the road that ran through the park, constituted a "sidewalk on any highway" for purposes of the highway exception. The Court concluded that the defendants were entitled to immunity, opining:

> According to *Webster's New World Dictionary*, a "sidewalk" is "a path for pedestrians, usually paved, along the side of a street." *The American Heritage Dictionary: Second College Edition* defines "sidewalk" as a "walk or raised path for pedestrians along the side of a road." *Random House Webster's College Dictionary* (1992) defines "sidewalk" as "a usu. paved walk at the side of a roadway." In Black's Law Dictionary (6th ed), "sidewalk" is defined as "[t]hat part of a public street or highway designed for the use of pedestrians."
>
> Furthermore, the Supreme Court has looked to definitions set forth in the Michigan Vehicle Code to ascertain the meaning of terms shared by the Michigan Vehicle Code and the governmental immunity statute. See *Roy v Dep't of Transportation*, 428 Mich 330, 338-340; 408 NW2d 783 (1987). In the Michigan Vehicle Code, the term "sidewalk" is defined as "that portion of a street between the curb lines, or lateral lines of roadway, and the adjacent property lines intended for the use of pedestrians." MCL 257.60; MSA 9.1860.
>
> There are no published Michigan cases that expressly construe the phrase "sidewalks . . . on any highway." However, the highway exception has been applied where the injury was sustained on a sidewalk "adjacent" to or "along" a county road. See *Listanski v Canton Twp*, 452 Mich 678, 682; 551 NW2d 98 (1996). Moreover, in *Campbell v Detroit*, 51 Mich App 34, 35-36; 214 NW2d 337 (1973), this Court determined that a sidewalk alongside a street that had been closed for some time and was being removed for an urban renewal project was not a sidewalk "on any highway"

> because the street was not open for public travel, as required by the statutory definition of highway.
>
> In light of the foregoing, we conclude that linking the word "sidewalk" with an adjacent road is in accord with the common and approved usage of the word. See *USAA Ins Co v Houston General Ins Co*, 220 Mich App 386, 391; 559 NW2d 98 (1996). Plaintiff's fall did not occur on the portion of the trail that runs adjacent to the roadway, but rather on the portion that runs through the wooded interior of the park. Because plaintiff's fall did not occur on a pedestrian way that ran alongside a public roadway, plaintiff's fall did not occur on a "sidewalk" within the meaning of MCL 691.1401(e); MSA 3.996(101)(e). Consequently, defendants are entitled to immunity. [*Stabley, supra* at 367-369.]

Thus, pursuant to *Stabley*, the phrase "sidewalks . . . on any highway" denotes a paved way dedicated to the use of pedestrians that runs alongside and adjacent to a public roadway and within the right of way of the roadway.

Here, the path is located within the right of way of Lakeshore Drive. At the point where plaintiff fell, the path runs alongside and adjacent to Lakeshore Drive.[2] Accordingly, the path is "on any highway" within the meaning of MCL 691.1401(e); MSA 3.996(101)(e). However, the question remains whether the path qualifies as a sidewalk within the defective highway exception. According to defendant, the path was created as a bicycle path. See MCL 41.722(1)(g); MSA 5.2770(52)(1)(g) (a township is authorized to construct, maintain, and improve bicycle paths). To the extent that the path was dedicated to the use of bicy-

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[2] Thus, this case is factually distinguishable from *Stabley, supra*. In *Stabley*, the plaintiff's fall did not occur on the portion of the trail adjacent to the roadway, but rather on the portion of the trail that runs through the wooded interior of the defendant park.

clists and not to pedestrians, the path does not appear to be a sidewalk within the meaning of the highway exception. *Stabley, supra.* Nevertheless, the "Hike-Bike Trail" in *Stabley* appears to be the functional equivalent of the path in this case. The photographic exhibits in the record show numerous footprints in the snow covering the bicycle path. Clearly, pedestrians as well as bicyclists use the path. There is no indication in the record that defendant either posted the trail as being for bicycle use only or restricted access to the path to bicyclists only. The only difference between the "Hike-Bike Trail" in *Stabley* and the instant path is the label assigned the paths by the respective governmental agencies having jurisdiction over the paths. Accordingly, we conclude that the path qualifies as a sidewalk for purposes of the highway exception at the point where plaintiff fell.[3] Consequently, defendant is not entitled to immunity. *Listanski, supra.*

Reversed and remanded for trial. Jurisdiction is not retained.

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[3] *Stabley, supra,* implies that only the precise location at which an injury occurs is relevant in determining whether a given area constitutes a "sidewalk . . . on any highway" for purposes of the highway exception to governmental immunity.

In re OSBORNE

Docket No. 200296. Submitted March 12, 1998, at Grand Rapids. Decided July 24, 1998, at 9:00 A.M.

The Family Independence Agency filed a petition in the Muskegon County Probate Court, Juvenile Division, seeking to terminate the parental rights of Dyphine Osborne to her minor child. The neglect proceedings and numerous hearings spanned a three-year period, culminating in an order terminating the respondent's parental rights following a permanent wardship trial, Neil G. Mullally, J. The respondent appealed by leave granted.

The Court of Appeals *held*:

1. The respondent was denied her right to a fair trial because the assistant prosecutor who represented the petitioner at the permanent wardship trial had previously represented the respondent at a review hearing in the same neglect proceeding one year earlier. Prejudice must be presumed because the extent to which the confidential information the attorney obtained from his prior representation could be used against the respondent is immeasurable and the danger is obvious. The probate court's order must be reversed and the matter must be remanded for a new trial.

2. The appropriate remedy in this case is to disqualify the entire Muskegon County prosecutor's office from representing the petitioner on remand. The probate court, on remand, must appoint a special prosecuting attorney to represent the petitioner.

Reversed and remanded.

1. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — COURT-APPOINTED COUNSEL — CONFLICT OF INTEREST.

Indigent parents have the right to court-appointed counsel who is free from conflicts of interest at all hearings in a child protective proceeding (MCR 5.915[B][1]).

2. ATTORNEY AND CLIENT — CONFLICT OF INTEREST.

The Michigan Rules of Professional Conduct provide that a lawyer serving as a public officer or employee shall not participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment

unless the law otherwise expressly permits such participation (MRPC 1.11[c][1]).

3. PROSECUTING ATTORNEYS — DISQUALIFICATION OF PROSECUTING ATTORNEYS — CONFLICT OF INTEREST.

The policy considerations underlying the disqualification of prosecuting attorneys for a conflict of interest are fairness to the accused and the preservation of public confidence in the impartiality and integrity of the criminal justice system; a conflict of interest is obvious where a prosecuting attorney prosecutes someone after having previously represented that person in the same case; under such circumstances, no specific prejudice need be shown by the defendant and the defendant may be found to have been denied a fair trial.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Tony Tague*, Prosecuting Attorney, and *Nick Mehalco, Jr.*, Senior Assistant Prosecuting Attorney, for the Family Independence Agency.

Shon A. Cook, for Dyphine Osborne.

John M. Wiewiora, for the minor child.

Before: MARKEY, P.J., and GRIFFIN and WHITBECK, JJ.

GRIFFIN, J. Respondent Dyphine Osborne appeals by leave granted an order of the Muskegon County Probate Court, Juvenile Division, terminating her parental rights to her minor child pursuant to MCL 712A.19b(3)(c)(i) and (g); MSA 27.3178(598.19b)(3)(c)(i) and (g). On appeal, respondent alleges that she was denied a fair trial because the assistant prosecutor who represented petitioner Family Independence Agency at the permanent wardship trial had previously represented her as defense counsel in the same

neglect proceedings.[1] We agree that respondent was denied her right to a fair trial and therefore reverse and remand for further proceedings.

I

During the course of the neglect proceedings and numerous hearings that spanned a three-year period, culminating in the termination of her parental rights, respondent was represented by five different court-appointed attorneys. Correspondingly, petitioner was represented by three different assistant prosecuting attorneys. One of respondent's attorneys was Kevin Wistrom, who represented respondent at a review hearing on August 22, 1995. However, one year later, Wistrom, now a Muskegon County assistant prosecutor, represented petitioner against his former client during the three-day permanent wardship trial.

In its brief on behalf of petitioner, the Muskegon County Prosecuting Attorney characterizes Mr. Wistrom's conflict of interest as follows:

> The record in this case is void of any reference that the Appellant or Mr. Wistrom were even aware of such a conflict. There is no mention in the record that this issue was

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[1] Although no objection or motion for disqualification was made in the trial court, and the issue was not raised in respondent's application for leave to appeal to this Court as required by MCR 7.205(D)(4), we grant relief to respondent pursuant to MCR 7.216(A)(7). In so doing, we note that in these particular circumstances, "[r]esolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation," Comment to Rule 1.7 of the Michigan Rules of Professional Conduct, and that attorney Kevin Wistrom should have been cognizant of the conflict and disclosed it or disqualified himself. Applying by analogy the principles of appellate review regarding plain, unpreserved error in the criminal law context, the error in the instant case, an obvious conflict of interest, falls within that category of cases "where prejudice is presumed or reversal is automatic." *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). See discussion later in text of opinion.

> raised, discussed, etc. There is no evidence from the record that would show that Mr. Wistrom relied on any prior confidential information obtained from his then client the [A]ppellant. Therefore, this court does not have before it enough facts to rule on this issue.

The brief filed on behalf of the minor child also relies on the defense of ignorance:

> According to the court record and the transcripts supplied, Attorney Kevin Wistrom did represent Respondent at one point in the proceedings, filling in for Hal Hermanson at a review hearing on August 22, 1995, as well as the petitioner throughout the permanent wardship proceedings nearly one year later. Yet, there is no mention in the transcripts of the three days scheduled for the permanent wardship trial that Mr. Wistrom recognized Respondent or recalled his prior representation of her or recalled any conversation with Respondent. Because no objection was raised, the trial court did not inquire into the prior representation or look into what effect it would have on Mr. Wistrom representing the petitioner.
>
> While the cases cited by Appellant discuss the propriety of an attorney representing adverse parties at different stages of a proceeding, it is clear that they were discussing the knowing representation of an adverse party after having represented another. The cases properly address the problem of the attorney using privileged information to the detriment of a former client or the appearance of impropriety being enough to have the attorney removed from the latter appearance. *Yet, these are only issues if the attorney recalls the prior representation.* [Emphasis added.]

II

The Michigan Supreme Court has acknowledged the uniqueness of cases involving the involuntary, permanent termination of parental rights, "in the kind, the degree, and the severity of the deprivation they

inflict." *In re Sanchez*, 422 Mich 758, 765; 375 NW2d 353 (1985). Although the right to court-appointed counsel in all cases is not guaranteed by the United States Constitution,[2] MCR 5.915(B)(1) mandates the appointment of counsel for indigent parents at all hearings in a child protective proceeding.[3] Borrowing from the axioms of Sixth Amendment right-to-counsel jurisprudence, *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988), we hold that where the right to court-appointed counsel exists, there is a correlative right to representation that is free from conflicts of

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[2] In *Lassiter v Dep't of Social Services of Durham Co, North Carolina*, 452 US 18, 32; 101 S Ct 2153; 68 L Ed 2d 640 (1981), the United States Supreme Court held that the Fourteenth Amendment of the United States Constitution does not require court-appointed counsel for a respondent in every neglect or termination of parental rights proceeding. Rather, the decision whether due process calls for the appointment of counsel is to be answered in the first instance by the trial court, subject to appellate review. *Id.* The Michigan courts have never resolved the nature of the doctrinal foundation for the appointment of counsel for indigent respondents in parental rights termination cases. See *In re Sanchez*, *supra* at 766, n 8; *Reist v Bay Circuit Judge*, 396 Mich 326, 339-346; 241 NW2d 55 (1976); *In re Perry*, 148 Mich App 601, 609-610; 385 NW2d 287 (1986).

[3] MCR 5.915(B)(1) provides in pertinent part:

> (B) Child Protective Proceedings.
>
> (1) Respondent.
>
> (a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that
>
> (i) the respondent has the right to a court-appointed attorney if the respondent is financially unable to retain counsel, and,
>
> (ii) if the respondent is not represented by an attorney, that the respondent may request and receive a court-appointed attorney at any later hearing.
>
> (b) When it appears to the court, following an examination of the record, through financial written statements, or through other means that the respondent is financially unable to retain an attorney and the respondent desires an attorney, the court shall appoint one to represent the respondent at any hearing conducted pursuant to these rules.

interest. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Wood v Georgia*, 450 US 261, 271; 101 S Ct 1097; 67 L Ed 2d 220 (1981); *Cuyler v Sullivan*, 446 US 335; 100 S Ct 1708; 64 L Ed 2d 333 (1980); *People v Kirk*, 119 Mich App 599, 601; 326 NW2d 145 (1982). As the Court explained in *Strickland, supra* at 692:

> In *Cuyler v Sullivan* [446 US 335, 345-350; 100 S Ct 1708; 64 L Ed 2d 333 (1980)], the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. . . . Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v Sullivan, supra*, 446 US [350, 348] (footnote omitted).

In *People v Doyle*, 159 Mich App 632, 641; 406 NW2d 893 (1987), mod on other grounds (On Rehearing), 161 Mich App 743; 411 NW2d 730 (1987), this Court noted that cases discussing the disqualification of prosecutors fall into two categories. The first category "involves disqualification for a conflict of interest arising out of some professional, attorney-client relationship, as when the defendant is a former client of the prosecuting attorney." *Id.* The second category "includes situations where the prosecuting attorney has a personal interest (financial or emotional) in the

litigation, or has some personal relationship (kinship, friendship or animosity) with the accused." *Id.* at 641-642. See, generally, 42 ALR5th 581; 31 ALR3d 953.

The assistant prosecutor's conduct in the instant case clearly falls into the first category and is proscribed by the Michigan Rules of Professional Conduct (MRPC). MRPC 1.11(c)(1) directly addresses the present situation and provides:

> (c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
>
> (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment . . . .

In a more general vein, MRPC 1.9(a) and (c)(1) similarly state:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
>
> * * *
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known. . . .

The official Comment to MRPC 1.9 explains the pertinent considerations in judging the effect of a conflict of interest:

> The scope of a "matter" for purposes of this rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. . . . *The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.* [Emphasis added].

See also MRPC 1.7(a)(2) ("A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: . . . (2) each client consents after consultation.") and MRPC 1.6(b) ("[A] lawyer shall not knowingly: [1] reveal a confidence or secret of a client; [2] use a confidence or secret of a client to the disadvantage of the client" without the consent of the client.).

These conflict of interest rules are

> " 'a frank recognition that, human nature being what it is, a dual relationship involving adverse or conflicting interests, constitutes enormous temptation to take advantage of one or both parties to such relationship' " and that " '[t]he purpose of [the conflict of interest rules] is to condemn the creation and existence of the dual relationship instead of merely scrutinizing the results that may flow therefrom.' " [State Bar of Michigan Ethics Committee] Formal Opinion 160 (November 1954), quoting [State Bar of Michigan Ethics Committee] Formal Opinion 132 (January 1950). *Barkley v Detroit*, 204 Mich App 194, 202-203; 514 NW2d 242 (1994).

Two policy considerations underlie the disqualification of prosecuting attorneys, in particular, for a conflict of interest: fairness to the accused and the preservation of public confidence in the impartiality and integrity of the criminal justice system. *Doyle, supra,*

159 Mich App 643-644. As the court explained in *Ex parte Spain*, 589 SW2d 134, 133 (Tex Crim App, 1979):

> When a district attorney prosecutes someone whom he previously represented *in the same case*, the conflict of interest is obvious and the integrity of the prosecutor's office suffers correspondingly. Moreover, there exists the very real danger that the district attorney would be prosecuting the defendant on the basis of facts acquired by him during the existence of his former professional relationship with the defendant. Use of such confidential knowledge would be a violation of the attorney-client relationship and would be clearly prejudicial to the defendant. . . .
>
> When an appointed counsel has an actual conflict of interest, a defendant is denied his right of effective representation, without the necessity of a showing of specific prejudice. . . . We likewise conclude that when a prosecutor proceeds against a defendant whom he formerly represented as defense counsel in the same case, no specific prejudice need be shown by the defendant.

See also *State ex rel Romley v Superior Court*, 184 Ariz 223; 908 P2d 37 (Ariz App, 1995).

III

In the present case, it is clear that attorney Wistrom's representation of respondent at the review hearing constituted "personal" and "substantial" participation in a matter for purposes of MRPC 1.11(c)(1). Further, we conclude that Wistrom committed a serious ethical violation by prosecuting an individual whom he formerly represented as defense counsel in the same proceeding.[4] In his capacity as defense counsel, Wistrom was privy to confidential

[4] It is possible that this violation was unintentional.

information from respondent. Because the extent to which the confidential information obtained from this prior representation could be used to respondent's detriment is immeasurable, and the danger is obvious, prejudice must be presumed. The order is reversed and the matter is remanded for a new trial. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Having determined that disqualification is compelled, we must determine whether the present circumstances require disqualification of the prosecutor's entire office or only the particular prosecuting attorney. *Doyle*, *supra*, 159 Mich App 644. See also MRPC 1.10. In this case, given the exposure of respondent's case to numerous members of the prosecutor's staff during the extended course of the neglect proceedings culminating in the termination of parental rights, we hold that the appropriate remedy is to disqualify the entire Muskegon County prosecutor's office in order to ensure the integrity of the judicial process. On remand, pursuant to MCR 7.216(A)(7),[5] the probate court is directed to appoint a special prosecuting attorney to assume the representation of petitioner.

In light of our disposition, we find it unnecessary to address the remaining issues raised by respondent.

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[5] MCR 7.216(A)(7) provides:

> (A) Relief Obtainable. The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just:
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> * * *
>
> (7) enter any judgment or order or grant further or different relief as the case may require.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

In re NEAL

Docket No. 199884. Submitted February 10, 1998, at Grand Rapids. Decided July 24, 1998, at 9:05 A.M. Leave to appeal denied, 459 Mich ___.

Virginia Neal petitioned the Van Buren County Probate Court for the appointment of a guardian and a conservator for each of her twin adult sons, Richard Neal and Lawrence Neal. Both Richard and Lawrence, now in their forties, have been mentally impaired and retarded in their development since birth. The petition sought appointment of a guardian under the provision of § 444 of the Revised Probate Code, MCL 700.444; MSA 27.5444, relating to the appointment of a guardian for a legally incapacitated person. The probate court, Frank D. Willis, J., over the respondents' objection that the proceedings should be conducted under the provisions of chapter 6 of the Mental Health Code, MCL 330.1600 *et seq.*; MSA 14.800(600) *et seq.*, determined that the respondents were legally incapacitated persons within the meaning of the Revised Probate Code and, upon finding that each respondent lacked the capacity to do some of the tasks necessary to take care of himself, appointed the petitioner and two other family members as coguardians and coconservators of each of the respondents. The respondents appealed to the Van Buren Circuit Court, which, Meyer Warshawsky, J., affirmed. The respondents appealed to the Court of Appeals by leave granted. The appeal with respect to Lawrence Neal was dismissed by stipulation.

The Court of Appeals *held*:

1. Section 604(2) of the Mental Health Code, MCL 330.1604(2); MSA 14.800(604)(2), provides that, except in the case of minors, a guardian for a developmentally disabled person shall be made pursuant to chapter 6 of the Mental Health Code. Review of the record clearly shows that Richard Neal was a developmentally disabled person within the meaning of the Mental Health Code. Accordingly, because the appointment of a guardian for Richard should have proceeded under the provisions of the Mental Health Code, the probate court erred in conducting the guardianship proceedings under the provisions of § 444 of the Revised Probate Code, notwithstanding that Richard might also be considered a legally incapacitated person under the provisions of the Revised Probate Code.

2. Because the Legislature has provided in the provisions of the Mental Health Code relating to the appointment of a guardian for a developmentally disabled person certain safeguards not required for the appointment of a guardian for a legally incapacitated person under the Revised Probate Code and has mandated that the appointment of a guardian of a developmentally disabled adult be made under the Mental Health Code, the probate court's appointment of the respondent's guardians under the provisions of the Revised Probate Code and the circuit court's affirmance of the probate court's order cannot be said to be harmless.

Reversed and remanded.

GUARDIAN AND WARD — DEVELOPMENTALLY DISABLED PERSONS — LEGALLY INCAPACITATED PERSONS — MENTAL HEALTH CODE — REVISED PROBATE CODE — HARMLESS ERROR.

The proceedings relating to appointment of a guardian of a developmentally disabled adult must be conducted pursuant to the provisions of the Mental Health Code rather than pursuant to the provisions of the Revised Probate Code relating to the appointment of a guardian for a legally incapacitated person; the appointment of a guardian for a developmentally disabled adult under the provisions of the Revised Probate Code rather than the provisions of the Mental Health Code cannot be deemed to be harmless error (MCL 330.1604[2], 700.444; MSA 14.800[604][2], 27.5444).

Schuitmaker, Clarke & Cooper, P.C. (by *Harold Schuitmaker*), for the petitioner.

David Michael Stokes and *Calvin A. Luker*, for the respondent.

Before: GRIFFIN, P.J., and HOLBROOK, JR., and NEFF, JJ.

NEFF, J. Respondent Richard Neal appeals by leave granted the circuit court decision that affirmed the probate court's appointment of limited coguardians and coconservators for him pursuant to article 4 of

the Revised Probate Code, MCL 700.401 *et seq.*; MSA 27.5401 *et seq.*[1] We reverse and remand.

I

Richard and his twin brother Lawrence were born January 1, 1949. Because of a medical complication arising from the incompatibility of blood between the boys' parents, both Lawrence and Richard became mentally impaired and were retarded in their development. Richard's family made a concerted effort to ensure that both boys received an education and upbringing that would prepare them to be as independent as possible. For over twenty years, both Lawrence and Richard maintained steady employment. However, for most of their lives their financial and other living arrangements have been handled by their parents and other immediate family members in what both parties describe as a "de facto guardianship."

Following the death of their father in 1992, both brothers sought more independence from their family. They contacted the Van Buren County Community Mental Health agency for assistance and developed new friendships through that agency's "circle of friends" support group program. Richard quit his full-time job in South Haven to move into the Bangor home of his friend Marilyn Schneider, whom he intends to marry. Although Richard obtained a part-time job bagging groceries, his job change resulted in a loss of health insurance benefits.

In October 1995, Richard's mother, Virginia Neal, petitioned the probate court for appointment as

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[1] Respondent Lawrence Neal, for whom coguardians and coconservators were also appointed, has withdrawn his appeal from our consideration.

guardian and conservator of both Lawrence and Richard, as legally incapacitated persons, pursuant to the Revised Probate Code. Lawrence and Richard filed a motion for summary disposition, arguing that because they were developmentally disabled, any guardianship proceedings should proceed under chapter 6 of the Mental Health Code. The probate court denied the motion and issued a lengthy and detailed opinion and order appointing Lawrence and Richard's mother, brother, and sister as limited coguardians and coconservators for Lawrence and Richard pursuant to the Revised Probate Code.

The circuit court affirmed the decision of the probate court, finding that there was no error in the trial court's characterization of Lawrence and Richard as legally incapacitated and that a determination whether they were also developmentally disabled was unnecessary and merely exalted form over function. Richard now appeals by leave granted.

II

Richard first argues that the probate court erred in appointing a guardian under the procedures contained in article 4 of the Revised Probate Code, MCL 700.401 *et seq.*; MSA 27.5401 *et seq.* Richard insists that he is, and continues to be, a person with a developmental disability; therefore, any guardianship proceedings should have been conducted according to chapter 6 of the Mental Health Code, MCL 330.1600 *et seq.*; MSA 14.800(600) *et seq.* We agree.

A

The Revised Probate Code and the Mental Health Code each provide mechanisms through which an

interested person can petition the probate court for the appointment of a guardian and which mirror each other to a significant degree. Importantly however, the Mental Health Code provides that, except in the case of minors, a guardian for a developmentally disabled person may be made pursuant only to chapter 6 of the Mental Health Code. MCL 330.1604(2); MSA 14.800(604)(2). Accordingly, if Richard was a developmentally disabled person at the time of the guardianship proceedings, then only chapter 6 of the Mental Health Code could be used to appoint a guardian for him, regardless of whether Richard also satisfied the definition of a legally incapacitated person as defined in the Revised Probate Code.[2]

At all times relevant to this appeal, the Mental Health Code defined "developmental disability" as "an impairment of general intellectual functioning or adaptive behavior" that "has continued since its origination or can be expected to continue indefinitely" and that "constitutes a substantial burden to the impaired person's ability to perform normally in society" and that "is attributable to . . . [m]ental retardation, cerebral palsy, epilepsy, or autism," or to any other condition producing a similar impairment or to dyslexia resulting from any of the above. MCL

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[2] Section 8(2) of the Revised Probate Code, MCL 700.8(2); MSA 27.5008(2), defines a "legally incapacitated person" as follows:

> [A] person . . . who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, to the extent that the person lacks sufficient understanding capacity to make or communicate informed decisions concerning his or her person.

We express no opinion regarding whether Richard also falls within this definition of a legally incapacitated person.

330.1600(e); MSA 14.800(600)(e).[3] We have carefully reviewed the record and find that, without question, Richard falls within this definition.[4] Accordingly, because Richard is a developmentally disabled person, the probate court erred in conducting the guardianship proceedings pursuant to article 4 of the Probate Code.

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[3] The Legislature has amended this definition, effective March 28, 1996, to read as follows:

"Developmental disability" means either of the following:

(a) If applied to an individual older than 5 years, a severe, chronic condition that meets all of the following requirements:

(i) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.

(ii) Is manifested before the individual is 22 years old.

(iii) Is likely to continue indefinitely.

(iv) Results in substantial functional limitations in 3 or more of the following areas of major life activity:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

(v) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated. [MCL 330.1100a(19); MSA 14.800(100a)(19).]

[4] Richard has been clinically diagnosed as being mildly mentally retarded. He cannot read, write, or dial a telephone. He can do only the simplest of arithmetic and is unable to carry out monetary transactions except in single dollar amounts. He cannot pay his monthly expenses without assistance and is unable to make medical decisions for himself such as when to see a doctor or dentist. Although he is capable of learning and keeping a simple daily routine, his mental retardation renders him unable to comprehend the long-term consequences of his decisions and precludes him from performing normally in society.

B

The coguardians argue that any error in the probate court's use of the wrong statutory procedure was harmless. We disagree.

The Mental Health Code provides safeguards to protect the substantive rights of the developmentally disabled. *Michigan Ass'n for Retarded Citizens v Wayne Co Probate Judge*, 79 Mich App 487, 492; 261 NW2d 60 (1977). Our Supreme Court has stated that the powers of the probate court to appoint a guardian are purely statutory and that the requirements of the applicable statutes must be strictly observed. *Stevens v Stevens*, 266 Mich 446, 449; 254 NW 162 (1934). Here, the mandate of MCL 330.1604(2); MSA 14.800(604)(2) is clear and unambiguous: "An appointment of a guardian for a developmentally disabled person shall be made only pursuant to [the Mental Health Code]." The word "shall" indicates a mandatory, nondiscretionary provision. *In re Hall-Smith*, 222 Mich App 470, 472; 564 NW2d 156 (1997). Consequently, the appointment of a guardian for a developmentally disabled person under the Revised Probate Code would directly contradict the Legislature's clear mandate that such proceedings must be conducted pursuant to the Mental Health Code.

Appellees' argument, that the facts of this case would support the establishment of a guardianship under either code ignores the Legislature's decision to afford certain safeguards to the developmentally disabled not afforded to persons alleged to be legally incapacitated.[5] These safeguards would be nullified if

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[5] Although the guardianship provisions of chapter 6 of the Mental Health Code are virtually identical to the provisions of article 4 of the

a party petitioning for the appointment of a guardian for a developmentally disabled person were allowed to proceed under the Revised Probate Code.

Revised Probate Code in several respects, in certain areas the provisions of chapter 6 of the Mental Health Code appear to be more stringent. For example, the Mental Health Code requires that a petition for guardianship for a developmentally disabled person must be accompanied by a report that contains (1) a description of the person's developmental disability, (b) current evaluations of the person's mental, physical, social, and educational condition, adaptive behavior, and social skills, (c) an opinion whether guardianship is needed, the type and scope of the guardianship, and the reasons for the guardianship, (d) a recommendation concerning appropriate rehabilitation and living arrangements, (e) the signatures of those who performed the evaluations, one being a physician or psychologist who is competent in evaluating persons with developmental disabilities, and (f) a list of the person's medications. MCL 330.1612; MSA 14.800(612). Although the Revised Probate Code provides for the creation of a similar report, preparation and submission of the report is not mandatory; rather, the Revised Probate Code leaves the preparation of the report to the discretion of the probate court. MCL 700.443(3),(4),(5); MSA 27.5443(3), (4), (5).

When appointing a guardian pursuant to the Mental Health Code, the probate court is required to make specific findings on the record with regard to the nature and extent of the person's impairment, the person's capacity to care for himself, the person's ability to manage his financial affairs, and the appropriateness of the proposed living arrangement. MCL 330.1618; MSA 14.800(618). The Revised Probate Code contains no such requirement. Furthermore, any limited guardianship established for developmentally disabled persons must be substantially and specifically limited in scope only to the extent necessitated by the individual's actual mental and adaptive limitations. MCL 330.1602; MSA 14.800(602). To this end, the probate court must specifically define the powers and duties of the guardian. *Id.*; MCL 330.1618; MSA 14.800(618) and MCL 330.1620; MSA 14.800(620).

Other provisions contained in chapter 6 of the Mental Health Code are arguably less stringent than article 4 of the Revised Probate Code. Under article 4 of the Revised Probate Code, if a legally incapacitated person indicates a preference to have a particular person appointed as guardian, the probate court must appoint that designee unless the person is unsuitable or unwilling to serve as guardian. MCL 700.454(2); MSA 27.5454(2). However, under chapter 6 of the Mental Health Code, the probate court need only give "due consideration" to the developmentally disabled person's preference regarding the person to be appointed guardian. MCL 330.1628(2); MSA 14.800(628)(2).

We conclude that only chapter 6 of the Mental Health Code may be used to appoint a guardian for a developmentally disabled adult, regardless of whether that person also satisfies the definition of a legally incapacitated person as defined in the Revised Probate Code. The probate court erred in not following this clear statutory mandate, and the circuit court erred in affirming the decision of the probate court. By conducting the guardianship proceedings under the Revised Probate Code, the probate court denied Richard the protections that the Legislature has specifically afforded to the developmentally disabled under the Mental Health Code. Because this error is not harmless, we reverse the judgment of the circuit court and remand this case with instructions that the probate court dissolve the guardianships and conservatorships. Petitioner is free to file a new petition for guardianship pursuant to the Mental Health Code.

III

Because of our determination that reversal is required, we need not address Richard's remaining issues on appeal.

Reversed and remanded. We do not retain jurisdiction.

CONNOISSESUR COMMUNICATION OF FLINT, LP v UNIVERSITY OF MICHIGAN

Docket No. 203248. Submitted June 11, 1998, at Lansing. Decided July 24, 1998, at 9:10 A.M.

Connoisseur Communication of Flint, L.P., and David Barber brought an action in the Genesee Circuit Court against the University of Michigan, alleging a violation of the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*, relating to the defendant's refusal to provide the plaintiffs a copy of a student-athlete automobile information sheet filled out by a student of the defendant. The court, Judith A. Fullerton, J., granted summary disposition for the defendant, ruling that the document was exempt from disclosure under subsection 13(1)(e) of the FOIA, MCL 15.243(1)(e); MSA 4.1801(13)(1)(e). The plaintiffs appealed.

The Court of Appeals *held*:

Subsection 13(1)(e) provides that a public body may exempt from disclosure as a public record information whose release would prevent the public body from complying with the Family Educational Rights and Privacy Act (FERPA), 20 USC 1232g. Under the FERPA, a postsecondary educational institution may not disclose the education records of a student or any personally identifiable information contained therein without the written consent of the student. 20 USC 1232g(d). The document at issue in this case is an education record, and it was not contended that the student provided written consent for the release of the record. The document also does not consist of directory information and therefore does not fit within the FERPA exception for directory information, 20 USC 1232(a)(5)(A).

Affirmed.

RECORDS — FREEDOM OF INFORMATION ACT — FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT.

The education records of a student at a public, postsecondary educational institution or any personally identifiable information contained therein are exempt from disclosure pursuant to the Freedom of Information Act where the student has not given written consent to disclosure and the records or information concern matters beyond those defined by the Family Educational Rights and Privacy

Act as directory information (MCL 15.243[1][e]; MSA 4.1801[13][1][e]; 20 USC 1232g[a][5][A], [d]).

Leyton & Kasle, P.L.C. (by *David S. Leyton*), for the plaintiffs.

Debra A. Kowich, for the defendant.

Before: JANSEN, P.J., and MARKEY and O'CONNELL, JJ.

PER CURIAM. Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm.

Plaintiff David Barber, a reporter and talk show host for radio station WFDR-AM, which is owned by plaintiff Connoisseur Communication of Flint, L.P., requested documents in the files of defendant University of Michigan pursuant to the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.* Specifically, Barber requested all writings pertaining "to the possession and use by one Maurice Taylor, a student athlete and scholarship varsity basketball player at the said University, of a 1996 Ford Explorer Limited automobile recently involved in a roll over accident in Washtenaw County Michigan." Although defendant had in its files a Student-Athlete Automobile Information Sheet (information sheet) completed by Taylor, which included information concerning the vehicle in question, defendant refused to disclose the information sheet to Barber, citing two exemptions from disclosure under the FOIA, MCL 15.243(1)(a); MSA 4.1801(13)(1)(a) and MCL 15.243(1)(e); MSA 4.1801(13)(1)(e).

Plaintiffs subsequently filed a complaint alleging that defendant's failure to provide the information sheet violated the FOIA. Defendant moved for sum-

mary disposition pursuant to MCR 2.116(C)(8) and (10), asserting that the information sheet was exempt from disclosure under the FOIA. The trial court agreed and granted defendant's motion pursuant to MCR 2.116(C)(8), finding that, as a matter of law, the information sheet was exempt from disclosure under the FOIA, pursuant to MCL 15.243(1)(e); MSA 4.1801(13)(1)(e), because it falls within the definition of "education records" for purposes of the Family Educational Rights and Privacy Act (FERPA), 20 USC 1232g. Plaintiffs contend that the trial court erred in finding the information sheet exempt from disclosure under the FOIA and in granting summary disposition to defendant.

A trial court's determination of a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief can be granted. *Spiek*, *supra*, p 337. The motion for summary disposition must be granted if no factual development could justify the plaintiff's claim for relief. *Id.*

A policy of full disclosure underlies the FOIA. *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 543; 475 NW2d 304 (1991). All public records are subject to full disclosure under the FOIA unless the material is specifically exempted under § 13. *Id.* Because the FOIA is intended primarily as a full-disclosure statute, the exemptions are to be narrowly construed. *Id.* When a public body refuses to disclose a requested document under the FOIA, the public body bears the burden of proving that the refusal was justified. *Id.*

Plaintiffs argue that the information sheet contains "directory-type" information, which is not subject to the FERPA prohibition on disclosure. Furthermore, plaintiffs contend that release of the information would not be an invasion of privacy because the information in question made its way into the "public domain" through others channels and so is no longer private. Finally, plaintiffs argue, the FERPA allows for the release of educational records when those records are furnished in compliance with a judicial order.

Plaintiffs' arguments are unavailing in light of the clear and unambiguous provisions of MCL 15.243(1)(e); MSA 4.1801(13)(1)(e) exempting from disclosure under the FOIA any information, that, if released would put a public body out of compliance with the FERPA. Specifically, MCL 15.243(1)(1)(e); MSA 4.1801(13)(1)(e) provides:

> A public body may exempt from disclosure as a public record under this act:
>
> (e) Information the release of which would prevent the public body from complying with section 438 of subpart 2 of part C of the general education provisions act, title IV of Public Law 90-247, 20 U.S.C. 1232g, commonly referred to as the family educational rights and privacy act of 1974.

Under the FERPA, an educational institution may not disclose the education records or any personally identifiable information contained in the record other than directory information to any third parties without the written consent of the student's parents, 20 USC 1232g(b)(1), or the written consent of the student where the student attends an institution of post-secondary education, 20 USC 1232g(d). For purposes of the FERPA, education records are defined as the

records, files, documents, and other materials that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 USC 1232g(a)(4)(A).

Pursuant to the FERPA, the information sheet is an education record. As defendant notes, the information sheet completed by Taylor is directly related to a university student and is maintained by the university in its files. Further, no one contends that Taylor provided written consent for the release of the requested records. Additionally, the directory information exception, 20 USC 1232g(a)(5)(A),[1] does not apply because it is clear that the information sought by plaintiffs does not fit within the definition of directory information.

Further, there is no exception under the FOIA allowing for disclosure of documents falling within the purview of the FERPA when such disclosure would not constitute an invasion of privacy. Finally, the provision within the FERPA allowing for disclosure of education records pursuant to a judicial order is not applicable under the circumstances presented by this case. 20 USC 1232g(b)(2)(B). Therefore, the trial court properly granted summary disposition as a matter of law.

Because the document is exempt from disclosure pursuant to MCL 15.243(1)(e); MSA 4.1801(13)(1)(e)

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[1] The FERPA defines directory information, which may be disclosed without the consent of the parents or the student, as the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

and the trial court's ruling was based on that subsection only, we need not review whether subsection 13(1)(a) is applicable as well.

Affirmed.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Order Entered July 24, 1998:

LAMORIA v HEALTH CARE & RETIREMENT CORPORATION, Docket No. 199795. The Court orders that a special panel shall be convened pursuant to MCR 7.215(H) to resolve the conflict between this case and *Rymar v Michigan Bell Telephone Co*, 190 Mich App 504; 476 NW2d 451 (1991).

The Court further orders that the opinion in this case released July 10, 1998, is hereby vacated.

The appellant may file a supplemental brief within 28 days of the clerk's certification of this order. Appellee may file a supplemental brief within 21 days of service of appellant's brief. Nine copies must be filed with the Clerk of the Court.

LAMORIA v HEALTH CARE & RETIREMENT CORPORATION

Docket No. 199795. Released July 10, 1998, at 9:00 A.M.; vacated July 24, 1998.

Before: FITZGERALD, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM. Plaintiff Barbara Lamoria[1] appeals as of right the trial court's grant of summary disposition. Lamoria filed this action after she was discharged from her employment at defendant Sun Valley Manor, Inc., a retirement home owned by defendant Health Care & Retirement Corporation (HCR). Defendant Marilyn K. Martin was, at the time of Lamoria's discharge, the administrator of Sun Valley. In pertinent part, Lamoria alleges that her discharge (1) violated the prohibition of the state Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, against weight and age discrimination, (2) violated the Handicappers' Civil Rights Act, MCL 37.1202(1)(b); MSA 3.550(202)(1)(b), with respect to handicap discrimination related to an injury that Lamoria suffered in the course of her employment, and (3) constituted illegal retaliation for plaintiff's seeking worker's compensation benefits. Lamoria advanced additional claims on which the trial court also granted summary disposition to defendants, but Lamoria does not challenge the grant of summary disposition on those claims. In contrast, defendants assert that Lamoria was discharged in accordance with HCR's policy of discharging employees who do not return to work after having been on a medical leave of absence for six months. We reverse the grant of summary disposition with respect to the claims at issue in this appeal and remand for further proceedings consistent with

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[1] Plaintiff's last name is spelled "Lamoria" in her brief on appeal, but variously as "Lamoria" and "LaMoria" in some lower court documents. We adopt the spelling used by plaintiff's own counsel.

this opinion. But for MCR 7.215(H), we would affirm the trial court's decision with respect to issue IV. However, as we will discuss more fully in this opinion, MCR 7.215(H) requires us to reverse with regard to issue IV.

I. FACTS

Lamoria has been a registered nurse since 1959 and was employed in that capacity (including time spent on leave) for nearly twenty years at Sun Valley, from September 9, 1975, until July 7, 1994. However, Lamoria stated in an affidavit[2] that she was not officially notified that her employment had been terminated until October 1994. Lamoria alleged in her complaint that, at the time her employment was terminated, she was fifty-five years old, 5' 7" tall and weighed about 240 pounds and that, previously, she had weighed as much as 311 pounds. Lamoria stated that she began working at Sun Valley as a staff nurse and was promoted in 1991 to the position of "Nurse (Unit) Manager." According to Lamoria, her "last evaluation in August, 1993, stated that [she] had a 'demonstrated loyalty' to Sun Valley Manor and that [she] had the potential for promotion within HCR."

Ruth Wilcox, who also had worked at Sun Valley, testified in her deposition that she had the opportunity to review Lamoria's work or watch her interact with patients. When asked for her opinion of Lamoria's work performance as a nurse, Wilcox testified:

> I respect her. She has good standards. She's honest and credible and trustworthy. She expressed and demonstrated a lot of behaviors that are consistent with a high degree of caring. I would describe her as dedicated.

Wilcox did not recall having any problems with Lamoria during the time that Wilcox was serving as the internal administrator or director of nursing at Sun Valley. Lamoria stated in her affidavit that Martin was hired as the administrator of Sun Valley by Dan Livy, a regional manager for HCR in December 1993.

Lamoria suffered a knee injury as a result of a fall at Sun Valley on August 9, 1993, during the course of her employment. Lamoria went on a medical leave from her employment in January 1994.

Faith Hall indicated in her affidavit that she worked at Sun Valley as a "Nurse Consultant" when Martin was hired as the administrator for Sun Valley. Hall stated that, in her first meeting with Martin at Sun Valley, Martin proclaimed that she was going to "clean house" and that she intended to get rid of the employees who had been at Sun Valley the longest because they "would be the hardest to change." Hall also stated that "Martin said that HCR sought her out for this position and brought her in specifically to clean out the older employees." According to Hall, "Martin made

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[2] All the references in this opinion to statements in affidavits and to deposition testimony in this case refer to evidence that was submitted to the trial court before its decision on defendants' motion for summary disposition.

comments about immediately terminating the director of nursing, several dietary department personnel, and some of the older nurses." Hall stated that Martin and Livy referred to a "hit list" of employees whom they sought to terminate and that "in several instances [they] would 'target' an employee for termination, then begin to build a case for termination or instead force the person to resign." Hall also stated that Martin and Livy "made critical and harsh remarks in [Hall's] presence about the weight of some Sun Valley Manor personnel, including Annette Smith and Barbara Lamoria, in a manner that suggested to [Hall] that they intended to terminate people who they perceived as overweight."

Brenda LaVigne, who was employed by Sun Valley as a social worker, stated that, while she was at Sun Valley, Martin became the administrator. LaVigne made the following statements about Martin in her affidavit:

> 4. Marilyn Martin threatened to fire me on several occasions without justification.
>
> 5. Shortly after she started in December, 1993, Martin began to terminate several of the department heads[,] including nursing supervisors. These employees were then replaced with younger employees.
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> 6. Among the department heads or supervisors fired by Martin or forced to resign were Annette Smith, Director of Nursing; Sharon DeWhale, Director of Nursing; Donna Hair, Social Worker; Dennis Fox, Nurse Supervisor; and Belda Denzer, Nurse Supervisor.
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> * * *
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> 8. Martin did not like over-weight people. Martin made disparaging comments about heavy people, including Sun Valley Manor employees.
>
> 9. Annette Smith, Donna Hair and Barbara Lamoria were all overweight by Martin's standards, and all were fired or forced to resign while Martin was Administrator.

According to LaVigne, "Martin hired younger, more attractive people to enhance the 'corporate image' of HCR and to replace the people that Martin wanted to terminate." LaVigne also stated that Martin knew that Lamoria needed surgery to repair her knee and that Martin would be off work for a long time rehabilitating her knee. According to LaVigne, Martin did not want HCR to pay for the cost of this surgery or rehabilitation.

Annette Smith-Jones indicated in her affidavit that she was employed as the director of nursing when Martin was hired as the administrator. According to Smith-Jones, Martin along with Livy "almost immediately began trying to fire [Smith-Jones] from [her] job." Smith-Jones stated that, at meetings, "Martin often stated how she had no use for certain people, targeting in particular some of the nurse unit managers and African-American licensed practical nurses."

Defendants stress a provision of the "HCR Employee Handbook" regarding medical leaves that includes the statement, "Normally, a Medical Leave of Absence with extensions may not exceed six months." However,

Lamoria stated that she went to Sun Valley each month from February to August 1994 to complete the necessary forms to extend her leave of absence "for another month while HCR delayed my surgery." Lamoria further stated that no one advised her during any of these visits that her leave would expire at some point or that she had to return to work by a certain date or face termination. Each time, Lamoria filled out a form on which she stated that her leave of absence was "work related" and that her estimated date of return to work was "undetermined." Lamoria stated that, each time, Martin approved the leave form without modification. Further, according to Lamoria, neither Martin nor HCR ever stated on the form that the leave would expire at some point, although there is a space on the form to designate the end of a leave period. Lamoria also stated that she visited Sun Valley about ten times during her leave period to complete various paperwork and that she was given no notice of her impending termination during those visits.[3]

Kenneth Distler, M.D., an orthopedic surgeon, stated in an affidavit that he performed an arthroscopic procedure on Lamoria on January 10, 1994. The costs associated with this procedure, as well as benefits for partial wage loss and medical bills, were paid by ITT Hartford, which administered worker's compensation claims for HCR. However, Dr. Distler stated that he thereafter determined that Lamoria's left knee was not responding to treatment and that a total knee replacement was needed to restore her knee to "functionality." Dr. Distler stated that, in his opinion, Lamoria's problem with her knee was caused by degenerative arthritis that was aggravated by the August 1993 injury.

According to Dr. Distler, he requested authorization from Lamoria's employer to have the cost of the surgery paid under an insurance policy covering work-related injuries "as the cause of [Lamoria's] condition was at least partially related to a fall [Lamoria] had while on the job in August, 1993." Dr. Distler stated that the surgery was not scheduled because of the uncertainty regarding Lamoria's insurance coverage. He said that HCR never contacted his office to advise him whether HCR would pay for the cost of the surgery. Dr. Distler stated that, "[i]f Ms. Lamoria has surgery, [he] would expect her to return to a normal life, including productive work as a nurse, although she will have some restrictions on her work and activities for a brief period of time." He stated that "Ms. Lamoria's knee would improve with surgery because a replacement knee would have corrected not only the problems brought about by her fall, but also any of the degenerative arthritic problems that she has experienced."

Lamoria stated in her affidavit that she contacted HCR and ITT Hartford on several occasions from March to June 1994 "trying to get answers to why the surgery was not being done and about [her] condition, and each time [her] questions largely went unanswered or [she] was told that no decisions had yet been made." Lamoria stated that she was told by Sun

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[3] Presumably, Lamoria meant that she visited Sun Valley about ten times in addition to the monthly visits from February to August 1994 to extend her leave of absence.

Valley personnel in May 1994 that her file had been "taken over" by Martin and Livy and that Martin had been in contact with HCR personnel who were in charge of worker's compensation claims. Lamoria stated that it was about this time that her file was transferred within ITT Hartford from Susan Billiett to Wayne Beechum and that Beechum told her that he was taking over her file because HCR was not satisfied with the way that Billiett was handling her case.

Lamoria stated that on June 29, 1994, she was finally told by Beechum that a decision had been made to deny her worker's compensation coverage for her surgery. Lamoria further stated that Beechum told her, on June 29, 1994, that he was being pressured by HCR to deny the claim, that "he had 'no alternative' but to stop compensation payments because HCR had told him to do it" and that "HCR was 'self funded' for worker's compensation insurance, thus HCR could tell him to stop payments, a fact noted in [Lamoria's] records of the conversation."

II. REVIEW OF A GRANT OF SUMMARY DISPOSITION

We review a trial court's grant of summary disposition de novo. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997). In reviewing a motion for summary disposition based on MCR 2.116(C)(10), we review the documentary evidence and determine whether a genuine issue of material fact exists. *Paul*, *supra* at 210. In doing so, we draw all reasonable inferences in the nonmovant's favor and give the nonmovant the benefit of any reasonable doubt. *Id.* "Summary disposition is appropriate only if the court is satisfied that it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome." *Id.* However, a party opposing a motion for summary disposition under MCR 2.116(C)(10) may not rest on its pleadings, but must come forward with evidence to show the existence of a material factual dispute. *Paul*, *supra* at 210-211. If the nonmoving party fails to show that a material fact is at issue, the motion would be properly granted. *Id.* at 211. Granting a motion for summary disposition is especially suspect where motive and intent are at issue or where the credibility of a witness or deponent is crucial. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994).

III. LAMORIA'S CLAIMS UNDER THE STATE CIVIL RIGHTS ACT

A. GENERAL PRINCIPLES

MCL 37.2202; MSA 3.548(202) provides in part:

> (1) An employer shall not do any of the following:
> (a) Fail or refuse to hire or recruit, *discharge*, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, *age*, sex, height, *weight*, or marital status. [Emphasis added.]

The trial court in its written opinion provided the following explanation for its grant of summary disposition to defendants with regard to

Lamoria's claims that her discharge was based on weight and age discrimination contrary to the state Civil Rights Act:

> In a discrimination case, the plaintiff has the initial burden of establishing a prima facie case of discrimination by a preponderance of the evidence. If the plaintiff is successful, then the burden of proof shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. The plaintiff then has the burden to prove that defendants['] reason for its actions was a mere pretext. *Plieth v St Raymond Church*, 210 Mich App 568, 571 [534 NW2d 164] (1995); *Barnell v Taubman Co, Inc*, 203 Mich App 110, 120 [512 NW2d 13] (1993). To establish a prima facie case of employment discrimination, the plaintiff must demonstrate, as a threshold matter, that she was qualified for the position. *Ackerman v Diamond Shamrock Corp*, 670 F2d 66, 69 (CA 6, 1982). In *Baughey v Tecumseh Country Club*, 778 F Supp 354 (ED Mich, 1991), vacated 989 F2d 498 (CA 6, 1993), aff'd 1 F3d 1240 (CA 6, 1993), the court found that a former employee failed to establish a prima facie case of age or sex discrimination where she was unable to perform her job due to an on-the-job injury prior to her discharge. While Ms. LaMoria may have all necessary state licensures and other qualifications for the position of Nurse Manager or Staff Nurse, it is not disputed that she cannot physically perform either position. Therefore, she has failed to establish a prima facie case of employment discrimination. Defendants['] motion for summary disposition is granted as there is no evidence to establish a material factual dispute. Since plaintiff has not established a prima facie case, the court need not consider the disparate treatment nor the intentional discrimination claims.

With regard to Lamoria's claims of weight and age discrimination, the trial court's analysis overlooks that the prima facie case, as part of a mechanism for shifting the burden of producing evidence, is merely one method that an alleged victim of illegal discrimination may use in attempting to show disparate treatment in violation of the state Civil Rights Act. The "prima facie case" derives from the construct established in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), for analysis of employment discrimination claims under title VII of the federal Civil Rights Act that involve only circumstantial evidence of discrimination. See *Harrison v Olde Financial Corp*, 225 Mich App 601, 606-607; 572 NW2d 679 (1997). However, where a plaintiff offers direct evidence of discriminatory animus by a decisionmaker in connection with a claim of employment discrimination, the prima facie case construct, as part of the *McDonnell Douglas* framework, is inapplicable:

> [W]hile the *McDonnell Douglas* burden-shifting analysis is appropriate in cases without direct evidence of discrimination, this case presents a different situation. Federal case law holds, and we agree, that the *McDonnell Douglas* evidentiary framework does not apply when a plaintiff presents direct evidence of discriminatory

animus. *Kresnak v Muskegon Heights*, 956 F Supp 1327 (WD Mich, 1997); see also *Matras v Amoco Oil Co*, 424 Mich 675, 683-684; 385 NW2d 586 (1986). "Direct evidence and the *McDonnell Douglas* formulation are simply different evidentiary paths by which to resolve the ultimate issue of [the] defendant's discriminatory intent." *Blalock v Metals Trades, Inc*, 775 F2d 703, 707 (CA 6, 1985). [*Harrison, supra* at 609-610; see also *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998).][4]

Accordingly, where a plaintiff presents direct evidence of discriminatory animus, it is erroneous for a trial court to use the *McDonnell Douglas* framework. *Harrison, supra* at 613.

This Court in *Harrison, id.* at 610, further described what constitutes direct evidence of discrimination:

> "Direct evidence" has been defined in the Sixth Circuit Court of Appeals as evidence that, if believed, " 'requires the conclusion that unlawful discrimination was at least a motivating factor.' " *Kresnak, supra* at 1335 (citations omitted). For example, racial slurs by a decisionmaker constitute direct evidence of racial discrimination that is " 'sufficient to get the plaintiff's case to the jury.' " *Id.* (citation omitted).

Cases involving direct evidence of discriminatory animus are sometimes called "mixed motives" cases in light of the presentation of such evidence by the alleged victim of discrimination ordinarily coupled with the presentation of other evidence by the employer of legally permissible motives for an adverse employment-related decision:

> Thus, when direct evidence of discrimination is involved, we believe that federal case law provides appropriate guidance for analyzing discrimination claims arising under the Michigan Civil Rights Act.
>
> In the instant case, plaintiff testified in her deposition that defendant's employees made derogatory comments about her race. Because of plaintiff's direct evidence of discrimination, this case presents a question of mixed motives, one in which defendant's decision not to hire plaintiff could have been based on several factors, legitimate ones as well as legally impermissible ones. [*Harrison, supra* at 610.]

Direct proof of discriminatory animus ordinarily precludes a grant of summary disposition:

> To summarize, we hold that the following principles of proof apply in a typical single-plaintiff, mixed-motive employment dis-

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[4] In fairness to the trial court, we note that its opinion was issued before the release of the instructive decision in *Harrison*.

> crimination case. First, as with circumstantial discrimination cases, in a case involving direct evidence of discrimination, the plaintiff always bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. Second, whatever the nature of the challenged employment action, the plaintiff must establish evidence of the plaintiff's qualification (*or other eligibility*) and direct proof that the discriminatory animus was causally related to the decisionmaker's action. Upon such a presentation of proofs, an employer may not avoid trial by merely "articulating" a nondiscriminatory reason for its action. Under such circumstances, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true. [*Id.* at 612-613; (emphasis added).]

In this case, viewing the evidence favorably to Lamoria, she was as "eligible" to be on a medical leave as was any other employee who was, as a practical matter, unable to perform the employee's job duties because of an injury. In the context of alleged discrimination against an incumbent employee with regard to medical leave, it is not sensible that the employee should have to show that the employee was "qualified" to physically perform the job at the time of discharge. Otherwise, an employer would be free to discriminate against an individual in denying a medical leave based on a protected characteristic under the state Civil Rights Act. In this regard, the *Harrison* panel wisely noted that "other eligibility" could substitute for a demonstration of qualification with regard to a challenged employment action.

B. WEIGHT DISCRIMINATION

Interestingly, we have found no published opinion of the Michigan Supreme Court or this Court explicitly addressing the elements necessary for a party to establish a claim of weight discrimination.[5] However, in determining whether there was sufficient evidence to support a jury's finding of weight discrimination under the state Civil Rights Act against a motion for judgment notwithstanding the verdict (JNOV), the federal district court in *Ross v Beaumont Hosp*, 687 F Supp 1115, 1123-1124 (ED Mich, 1988), stated that it "must determine whether reasonable minds could have concluded that Ross' discharge would not have occurred but for the Defendants' consideration of [the plaintiff's] weight." On the basis of the plain language of MCL 37.2202; MSA 3.548(202), we agree with the federal district court in *Ross* that if a party directly proves that the party was discharged from employment with the party's weight[6] being a deter-

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[5] While *Dep't of Civil Rights v Horizon Tube Fabricating, Inc*, 148 Mich App 633, 636; 385 NW2d 685 (1986), involved a successful claim of weight discrimination, the issues on appeal regarded only damages, not liability.

[6] The circumstances of this case do not require us to address the legal ramifications, with regard to a weight discrimination claim, of a person

minative factor in the discharge, then the party has established a claim of weight discrimination.[7]

In *Ross*, the federal district court, in finding that there was enough evidence to preclude JNOV for the employer, noted that a letter of suspension addressed to the plaintiff referred to her failure to provide a monthly letter from the physician treating her obesity. *Ross*, *supra* at 1124. The *Ross* court further observed:

> On the basis of this letter, a jury could have reasonably concluded that Ross' obesity made a difference in the Defendants' decision to terminate her services. Her obesity was explicitly identified as one of the determining factors.
>
> Ross also produced evidence which showed that various medical committees at the Hospital were aware of Wilson's concerns, and other information, regarding her weight. This evidence could also have led a jury to determine that Ross' weight was a determining factor. In addition, the irregularity of Wilson's request for obesity letters, and his unusual actions in using Ross' weight problem to secure a negative letter from Smith, supports her position on this issue. [*Id.*]

Lamoria alleged in her complaint that, at the time her employment was terminated, she was fifty-five years old, 5' 7" tall and weighed about 240 pounds and that, before her injury on August 9, 1995, she had weighed as much as 311 pounds. A reasonable factfinder could conclude that Lamoria was "overweight." Because defendants did not attack these assertions in their motion for summary disposition, Lamoria had no obligation to present evidence in support of these assertions to prevent a grant of summary disposition under MCR 2.116(C)(10). See MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Lamoria has produced direct evidence that Martin expressed hostile views toward "overweight" employees at Sun Valley, including Lamoria herself. LaVigne stated in her affidavit that Martin made disparaging comments about "heavy people," including Sun Valley employees. Further, Hall stated in her affidavit that Martin and Livy "made critical and harsh remarks in [Hall's] presence about the weight of some Sun Valley Manor personnel, including Annette Smith and Barbara Lamoria, in a manner that suggested to [Hall] that they intended to terminate people who they

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being discharged on the basis of an ability to perform an essential job function that is in turn caused by the person's weight as opposed to a decision to discharge an employee directly on the basis of the employee's weight.

[7] Because, as we will discuss below, Lamoria has presented direct evidence of weight-based animus, we need not consider whether and, if so, how the *McDonnell Douglas* construct with its prima facie case concept should apply to claims of weight discrimination based on circumstantial evidence.

perceived as overweight." This evidence of hostile remarks by a supervisory or managerial level employee based on weight is similar to the racial slurs discussed in *Harrison, supra,* and may be evidence of animus based on a characteristic upon which discrimination is forbidden by the state Civil Rights Act.[8]

Further, LaVigne stated that "Annette Smith, Donna Hair and Barbara Lamoria were all over-weight by Martin's standards, and all were fired or forced to resign while Martin was Administrator." From this evidence, a reasonable factfinder might infer that Lamoria's weight was a decisive factor in defendants' decision to discharge Lamoria. Accordingly, Lamoria presented enough direct evidence to support a conclusion that she was discharged on the basis of her weight. The trial court erred in granting defendants' motion for summary disposition with respect to Lamoria's claim of weight discrimination in violation of the state Civil Rights Act. See *Harrison, supra* at 612-613.

C. AGE DISCRIMINATION

This Court in *Downey, supra* at 633-634, found the following to constitute direct evidence of age discrimination:

> Lionel McClanaghnan, an employee at the Ironton garage, testified at his deposition that Hamlin [the manager of the road commission] made a comment to a group of employees about "getting rid of older employees" because they "weren't doing the job." McClanaghan testified that Hamlin stated, "If I have to, I will get rid of the older guys—you older guys and replace you with younger ones." Patrick Whitely testified that in the summer of 1994, when he had considered leaving his job, Parsel [a supervisor] told him: "Don't quit now. We will get rid of these old guys, and we will have a good crew." Whitely also stated that Parsel would "pick on" the older workers and give preferential treatment to the younger work-

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[8] In reaching this conclusion, we regard it as important that racial slurs and derogatory remarks about others whom the speaker regards as "overweight" both display, on their face, hostility toward a group protected by the state Civil Rights Act and reasonably may be considered as indicating a likelihood that the speaker would discriminate against the targets of the remarks. However, in other contexts, we would not expect trial courts faced with motions for summary disposition on claims of weight discrimination to ignore real differences between the characteristics of race and weight. Race is basically an immutable characteristic; being of a particular race is not a negative attribute. In contrast, weight is an aspect of oneself that is subject to some control by one's conduct. It is common knowledge that many health professionals advise against being "overweight." Accordingly, comments that could be reasonably taken as mere advice about diets and the like do not amount to expressions of animus sufficient to indicate a likelihood that one would engage in illegal weight discrimination.

> ers. There was additional deposition testimony from Stangis that Parsel used the term "old guys" all the time. Martinchek also testified that Hamlin believed the "old guys" were lazy. Further, plaintiff testified that Downey told her that Hamlin was "going to get rid of all of us older guys. He wants the older men out of there."

Here, there was similar direct evidence of discriminatory animus. According to Hall's affidavit, Martin told Hall that "HCR sought [Martin] out for this position and brought her in specifically to clean out the older employees." Further, Hall stated that Martin made comments about immediately terminating some of the older nurses. In light of Lamoria's unopposed assertion that she was fifty-five years old when her employment was terminated, a reasonable factfinder could infer that Martin regarded her as an "older" employee. Considering the foregoing, LaVigne's affidavit could reasonably be considered as providing evidence that Martin actually carried out defendants' plan to terminate older employees:

> Shortly after she started in December, 1993, Martin began to terminate several of the department heads[,] including nursing supervisors. These employees were then replaced with younger employees.

In light of the direct evidence of age-based animus on defendants' part and Lamoria's status as an "older" employee, Lamoria presented sufficient evidence to raise a genuine issue of fact regarding whether she was discharged by defendants because of her age. Thus, the trial court erred in granting defendants' motion for summary disposition with regard to her claim of age discrimination.

D. THE ALLEGED SIX-MONTH LIMIT ON MEDICAL LEAVES

Defendants argue that Lamoria was discharged pursuant to HCR's policy that employees would automatically be discharged if they did not return from a medical leave at the end of six months. Thus, defendants argue, Lamoria's age was not a determinative factor in the decision to discharge her. A written policy of an employer purporting to require discharge in a certain circumstance that is facially neutral with regard to protected characteristics under the state Civil Rights Act cannot stand as an absolute shield against claims of unlawful disparate treatment discrimination by an employee subject to discharge under the policy unless the employer establishes that the policy is applied uniformly without exceptions. Otherwise, such a policy could be used as a subterfuge to be invoked only when an employer wishes to discharge an employee and could otherwise be ignored.

The policy statement in the employee handbook provided that "*Normally*, a Medical Leave of Absence with extensions may not exceed six months." (Emphasis added.) This is not a statement that an employee who does not or cannot return from a medical leave that has lasted six months will automatically be discharged. Indeed, the qualifier "normally" suggests that there may be circumstances in which an employee will be allowed to

remain on a medical leave for over six months. Further, Hall stated in her affidavit that, at a meeting she attended, HCR Vice President Jim Millspaugh "indicated that the 6-month leave of absence policy could be used to get rid of undesirable employees." If believed by a factfinder, this could be considered as evidence that HCR did not follow a uniform policy of discharging employees who did not return to work immediately after having been on a medical leave for six months but rather allowed supervisory or management level employees to decide selectively whether to discharge such employees.

IV. LAMORIA'S CLAIM UNDER THE HCRA

In part, Lamoria argues that defendants' refusal to extend her medical leave past six months violated the HCRA in failing to accommodate reasonably the handicap that she suffered when she injured her knee on the job. MCL 37.1202(1)(b); MSA 3.550(202)(1)(b) provides:

> An employer shall not:
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> * * *
>
> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.

In explaining its decision to grant summary disposition to defendants on plaintiff's HCRA claim, the trial court stated:

> The court, in *Ashworth v Jefferson Screw Prods Inc*, 176 Mich App 737, 743 [440 NW2d 101 (1989)], determined that "The HCRA covers only those whose disability is unrelated to the ability to perform the job. The handicapped person seeking employment must be capable of performing the duties of the position. *Carr v General Motors Corp*, 425 Mich 313, 321-322 [389 NW2d 686 (1986)]. A disability that is related to one's ability to perform the duties of a particular position is not a "handicap" within the meaning of the HCRA. *Id.*, pp 315-316." [sic] Therefore, Ms. LaMoria is not handicapped within the meaning of HCRA since it is undisputed that she could not perform the duties of her job.
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> Neither were defendants required to give plaintiff more time to heal. The HCRA does not require that an employer leave a job open until plaintiff's handicap is removed. *Ashworth* at 745. In addition, the employer's duty to make [ ] "reasonable accommodation" does not extend to granting plaintiff a medical leave until such time as she would be able to perform the requirements of her job. *Wilson v Acacia Park Cemetery Ass'n*, 162 Mich App 638, 643-644 [413 NW2d 79] (1987); *Carr, supra*. Ms. LaMoria had already been off work for her injury from August 1993 through August 1994. An employer's

> duty to accommodate handicapped employees does not extend to new job placement, *Rancour v The Detroit Edison Co*, 150 Mich App 276, 279 [388 NW2d 336] (1986), lv den 428 Mich 860 (1987), *Ashworth, supra*. Therefore, defendants were not required to offer plaintiff "light duty" work, nor were they required to continue plaintiff's leave of absence when she had already been off work for more than six months, she needed additional surgery and recuperation time, and even then may not be able to perform her job duties. This court, having considered all documents presented by the parties, finds there is no genuine issue of material fact and no factual development could establish this claim. Therefore, defendants' motion to dismiss the HCRA claim is granted.

In *Ashworth, supra* at 739, the defendant laid off the plaintiff, who thereafter suffered serious injuries in an automobile accident. The day after the defendant recalled the plaintiff, he reported to the defendant's office and stated that he was unable to return to work at that time but estimated that he expected to return to work in about two months. *Id.* at 739-740. The defendant discharged him for his "failure to return to work." *Id.* at 740. The plaintiff claimed that he would have been able to perform the requirements of his job within two months of his recall and that the defendant had a duty to reasonably accommodate his handicap by granting him a medical leave. *Id.* at 744. The *Ashworth* panel rejected this position:

> Nowhere in the handicappers' act do we find a requirement that an employer leave a job open until a plaintiff's handicap is removed. . . . [W]e hold that defendants' duty to make a "reasonable accommodation" did not extend to granting plaintiff a medical leave until such time as he would be able to perform the requirements of his job. [*Id.* at 745.]

Thus, if *Ashworth* were controlling, defendants would have had no obligation under the HCRA to provide Lamoria any medical leave whatsoever. However, Judge SHEPHERD dissented in *Ashworth*. With respect to the "reasonable time to heal" issue, Judge SHEPHERD noted that *Carr v General Motors Corp, supra* at 319, contained the following quote from 1976 Senate Journal 590:

> [If] a handicapped person seeking employment meets the qualifications of the job and can attain the performance levels required *within a reasonable time*, he must, by law be given the same opportunity as other applicants to secure the position. [*Ashworth, supra* at 748 (SHEPHERD, J., dissenting) (emphasis in Judge SHEPHERD's dissent).][9]

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[9] The quotation by Judge SHEPHERD is only part of the passage in 1976 Senate Journal 590 cited in *Carr*. The full citation in *Carr, supra* at 319,

Relying on this language, Judge SHEPHERD concluded that "even if plaintiff were handicapped, the employer must have afforded him a *reasonable time to heal* his wounds on the same conditions as other employees." *Id.* at 748-749. (Emphasis supplied.) This line of reasoning was picked up in *Rymar v Michigan Bell Telephone Co*, 190 Mich App 504; 476 NW2d 451 (1991). The *Rymar* panel conceded that Michigan case law has consistently used the date of termination as the relevant point to assess the status of a disability. *Id.* at 506. The *Rymar* panel went on to state, however, that

> we are not persuaded that the date of termination is the obligatory focal point in every case. We agree with Judge SHEPHERD's reasoning in his dissent in *Ashworth.* A mandatory fixation on the date of termination ignores the factor of time. *Ashworth*, 746. That factor was not relevant in the *Carr* case, where the plaintiff was permanently, not temporarily, disabled. [*Id.* at 506-507.]

The *Rymar* panel then referred to Senator William Faust's "reasonable time" floor remarks in the 1976 Senate Journal and concluded:

> In this case, on the date of termination, plaintiff's disability was related to her ability to do her job. Her condition was not "mentally ill restored." However, there remains unanswered a question whether, within a reasonable time, her disability would cease to adversely affect her capacity to do the work, putting her in a restored condition.
>
> Plaintiff's MHCRA claim is not so clearly unenforceable as a matter of law that no factual development could justify a right to recovery. *Scameheorn v Bucks*, 167 Mich App 302, 306; 421 NW2d 918 (1988). The trial court did not err in denying the motion for summary dis-

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from the remarks of Senator William Faust, speaking on the Senate floor, is as follows:

> The bill essentially spells out the above areas of civil rights, now guaranteed to all, and applies them with equal force under the law to this new category. Handicapped persons wish to, and, when the legislation is enacted into law, must be judged and accepted based on their ability.
>
> * * *
>
> Businesses and public facilities will not be required to go to undue lengths to make facilities more convenient for handicapped individuals. However, if a handicapped person seeking employment meets the qualifications of the job and can attain the performance levels required within a reasonable time, he must, by law be given the same opportunity as other applicants to secure the position.

position as to the handicappers' civil rights claim. [*Rymar*, *supra* at 507.]

Thus was born the "reasonable time to heal" doctrine. We agree with the comment in *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 329; 535 NW2d 272 (1995), that the soundness of the reasoning in *Rymar* is questionable. First, one senator's statement on the floor of the Senate is a singularly thin basis upon which to read an entirely new doctrine into the HCRA. While this statement may have accurately reflected Senator Faust's view, there can be no certainty whatever that it reflected the view of the entire Legislature.[10] However, even if we can assume that Senator Faust's view was shared by the entire Legislature, given his preceding remarks about not requiring businesses and public facilities to go to "undue lengths" to make facilities more convenient for handicapped individuals, we are not at all certain that this snippet of legislative history reflects *any* legislative intent to require a reasonable time to heal. Finally, we also note that Senator Faust in the remarks directly quoted in Judge SHEPHERD's dissent in *Ashworth* and in *Rymar* was referring to a handicapped person

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[10] See Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997), pp 31-32:

> It [legislative history] is much more likely to produce a false or contrived legislative intent than a genuine one. The first and most obvious reason for this is that, with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent, so that any clues provided by legislative history are bound to be false. Those issues almost invariably involve points of relative detail, compared with the major sweep of the statute in question. That a majority of both houses of Congress (never mind the President, if he signed rather than vetoed the bill) entertained *any* view with regard to such issues is utterly beyond belief. For a virtual certainty, the majority was blissfully unaware of the *existence* of the issue, much less had any preference as to how it should be resolved. [Emphasis in original.]

See also the concurrence of Justice Jackson in *United States v California Public Utilities Comm'n*, 345 US 295, 319; 73 S Ct 706; 97 L Ed 1020 (1953):

> I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.

seeking employment. To stretch these remarks to give an existing employee a reasonable time to heal following an injury is a remarkable extension indeed.[11]

Therefore, were we permitted, we would affirm the trial court's grant of summary disposition with respect to Lamoria's HCRA claim. Unlike the panel in *Hatfield*, which considered a substantially different factual situation, we can find no principled basis upon which to distinguish the case before us from *Rymar*, *supra*. See *Hatfield*, *supra* at 329. Therefore, pur-

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[11] In this regard, we find the Michigan Supreme Court's recent opinion in *Rourk v Oakwood Hosp Corp*, 458 Mich 25; 580 NW2d 397 (1998), to be instructive. That case, in the main, dealt with the implications of the definition of "handicap" in § 103 of the HCRA as related to an alleged duty to accommodate a handicapped employee by transferring her to a different job or position. Before 1990, in the employment setting, a handicap was defined as a "determinable physical or mental characteristic of an individual or a history of the characteristic which may result from disease, injury, congenital condition of birth, or functional disorder which characteristic . . . is unrelated to the individual's ability to perform the duties of a particular job or position . . . ." After 1990, however, the counterpart of § 103 now defines a handicap as a "determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder if the characteristic . . . substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position . . . ." MCL 37.1103(e)(i); MSA 3.550(103)(e)(i). "Unrelated to the individual's ability" is defined as meaning that "*with or without accommodation*, an individual's handicap does not prevent the individual from . . . performing the duties of a particular job or position." MCL 37.1103(l)(i); MSA 3.550(103)(l)(i). (Emphasis supplied.)

In *Rourk*, the Court held that the 1990 amendment overturned the narrow holding of *Carr*, *supra*, and that the addition of the language "with or without accommodation" guarantees that an individual otherwise qualified for a particular job or position is entitled to some accommodation if needed. *Rourk*, *supra* at 31. The Court went on to find, however, that if the Legislature had meant to redefine "accommodation," it would have done so expressly. *Id.* The Court held that this Court's decision in *Rancour v Detroit Edison Co*, 150 Mich App 276; 388 NW2d 336 (1986), interpreting the pre-1990 version of the HCRA, that held that job transfers were not among the accommodations owed by an employer to a handicapped employee, also holds true under the post-1990 amended HCRA. *Rourk*, *supra* at 30. In this regard, the Court observed that, "[i]t is not for the courts to impose such a burden [of placing an employee in another position] on employers in the absence of express, unequivocal language from the Legislature." *Id.* at 34.

Similarly, we believe, it is not for the courts to impose a "reasonable time to heal" requirement on employers in the absence of express, unequivocal language from the Legislature.

suant to MCR 7.215(H), we must follow and apply the holding of the opinion in *Rymar*, *supra*, that compels us, reluctantly, to reverse on this issue.

We note that, while Lamoria's argument on this point is somewhat unclear, she apparently asks us to further hold that when an employee has a handicap that prevents the employee from performing a job because of an on-the-job injury covered by worker's compensation, the medical leave for a "reasonable time to heal" under the HCRA required by *Rymar* should extend to a period longer than that for other handicaps. We disagree. The plain language of the HCRA in MCL 37.1202(1)(b); MSA 3.550(202)(1)(b), as set forth above, generally proscribes employment discrimination against the handicapped without drawing any distinctions based on the cause of the handicap. In light of the plain language of the HCRA, there is no basis for concluding that a person who is handicapped because of an on-the-job injury covered by worker's compensation has any greater, or lesser, protection than an employee handicapped for any other reason. *Sanders v Delton Kellogg Schools*, 453 Mich 483, 487; 556 NW2d 467 (1996) (if statutory language is clear, the Legislature must have intended the meaning that it plainly expressed and the statute must be enforced as written). "It is the function of the court to fairly interpret a statute as it then exists; it is not the function of the court to legislate." *Id.*

V. LAMORIA'S RETALIATORY DISCHARGE CLAIM

In one count of her complaint, Lamoria alleged that she was the victim of a retaliatory discharge for seeking worker's compensation benefits. MCL 418.301(11); MSA 17.237(301)(11), the "antiretaliation provision" of the Worker's Disability Compensation Act (WDCA), provides:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

In its written opinion, the trial court stated the following regarding Lamoria's retaliation claim:

> Defendants['] next contention is that Ms. Lamoria's retaliatory discharge claim should be dismissed because there is no relationship between her termination and her worker's compensation dispute. She was terminated on a nondiscriminatory basis: She violated her employer's six month leave of absence policy. Defendants assert that their worker's compensation insurance carrier, ITT, made the decision to end Ms. LaMoria's benefits. Plaintiff insists this reason was a pretext and that she was fired because HCR did not want to continue to pay her worker's compensation and her knee replacement surgery. She asserts that ITT cancelled [sic] her benefits only after being told by HCR to do so.

> To establish a retaliatory discharge claim, the plaintiff must prove the following: (1) she was engaged in a protected activity, (2) defendants knew of the protected activity, (3) defendants acted adversely to plaintiff, and (4) the protected activity caused the adverse employment activity. *Polk v Yellow Freight System, Inc*, 801 F2d 190, 198 (CA 6, 1986). The plaintiff must prove she was discharged because she exercised her rights under the Worker's Disability Compensation Act (WDCA) and this activity was a significant factor in her employer's decision to discharge her. *Polk* at 198; *Taylor v GMC*, 826 F2d 452, 456 (CA 6, 1987). A retaliatory discharge claim premised on the employer's anticipation of a future claim does not create a cause of action. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665 [473 NW2d 790] (1991); *Wilson v Acacia Park Cemetery Ass'n*, 162 Mich App 638 [413 NW2d 79] (1987). Under *Griffey* and *Wilson*, plaintiff's retaliatory discharge claim fails. Plaintiff had not filed a lawsuit nor an appeal of the worker's compensation denial at the time of her termination. Notes of phone calls by ITT provided by plaintiff do not establish anything other than an anticipation of [a] future claim. Nor can plaintiff show she was discharged for exercising her rights under the WDCA. HCR and ITT paid her benefits except for her knee replacement surgery. An independent IME determined the injury necessitating knee replacement was not work[-]related and plaintiff's own doctor refused to provide an answer to this question. Therefore, Defendants' motion is granted.

An employee has a cause of action in tort if the employee is discharged in retaliation for filing a worker's compensation claim. *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 245-249; 531 NW2d 144 (1995). The trial court's analysis fails to properly consider the undisputed fact that Lamoria had filed a claim for worker's compensation benefits and had received worker's compensation coverage on the basis of a work-related injury before her discharge. The anticipatory discharge cases relied on by the trial court are inapplicable.

In *Griffey, supra* at 666, the plaintiff was fired before he filed a worker's compensation claim. This Court concluded that the antiretaliation provision of the WDCA "prohibited discharge in retaliation for having filed a worker's compensation claim, not for the anticipated filing of such a claim" and, thus, held that the plaintiff failed to state a cause of action on which relief could be granted in alleging retaliatory discharge. *Id.* at 666, 668-669.

Similarly, in *Wilson, supra* at 644, the plaintiff alleged, in pertinent part, that the defendant employer "terminated his employment in anticipation of future claims by plaintiff to workers' compensation benefits if plaintiff were to be injured on the job." The plaintiff in *Wilson* had been disabled from his employment in the course of activity apart from his employment with the defendant. *Id.* at 640. Accordingly, there is no indication from the *Wilson* opinion that the plaintiff in that case ever sought worker's compensation benefits in connection with his employment with the defendant. This Court held that "retaliatory discharge premised upon the employer's

anticipation of a future claim does not state a legally cognizable cause of action." *Id.* at 646.

Thus, *Griffey* and *Wilson* hold that an employee who has never filed a claim for worker's compensation benefits with regard to an employer does not have a cause of action under the WDCA for retaliatory discharge if that employer fires the employee on the basis of a belief that continued employment of the employee poses an above average risk of an injury covered by worker's compensation. However, this case is distinguishable from *Griffey* and *Wilson*. It is undisputed that Lamoria claimed and received worker's compensation benefits. We conclude that the discharge of an employee who is receiving worker's compensation benefits due to a particular on-the-job injury, if it is in retaliation for that employee having sought, in good faith, additional benefits based on the injury, constitutes a retaliatory discharge in violation of the WDCA. In such a circumstance, the fact that a person actually filed an initial worker's compensation claim under which the person began receiving benefits would be a direct causal factor in the decision to discharge the employee. Thus, it is immaterial whether the employee challenged the denial of the employee's request for further benefits.

LaVigne stated the following in her affidavit:

> Martin knew that Barbara Lamoria needed surgery to repair her knee and that she would be off work for a long period of time rehabilitating her knee. Martin did not want HCR to pay the cost of the surgery or rehabilitation.

Plaintiff stated in her deposition that she was informed by Sun Valley personnel that, in May 1994, Martin and Livy had taken over the handling of her worker's compensation claim. Viewing this evidence in a light most favorable to Lamoria, a record may be developed at trial to reasonably support a conclusion that Lamoria was discharged by defendants at least in part because she filed a claim for worker's compensation benefits. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 435; 566 NW2d 661 (1997) (in reviewing a grant of summary disposition under MCR 2.116[C][10], this Court examines the entire record in a light most favorable to the nonmoving party to determine if a record could be developed that would leave open an issue on which reasonable minds could differ). Thus, the trial court erred in granting summary disposition to defendants on Lamoria's claim for retaliatory discharge under the WDCA.

VI. CONCLUSION

We reverse the trial court's grant of summary disposition to defendants on Lamoria's claims that her discharge involved weight and age discrimination in violation of the state Civil Rights Act, that her discharge violated the HCRA, and that her discharge was in illegal retaliation for Lamoria's fil-

ing of a worker's compensation claim.[12] Because Lamoria has not challenged the trial court's grant of summary disposition with regard to the other claims she advanced below, we do not address those claims or disturb the trial court's grant of summary disposition to defendants with respect to those claims. Lamoria, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

FITZGERALD, P.J. (*concurring*). I disagree with the majority's sentiments regarding the soundness of the decision in *Rymar v Michigan Bell Telephone Co*, 190 Mich App 504; 476 NW2d 451 (1991). I believe that *Rymar* was properly decided and that the Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, requires an employer to provide its employee a "reasonable time to heal" from a temporary injury before discharging an employee for an inability to perform a job, where the inability results from the injury.

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[12] In light of our extensive discussion of evidence that may be considered to implicate defendants at trial, we emphasize that, in the context of reviewing a grant of summary disposition, we view the evidence and all reasonable inferences therefrom most favorably to the nonmoving party. See, e.g., *Paul*, *supra* at 210-211. In so examining the evidence, a court may not weigh credibility. *York v 50th Dist Court*, 212 Mich App 345, 349; 536 NW2d 891 (1995). Thus, our reversal of the trial court's grant of summary disposition should not be considered as an indication that Lamoria and her witnesses are (or are not) credible with regard to their various claims about the conduct of Martin and others.

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5. "Public welfare," for purposes of the adoption under the Administrative Procedures Act of an emergency rule deemed necessary for the preservation of public welfare, means the prosperity, well-being, or convenience of the public at large, or of a whole community, as distinguished from the advantage of an individual or limited class (MCL 24.248; MSA 3.560[148]). *Michigan State AFL-CIO v Secretary of State*, 230 Mich App 1.
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7. The validity of a rule adopted by an administrative agency is determined by a three-part test: whether the rule is within the subject matter of the enabling statute; whether it complies with the legislative intent underlying the enabling statute; and whether it is arbitrary or capricious (MCL 24.201 *et seq.*; MSA 3.560[101] *et seq.*). *Michigan State AFL-CIO v Secretary of State*, 230 Mich App 1.

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2. Defense counsel does not provide improper advice by informing the defendant that conviction is likely in either a jury trial or a bench trial, that most judges, including the one presiding in the defendant's case, will provide a sentence concession to a defendant who elects a bench trial, and that the particular judge will provide a fair trial; although such advice might cause the defendant to waive the constitutional right to be tried by a jury, the advice is not the equivalent of a warning that the defendant will be penalized for opting for a jury trial and does not render a resulting bench trial involuntary or the product of coercion; such a waiver of the right to a jury trial is informed, not coerced. *People v Godbold*, 230 Mich App 508.

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2. The influence of the Restatement of the Law depends upon its persuasiveness, and even where a particular section of the Restatement has received specific judicial endorsements, cases where that section is invoked must be decided by reference to the policies and precedents underlying the rule restated; textual analysis of the Restatement is useful only to the extent that it illuminates these fundamental considerations. *Braun v York Properties, Inc*, 230 Mich App 138.

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COMPROMISE AND SETTLEMENT
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2. Conflict preemption is compelled not only when a state law is in conflict with a federal statute, but also when it conflicts with a valid federal regulation; conflict preemption is also compelled when a state law is in conflict with a federal regulatory agency's intentional decision not to regulate. *Boulahanis v Prevo's Family Market, Inc*, 230 Mich App 131.
3. State law, for purposes of federal preemption, need not be a state statute; a state common-law cause of action may constitute state regulation subject to preemption if the cause of action would impose, through an award of damages, a requirement not found in federal law. *Boulahanis v Prevo's Family Market, Inc*, 230 Mich App 131.

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2. The constitutional right to self-representation at a criminal trial is not absolute; a court may deny a defendant's request for self-representation where the defendant behaves in a disruptive manner and makes the request for surreptitious reasons (US Const, Am VI; Const 1963, art 1, § 13). *People v Ramsdell*, 230 Mich App 386.

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2. A court that finds on motion of any party that an action was frivolous shall award the prevailing party costs and fees, including reasonable attorney fees; a claim is frivolous when the party's primary purpose was to harass, embarrass, or injure the prevailing party, the party had no reasonable basis upon which to believe the underlying facts were true, or the party's position was devoid of arguable legal merit; a trial court's finding that a claim is frivolous will not be reversed on appeal unless it is clearly erroneous (MCL 600.2591; MSA 27A.2591). *Carpenter v Consumers Power Co*, 230 Mich App 547.

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COURT OF APPEALS

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2. The Court of Claims lacks subject-matter jurisdiction of an action brought by a local unit of government to enforce provisions of the Michigan Constitution concerning new activities or services that the state has required the local unit of government to provide but for which no state appropriation or disbursement was made to cover the necessary costs of implementation (Const 1963, art 9, § 29). *Wayne Co Chief Executive v Governor*, 230 Mich App 258.

JURISDICTION

3. Although the Court of Claims generally has exclusive jurisdiction over all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies, a complaint against the state seeking only equitable or declaratory relief must be filed in the circuit court (MCL 600.6419[1][a]; MSA 27A.6419[1][a]). *Neal v Dep't of Corrections*, 230 Mich App 202.

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See, also, ATTORNEY AND CLIENT 2

CARJACKING

1. Carjacking is a general intent crime that requires for conviction proof that the defendant took a motor vehicle from another person, that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and that the defendant did so by force or violence, by threat of force or violence, or by putting the other person in fear (MCL 750.529a[1]; MSA 28.797[a][1]). *People v Davenport*, 230 Mich App 577.

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2. The prospect of leniency if a right is waived is not the equivalent of a penalty for the exercise of the right; where there is no express or implied threat of punishment for exercising the constitutional right to a jury trial, such a threat does not emerge solely from a defendant's expectation of leniency, based on the trial court's practice of exer-

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cising leniency in sentencing defendants who waive the right to a jury trial and receive a bench trial, where the right is waived. *People v Godbold*, 230 Mich App 508.

3. The statute prohibiting the intentional discharge of a firearm at a dwelling is not unconstitutionally vague and does not use terms that require persons of common intelligence to guess at the meaning of the statute and differ regarding its application to the facts of a case; the statute sufficiently places a person on notice that the discharge of a firearm aimed close to a building in order to place the inhabitants in fear for their safety is prohibited and does not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense was committed (MCL 750.234b; MSA 28.431[2]). *People v Wilson*, 230 Mich App 590.

4. A defendant has a right to be present during any stage of a trial where the defendant's substantial rights might be adversely affected; a defendant's due process rights are not violated where the defendant and defense counsel are excluded from a hearing concerning the prosecution's petition to hold individuals as material witnesses where the only matter discussed is the witnesses' fear of testifying against the defendant and no substantive evidence is taken from the witnesses; because a defendant's Sixth Amendment right to cross-examine witnesses applies only when witnesses provide evidence of substance that bears on the outcome of the trial, that right also is not violated by the exclusion of the defendant and defense counsel from the hearing (US Const, Ams VI, XIV). *People v Wade Parker*, 230 Mich App 677.

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5. Duress, as an affirmative defense, requires a showing by the defendant that the threatened danger was present, imminent, and impending. *People v Ramsdell*, 230 Mich App 386.

DISCHARGE OF FIREARM AT DWELLING

6. The statute prohibiting the intentional discharge of a firearm at a dwelling prohibits the discharge of a firearm toward or in the direction of a dwelling, including close to or above the dwelling (MCL 750.234b; MSA 28.431[2]). *People v Wilson*, 230 Mich App 590.

CRIMINAL LAW—Cont'd

DOUBLE JEOPARDY

7. A defendant's convictions of carjacking, stemming from the taking of an automobile at gunpoint, and armed robbery, stemming from the subsequent taking of the victim's wallet and money at gunpoint, do not violate the double jeopardy provisions of the federal or state constitutions; the Legislature designed both statutes to prevent a different type of crime and authorized multiple punishments for violations of the different social norms addressed by the statutes; the statutes each contain an element that the other does not and, thus, do not involve the "same offense"; the Legislature intended to separately punish a defendant convicted both of carjacking and armed robbery, even if the defendant committed the offenses in the same criminal transaction (US Const, Am V; Const 1963, art 1, § 15; MCL 750.529, 750.529a; MSA 28.797, 28.797[a]). *People v Jabez Parker*, 230 Mich App 337.

ETHNIC INTIMIDATION

8. A person is guilty of ethnic intimidation if the person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, causes physical contact with the other person, or damages, destroys, or defaces any real or personal property of the other person, or threatens, by word or act, to do such an act, if there is reasonable cause to believe that the act will occur; the ethnic intimidation statute is satisfied only when there is evidence of an underlying predicate criminal act committed because of racial animosity (MCL 750.147b; MSA 28.344[2]). *People v Stevens*, 230 Mich App 502.

EVIDENCE

9. The Court of Appeals, when reviewing a trial court ruling on a motion to suppress evidence of a confession, reviews the record de novo but gives deference to the trial court's findings, which will not be disturbed unless they are clearly erroneous. *People v Kowalski*, 230 Mich App 464.

10. A criminal defendant has no burden to produce any evidence; however, once the defendant advances evidence or a theory, prosecutorial argument regarding the inferences created by the evidence or theory does not shift the burden of proof. *People v Godbold*, 230 Mich App 508.

CRIMINAL LAW—Cont'd

FIRST-DEGREE HOME INVASION

11. The first-degree home invasion statute does not require that a defendant charged with first-degree home invasion and any other criminal offense arising from the same transaction be given notice in the information of the possibility that sentences of imprisonment could be consecutive (MCL 750.110a[6]; MSA 28.305[a][6]). *People v St John*, 230 Mich App 644.

GUILTY PLEAS

12. A motion in the district court for postjudgment relief from a plea-based conviction on the ground that the conviction is invalid because the district court failed to comply with the plea-taking procedures required by the court rules is a direct, not a collateral, attack on the conviction (MCR 6.610[E]). *People v Ward*, 230 Mich App 95.

13. The court rule that requires the filing of a motion in the district court to withdraw a plea before the plea can be challenged on appeal does not set a time limit by which such a motion must be made (MCR 6.610[E][7][a]). *People v Ward*, 230 Mich App 95.

INEFFECTIVE ASSISTANCE OF COUNSEL

14. Relief based on ineffective assistance of counsel requires a reasonable probability that, but for unprofessional errors by counsel, the result of the proceeding would have been different. *People v Ramsdell*, 230 Mich App 386.

15. A defendant, in order to prove a claim of ineffective assistance of counsel, must show that counsel's performance fell below an objective standard of reasonableness and the representation prejudiced the defendant so as to deprive the defendant of a fair trial; in order to show that counsel's performance was deficient, the defendant must overcome the presumption that counsel's assistance constituted sound trial strategy; to demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Shively*, 230 Mich App 626.

JURY INSTRUCTIONS

16. A trial court does not abuse its discretion in failing to repeat jury instructions addressing areas not covered by the jury's specific request for the repeat of other instructions. *People v Wade Parker*, 230 Mich App 677.

CRIMINAL LAW—Cont'd

LARCENY BY FALSE PRETENSES

17. The elements of larceny by false pretenses are a false representation concerning an existing fact, knowledge by the defendant of the falsity of the representation, use of the representation with the intent to deceive, and detrimental reliance by the victim on the false representation (MCL 750.218; MSA 28.415). *People v Shively*, 230 Mich App 626.

LESSER MISDEMEANOR OFFENSES

18. A proper request for a jury instruction regarding a lesser misdemeanor offense is a precondition to a court's being required to give such an instruction; such an instruction should be given only if supported by a rational view of the evidence adduced at trial. *People v Ramsdell*, 230 Mich App 386.

PANDERING

19. The pandering statute and the statute proscribing the acceptance of earnings of a prostitute are not unconstitutionally vague or overbroad; they provide fair notice of conduct proscribed, do not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, and do not prohibit constitutionally protected conduct (MCL 750.455; 750.457; MSA 28.710, 28.712). *People v Morey*, 230 Mich App 152.

20. A person commits pandering by inducing, persuading, encouraging, inveigling, or enticing a woman who is not a prostitute into becoming one; pandering is not committed where the woman at issue is already a prostitute or is reasonably believed to already be a prostitute (MCL 750.455; MSA 28.710). *People v Morey*, 230 Mich App 152.

POLICE INTERROGATIONS

21. A suspect under police interrogation, upon invoking the right to counsel, is not subject to further interrogation in the absence of counsel unless the suspect initiates further communication by which the suspect unequivocally indicates that counsel is no longer wanted and that the suspect wishes to give a statement; interrogation is not resumed where the police merely inquire into whether the suspect continues to want counsel. *People v Kowalski*, 230 Mich App 464.

CRIMINAL LAW—Cont'd

POSSESSION OF FIREARM BY PERSON CONVICTED OF A FELONY

22. MCL 750.224f; MSA 28.421(6) establishes two separate periods during which it is unlawful for a convicted felon to carry a firearm; a three-year period applies to individuals convicted of a "felony," as defined in the statute; a five-year period applies to individuals convicted of a "specified felony," as defined in the statute; the two categories overlap and a "specified felony" is merely a particularized subcategory of the category "felony"; the definition of "felony" also applies to the definition of "specified felony" although additional requirements must be met in order for a felony to also be a specified felony; the attempted unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance is a "specified felony" for which the five-year prohibition applies. *People v Wade Parker*, 230 Mich App 677.

PRISONER IN POSSESSION OF CONTRABAND

23. A prisoner's possession of contraband need not be knowing or intentional in order for the prisoner to be convicted of being a prisoner in possession of contraband; the offense is a strict liability crime that requires proof beyond a reasonable doubt that the accused is a prisoner and that the prisoner had actual physical control of the contraband (MCL 800.281[4]; MSA 28.1621[4]). *People v Ramsdell*, 230 Mich App 386.

PROSTITUTION

24. An act of prostitution occurs when a person agrees to perform fellatio in exchange for money and initiates physical contact with the customer's penis; the person need not complete the act of fellatio to be deemed to have engaged in prostitution. *People v Morey*, 230 Mich App 152.

SEARCHES AND SEIZURES

25. A search must have infringed a constitutionally protected interest in order for a defendant to attack the propriety of the search and seizure; a trial court, in determining whether an infringement occurred, must decide, upon consideration of the totality of the circumstances, whether the defendant had an expectation of privacy in the object of the search and seizure and whether that expectation is one that society is prepared to recognize as reasonable (US Const, Am IV; Const 1963, art 1, § 11). *People v Jabez Parker*, 230 Mich App 337.

CRIMINAL LAW—Cont'd
TRIAL
26. A prosecutor may state that the evidence against the defendant is uncontroverted or undisputed even if the defendant did not call corroborating witnesses. *People v Godbold*, 230 Mich App 508.
27. A defendant who is denied pretrial release and agrees to a trial date that is more than ninety days later waives the right to proceed to trial within ninety days (MCR 6.106[B]). *People v Jabez Parker*, 230 Mich App 677.
UTTERING AND PUBLISHING
28. The elements of uttering and publishing are knowledge on the part of the defendant that the instrument involved was false, an intent to defraud, and presentation of the forged instrument for payment (MCL 750.249; MSA 28.446). *People v Shively*, 230 Mich App 626.

CRIMINAL SEXUAL CONDUCT—*See*
RAPE 1

CRIMINAL TRIALS—*See*
CONSTITUTIONAL LAW 2

CROSS APPEALS—*See*
APPEAL 2

DAMAGES—*See*
ACTIONS 1, 2

DECLARATORY RELIEF—*See*
ACTIONS 1, 2

DEFAMATION BY IMPLICATION—*See*
LIBEL AND SLANDER 7-10

DEFECTIVE BALLOT OR EQUIPMENT—*See*
ELECTIONS 1-3

DEFENSES—*See*
LIBEL AND SLANDER 1-4
CRIMINAL LAW 5, 14, 18, 23

DEMONSTRATIVE EVIDENCE—*See*
EVIDENCE 1

DENIAL—*See*
CRIMINAL LAW 4, 7, 16, 22, 25, 27

DEPARTURES—*See*
SENTENCES 5

DEVELOPMENTALLY DISABLED PERSONS—*See*
GUARDIAN AND WARD 1

DISCHARGE OF FIREARM AT DWELLING—*See*
CRIMINAL LAW 3, 5

DISQUALIFICATION OF PROSECUTING ATTORNEYS—*See*
PROSECUTING ATTORNEYS 1

DISTRICT COURT—*See*
CRIMINAL LAW 12, 13

DOUBLE JEOPARDY—*See*
CRIMINAL LAW 4, 7, 16, 22, 25, 27

DRAMSHOP ACTIONS—*See*
INTOXICATING LIQUORS 3

DUE PROCESS—*See*
CRIMINAL LAW 4, 7, 16, 22, 25, 27

DURESS—*See*
CRIMINAL LAW 5, 14, 18, 23

DUTY TO INSPECT AND REPAIR—*See*
NEGLIGENCE 2

DUTY TO WARN THIRD PARTIES—*See*
MENTAL HEALTH 1

ECONOMIC-REALITY TEST—*See*
WORKER'S COMPENSATION 1

ELECTIONS

BOARDS OF CANVASSERS

1. A board of canvassers is authorized to order a special election if it is shown that an elector cannot cast a valid

ELECTIONS—Cont'd
vote by reason of a defect or mechanical malfunction of a voting machine, voting device, ballot, or other election equipment or material (MCL 168.831 *et seq.*; MSA 6.1831 *et seq.*). *Vorva v Plymouth-Canton Community School Dist*, 230 Mich App 651.
ELECTRONIC VOTING SYSTEMS
2. Approval of an electronic voting system lies with the Board of State Canvassers pursuant to § 795a of the Michigan Election Law rather than with the Secretary of State pursuant to § 770a of the Michigan Election Law (MCL 168.770a, 168.795a; MSA 6.1770[1], 6.1795[1]). *Vorva v Plymouth-Canton Community School Dist*, 230 Mich App 651.
3. The use of an electronic voting system that has been approved by the Board of State Canvassers but for which the required approval of a change to the system has not been secured will not invalidate an election where the use of the changed system did not impair the electorate's right to vote or affect the outcome of the election (MCL 168.795a; MSA 6.1795[1]). *Vorva v Plymouth-Canton Community School Dist*, 230 Mich App 651.

ELECTRIC UTILITIES—*See*
NEGLIGENCE 2

ELECTRONIC VOTING SYSTEMS—*See*
ELECTIONS 1-3

ELEMENTS—*See*
CRIMINAL LAW 15, 17, 28
LIBEL AND SLANDER 7-10

EMERGENCY RULES—*See*
ADMINISTRATIVE LAW 1, 5-7

EMPLOYMENT DISCRIMINATION—*See*
CIVIL RIGHTS 1

EQUAL PROTECTION—*See*
PAROLE 1

EQUITABLE ESTOPPEL—*See*
ESTOPPEL 1, 2

ESTOPPEL

EQUITABLE ESTOPPEL

1. Silence or inaction may form the basis for equitable estoppel only where the silent party had a duty or obligation to speak or take action. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305.
2. Equitable estoppel may arise where a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party is prejudiced if the first party is allowed to deny the existence of those facts. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305.

EVIDENCE

See, also, ADMINISTRATIVE LAW 2-4
CRIMINAL LAW 8, 16
MOTIONS AND ORDERS 1
RAPE 1

DEMONSTRATIVE EVIDENCE

1. A weapon similar to one allegedly used in the commission of a crime may be admitted as demonstrative evidence where substantial evidence attests to the similarity of the exhibit offered and the weapon allegedly used, there is no reasonable likelihood that the jury may fail to understand the demonstrative nature of the evidence, and the opposing party has ample opportunity for cross-examination regarding the demonstrative weapon; such evidence must also be relevant, probative, and not prejudicial (MRE 401-403). *People v Castillo*, 230 Mich App 442.

EXCLUSION OF ATTORNEYS—*See*
PAROLE 1

EXCLUSIONARY CLAUSES—*See*
INSURANCE 4, 5

EXCLUSIONS—*See*
INSURANCE 10, 11

EXCLUSIVE REMEDY—*See*
WORKER'S COMPENSATION 1

EXECUTIVE ORDERS—*See*
CONSTITUTIONAL LAW 1, 3, 4

EXECUTIVE REORGANIZATION—*See*
CONSTITUTIONAL LAW 1, 3, 4

EXEMPT VEHICLES—*See*
INSURANCE 7-9

EXERCISE OF DISCRETION—*See*
MANDAMUS 1

EXPECTATION OF PRIVACY—*See*
CRIMINAL LAW 6, 19

EXTENT OF LIABILITY—*See*
GARNISHMENT 1, 2

FACIAL CHALLENGES—*See*
CONSTITUTIONAL LAW 1, 3, 4

FALSITY OF STATEMENT—*See*
LIBEL AND SLANDER 7-10

FAMILY ALLOWANCE PAYMENTS—*See*
WILLS 1-3

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT—*See*
RECORDS 2

FAULT OF MAKER—*See*
LIBEL AND SLANDER 7-10

FEDERAL LAW—*See*
CONFLICT OF LAWS 1-3

FELLATIO—*See*
CRIMINAL LAW 14, 15, 18

FELONY—*See*
CRIMINAL LAW 6, 19

FINAL JUDGMENTS—*See*
APPEAL 1

FIREMAN'S RULE—*See*
NEGLIGENCE 4, 5

FIRST AMENDMENT LIMITATIONS ON ACTIONABILITY—*See*
LIBEL AND SLANDER 1-6, 11, 12

FIRST-DEGREE HOME INVASION—*See*
SENTENCES 1, 4
CRIMINAL LAW 11

FRAUD, MISREPRESENTATION, OR MISCONDUCT—*See*
JUDGMENTS 1

FREEDOM OF INFORMATION ACT—*See*
RECORDS 1

FRIVOLOUS ACTIONS—*See*
COSTS 1, 2

FUNDED—*See*
RECORDS 1

FUTURE DEBTS—*See*
GARNISHMENT 1, 2

GARNISHMENT

CONTRACTS

1. A court should try the issue of a garnishee defendant's liability in the same manner as other civil actions where the obligation of the garnishee defendant to a principal defendant arises out of a contract under which the garnishee defendant's debt is capable of being fixed but the garnishee defendant has asserted that there is no further indebtedness. *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582.

PRESENT DEBTS

2. A garnishee defendant is liable for all debts, whether or not due, owing by the garnishee defendant to a principal defendant on the date the writ of garnishment was served on the garnishee defendant, except for debts evidenced by

GARNISHMENT—Cont'd

negotiable instruments or representing the principal defendant's earnings; debts due in the future are those that are already fixed in amount or are capable of being so fixed and that do not depend for their validity or amount on anything to be done or earned in the future or on a continued liability that may be changed by events (MCL 600.4011[1][b]; MSA 27A.4011[1][b]; MCR 3.101[G][1][d]). *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582.

GOVERNMENTAL IMMUNITY

HIGHWAY EXCEPTION

1. MCL 691.1401(e); MSA 3.996(101)(e) defines "highway" for purposes of governmental immunity to include sidewalks on any public highway; the phrase "sidewalks . . . on any highway" denotes a paved way dedicated to the use of pedestrians that runs alongside and adjacent to a public roadway and within the right of way of the roadway; a sidewalk is part of a highway for which a governmental agency may be held liable for personal injury or property damage pursuant to the highway exception to governmental immunity, MCL 691.1402(1); MSA 3.996(102)(1), where the sidewalk is adjacent to or alongside the highway. *Hatch v Grand Haven Charter Twp*, 230 Mich App 705.
2. A paved path used by both pedestrians and bicyclists may be found to be a sidewalk on a public highway within the defective highway exception to governmental immunity where it runs alongside and adjacent to the highway and within the right of way of the highway and where, even though the path was created as a "bicycle path" by the governmental agency having jurisdiction over the path, the agency neither posted the path as being for bicycle use only nor restricted access to the path to bicyclists only (MCL 691.1401[e], 691.1402[1]; MSA 3.996[101][e], 3.996[102][1]). *Hatch v Grand Haven Charter Twp*, 230 Mich App 705.

GOVERNOR—*See*

CONSTITUTIONAL LAW 1, 3, 4

GROUNDS FOR AFFIRMANCE—*See*

APPEAL 2

GUARDIAN AND WARD

DEVELOPMENTALLY DISABLED PERSONS

1. The proceedings relating to appointment of a guardian of a developmentally disabled adult must be conducted pursuant to the provisions of the Mental Health Code rather than pursuant to the provisions of the Revised Probate Code relating to the appointment of a guardian for a legally incapacitated person; the appointment of a guardian for a developmentally disabled adult under the provisions of the Revised Probate Code rather than the provisions of the Mental Health Code cannot be deemed to be harmless error (MCL 330.1604[2], 700.444; MSA 14.800[604][2], 27.5444). *In re Neal*, 230 Mich App 723.

GUILTY PLEAS—*See*

CRIMINAL LAW 12, 13

HARMLESS ERROR—*See*

GUARDIAN AND WARD 1

HEADLEE AMENDMENT—*See*

ACTIONS 1, 2

COURTS 2

HEALTH

CHIROPRACTIC

1. The practice of chiropractic is limited by statute to the diagnosis and adjustment of spinal misalignments in humans (MCL 333.16401[1][b]; MSA 14.15[16401][1][b]). *Dep't of Consumer & Industry Services v Hoffmann*, 230 Mich App 170.

HIGHWAY EXCEPTION—*See*

GOVERNMENTAL IMMUNITY 1, 2

HOMICIDE

SECOND-DEGREE MURDER

1. The malice element of second-degree murder is satisfied by a showing that the defendant possessed the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with the knowledge that death or great bodily harm would be the probable result; malice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great

HOMICIDE—Cont'd

bodily harm; the creation of a high risk of death or great bodily harm where death or great bodily harm is the natural tendency of the act satisfies the malice element (MCL 750.317; MSA 28.549). *People v Djordjevic*, 230 Mich App 459.

VOLUNTARY MANSLAUGHTER

2. An information that charges a defendant with first-degree murder provides adequate notice to the defendant of the need to defend against a charge of voluntary manslaughter arising out of the same conduct; a charge of first-degree murder requires consideration of the lesser included offense of second-degree murder, and voluntary manslaughter is a cognate lesser included offense of murder (MCL 750.321; MSA 28.553). *People v Darden*, 230 Mich App 597.
3. A conviction of voluntary manslaughter requires proof sufficient to sustain a conviction of second-degree murder, along with evidence of provocation as a mitigating factor (MCL 750.321; MSA 28.553). *People v Darden*, 230 Mich App 597.

HOSPITALS

PHYSICIANS AND SURGEONS

1. The Legislature has imposed a comprehensive statutory ban on the disclosure of any information collected by, or records of the proceedings of, committees assigned a professional review function within hospitals and health facilities; materials relating to the provision of staff privileges are not outside the purview of the statutes (MCL 333.20175[8], 333.21515; MSA 14.15[20175][8], 14.15[21515]). *Dye v St John Hosp & Medical Center*, 230 Mich App 661.
2. Materials submitted to a review entity of a hospital or health facility by a doctor or submitted on the doctor's behalf by colleagues, references, and so forth, as part of the review entity's requirements with respect to the materials it seeks to review before granting the doctor staff privileges are "collected for or by" the review entity for purposes of MCL 333.20175(8), 333.21515; MSA 14.15(20175)(8); 14.15(21515). *Dye v St John Hosp & Medical Center*, 230 Mich App 661.
3. Disclosure of information by a review entity of a hospital or health facility generally is not mandated by 1967 PA 270; the act immunizes from liability an entity that chooses to

HOSPITALS—Cont'd

disclose information where the disclosure is for one of the purposes enumerated in MCL 331.532; MSA 14.57(22); the disclosure authorized by subsection 2(e) refers only to the release of information for the purpose of assisting a health care facility in determining whether a health care professional has the qualifications, competence, and performance needed to be selected and appointed to a medical staff position and is not concerned with the release of information to a plaintiff bringing a malpractice or negligent hiring lawsuit against a hospital and a doctor granted staff privileges by the hospital. *Dye v St John Hosp & Medical Center*, 230 Mich App 661.

IMPLIED CONSENT—*See*
INTOXICATING LIQUORS 1, 2

INDEMNIFICATION OF LICENSEES BY INTOXICATED PERSONS—*See*
INTOXICATING LIQUORS 3

INDEPENDENT AGENTS—*See*
INSURANCE 1, 3

INFORMATION CHARGING FIRST-DEGREE MURDER—*See*
HOMICIDE 2, 3

INFORMATIONS—*See*
CRIMINAL LAW 11

INJUNCTIONS

PRELIMINARY INJUNCTIONS

1. A court, in determining whether to issue a preliminary injunction, must consider harm to the public interest if the injunction issues, whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted, the likelihood that the applicant will prevail on the merits, and a demonstration that the applicant will suffer irreparable injury if the relief is not granted; other considerations are whether a preliminary injunction will preserve the status quo so that a final hearing can be held without either party having been injured and whether it will grant one of the parties final

INJUNCTIONS—Cont'd
relief before a hearing on the merits; the court's decision must not be arbitrary and must be based on the facts of the particular case. *Michigan State AFL-CIO v Secretary of State*, 230 Mich App 1.

INJUNCTIVE RELIEF—*See*
ACTIONS 1, 2

INSTALLMENTS OF SPECIAL ASSESSMENTS—*See*
TAXATION 1

INSURABLE INTERESTS—*See*
INSURANCE 6

INSURANCE
CERTIFICATES OF INSURANCE
1. An insurer under an insurance agreement facilitated by an independent insurance agent owes to a third party to whom the agent, on behalf of the insured, has issued a certificate of insurance no legal duty or obligation to advise the third party about inaccuracies in, or subsequent changes to, the information contained in the certificate of insurance. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305.

CONTRACTS
2. The Court of Appeals, in determining whether an insurance policy applies in an action, first determines whether the policy is clear and unambiguous on its face; the Court reads and interprets the contract as a whole; the contract is clear if it fairly admits of but one interpretation, but is ambiguous if, after the entire contract has been read, the language reasonably can be understood in different ways; ambiguities in a policy drafted by the insurer are construed against the insurer and in favor of the insured and a finding of coverage; exclusions are read with the insuring agreement and independent of other exclusions; exclusionary clauses are strictly construed against the insurer. *Farm Bureau Mut Ins Co v Blood*, 230 Mich App 58.

INDEPENDENT AGENTS
3. An independent insurance agent, when facilitating an insurance agreement between the insurer and the insured, is an agent of the insured, not the insurer. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305.

INSURANCE—Cont'd

JUDICIAL CONSTRUCTION

4. A court's determination that an insurance policy provides coverage for an insured does not preclude a determination by the court that a second policy, issued by a different insurer, affords coverage as well where the two policies by their own terms provide coverage for the insured. *Engle v Zurich-American Ins Group (On Remand)*, 230 Mich App 105.
5. Exclusionary clauses in insurance contracts are strictly construed against the insurer. *Engle v Zurich-American Ins Group (On Remand)*, 230 Mich App 105.

LIABILITY

6. A named insured of an automobile liability policy must have an insurable interest in the automobile; a person who in a bona fide sale of an automobile removes from the automobile the person's license plate, registration, and certificate of insurance ceases to be the owner and registrant of the vehicle and therefore no longer has an insurable interest in the automobile such that the person's automobile liability insurance, if not already canceled, becomes void. *Allstate Ins Co v State Farm Mut Automobile Ins Co*, 230 Mich App 434.

MOTOR VEHICLES

7. A vehicle may be found to be both a motor vehicle and an off-road vehicle; the categories defining both motor vehicles and off-road vehicles are not mutually exclusive (MCL 324.81101[n], 500.3101[2][e]; MSA 13A.81101[n], 24.13101[2][e]). *Morris v Allstate Ins Co*, 230 Mich App 361.

NO-FAULT ACT

8. Section 3113 of the no-fault act identifies those persons who are not entitled to personal protection insurance benefits under the act to include persons who fail to purchase the required insurance for their own vehicle; a person specifically exempted from purchasing no-fault insurance is not included in the list of persons not entitled to such benefits (MCL 500.3113; MSA 24.13113). *Morris v Allstate Ins Co*, 230 Mich App 361.
9. The Legislature intended the no-fault insurance act on occasion to afford no-fault benefits to someone injured as a result of the ownership, operation, maintenance, or use of a motor vehicle that is not required to be registered or

INSURANCE—Cont'd

insured; the owner of a vehicle not required to be registered or insured should not be subjected to tort liability under § 3177 of the act in a third-party action by an insurer that has been obligated to pay personal protection insurance benefits for accidental bodily injury to a person arising out of the ownership, maintenance, or use of an uninsured motor vehicle that was not required to be insured (MCL 500.3177[1]; MSA 24.13177[1]). *Morris v Allstate Ins Co*, 230 Mich App 361.

POLICIES

10. A court, when construing an insurance policy, reads it as a whole and gives meaning to all the terms in the policy; language in the policy is given its plain and ordinary meaning to avoid technical and strained constructions; where policy language is clear and unambiguous, it is enforced as written. *Century Surety Co v Charron*, 230 Mich App 79.

11. An exclusionary clause in an insurance policy is strictly construed in favor of the insured; coverage under the policy is lost if the exclusion applies to the insured's particular claim; a clear and specific exclusion must be given effect because the insurance company cannot be liable for a risk it did not assume. *Century Surety Co v Charron*, 230 Mich App 79.

INSURERS—*See*

INSURANCE 1, 3

INTOXICATING LIQUORS

AUTOMOBILES

1. A blood test administered to a motorist will be deemed to have been given under the implied consent statute unless express disclaimers of reliance on the statute are made to both the motorist and the health-care worker administering the test (MCL 257.625c; MSA 9.2325[3]). *People v Borchard-Ruhland*, 230 Mich App 166.

2. Test results obtained pursuant to the exercise of authority under the implied consent statute are not admissible in prosecutions for drunk driving unless they are obtained in conformity with the statute (MCL 257.625c; MSA 9.2325[3]). *People v Borchard-Ruhland*, 230 Mich App 166.

INTOXICATING LIQUORS—Cont'd
DRAMSHOP ACTIONS
3. A liquor licensee against whom a judgment is entered in a dramshop action has the right to seek indemnification from the alleged visibly intoxicated person only where the judgment resulted from a determination by the trier of fact that intoxication was a proximate cause of the damage, injury, or death sustained (MCL 436.22[4],[7]; MSA 18.933[4],[7]). *Hoover Corners, Inc v Conklin*, 230 Mich App 567.

ISSUES OF MATERIAL FACT—*See*
MOTIONS AND ORDERS 1

JUDGMENT NOTWITHSTANDING THE VERDICT—*See*
MOTIONS AND ORDERS 2

JUDGMENTS
RELIEF FROM JUDGMENTS
1. A trial court may relieve a party from a final judgment, order, or proceeding on the grounds of fraud, misrepresentation, or other misconduct of the opposing party; wrongful conduct by a plaintiff must be prohibited or almost entirely prohibited under a penal or criminal statute in order to serve as a basis for barring the claim; there also must be a sufficient causal nexus between the plaintiff's illegal conduct and the plaintiff's asserted damages (MCR 2.612[C][1][c]). *Carpenter v Consumers Power Co*, 230 Mich App 547.

JUDICIAL CONSTRUCTION—*See*
ADMINISTRATIVE LAW 2-4
INSURANCE 2
STATUTES 1

JURISDICTION—*See*
COURTS 3

JURY INSTRUCTIONS—*See*
CRIMINAL LAW 5, 14, 18, 23

JUVENILE CODE—*See*
PARENT AND CHILD 2-4

LARCENY BY FALSE PRETENSES—*See*
CRIMINAL LAW 15,17,28

LEGALLY INCAPACITATED PERSONS—*See*
GUARDIAN AND WARD 1

LESSER MISDEMEANOR OFFENSES—*See*
CRIMINAL LAW 5, 14, 18, 23

LIABILITY—*See*
INSURANCE 6

LIBEL AND SLANDER
ACTIONS
1. A plaintiff may establish a defamation claim regarding statements by a defendant that are not protected by the First Amendment by showing a false and defamatory statement concerning the plaintiff, an unprivileged publication to a third party, fault amounting at least to negligence on the part of the publisher, and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication; in addition, where the plaintiff is a limited-purpose public figure, the plaintiff must establish by clear and convincing evidence that the defendant made the statement with actual malice; actual malice exists where the publication was made with knowledge of the falsity of the statement or with reckless disregard of its truth or falsity (US Const, Am I). *Ireland v Edwards*, 230 Mich App 607.
2. The First Amendment limitations on the actionability of statements alleged to be defamatory that provide that the statement must be provable as false, the statement must be understandable as stating actual facts about the plaintiff, and in the case of a public-official or public-figure plaintiff, the plaintiff must prove actual malice by clear and convincing evidence are not exclusive to defamation claims and may be applied to the plaintiff's claims of false light invasion of privacy and intentional infliction of emotional distress based on the same statements (US Const, Am I). *Ireland v Edwards*, 230 Mich App 607.
3. A communication is defamatory if, considering all the circumstances, it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with the individual; not all defamatory statements

LIBEL AND SLANDER—Cont'd

are actionable; the First Amendment protects a communication that cannot be reasonably interpreted as stating actual facts about an individual (US Const, Am I). *Ireland v Edwards*, 230 Mich App 607.

4. Statements, although factual on their face and provable as false, that cannot be interpreted by a reasonable listener or reader as stating actual facts about a plaintiff in a defamation action and statements that, when read in context, are not capable of defamatory interpretation do not support an action for defamation. *Ireland v Edwards*, 230 Mich App 607.

5. A court in an action for defamation may decide as a matter of law whether a statement is actually capable of defamatory meaning and may grant summary disposition where no such meaning is possible. *Ireland v Edwards*, 230 Mich App 607.

APPEAL

6. Appellate courts addressing defamation claims implicating First Amendment freedoms must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection (US Const, Am I). *Ireland v Edwards*, 230 Mich App 607.

DEFAMATION BY IMPLICATION

7. A cause of action for defamation by implication exists in Michigan; a plaintiff alleging defamation by implication must prove that the defamatory implication is materially false; such a cause of action can be successful even without a direct showing of a literally false statement. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315.

DEFENSES

8. A defendant is not liable for libel where the gist of the article or the sting of the charge is substantially true. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315.

FALSITY OF STATEMENT

9. Separate, distinct, and independent determinations are to be made with respect to the material falsity of an alleged defamatory statement and the fault of the maker of the statement; summary disposition for a defendant based on the substantial truth defense may be granted even where

LIBEL AND SLANDER—Cont'd
there exists a genuine issue of fact concerning whether the alleged defamatory statement was made negligently or intentionally. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315.

LIBEL

10. The four components of a cause of action for libel are a false and defamatory statement concerning the plaintiff, an unprivileged communication to a third party, fault amounting to at least negligence on the part of the publisher, and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315.

MALICE

11. Whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law. *Ireland v Edwards*, 230 Mich App 607.

STATEMENTS OF OPINION

12. A statement of opinion must be provable as false in order for the statement to support a defamation action; an opinion regarding an objectively verifiable event may be proved to be false while an opinion containing a subjective assertion is not provable as false. *Ireland v Edwards*, 230 Mich App 607.

LIBEL—*See*
LIBEL AND SLANDER 7-10

LIMITATION OF ACTIONS—*See*
ACTIONS 1, 2

LIMITED-PURPOSE PUBLIC FIGURES—*See*
LIBEL AND SLANDER 1-6, 11, 12

LOTTERIES

ASSIGNMENT OF LOTTERY WINNINGS

1. Section 25 of the Lottery Act provided before its amendment in 1988 two exceptions to the general nonassignability of lottery prizes: winnings could be paid to a deceased prizewinner's estate or to a person pursuant to an appropriate judicial order; the 1988 amendment established a third distinct exception by providing for payments directly

LOTTERIES—Cont'd

to a deceased prizewinner's surviving spouse or living children or other designated beneficiaries; the amendment to allow prize money to bypass the decedent's estate as nonprobate assets and go directly to the survivors indicated requires that the winnings of a deceased prizewinner should be paid to the decedent's estate only if the decedent has no surviving spouse or child and has designated no other beneficiary; only when the estate stands to receive the winnings because of the lack of a surviving spouse, child, or other designated beneficiary are those winnings subject to attachment by a person through a judicial order as provided by § 25 (1988 PA 243, MCL 432.25[1], [2]; MSA 18.969[25][1], [2]). *Daniels v Ware*, 230 Mich App 44.

MALICE—*See*

HOMICIDE 1

LIBEL AND SLANDER 1-6, 11, 12

MANDAMUS

CONDITIONS FOR ISSUANCE

1. A writ of mandamus is properly issued where the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, the defendant has the clear legal duty to perform the act, and the act is ministerial, involving no exercise of discretion or judgment; mandamus is an extraordinary remedy that may lie to compel the exercise of discretion, but not to compel its exercise in a particular manner. *Vorva v Plymouth-Canton Community School Dist*, 230 Mich App 651.

MEDIATION—*See*

COMPROMISE AND SETTLEMENT 1, 2

PRETRIAL PROCEDURE 1

MEDICAL MALPRACTICE ACTIONS—*See*

NEGLIGENCE 3

MENTAL HEALTH CODE—*See*

GUARDIAN AND WARD 1

MENTAL HEALTH PROFESSIONALS—*See*

MENTAL HEALTH 1

MENTAL HEALTH

NEGLIGENCE

1. MCL 330.1946; MSA 14.800(946) limits the duty a mental health professional owes to third parties to a duty to warn in those situations where a patient has communicated a threat of physical violence against a reasonably identifiable third person; the duty to warn imposed on a mental health professional under the act also applies to a corporate institution that undertakes to render psychological treatment. *Swan v Wedgwood Christian Youth & Family Services, Inc*, 230 Mich App 190.

MENTALLY INCAPABLE VICTIMS—*See*

RAPE 2

MINISTERIAL ACT—*See*

MANDAMUS 1

MOTIONS AND ORDERS

EVIDENCE

1. A court considering a motion for summary disposition in which it is alleged that no genuine issue of material fact exists may rely on affidavits, depositions, or any other documentary evidence, including the pleadings, in deciding whether a genuine issue of material fact exists (MCR 2.116[C][10]). *Farm Bureau Mut Ins Co v Blood*, 230 Mich App 58.

JUDGMENT NOTWITHSTANDING THE VERDICT

2. A trial court, when deciding a motion for judgment notwithstanding the verdict, must examine the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the plaintiff; if the evidence is such that reasonable jurors could have found for the plaintiff, neither the trial court nor the Court of Appeals may substitute its judgment for that of the jury. *Carpenter v Consumers Power Co*, 230 Mich App 547.

SUMMARY DISPOSITION

3. Summary disposition may not be granted pursuant to MCR 2.116(C)(10) where a record might be developed that leaves open an issue of material fact upon which reasonable minds could differ. *Morris v Allstate Ins Co*, 230 Mich App 361.

MOTOR VEHICLES—*See*
INSURANCE 7-9

MULTIPLE INSURERS—*See*
INSURANCE 4, 5

NEGLIGENCE

See, also, MENTAL HEALTH 1

CONTRACTS

1. A person who undertakes, gratuitously or for consideration, to render services to another that the person should recognize as necessary for the protection of a third person or that person's property is subject to liability to the third person for physical harm resulting from the failure to exercise reasonable care to protect the undertaking if the person's failure to exercise reasonable care increases the risk of such harm, the person has undertaken to perform a duty owed by the other to the third person, or the harm is suffered because of reliance of the other or the third person upon the undertaking. *Braun v York Properties, Inc*, 230 Mich App 138.

ELECTRIC UTILITIES

2. An electric utility must exercise reasonable care to reduce potential hazards as far as practicable, including reasonably inspecting and repairing wires and other instrumentalities to discover and remedy hazards and defects. *Carpenter v Consumers Power Co*, 230 Mich App 547.

MEDICAL MALPRACTICE ACTIONS

3. A defendant in a medical malpractice action brought when a statute and a court rule required the plaintiff to file either security for costs or an affidavit of meritorious claim with the complaint was obligated to file an answer within twenty-one days of being served notice of the filing of security or an affidavit; in the absence of a filing of security or an affidavit, the defendant was not obligated to answer and a default or default judgment could not be entered on the basis of a failure to answer (MCL 600.2912d, 600.2912e[1]; MSA 27A.2912[4], 27A.2912[5][1]; MCR 2.108[A][6], 2.109[B]). *White v Busuito*, 230 Mich App 71.

POLICE OFFICERS

4. The fireman's rule bars a recovery for damages by a police officer or fire fighter for injuries derived from the negli-

NEGLIGENCE—Cont'd
gence causing the safety officer's presence and those stemming from the normal, inherent, and foreseeable risks of the safety officer's profession; although the analytical focus is on whether the injury stems directly from the safety officer's professional functions, the rule may not apply in situations where the policy rationales for its adoption are inapplicable; the fireman's rule is not a license to act with impunity, without regard for the safety officer's well-being. *McCaw v T & L Operations, Inc (On Remand)*, 230 Mich App 413.

5. The foundational policy rationale for the fireman's rule is that the purpose of the safety professions is to confront danger, and therefore, the public should not be liable for damages for injuries that occur in the performance of the very function police officers and fire fighters are intended to fulfill; additional rationales include the fact that public safety officers are trained to deal with the hazards of their respective professions and that worker's compensation benefits are available to public safety officers injured in the course of their employment. *McCaw v T & L Operations, Inc (On Remand)*, 230 Mich App 413.

SKI AREA OPERATORS

6. Neither the Ski Area Safety Act nor the common law imposes a duty on a ski area operator to ascertain, for the benefit of an accidentally injured skier, the identity of any other skier involved in the accident; the failure of a ski area operator to ascertain the identity of a skier involved in accidental injury to another skier does not subject the operator to liability to the injured skier for negligence (MCL 408.343[1]; MSA 18.483[23][1]). *Hakari v Ski Brule, Inc*, 230 Mich App 352.

NEW ACTIVITIES OR SERVICES—*See*
ACTIONS 1, 2
COURTS 2

NO-FAULT ACT—*See*
INSURANCE 7-9

OFF-ROAD VEHICLES—*See*
INSURANCE 7-9

OVERBREADTH—*See*
CRIMINAL LAW 14, 15, 18

PANDERING—*See*
CRIMINAL LAW 14, 15, 18

PARENT AND CHILD

CHILD PROTECTIVE PROCEEDINGS

1. Indigent parents have the right to court-appointed counsel who is free from conflicts of interest at all hearings in a child protective proceeding (MCR 5.915[B][1]). *In re Osborne*, 230 Mich App 712.

PATERNITY ACT

2. A putative father who has executed a valid acknowledgment of paternity pursuant to the Revised Probate Code does not have to proceed under the Paternity Act before bringing an action under the Child Custody Act (MCL 700.111, 722.714[2], 722.21 *et seq.*; MSA 27.5111, 25.494[2], 25.312[1] *et seq.*). *Hoshowski v Genaw*, 230 Mich App 498.

TERMINATION OF PARENTAL RIGHTS

3. A custodial natural parent who has legal and physical custody of a child pursuant to a decree of divorce from the other natural parent has standing to petition for termination of the noncustodial parent's parental rights pursuant to the provisions of the Juvenile Code (MCL 712A.19b[1]; MSA 27.3178[598.19b][1]). *In re Huisman*, 230 Mich App 372.

4. The provisions of the Juvenile Code relating to the termination of parental rights allow a probate court to terminate the parental rights of just one parent; the Juvenile Code does not require that the rights of both parents be terminated (MCL 712A.19b[1]; MSA 27.3178[598.19b][1]). *In re Huisman*, 230 Mich App 372.

5. Termination of the parental rights of a former spouse for the purpose of allowing the present spouse of a custodial parent to adopt a child of the former marriage may be sought under the provisions of either the Juvenile Code or the Adoption Code (MCL 710.41[1], 710.51[6], 712A.19b[1]; MSA 27.3178[555.41][1], 27.3178[555.51][6], 27.3178 [598.19b][1]). *In re Huisman*, 230 Mich App 372.

PAROLE INTERVIEWS—*See*
PAROLE 1

PATERNITY ACT—*See*
PARENT AND CHILD 2

PERSONAL PROTECTION INSURANCE BENEFITS—*See*
INSURANCE 7-9

PERSONS EXCLUDED—*See*
INSURANCE 7-9

PHYSICIANS AND SURGEONS—*See*
HOSPITALS 1-3

PLACE OF PUBLIC ACCOMMODATION—*See*
CIVIL RIGHTS 2, 3

POLICE INTERROGATIONS—*See*
CRIMINAL LAW 9, 21

POLICE OFFICERS—*See*
NEGLIGENCE 4, 5

POLICIES—*See*
INSURANCE 10, 11

POSSESSION OF FIREARM BY PERSON CONVICTED OF A FELONY—*See*
CRIMINAL LAW 4, 7, 16, 22, 25, 27

POSTJUDGMENT RELIEF—*See*
APPEAL 1

PREEMPTION—*See*
CIVIL RIGHTS 1
CONFLICT OF LAWS 1-3

PRESENT DEBTS—*See*
GARNISHMENT 1, 2

PRESERVATION OF PUBLIC WELFARE—*See*
ADMINISTRATIVE LAW 1, 5-7

PRETRIAL PROCEDURE

MEDIATION

1. A trial court has discretion over whether to allow an amendment of a party's rejection of a mediation evaluation that was accepted by the other party where rejection is deemed from the failure to respond to evaluation in the manner required by court rule; if amendment is allowed, the other party must be provided an opportunity to reiterate its acceptance of the evaluation or to reject the evaluation (MCR 1.105, 2.403[L][1]). *Rieth v Keeler*, 230 Mich App 346.

PRETRIAL RELEASE—*See*
CRIMINAL LAW 4, 7, 16, 22, 25, 27

PRIOR INCONSISTENT STATEMENTS—*See*
TRIAL 2

PRISONER IN POSSESSION OF CONTRABAND—*See*
CRIMINAL LAW 5, 14, 18, 23

PRISONS AND PRISONERS—*See*
CIVIL RIGHTS 2, 3

PROBATE COURT—*See*
PARENT AND CHILD 2-4

PROPORTIONALITY—*See*
SENTENCES 1, 4

PROSECUTING ATTORNEYS

DISQUALIFICATION OF PROSECUTING ATTORNEYS

1. The policy considerations underlying the disqualification of prosecuting attorneys for a conflict of interest are fairness to the accused and the preservation of public confidence in the impartiality and integrity of the criminal justice system; a conflict of interest is obvious where a prosecuting attorney prosecutes someone after having previously represented that person in the same case; under such circumstances, no specific prejudice need be shown by the defendant and the defendant may be found to have been denied a fair trial. *In re Osborne*, 230 Mich App 712.

PROSECUTORIAL COMMENTS—*See*
CRIMINAL LAW 2, 10, 26

PROSTITUTION—*See*
CRIMINAL LAW 14, 15, 18

PROVOCATION—*See*
HOMICIDE 2, 3

PUBLIC BODY—*See*
RECORDS 1

PUBLIC SERVICE—*See*
CIVIL RIGHTS 2, 3

PUTATIVE FATHERS—*See*
PARENT AND CHILD 1

QUESTIONS OF LAW—*See*
LIBEL AND SLANDER 1-6, 11, 12

RAPE

CRIMINAL SEXUAL CONDUCT

1. Evidence of a victim's virginity as circumstantial proof of the victim's unwillingness to consent to a sexual act is not admissible in a prosecution for criminal sexual conduct (MRE 404[a][3]). *People v Bone*, 230 Mich App 699.

THIRD-DEGREE CRIMINAL SEXUAL CONDUCT

2. A person is "mentally incapable," for purposes of the statute that makes it criminal sexual conduct in the third degree to engage in sexual penetration with a person the actor knows or has reason to know is mentally incapable, if the person suffers from a mental defect that renders that person temporarily or permanently incapable of appraising the nature of the person's conduct; the person's appraisal of the nature of the person's conduct involves the ability to be aware that a physical act is occurring, as well as the ability to appreciate the moral implications of the act (MCL 750.520a[f], 750.520d[1][c]; MSA 28.788[1][f], 28.788[4][1][c]). *People v Breck*, 230 Mich App 450.

RECORDS

See, also, HOSPITALS 1-3

RECORDS—Cont'd

FREEDOM OF INFORMATION ACT

1. The Freedom of Information Act requires a public body to disclose all public records that are not specifically exempt from disclosure under the act; the act provides, in part, that a "public body" is a body that is created by state or local authority or which is primarily funded by or through state or local authority; an organization that is not created by state or local authority and receives payment from governmental sources in return for providing goods or services is not as a result of such payment funded by or through state or local authority irrespective of the amount of those payments; the term "funded" means the receipt of a governmental grant or subsidy; earned fees are not a grant, subsidy, or funding (MCL 15.232[b][iv]; 15.233[1]; MSA 4.1801[2][b][iv], 4.1801[3][1]). *State Defender Union Employees, UAW Local 412-Unit 64 v Legal Aid & Defender Ass'n of Detroit*, 230 Mich App 426.
2. The education records of a student at a public, postsecondary educational institution or any personally identifiable information contained therein are exempt from disclosure pursuant to the Freedom of Information Act where the student has not given written consent to disclosure and the records or information concern matters beyond those defined by the Family Educational Rights and Privacy Act as directory information (MCL 15.243[1][e]; MSA 4.1801[13][1][e]; 20 USC 1232g[a][5][A],[d]). *Connoisseur Communication of Flint, LP v Univ of Michigan*, 230 Mich App 732.

RELIEF FROM JUDGMENTS—*See*
JUDGMENTS 1

REMEDIES—*See*
ACTIONS 1, 2

RESTATEMENT—*See*
COMMON LAW 1, 2

RETROACTIVE APPLICATION—*See*
STATUTES 2, 3

RETROACTIVE GRANT OF PAYMENTS—*See*
WILLS 1-3

REVIEW ENTITIES—*See*
HOSPITALS 1-3

REVISED PROBATE CODE—*See*
GUARDIAN AND WARD 1

RIGHT TO CONFRONT WITNESSES—*See*
CRIMINAL LAW 6, 19

RIGHT TO COUNSEL—*See*
CRIMINAL LAW 9, 21

RULES—*See*
ADMINISTRATIVE LAW 1, 5-7

SALES REPRESENTATIVES' COMMISSIONS ACT—*See*
STATUTES 2, 3

SCOPE OF PRACTICE—*See*
HEALTH 1

SEARCHES AND SEIZURES—*See*
CRIMINAL LAW 6, 19

SECOND-DEGREE MURDER—*See*
HOMICIDE 1

SECRETARY OF STATE—*See*
ELECTIONS 1-3

SECURITY FOR COSTS—*See*
NEGLIGENCE 3

SELF-REPRESENTATION—*See*
CONSTITUTIONAL LAW 2

SENTENCES

CONSECUTIVE SENTENCES

1. The cumulative length of consecutive sentences is not considered when determining the proportionality of the sentences; each sentence must be proportionate to the seriousness of the crime for which it was imposed and proportionate to the defendant's prior criminal record. *People v St John*, 230 Mich App 644.

SENTENCES—Cont'd

CONSTITUTIONAL LAW

2. A court in passing sentence may not consider factors that violate a defendant's constitutional rights; a court must not state or imply to a defendant alternative sentencing possibilities based on the defendant's future procedural choices, such as an exercise of the right to a trial by jury or the choice of a bench trial. *People v Godbold*, 230 Mich App 508.

3. A trial court's sentencing practice whereby the court sentences a defendant convicted by a jury to a valid sentence and does not engage in retaliatory sentencing for the defendant's decision to have a trial by a jury, but exercises leniency by reducing an otherwise valid sentence for a defendant who waives the right to a jury trial and opts for a bench trial, does not needlessly encourage waiver of the right to a jury trial or coerce the defendant's waiver and is not constitutionally infirm. *People v Godbold*, 230 Mich App 508.

FIRST-DEGREE HOME INVASION

4. A court sentencing a defendant convicted of first-degree home invasion and any other criminal offense arising from the same transaction may order that a term of imprisonment imposed for first-degree home invasion be served consecutively to any term of imprisonment imposed for the other offense (MCL 750.110a[6]; MSA 28.305[a][6]). *People v St John*, 230 Mich App 644.

SENTENCING GUIDELINES

5. A sentencing court may justify imposing a sentence whose minimum term exceeds that which is recommended under the sentencing guidelines by referring to factors inadequately weighed within the guidelines, as well as by introducing legitimate factors not considered by the guidelines. *People v Castillo*, 230 Mich App 442.

SENTENCING GUIDELINES—*See*
SENTENCES 5

SETTLEMENT AGREEMENTS—*See*
COMPROMISE AND SETTLEMENT 1, 2

SIDEWALKS—*See*
GOVERNMENTAL IMMUNITY 1, 2

SILENCE OR INACTION—*See*
ESTOPPEL 1, 2

SKI AREA OPERATORS—*See*
NEGLIGENCE 6

SKI AREA SAFETY ACT—*See*
NEGLIGENCE 6

SPECIAL ELECTIONS—*See*
ELECTIONS 1-3

SPECIFIED FELONY—*See*
CRIMINAL LAW 4, 7, 16, 22, 25, 27

SPEEDY TRIAL—*See*
CRIMINAL LAW 4, 7, 16, 22, 25, 27

SPINAL MANIPULATIONS—*See*
ANIMALS 1, 2

SPOUSE'S ELECTION—*See*
WILLS 1-3

STANDING—*See*
PARENT AND CHILD 3-5

STATE BOARD OF EDUCATION—*See*
CONSTITUTIONAL LAW 1, 3, 4

STATE LAW—*See*
CONFLICT OF LAWS 1-3

STATUTES
See, also, COMMON LAW 1, 2
CRIMINAL LAW 3, 5
JUDICIAL CONSTRUCTION
1. An administrative agency's interpretation of a statute may be afforded some deference by the Court of Appeals but is not binding on the Court and cannot be used to override the plain meaning of the statute. *Daniels v Ware*, 230 Mich App 44.

STATUTES—Cont'd

RETROACTIVE APPLICATION

2. Four rules guide the determination whether a statute can be applied retroactively: is there specific language in the act that states that it should be given retrospective or prospective application; a statute is not regarded as operating retrospectively solely because it relates to an antecedent event; a retrospective law is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past; a remedial or procedural act that does not destroy a vested right will be given effect where the injury is antecedent to the enactment of the statute. *Flynn v Flint Coatings, Inc*, 230 Mich App 633.

SALES REPRESENTATIVES' COMMISSIONS ACT

3. The sales representatives' commissions act retroactively applies to claims for sales commissions that were already owed when the act took effect (MCL 600.2961; MSA 27A.2961). *Flynn v Flint Coatings, Inc*, 230 Mich App 633.

STRICT LIABILITY—*See*
CRIMINAL LAW 5, 14, 18, 23

SUBJECT-MATTER JURISDICTION—*See*
COURTS 2

SUBSIDIARY CORPORATIONS—*See*
WORKER'S COMPENSATION 1

SUBSTANTIAL TRUTH—*See*
LIBEL AND SLANDER 1-4

SUBSTANTIVE VALIDITY—*See*
ADMINISTRATIVE LAW 1, 5-7

SUMMARY DISPOSITION—*See*
MOTIONS AND ORDERS 1

SUPERINTENDENT OF PUBLIC INSTRUCTION—*See*
CONSTITUTIONAL LAW 1, 3, 4

SUPPRESSION—*See*
CRIMINAL LAW 8, 16

TAX SALES—*See*
TAXATION 1

TAXATION
TAX SALES
1. Installments of a special assessment secured by a lien on property sold at a tax sale are not canceled upon conveyance of the property by tax deed and were not even before October 19, 1993, the effective date of an amendment of the applicable statute to specifically so provide (MCL 211.72; MSA 7.117). *Howard v Clinton Charter Twp*, 230 Mich App 692.

TERMINATION OF PARENTAL RIGHTS—*See*
PARENT AND CHILD 3-5

THIRD PARTIES—*See*
INSURANCE 1, 3

THIRD-PARTY LIABILITY—*See*
INSURANCE 7-9

THIRD-DEGREE CRIMINAL SEXUAL CONDUCT—*See*
RAPE 2

TIMELINESS OF APPEAL—*See*
APPEAL 1

TRIAL
See, also, CRIMINAL LAW 2, 6, 10, 19, 26
GARNISHMENT 1, 2
EVIDENCE
1. Decisions regarding the order and mode of presentation of evidence are within the discretion of the trial court; the court may permit a party to introduce additional evidence during the redirect examination of the party's witness (MRE 611). *People v Stevens*, 230 Mich App 502.
WITNESSES
2. A trial court maintains control of the order in which parties will adduce proof; the traditional approach whereby a prior inconsistent statement made by a witness could not be offered until and unless the witness was presented with the inconsistent statement was modified by MRE 613(b),

TRIAL—Cont'd
which provides that the witness need only be provided with the opportunity to address the alleged inconsistency at some point during the trial; the rule does not indicate that a court must admit extrinsic evidence of a prior inconsistent statement before the statement is presented to the witness; a proponent of the testimony who fails to follow the traditional approach runs the risk that the court will properly exercise its discretion not to allow the admission of the prior statement. *People v Wade Parker*, 230 Mich App 677.

UTTERING AND PUBLISHING—*See*
CRIMINAL LAW 15, 17, 28

VAGUENESS—*See*
CRIMINAL LAW 14, 15, 18

VETERINARIANS—*See*
ANIMALS 1, 2

VETERINARY MEDICINE—*See*
ANIMALS 1, 2

VEXATIOUS PROCEEDINGS—*See*
COURTS 1

VIRGINITY—*See*
RAPE 1

VOLUNTARY MANSLAUGHTER—*See*
HOMICIDE 2, 3

WAIVER OF JURY TRIAL—*See*
ATTORNEY AND CLIENT 2
CRIMINAL LAW 2, 10, 26
SENTENCES 1, 2

WAIVER—*See*
CRIMINAL LAW 4, 7, 16, 22, 25, 27

WEAPONS—*See*
EVIDENCE 1

WILLS

FAMILY ALLOWANCE PAYMENTS

1. The family allowance statute provides that a nonchargeable family allowance shall be granted for one full year upon petition to the probate court following a testator's death; the statute does not preclude a retroactive grant of such payments for the period between the time of the death and the time of the filing of the petition where the total nonchargeable allowance is for one year (MCL 700.287; MSA 27.5287). *In re Herbach Estate*, 230 Mich App 276.

PRETERMITTED SPOUSES

2. The pretermitted spouse statute makes no distinction between a devise made to a future spouse in contemplation of marriage and one made to a future spouse as a friend or in a different capacity; the statute simply requires a failure by the testator to provide in a will for a surviving spouse in any capacity in order for the surviving spouse to be considered a pretermitted spouse (MCL 700.126; MSA 27.5126). *In re Herbach Estate*, 230 Mich App 276.

SPOUSE'S ELECTION

3. The spouse's election statute provides that a surviving spouse of a decedent domiciled in Michigan who dies testate may elect to either abide by the terms of the will or take a portion of the share that would have passed to the surviving spouse had the decedent died intestate; the surviving spouse must make the election within sixty days after the date for presentment of claims or within sixty days after the filing of the proof of service of the inventory upon the surviving spouse, whichever is later; a surviving spouse generally should not be permitted to withdraw an election after the statutory period for making the election has passed (MCL 700.282; MSA 27.5282). *In re Herbach Estate*, 230 Mich App 276.

WITHDRAWAL OF ELECTIONS—*See*
WILLS 1-3

WITNESSES

See, also, TRIAL 2

EXPERT WITNESSES

1. A person may be qualified to testify as an expert by virtue of knowledge, skill, experience, training, or education in

WITNESSES—Cont'd

the subject matter of the testimony; where such testimony is speculative, it should be excluded or stricken; a trial court's decision to admit expert testimony or to exclude it as speculative is reviewed on appeal for abuse of discretion (MRE 403, 702). *Carpenter v Consumers Power Co*, 230 Mich App 547.

WORDS AND PHRASES—*See*

CIVIL RIGHTS 2, 3
CRIMINAL LAW 3, 5
RECORDS 1

WORKER'S COMPENSATION

SUBSIDIARY CORPORATIONS

1. Two wholly owned subsidiary corporations may through the application of the economic-reality test under appropriate circumstances be considered components of the same employer, the parent corporation, and thus each be deemed to be an employer of the workers of the other such that both subsidiaries are entitled to the protection of the exclusive remedy provision of the Worker's Disability Compensation Act with respect to an action for damages for a personal injury suffered in the course of employment brought by a worker for either subsidiary (MCL 418.131[1]; MSA 17.237[131][1]). *James v Commercial Carriers, Inc*, 230 Mich App 533.