Michigan. Court of Appeals.

MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN COURT OF APPEALS

FROM

June 20, 1994 to September 19, 1994

WILLIAM F. HAGGERTY
REPORTER OF DECISIONS

NORMAN C. HELFER
DEPUTY REPORTER OF DECISIONS

VOLUME 206

FIRST EDITION

MIC.

ROCHESTER, NEW YORK
LAWYERS COOPERATIVE PUBLISHING,
a division of Thomson Legal Publishing Inc.
1995

Copyright 1994, by Richard H. Austin, Secretary of State for the State of Michigan, Official Advance Sheets, Vol. 206 No. 1 and No. 2
Copyright 1995, by Richard H. Austin, Secretary of State for the State of Michigan

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.



COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
MARTIN M. DOCTOROFF, Birmingham	1999
Chief Judge Pro Tem	
WILLIAM B. MURPHY, Grand Rapids	1995
Judges	
DONALD E. HOLBROOK, Jr., Lansing	1997
MICHAEL J. KELLY, Bloomfield Hills	1995
BARBARA B. MacKENZIE, Petoskey	1997
MYRON H. WAHLS, Detroit	1999
HAROLD HOOD, Detroit	1997
ROMAN S. GRIBBS, Detroit	1995
JOHN H. SHEPHERD, Southfield	1997
DAVID H. SAWYER, Grand Rapids	1999
ELIZABETH A. WEAVER, Glen Arbor	1999
GARY R. McDONALD, Saginaw	1995
THOMAS J. BRENNAN, Dearborn	1995
MARK J. CAVANAGH, Rochester Hills	1997
RICHARD ALLEN GRIFFIN, Traverse City	1997
MARILYN J. KELLY, Bloomfield Hills	1995
JANET T. NEFF, Grand Rapids	1995
MAUREEN P. REILLY, Grosse Pointe Park	1997
KATHLEEN JANSEN, Mount Clemens	1995
E. THOMAS FITZGERALD, Owosso	1997
MICHAEL J. CONNOR, Grosse Pointe Farms	1997
CLIFFORD W. TAYLOR, East Lansing	1999
MAURA D. CORRIGAN, Grosse Pointe Park	1995
HELENE N. WHITE, Detroit	1999

Chief Clerk: ELLA WILLIAMS, Lansing

Assistant Clerks: HENRY L. HENSON, Detroit
KAREN Z. PARKER, Grand Rapids
LINDA C. RAGLAND-SHERER, Lansing
THOMAS J. RASDALE, DeWitt
JOHN P. LOWE, Lansing
SANDRA SCHULTZ MENGEL, Detroit
DARNELLE DICKERSON, Lansing

Deputy Clerk: LINDA BURNHAM, Lansing

Research Director: CARL L. GROMEK, Lansing

Commissioners:
JOHN H. STENGER, Lansing
ALLAN S. FALK, Lansing
NELSON S. LEAVITT, East Lansing
GLEN M. BIS, Ann Arbor
CRYSTAL L. MILLER, Lansing
WILLIAM W. SIDWELL, Lansing
NEAL C. VILLHAUER, Lansing

SUPREME COURT

Term Expires
January 1 of

Chief Justice

MICHAEL F. CAVANAGH, East Lansing 1999

Associate Justices

CHARLES L. LEVIN, Detroit 1997
JAMES H. BRICKLEY, Traverse City 1997
PATRICIA J. BOYLE, Detroit 1999
DOROTHY COMSTOCK RILEY, Grosse Pointe Farms 2001
ROBERT P. GRIFFIN, Traverse City 1995
CONRAD L. MALLETT, Jr., Detroit 1995

Commissioners

ALOYSIUS J. LYNCH, Chief Commissioner

DENNIS DONOHUE	MICHAEL L. PITTS
JOSEPH B. SZEREMET	MICHAEL MURRAY
T. VICTOR JACKSON	GLEN B. GRONSETH
FRANK J. GRECO	PHILLIP M. STEVENS
MARY C. SMITH	HARRY ZELIFF
TERENCE DAVIS	LINDA MOHNEY RHODUS
MICHAEL J. SCHMEDLEN	JOHN K. PARKER
DANIEL J. WRIGHT	BRENT E. SIMMONS

State Court Administrator: MARILYN K. HALL, Lansing

Clerk: CORBIN R. DAVIS, Lansing

Crier: DAVID G. PALAZZOLO, Williamston

Reporter of Decisions: WILLIAM F. HAGGERTY, East Lansing

TABLE OF CASES REPORTED

(For a list of cases released out of sequence see p xiv).

A

	PAGE
AFL-CIO (American Federation of State, Co & Municipal Employees) v Dep't of Mental Health	382
American Federation of State, Co & Municipal Employees, AFL-CIO v Dep't of Mental Health	382
American Health Resources, Inc v Blue Cross & Blue Shield of Michigan	570
American Transmissions, Inc v Curtis	178
American Transmissions, Inc v General Motors Corp	178
Amway Corp, Michaels v	644
Anchor Packing Co, Beaudrie v	245
Anchor Packing Co, Wright v	245
Anderson, Farmers Ins Exchange v	214
Aranda, Rossow v	456
Arcos, People v	374
Arim v General Motors Corp	178
Armstrong World Industries, Inc, Smith v	245
Ass'n of Businesses Advocating Tariff Equity v Public Service Comm	290
Attorney General v Public Service Comm	290
Auto Club Ins Ass'n, Mantua v	274

B

PAGE
Basham, State Farm Fire & Casualty Co v . . . 240
Beaudrie v Anchor Packing Co 245
Bell v Fox 522
Bell, Thorne v 625
Bellows v Delaware McDonald's Corp 555
Bennett, Schier, Deneweth & Parfitt, PC v . . . 281
Berrien Co, Lingle v 528
Bivins, People v 284
Blue Cross & Blue Shield of Michigan, American Health Resources, Inc v 570
Blue Cross & Blue Shield of Michigan, BPS Clinical Laboratories v 570
Books & News, Inc (F P), People v 78
Bordeau, People v 89
Borovoy, Jalaba v 17
Bossio v Pirochta 178
BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan 570
Brown, People v 535
Brown Corp of Ionia, Inc, Townsend v 257
Burger King, Zarka v 409

C

Canada Creek Ranch Ass'n, Inc v Montmorency Twp 498
Cannon, People v 653
Canton Charter Twp, Listanski v 356
Central Nat'l Ins Co of Omaha, Stolaruk Corp v 444
Chesebro, People v 468
Christie, People v (On Remand) 304
Chrysler Corp, Zoppi v 172
Citizens Ins Co of America, Eastway & Blevins Agency v 299
City of Detroit, Summers v 46
City of Ferndale, Massey v 698
City of Marshall v Consumers Power Co 666

PAGE
City of Marshall v Consumers Power Co (On Remand) 666
City of Marshall v Consumers Power Co (On Second Remand) 666
City of Novi, Paragon Properties Co v 74
City of Southfield, Southfield Western, Inc v 334
Colovos v Dep't of Transportation 26
Consolidated Aluminum Corp v Dep't of Treasury (After Remand) 222
Consumers Power Co, City of Marshall v 666
Consumers Power Co, City of Marshall v (On Remand) 666
Consumers Power Co, City of Marshall v (On Second Remand) 666
Corrections (Dep't of), Lowe v (On Rehearing) 128
Corrections (Dep't of), Wayne Co Prosecutor v 144
Cortez, People v 204
Curis Big Boy, Inc v Dep't of Treasury 139
Curtis, American Transmissions, Inc v 178

D

Dart Energy Corp v Iosco Twp 311
Delaware McDonald's Corp, Bellows v 555
Dep't of Corrections, Lowe v (On Rehearing) 128
Dep't of Corrections, Wayne Co Prosecutor v 144
Dep't of Mental Health, American Federation of State, Co & Municipal Employees, AFL-CIO v 382
Dep't of Natural Resources, Harkins v 317
Dep't of Transportation, Colovos v 26
Dep't of Transportation, Williams v 71
Dep't of Treasury, Consolidated Aluminum Corp v (After Remand) 222
Dep't of Treasury, Curis Big Boy, Inc v 139
Dep't of Treasury, Michigan Soft Drink Ass'n v 392
Detroit (City of), Summers v 46

PAGE
Detroit News (The), Garvelink v 604
Dexter Davison Kosher Meat & Poultry, Saraski v 347
Diehl, Fire Ins Exchange v 108
DiVietri, People v 61
Dlaikan v Roodbeen 591

E

Eastway & Blevins Agency v Citizens Ins Co of America 299
Edwards, People v 694
Enterprise Leasing Co, State Farm Mutual Automobile Ins Co v 7
Erb Lumber Co v Homeowner Construction Lien Recovery Fund 716

F

Farm Bureau Life Ins Co of Michigan, Zulcosky v 95
Farmers Ins Exchange v Anderson 214
Faulkner v Flowers 562
Ferndale (City of), Massey v 698
Fire Ins Exchange v Diehl 108
Flowers, Faulkner v 562
Ford, McCarthy v 705
Ford Estate, *In re* 705
Fox, Bell v 522
F P Books & News, Inc, People v 78

G

Garvelink v The Detroit News 604
General Motors Corp, American Transmissions, Inc v 178
General Motors Corp, Arim v 178
General Motors Corp, Sokolek v (On Remand) 31
Gomer, People v 55
Gregg, People v 208

PAGE

Griswold v Sealed Power Corp (On Remand) 251

H

Hamm, People v ... 270
Harkins v Dep't of Natural Resources ... 317
Hazzard, People v ... 658
Heim, People v ... 439
Hill, *In re* ... 689
Homeowner Construction Lien Recovery Fund, Erb Lumber Co v ... 716
Humbert, White v ... 459

I

In re Ford Estate ... 705
In re Hill ... 689
Integral Ins Co v Maersk Container Service Co, Inc ... 325
Iosco Twp, Dart Energy Corp v ... 311

J

Jalaba v Borovoy ... 17
Jay Enterprises, Inc v Pirochta ... 178
Johnson, People v ... 122
Johnson, Stehlik v (On Rehearing) ... 83
Jolly Bar & Grille, Inc, Lautzenheiser v ... 67

K

K & K Woodworking, Inc v Michigan Employment Security Comm ... 515
Kent Co Ed Ass'n, Kentwood Public Schools v 161
Kentwood Public Schools v Kent Co Ed Ass'n 161
Kincade, People v (On Remand) ... 477
Krause, People v ... 421

L

Labby, Newsome v ... 434
Lautzenheiser v Jolly Bar & Grille, Inc ... 67
Lawrence, People v ... 378
Lingle v Berrien Co ... 528

PAGE
Listanski v Canton Charter Twp 356
Lorenzo v Noel 682
Lowe v Dep't of Corrections (On Rehearing) 128
Lucas v Peters 530

M

Maersk Container Service Co, Inc, Integral Ins Co v 325
Mansour, People v 81
Mantua v Auto Club Ins Ass'n 274
Marshall (City of) v Consumers Power Co 666
Marshall (City of) v Consumers Power Co (On Remand) 666
Marshall (City of) v Consumers Power Co (On Second Remand) 666
Massachusetts Indemnity & Life Ins Co v Thomas 265
Massey v City of Ferndale 698
McCarthy v Ford 705
McKenzie, People v 425
Meerman v Murco, Inc 60
Mental Health (Dep't of), American Federation of State, Co & Municipal Employees, AFL-CIO v 382
Michaels v Amway Corp 644
Michigan Audubon Society v Natural Resources Comm 1
Michigan Employment Security Comm, K & K Woodworking, Inc v 515
Michigan National Corp, Seabrook v 314
Michigan Soft Drink Ass'n v Dep't of Treasury 392
Mid-America Realty Investors, Otis Elevator Co v 710
Miller, People v 638
Montmorency Twp, Canada Creek Ranch Ass'n, Inc v 498

PAGE
Mortgage Corp of America, Shimmons v 27
Murco, Inc, Meerman v 60

N

Natural Resources (Dep't of), Harkins v 317
Natural Resources Comm, Michigan Audubon Society v 1
Newsome v Labby 434
Noel, Lorenzo v 682
Novi (City of), Paragon Properties Co v 74

O

Orley Enterprises, Inc v Tri-Pointe, Inc 614
Otis Elevator Co v Mid-America Realty Investors 710

P

Paragon Properties Co v City of Novi 74
People v Arcos 374
People v Bivins 284
People v Bordeau 89
People v Brown 535
People v Cannon 653
People v Chesebro 468
People v Christie (On Remand) 304
People v Cortez 204
People v DiVietri 61
People v Edwards 694
People v F P Books & News, Inc 78
People v Gomer 55
People v Gregg 208
People v Hamm 270
People v Hazzard 658
People v Heim 439
People v Johnson 122
People v Kincade (On Remand) 477
People v Krause 421
People v Lawrence 378

PAGE
People v Mansour 81
People v McKenzie..... 425
People v Miller 638
People v Pubrat 340
People v Sloan..... 484
People v Spinks 488
People v Stewart (On Rehearing)..... 662
People v Swirles 416
People v Ward..... 38
People v Young..... 144
Peters, Lucas v 530
Phipps v State Farm Mutual Ins Co (After Remand) 199
Pinka v Pinka 101
Pirochta, Bossio v..... 178
Pirochta, Jay Enterprises, Inc v..... 178
Public Service Comm, Ass'n of Businesses Advocating Tariff Equity v 290
Public Service Comm, Attorney General v ... 290
Pubrat, People v..... 340

R

Roodbeen, Dlaikan v 591
Rossow v Aranda 456

S

Saraski v Dexter Davison Kosher Meat & Poultry 347
Schier, Deneweth & Parfitt, PC v Bennett ... 281
Seabrook v Michigan National Corp..... 314
Sealed Power Corp, Griswold v (On Remand) 251
Shimmons v Mortgage Corp of America 27
Sloan, People v 484
Smith v Armstrong World Industries, Inc.... 245
Sokolek v General Motors Corp (On Remand) 31
Southfield (City of), Southfield Western, Inc v 334
Southfield Western, Inc v City of Southfield.. 334
Spinks, People v 488

PAGE
State Farm Fire & Casualty Co v Basham ... 240
State Farm Mutual Automobile Ins Co v Enterprise Leasing Co 7
State Farm Mutual Ins Co, Phipps v (After Remand) 199
Stehlik v Johnson (On Rehearing)..... 83
Stewart, People v (On Rehearing) 662
Stolaruk Corp v Central Nat'l Ins Co of Omaha..... 444
Summers v City of Detroit..... 46
Swirles, People v 416

T

Thomas, Massachusetts Indemnity & Life Ins Co v 265
Thorne v Bell 625
Townsend v Brown Corp of Ionia, Inc 257
Transportation (Dep't of), Colovos v 26
Transportation (Dep't of), Williams v..... 71
Treasury (Dep't of), Consolidated Aluminum Corp v (After Remand) 222
Treasury (Dep't of), Curis Big Boy, Inc v..... 139
Treasury (Dep't of), Michigan Soft Drink Ass'n v..... 392
Tri-Pointe, Inc, Orley Enterprises, Inc v 614
Tuscola Co Abstract Co, Inc v Tuscola Co Register of Deeds 508
Tuscola Co Register of Deeds, Tuscola Co Abstract Co, Inc v 508

W

Ward, People v 38
Wayne Co Prosecutor v Dep't of Corrections . 144
White v Humbert..... 459
Williams v Dep't of Transportation 71
Wright v Anchor Packing Co 245

Y

PAGE
Young, People v 144

Z

Zarka v Burger King 409
Zoppi v Chrysler Corp 172
Zulcosky v Farm Bureau Life Ins Co of Michigan 95

97 CASES

CASES RELEASED OUT OF SEQUENCE

January 7, 1994

Williams v Dep't of Transportation 71

March 9, 1994

Ass'n of Businesses Advocating Tariff Equity v Public Service Comm 290
Attorney General v Public Service Comm ... 290

March 24, 1994

Eastway & Blevins Agency v Citizens Ins Co of America 299

April 6, 1994

People v DiVietri 61
People v Mansour 81

April 7, 1994

Paragon Properties Co v City of Novi 74

April 13, 1994

People v Christie (On Remand) 304

April 14, 1994

People v F P Books & News, Inc 78

April 22, 1994

PAGE

Seabrook v Michigan Nat'l Corp 314

April 29, 1994

Dart Energy Corp v Iosco Twp 311

May 20, 1994

Lautzenheiser v Jolly Bar & Grille, Inc 67

May 24, 1994

Harkins v Dep't of Natural Resources 317

Integral Ins Co v Maersk Container Service Co, Inc 325

June 8, 1994

Bell v Fox 522

June 14, 1994

Lingle v Berrien Co 528

June 29, 1994

Lucas v Peters 530

COURT OF APPEALS CASES

MICHIGAN AUDUBON SOCIETY v NATURAL RESOURCES COMMISSION

Docket No. 147583. Submitted April 12, 1994, at Lansing. Decided June 20, 1994, at 9:50 A.M.

The Michigan Audubon Society brought an action in the Ingham Circuit Court against the Natural Resources Commission and the Department of Natural Resources, challenging the NRC's authority to enact Amendment No. 7 of 1991 to the Wildlife Conservation Act Commission Order, which authorized the capture of certain raptors within the state under permit from the director of the DNR for use in falconry. The plaintiff contended that, because the raptors have not been designated as game by the Legislature, the NRC has no authority to allow the taking. The defendants contended that § 8(1)(b) of the Wildlife Conservation Act, MCL 300.258(1)(b); MSA 13.1258(1)(b), gives the NRC the power to regulate the taking of animals that have not been designated as game and that the enactment of the amendment was within that power. The court, James R. Giddings, J., granted summary disposition for the plaintiff and permanently enjoined the defendants from issuing any permits for the taking of wild raptors under the amendment. The defendants appealed.

The Court of Appeals *held:*

1. Section 8(1)(b) does not give the defendants the authority to issue permits allowing the taking of animals not defined as game in the act.

2. The second sentence of § 7 of the act, MCL 300.257; MSA 13.1257, indicates that the Legislature did not intend to authorize the NRC to allow the taking of nongame animals. That sentence means that § 7 shall not be construed to enhance the commission's powers so as to allow the commission to establish an open season for an animal that is not game or to give the commission the power to designate a species as game.

3. The authority granted the commission in § 8(1)(b), to determine "the kinds of animals that may be taken," applies

REFERENCES

Am Jur 2d, Fish and Game §§ 29 *et seq.*
See ALR Index under Fish and Game.

only to animals that have been designated as game by the Legislature and for which an open season has been declared under § 11 of the act, MCL 300.261; MSA 13.1261.

Affirmed.

1. GAME — WILDLIFE CONSERVATION ACT — NONGAME ANIMALS — PERMITS TO TAKE.

Section 8(1)(b) of the Wildlife Conservation Act does not give the Natural Resources Commission or the Department of Natural Resources the authority to issue permits allowing the taking of animals not defined as game in the act; the authority granted to the commission in § 8(1)(b) to determine "the kinds of animals that may be taken" applies only to animals that have been designated as game and for which an open season has been declared under § 11 of the act (MCL 300.258[1][b], 300.261; MSA 13.1258[1][b], 13.1261).

2. GAME — DESIGNATION AS GAME ANIMAL — FIRST OPEN SEASON.

Only the Legislature may designate a species of animal as game; once an animal has been designated as game, only the Legislature may authorize the establishment of the first open season for that animal (MCL 300.261; MSA 13.1261).

3. GAME — WILDLIFE CONSERVATION ACT — DESIGNATION AS GAME ANIMAL — NONGAME ANIMALS — OPEN SEASON.

Section 7 of the Wildlife Conservation Act does not authorize the Natural Resources Commission to establish an open season for an animal that is not game or give the commission the power to designate a species as game (MCL 300.257; MSA 13.1257).

Twohey Maggini (by *Patrick M. Muldoon*), for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Thomas J. Emery,* Assistant in Charge, and *Kevin T. Smith,* Assistant Attorney General, for the defendants.

Before: HOLBROOK, JR., P.J., and REILLY and G. W. HOOD,* JJ.

REILLY, J. Defendants appeal as of right a circuit court order granting summary disposition to plain-

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

tiff pursuant to MCR 2.116(C)(10) and permanently enjoining defendants from issuing any permits for the taking of wild raptors under Amendment No. 7 of 1991 to the Wildlife Conservation Act Commission Order. The trial court determined that § 8(1)(b)[1] of the Wildlife Conservation Act, MCL 300.251 *et seq.*; MSA 13.1251 *et seq.*, did not give defendants the authority to issue permits allowing the taking of animals not defined as game in the act. We affirm.

The Wildlife Conservation Act gives the Natural Resources Commission (NRC) the authority to manage animals in this state. MCL 300.258(1)(b); MSA 13.1258(1)(b). "Animals" are defined as "wild birds and wild mammals." MCL 300.253(1); MSA 13.1253(1). Certain species of animals listed in § 4(1)[2] are included within the definition of "game." Only the Legislature may designate a species as game. MCL 300.261; MSA 13.1261.[3] Once an animal has been designated as game, only the Legislature may authorize the establishment of the first open season for that animal. After that has been accomplished, the NRC has the power to establish open seasons for that animal and to issue orders pertaining to that animal for each of the other purposes listed in § 8. *Id.*

The only issue in this case concerns defendants' authority with regard to animals that have not

[1] MCL 300.258(1)(b); MSA 13.1258(1)(b).

[2] MCL 300.254(1); MSA 13.1254(1).

[3] MCL 300.261; MSA 13.1261 provides:

> Only the legislature may designate a species as game. If an animal is designated under this section by the legislature as game, then only the legislature may authorize the establishment of the first open season for that animal. After the legislature authorizes the establishment of the first open season for game pursuant to this section, the commission may issue orders pertaining to that animal for each of the purposes listed in section 8.

been designated as game. Specifically, plaintiff's claim challenges the NRC's authority to enact Amendment No. 7 of 1991 to the Wildlife Conservation Act Commission Order. This amendment authorized the capture of certain raptors (hawks, owls, and eagles) within the state under permit from the director of the DNR for use in falconry.[4] Plaintiff contends that because these animals have not been designated as game by the Legislature, the NRC has no authority to allow the taking.[5]

Defendants contend that § 8(1)(b) of the act gives the NRC the power to regulate the taking of animals that have not been designated as game, and that the enactment of the amendment was within that power. Section 8(1)(b) provides:

> (1) The commission shall manage animals in this state. In managing animals, the commission may issue orders to do all of the following:
>
> * * *
>
> (b) Determine the kinds of animals that may be taken.

"Kind" is defined in § 4(4) to mean "an animal's sex, age, or physical characteristics." Defendants argue that if the Legislature intended to restrict the power delegated in § 8(1)(b) to game animals, the subsection would read "kinds of game" rather than "kinds of animals." We disagree.

When determining legislative intent, statutory language should be given a reasonable construction considering the statute's purpose and the

[4] Before the amendment, falconers were permitted to hunt with and possess raptors, but were not permitted to capture wild raptors in this state.

[5] "Take" is defined in § 5(1), MCL 300.255(1); MSA 13.1255(1), as meaning:

> [T]o hunt with any weapon, dog, raptor, or other animal; kill; chase; follow; harass; harm; pursue; shoot; rob; trap; capture; or collect animals, or to attempt to engage in such an activity.

object sought to be accomplished. *Michigan Humane Society v Natural Resources Comm,* 158 Mich App 393, 401; 404 NW2d 757 (1987). An act must be read in its entirety and the meaning given to one section determined after due consideration of other sections so as to produce, if possible, an harmonious and consistent enactment as a whole. *Id.*

We believe that the Legislature's intent regarding the NRC's powers over nongame animals is suggested by a close reading of § 7[6] of the act.

> A person shall not take . . . game or any protected animal . . . except as provided for in this act or by an order of the commission or an interim order of the director. This section shall not be construed to enhance the commission's powers to establish an open season for an animal that is not game or to give the commission the power to designate a species as game.

We are satisfied that the second sentence of this section indicates that the Legislature did not intend to authorize the NRC to allow the taking of nongame animals. The sentence reasonably can be read to mean only that § 7 shall not be construed to enhance the commission's powers so as to allow the commission to establish an open season for an animal that is not game or to give the commission the power to designate a species as game.[7]

We agree with plaintiff that the Legislature intended that the delegation of power in § 8(1)(b)

[6] MCL 300.257; MSA 13.1257.

[7] Defendants seem to argue that the omission of a reference to nongame, nonprotected animals in the first sentence suggests that these animals can be taken by anyone at any time. However, this interpretation is inconsistent with the second sentence of the section. According to that sentence, the commission does not have the power to establish an open season, defined as "the dates during which game may be legally taken," MCL 300.254(5); MSA 13.1254(5), for nongame animals. If nongame animals could be taken at any time, there would

must be read in conjunction with § 11.[8] Thus, the authority granted in § 8(1)(b), to determine "the kinds of animals that may be taken," applies only to animals that have been designated as game and for which an open season has been declared under § 11. Our interpretation of the act is supported by the Legislature's use of the word "kinds," which has a limited definition, rather than "species" in § 8(1)(b).

Defendants contend that the use of the word "kinds" in § 8(1)(b) does not indicate a limitation on the NRC's power. Arguably, the NRC could determine that both sexes and all ages of a species of animal could be taken. However, we agree with plaintiff that if the Legislature had intended that the NRC would have the power to determine what species of animals could be taken, it would not have included § 11, and it would have used the word "species" in the definition of "kind."

Therefore, we agree with the trial court that because the raptors have not been designated as game, the NRC does not have the power to issue an order allowing the raptors to be taken. This being the only issue raised on appeal, we affirm the order of the trial court.

Affirmed.

---

have been no reason for the Legislature to include the second sentence. Further, it is not reasonable to conclude that the Legislature intended to give the NRC the power to determine that a nongame species could be taken, but not give it the power to regulate the dates during which the takings could occur.

[8] MCL 300.261; MSA 13.1261.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v ENTERPRISE LEASING COMPANY

Docket No. 168790. Submitted March 29, 1994, at Lansing. Decided June 20, 1994, at 9:55 A.M. Leave to appeal sought.

State Farm Mutual Automobile Insurance Company brought an action in the Wayne Circuit Court against Enterprise Leasing Company, seeking a declaration of their respective liability for damages suffered by third parties when an automobile rented from the defendant by the plaintiff's insured was involved in an accident. The rental agreement provided that the primary residual coverage would be provided by the renter's insurer rather than the defendant. The court, Roland L. Olzark, J., granted summary disposition for the plaintiff, holding that the defendant, as the owner of the vehicle, had the primary responsibility to provide residual liability insurance. The defendant appealed. The Court of Appeals, WEAVER, P.J., and JANSEN, J. (MURPHY, J., concurring), in an unpublished opinion per curiam, decided September 30, 1993 (Docket No. 150077), reversed and remanded, the majority doing so only because of being required by Administrative Order No. 1990-6 to follow the holding in *State Farm Mutual Automobile Ins Co v Snappy Car Rental, Inc,* 196 Mich App 143 (1992). The Court of Appeals granted the plaintiff's petition to convene a special panel to resolve the question "whether . . . a rental car company may include in its rental agreement an option allowing the permissive user of a vehicle to provide his or her own primary residual liability insurance . . . or whether the car rental company must provide primary residual liability insurance for a permissive user."

In an opinion by Judge MURPHY, joined by Chief Judge DOCTOROFF and Judges HOLBROOK, JR., MACKENZIE, HOOD, GRIBBS, SAWYER, and FITZGERALD, the Court of Appeals *held:*

A car rental company may include in its rental agreement an option allowing the permissive user of a vehicle to provide the primary residual liability insurance in accordance with the

REFERENCES

Am Jur 2d, Automobile Insurance §§ 24, 28, 238, 283, 353.
See ALR Index under Automobile Insurance.

holding in *State Farm Mutual Automobile Ins Co v Snappy Car Rental, Inc,* 196 Mich App 143 (1992).

Reversed and remanded.

Judge WEAVER, joined by Judges WAHLS, GRIFFIN, NEFF, and TAYLOR, dissenting, stated that the trial court's order of summary disposition should be affirmed because a car rental company, as owner of the vehicle, has a statutory duty to provide primary residual liability insurance for any permissive user.

INSURANCE — RENTAL VEHICLES — OPTIONAL COVERAGE — PRIORITY OF COVERAGE.

A car rental company may provide in its rental agreement that the renter of a vehicle has the option of refusing bodily injury and property damage insurance coverage by the rental company and supplying that coverage independently; such a clause establishes priority of coverage where there is other coverage for the rented vehicle.

Romain, Donofrio, Kuck & Egerer, P.C. (by *Ernst W. Kuck*), for the plaintiff.

Gofrank & Kelman (by *Thomas M. Douglas*), for the defendant.

Amicus Curiae:

Siemion, Huckabay, Bodary, Padilla, Morganti & Bowerman, P.C. (by *Charles A. Huckabay* and *Donna M. Severyn*), for Snappy Car Rental, Inc.

Before: DOCTOROFF, C.J., and HOLBROOK, JR., MACKENZIE, WAHLS, HOOD, GRIBBS, SAWYER, WEAVER, MURPHY, GRIFFIN, NEFF, FITZGERALD, and TAYLOR, JJ.

MURPHY, J. This case is before us for a resolution pursuant to Administrative Order No. 1990-6 of a conflict in the decisions of the Court of Appeals. In the previous opinion in this case, *State Farm Mutual Automobile Ins Co v Enterprise Leasing Co,* unpublished opinion per curiam of the Court of Appeals, decided September 30, 1993

(Docket No. 150077), this Court reversed the trial court's summary disposition in favor of plaintiff on the basis of the prior decision from this Court in *State Farm Mutual Automobile Ins Co v Snappy Car Rental, Inc,* 196 Mich App 143; 492 NW2d 500 (1992). Pursuant to Administrative Order No. 1990-6, we vacated the decision in this case pending resolution by this panel.

The question certified for this panel is as follows:

> [W]hether pursuant to MCL 500.3101(1); MSA 24.13101(1) and MCL 257.520(b)(2); MSA 9.2220(b)(2) a car rental company may include in its rental agreement an option allowing the permissive user of a vehicle to provide his or her own primary residual liability insurance, as found in *State Farm Mutual Automobile Ins Co v Snappy Car Rental, Inc,* 196 Mich App 143; 492 NW2d 500 (1992), lv den 442 Mich 883 (1993); or whether the car rental company must provide primary residual liability insurance for a permissive user pursuant to its policy of insurance, as would have been the holding in *State Farm Mutual Automobile Ins Co v Enterprise Leasing Co,* unpublished per curiam of the Court of Appeals, decided September 30, 1993 (No. 150077), absent Administrative Order 1990-6.

We conclude that *State Farm Mutual v Snappy Car Rental, supra,* is the appropriate resolution and, accordingly, reverse the trial court's grant of summary disposition in favor of plaintiff-appellee.

Reversed and remanded.

DOCTOROFF, C.J., and HOLBROOK, JR., MACKENZIE, HOOD, GRIBBS, SAWYER, and FITZGERALD, JJ., concurred.

WEAVER, J. *(dissenting).* We agree with the majority's careful statement of the issue before us,

but dissent because we would reach a different resolution.

We would hold instead that under MCL 500.3101(1); MSA 24.13101(1) and MCL 257.520(b)(2); MSA 9.2220(b)(2) an owner's policy of liability insurance is required to provide primary residual liability insurance for any permissive user. The arguments in support of this position were set forth in *State Farm Mutual Automobile Ins Co v Enterprise Leasing Co,* unpublished opinion per curiam of the Court of Appeals, decided September 30, 1993 (No. 150077) (set forth in full in the appendix to this opinion), and the dissent in *Citizen's Ins Co of America v Federated Mutual Ins Co,* 199 Mich App 345, 348; 500 NW2d 773 (1993).

Although we are cognizant of the policy arguments on both sides of this issue, we feel that the merits of these arguments should be addressed by the Legislature rather than this Court.

We would affirm.

WAHLS, GRIFFIN, NEFF, and TAYLOR, JJ., concurred.

APPENDIX

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellee,

v

ENTERPRISE LEASING COMPANY,

Defendant-Appellant,

September 30, 1993

No. 150077

Before: WEAVER, P.J., and MURPHY and JANSEN, JJ.

PER CURIAM. Ladonna Teasley rented a car from defendant Enterprise Leasing Company to use while her car was being repaired. While driving the rental car, Teasley was involved in an accident. The resulting personal injury claims were settled, and the claims paid by Teasley's automobile insurer and Enterprise. Now State Farm Mutual Automobile Insurance Company has brought suit against Enterprise to determine who is responsible for the damages. Both State Farm and Enterprise moved for summary disposition, each arguing that the other was the primary insurer responsible for providing residual liability insurance for the accident. The trial court granted summary disposition in favor of State Farm. Enterprise now appeals. We reverse and remand.

In the rental agreement Teasley signed, she warranted that she had insurance through State Farm and agreed to provide insurance for the rental vehicle and hold Enterprise harmless.

State Farm's policy provided residual liability coverage only if there was no other coverage available and excluded coverage if the insured was driving a car owned by a car business if there was other insurance to cover the vehicle. State Farm also argued that Enterprise's rental agreement was void because it violated certain statutory provisions: MCL 257.520(b)(2); MSA 9.2220(b)(2), MCL 500.3101; MSA 24.13101, MCL 500.3131; MSA 24.13131, and MCL 500.3135; MSA 24.13135.

I

Enterprise first asserts that the requirements of the Michigan financial responsibility act are not violated by the provision in its rental agreement. Enterprise points out that the renter agreed to provide her own insurance coverage for the vehi-

cle, and Enterprise still assumed financial responsibility for the rental vehicle on an excess basis to the primary personal liability insurance coverage of the renter.

This case involves the requirements of the no-fault act and the financial responsibility law relating to vehicle ownership. Section 3101(1) of the no-fault act, MCL 500.3101(1); MSA 24.13101(1), provides as follows:

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall be in effect continuously during the period of registration of the motor vehicle.

Section 520(b)(2) of the financial responsibility portion of the Vehicle Code, MCL 257.520(b)(2); MSA 9.2220(b)(2), states that an owner's automobile liability insurance policy

> [s]hall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle.

The question is whether the owner of a vehicle must always be primarily responsible for insuring against liability resulting from vehicle accidents, or whether the owner of a vehicle may contract or agree that the driver of the vehicle will be primarily responsible for liability insurance.

We are bound by Administrative Order No. 1990-6 to follow the recent case of *State Farm*

Mutual Automobile Ins Co v Snappy Car Rental, Inc, 196 Mich App 143; 492 NW2d 500 (1992). *Snappy* held that a person signing a short-term rental agreement for a vehicle can agree that his personal automobile insurance contract will provide primary liability coverage for accidents that occur while he has the rented vehicle and that such an agreement was not void.

We disagree with *Snappy* and, if not bound to follow it, would hold that an owner's policy of liability insurance is required to provide primary residual liability insurance for any permissive user. MCL 500.3101(1); MSA 24.13101(1) and MCL 257.520(b)(2); MSA 9.2220(b)(2).

II

The next issue is whether the State Farm policy provides coverage for the accident. State Farm argues that both State Farm and Enterprise are primary insurers with conflicting "excess" or "escape" clauses and, therefore, that each is required to pay a pro-rata share. Enterprise argues that Teasley signed an agreement stating that her personal automobile insurance contract would provide coverage for the rented vehicle.

State Farm's policy contains an "other insurance" clause,[1] which provides that if a temporary substitute car has other vehicle liability coverage on it, State Farm's coverage is excess. As we have seen, Enterprise's rental agreement also provides that its coverage is excess.

When there are two competing policies, each

[1] Temporary Substitute Car: Non-Owned Car, Trailer.

If a temporary substitute car, a non-owned car or a trailer designed for use with private passenger car or utility vehicle has other similar vehicle liability coverage on it, then these coverages are excess.

containing an excess clause, each of which would have provided coverage had the other policy not existed, liability should be prorated according to the policies' limits. *Nat'l Indemnity Co v Budget Rent A Car Systems, Inc,* 195 Mich App 186; 489 NW2d 175 (1992).

Accordingly, we reverse the court's order of summary disposition in favor of State Farm. We remand for calculation of the proper pro-rata liability of each party and entry of an order consistent with this opinion. We do not retain jurisdiction.

MURPHY, J., *(concurring).* I concur in the result reached by the majority. I write separately because I do not share the majority's disagreement with *State Farm Mutual Automobile Ins Co v Snappy Car Rental, Inc,* 196 Mich App 143; 492 NW2d 500 (1992).

In *Snappy Car Rental,* the defendant car rental company was self-insured. A provision in the defendant's car rental agreement permitted the person renting the car to opt to provide primary residual liability insurance. The plaintiff in that case contended that the provision in the defendant's car rental contract was void because the effect of the provision was to shift the responsibility of providing primary residual liability insurance to the permitted user. The plaintiff further argued that the provision was void because it is not specifically permitted by the no-fault act. This Court held that the provision of the rental agreement was not void as violative of the no-fault act because the provision simply stated the *priority of coverage* as contracted for by the person renting the car. Although the defendant was not permitted to contract away its statutory obligation to provide residual liability insurance as the owner of the

car, nor its obligation to provide insurance coverage for permitted users, this Court was constrained to acknowledge that neither the no-fault act nor the financial responsibility act specifically requires an owner to provide *primary* residual liability insurance for permitted users. Rather, these coverage requirements may be met by the policies of more than one insurer. *Snappy Car Rental, supra,* 150; *State Farm Mutual Automobile Ins Co v Auto-Owners Ins Co,* 173 Mich App 51, 54-55; 433 NW2d 323 (1988).

The majority expresses disagreement with this Court's decision in *Snappy Car Rental,* and *Snappy Car Rental* has on at least one other occasion raised concerns by this Court. See *Citizens Ins Co of America v Federated Mutual Ins Co,* 199 Mich App 345; 500 NW2d 773 (1993). I believe that this arises from confusion concerning the holding in *Snappy Car Rental.* The majority in this case states that "*Snappy* held that a person signing a short-term rental agreement for a vehicle can agree that his personal automobile insurance contract will provide primary liability coverage for accidents that occur while he has the rented vehicle and that such an agreement was not void." *Supra,* p 13. The majority adds that absent the decision in *Snappy Car Rental,* it would hold that an owner's policy is required to provide primary residual liability insurance for a permissive user, relying upon MCL 500.3101(1); MSA 24.13101(1) and MCL 257.520(b)(2); MSA 9.2220(b)(2).

Actually, *Snappy Car Rental* held merely that if a car rental company includes in its car rental contract an optional provision whereby the renter may provide primary residual liability, this provision is not void as violative of the no-fault act. A review of the statutory authority relied upon by the majority demonstrates that such a provision is

not precluded. Section 3101(1) of the no-fault act, MCL 500.3101(1); MSA 24.13101(1), requires the owner of a motor vehicle to provide residual liability insurance. Section 520(b) of the Vehicle Code (the financial responsibility act), MCL 257.520(b); MSA 9.2220(b) requires the owner of a motor vehicle to provide insurance coverage for permitted users of the vehicle. While an exclusionary clause of an insurance policy that conflicts with the liability coverage required by the no-fault act is invalid, *State Farm Mutual Automobile Ins Co v Ruuska,* 412 Mich 321, 336; 314 NW2d 184 (1982), there is no indication that the provision in question in the car rental agreement conflicts with the coverage required by the no-fault act. The owner is still obligated to provide all the coverage required by the no-fault act. Again, the car rental agreement only dictates the *priority* of coverage. If the lessee or permissive user fails to abide by the terms of the rental agreement by neglecting to obtain adequate insurance coverage, or any insurance at all, the car rental company would remain liable to an injured party to provide residual liability coverage as required by MCL 500.3101(1); MSA 24.13101(1) and MCL 257.520(b)(2); MSA 9.2220(b)(2).

Our goal when interpreting a statute is to discern and give effect to the intent of the Legislature. *Great Lakes Sales, Inc v State Tax Comm,* 194 Mich App 271, 275; 486 NW2d 367 (1992). If the meaning of statutory language is clear, then judicial construction of the language is neither necessary nor permitted. *Lorencz v Ford Motor Co,* 439 Mich 370, 376; 483 NW2d 844 (1992). Because neither the no-fault act nor the financial responsibility act specifically requires an owner to provide *primary* residual liability insurance for permitted users, I do not believe that this requirement may be imposed upon the defendant.

JALABA v BOROVOY

Docket No. 141440. Submitted January 11, 1994, at Detroit. Decided June 20, 1994, at 10:00 A.M. Leave to appeal sought.

Deborah Jalaba brought an action in the Oakland Circuit Court against podiatrist Matthew Borovoy and others, alleging malpractice. The court, Edward Sosnick, J., entered a judgment in favor of Borovoy pursuant to a jury verdict of no cause of action. The plaintiff appealed.

The Court of Appeals *held:*

1. The trial court did not err in instructing the jury that a podiatrist accused of malpractice is held to the recognized standard of acceptable professional practice in the community in which the podiatrist practices or in a similar community. MCL 600.2912a; MSA 27A.2912(1). Because there is no specialization within the general practice of podiatry, a podiatrist is a general practitioner, and a general practitioner of medicine or osteopathy is held to a local standard of care.

2. The trial court did not err in giving the standard jury instruction regarding comparative negligence, SJI2d 11.01, because the instruction was applicable and accurately stated the law.

3. The trial court did not abuse its discretion in denying the plaintiff's challenge for cause of a juror who eventually was dismissed peremptorily. The plaintiff failed to establish that the juror was biased for or against either party or that there was anything objectionable about another juror whom the plaintiff would have challenged peremptorily had she not used the peremptory challenge against the first juror.

4. The trial court did not deny the plaintiff a fair trial in failing to make a ruling with regard to the admission of certain exhibits and by refusing to allow the plaintiff to be examined by a podiatrist chosen by the plaintiff as her expert witness.

Affirmed.

REFERENCES

Am Jur 2d, Physicians, Surgeons, and Other Healers § 220.

Standard of care owed to patient by medical specialist as determined by local, "like community," state, national, or other standards. 18 ALR4th 603.

J. STEMPIEN, J., concurring, stated that the Supreme Court should address the issue of local standards of care for general practitioners in light of *Birmingham v Vance,* 204 Mich App 418 (1994).

NEGLIGENCE — PODIATRIC MALPRACTICE — STANDARD OF CARE.

A podiatrist against whom an action for malpractice has been brought is held to the recognized standard of care in the community in which the podiatrist practices or in a similar community (MCL 600.2912a; MSA 27A.2912[1]).

Thurswell, Chayet & Weiner (by *Gregg E. Herman* and *Tammy J. Reiss*), for the plaintiff.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. (by *Boyd E. Chapin* and *Daniel S. Saylor*), for the defendants.

Before: HOOD, P.J., and R. J. DANHOF,* and J. STEMPIEN,** JJ.

R. J. DANHOF, J. Plaintiff appeals as of right from the judgment entered by the trial court on a jury verdict of no cause of action in favor of defendant Dr. Matthew Borovoy, a board-certified podiatrist.[1] Plaintiff brought a medical malpractice action against Dr. Borovoy and the other defendants based on their unsuccessful attempt to extract a fragment of a sewing needle that had lodged in her foot. Dr. Borovoy treated plaintiff at his office located in Oak Park, Michigan. Among other errors raised on appeal, plaintiff claims the trial court erred in instructing the jury to apply a local standard of care as opposed to a national

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

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

[1] Dr. Borovoy has been a board-certified podiatrist since 1975 by the American Board of Podiatric Surgery. He is also certified by the American Board of Quality Assurance and Utilization Review, which is a national board.

standard of care to Dr. Borovoy's conduct. We affirm.

The trial court initially ruled during the trial that a board-certified podiatrist was to be held to a national standard of care, thereby finding plaintiff's expert podiatrist from California, Dr. Anthony Dintcho, qualified to testify. However, on the ninth day of trial, before closing arguments, the court ruled that a podiatrist is subject to the same standard of care as other general practitioners, and later instructed the jury over plaintiff's objection:

> When I use the words "professional negligence" or "malpractice" with respect to the Defendant Matthew Borovoy's conduct, I mean the failure to do something which a podiatrist who is board certified of ordinary learning, judgment or skill *in this community or a similar one,* would do, or the doing of something which a podiatrist who is board certified, of ordinary learning, judgment or skill, would not do under the same or similar circumstances you find to exist in this case.
>
> It is for you to decide, based upon the evidence, what the ordinary podiatrist who is board certified of ordinary learning, judgment or skill would do or would not do under the same or similar circumstances. [Emphasis added; see SJI2d 30.01.]

I

On appeal, plaintiff first contends that the trial court erred in instructing the jury to apply a local community standard of care as opposed to a nationwide standard of care. We disagree.

A malpractice action may be maintained against any state-licensed professional.[2] MCL 600.2912a;

[2] MCL 600.2912; MSA 27A.2912.

MSA 27A.2912(1) provides that in a malpractice action, the plaintiff has the burden of proving:

> (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered injury.
>
> (b) The defendant, if a specialist, failed to provide the recognized standard of care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

Restated, the applicable standard of care for general practitioners is that of the local community or a similar community, whereas the standard of care for specialists is nationwide. *Bahr v Harper-Grace Hosp,* 198 Mich App 31, 34; 497 NW2d 526 (1993); *Thomas v McPherson Community Health Center,* 155 Mich App 700, 708; 400 NW2d 629 (1986).

This Court must decide the applicable standard of care for podiatrists for purposes of professional malpractice. MCL 333.18001; MSA 14.15(18001) defines the practice of podiatric medicine as follows:

> (a) "Podiatrist" means a physician and surgeon licensed under this article to engage in the practice of podiatric medicine and surgery.
>
> (b) "Practice of podiatric medicine and surgery" means the examination, diagnosis, and treatment of abnormal nails, superficial excrescenses occurring on the human hands and feet, including corns, warts, callosities, and bunions, and arch troubles or the treatment medically, surgically,

> mechanically or by physiotherapy of ailments of human feet or ankles as they affect the condition of the feet. It does not include amputation of human feet, or the use or administration of anesthetics other than local.

A podiatrist receives four years of training regarding the foot at a school of podiatry, and may subsequently engage in an optional internship. Podiatric medicine does not have areas of specialties within the general field of practice.

On the other hand, medical doctors or osteopathic physicians attend medical or osteopathic schools for fours years, where they are instructed in all the general areas of medicine. Upon completion of an internship, they are eligible to become licensed as general practitioners. However, a person desiring to become a specialist in a particular field of medicine proceeds into a residency for a period, generally four years. During the residency, the doctor or physician receives advance training in the particular field. Upon completion, the doctor or physician must pass a nationally administered examination. Afterward, the doctor or physician is a board-certified specialist.

We hold that the local standard of care is applicable to podiatrists in light of our finding that a podiatrist is not a specialist under MCL 600.2912a; MSA 27A.2912(1). As this Court previously has recognized, a podiatrist is not a medical or osteopathic doctor who specializes in the treatment of the foot, but rather is a limited practitioner authorized to treat ailments of the human foot. See *DeHart v Bd of Podiatry,* 97 Mich App 307, 314; 293 NW2d 806 (1980)(a licensure action brought against a podiatrist). We are not persuaded by plaintiff's argument that Dr. Borovoy is a specialist because his practice focuses on a certain part of

the body and is board-certified by a national organization. A doctor or physician is a specialist on the basis of advanced training and expertise in a particular field of general medicine. As the Michigan Supreme Court has explained, a specialist is measured by a national standard because:

> The reliance of the public upon the skills of a specialist and the wealth and sources of his knowledge are not limited to the geographic area in which he practices. Rather his knowledge is a specialty. He specializes so that he may keep abreast. Any other standard for a specialist would negate the fundamental expectations and purpose of a specialty. [*Naccarato v Grob,* 384 Mich 248, 253-254; 180 NW2d 788 (1970).]

Accordingly, the trial court did not err in instructing the jury to apply a local community standard of care to Dr. Borovoy's conduct.

Additionally, plaintiff argues that she was prejudiced by the court's earlier erroneous ruling that a national standard would be applied because her experts had testified regarding the national standard of care. We disagree. Although plaintiff learned of the court's ruling before closing arguments, she did not move to reopen proofs or move for a mistrial, but took her chances with the jury. Moreover, this Court will not reverse on the basis of prejudice where plaintiff's counsel urged the erroneous ruling during the trial.[3] See *Vannoy v City of Warren,* 386 Mich 686; 194 NW2d 304 (1972).

II

Plaintiff next claims that the court erred in

[3] The trial court expressed its displeasure that these matters were not brought to its attention before trial.

instructing the jury regarding comparative negligence. We disagree.

Defendant requested the standard jury instruction regarding comparative negligence, SJI2d 11.01. When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2); *Constantineau v DCI Food Equipment, Inc,* 195 Mich App 511, 516; 491 NW2d 262 (1992). In this case, Dr. Borovoy testified that plaintiff disregarded his instructions to use crutches and to refrain from placing weight on her foot. Plaintiff also admitted that she did not follow Dr. Borovoy's instructions. Defendant's podiatrist expert opined that she may have caused the needle to move further into her foot by continuing to walk on her foot, thereby causing her injuries. We find that the instruction was supported sufficiently by the evidence.

Moreover, plaintiff's argument that comparative negligence is not applicable in a malpractice action is without merit. *Pietrzyk v Detroit,* 123 Mich App 244, 248-249; 333 NW2d 236. Accordingly, the trial court did not err in giving the standard jury instruction regarding comparative negligence.

III

Plaintiff also contends that the trial court erred in denying her request to excuse a juror for cause, where the juror was subsequently dismissed peremptorily. We disagree.

This Court reviews a court's decision to deny a challenge for cause for an abuse of discretion. *Poet v Traverse City Osteopathic Hosp,* 433 Mich 228, 236; 445 NW2d 115 (1989). Error requiring reversal occurs when the record indicates (1) the court improperly denied a challenge for cause, (2) the aggrieved party had exhausted all peremptory

challenges, (3) the party demonstrated a desire to excuse another summoned juror, and (4) the juror whom the party later wished to excuse was objectionable. *Id.,* pp 231, 241. The determination whether a trial court improperly denied a challenge for cause is made in accordance with whether a juror is excusable under MCR 2.511(D). *Poet, supra,* p 241, n 13.

The juror in question, John Hart, indicated that a potential witness for defendant Beaumont Hospital, Dr. Richard Reilly, had operated on his knee fifteen years before.[4] Mr. Hart responded negatively when asked by the court and counsel whether his contact with Dr. Reilly would cause him to be biased or to believe Dr. Reilly over the testimony of other doctors. Mr. Hart voluntarily stated that he did not believe doctors were "gods." Plaintiff argued that Mr. Hart's statement that doctors were not "gods" would require a greater showing of negligence than the law required and, therefore, he should have been excused for cause. The court disagreed, and, in response to the court's inquiry, Mr. Hart stated that he believed doctors should be held accountable if they do something wrong. The court denied the request, finding that Mr. Hart was not biased for or against any party. This Court agrees with the trial court that Mr. Hart's statements did not establish that he was biased for or against either party. Because Mr. Hart was not excusable per se under MCR 2.511(D)(3), the trial court did not abuse its discretion by denying plaintiff's challenge for cause.

This Court also notes that plaintiff's counsel indicated on the record at the end of voir dire that he would have used a peremptory challenge for a subsequent juror had he not used his last peremptory challenge for Mr. Hart, although he never

[4] Ultimately, Dr. Reilly did not testify at trial.

identified which juror he would have subsequently excused. We assume plaintiff's counsel was referring to the last person seated on the jury because only two men were called after Mr. Hart, and one was excused for cause. However, plaintiff's counsel failed to indicate specifically on the record and on appeal any particular reason why this person was objectionable, and this Court cannot glean any reason from the record. See *Poet, supra,* p 241, n 15. Thus, plaintiff also failed to establish the fourth requirement for reversal.

IV

Finally, plaintiff claims that the trial court denied her a fair trial by failing to rule on the admission of certain exhibits and by refusing to allow Dr. Dintcho to examine her. Plaintiff requests a new trial on the basis of these alleged prejudicial errors. After reviewing the record, this Court finds that plaintiff was not denied a fair trial. *Van Oordt v Metzler,* 375 Mich 526; 134 NW2d 609 (1965).

Affirmed.

HOOD, P.J., concurred.

J. STEMPION, J. *(concurring).* I concur with the conclusions of the majority opinion. The analysis and conclusion that a podiatrist is a general practitioner is correct. The application of a local standard of care as opposed to a national standard of care for general practitioners is in keeping with current law. However, the preservation of the locality rule is not a realistic manner for evaluation of the standard of care as stated by this Court in *Birmingham v Vance,* 204 Mich App 418; 516 NW2d 95 (1994). I join in the request made in the *Birmingham* case that the Supreme Court revisit this area and adopt the modifications suggested.

COLOVOS v DEPARTMENT OF TRANSPORTATION

Docket No. 134013

ORDER ENTERED JUNE 20, 1994

The Judges of this Court having been polled pursuant to Administrative Order No. 1994-4, and the result of the poll being that fourteen Judges opposed convening a special panel, nine were in favor, and one abstained, it is ordered that a special panel shall not be convened.

It is the recommendation of this Court that the Supreme Court accept an application for leave in this matter, to be held in abeyance together with *Pick v Gratiot Co Road Comm,* 203 Mich 138; 511 NW2d 694 (1993), pending the Supreme Court's decision in *Mason v Wayne Co Bd of Comm'rs,* Supreme Court Docket No. 94911, lv gtd 442 Mich 924 (1993).

SHIMMONS v MORTGAGE CORPORATION OF AMERICA

Docket No. 151398. Submitted May 4, 1994, at Lansing. Decided June 21, 1994, at 9:00 A.M.

Steven B. Shimmons brought an action in the Genesee Circuit Court against Mortgage Corporation of America, alleging fraudulent omission with regard to the defendant's failure to inform the plaintiff at the time the plaintiff purchased a house "as is" from the defendant that the Grand Blanc Township Building Department had inspected the house, declared it uninhabitable, and issued to the defendant a repair notice and order. The plaintiff alleged that the cost of rehabilitating the house to comply with the notice and order was greater than it otherwise would have been. The court, Valdemar L. Washington, J., granted summary disposition for the defendant, finding that it had no duty to disclose that the house had been deemed uninhabitable. The plaintiff appealed.

The Court of Appeals *held:*

1. A plaintiff may allege fraudulent concealment even where the purchase agreement includes an "as is" clause.

2. The issuance of the repair notice and order was a latent defect that must be disclosed.

3. It is not reasonable to assume, as a matter of law, that every purchaser should examine the local building inspector's records before purchasing a residential home. Whether such an assumption should be made in this case is a question of fact to be determined by the jury.

4. The trial court erred in weighing the credibility of the parties' affidavits to determine whether the plaintiff had actual knowledge of the repair notice and order. Summary disposition was inappropriate.

Reversed and remanded.

1. VENDOR AND PURCHASER — REALTY — LATENT DEFECTS — FRAUDULENT CONCEALMENT — "AS IS" CLAUSES.

An "as is" clause in a purchase agreement for the sale of realty does not preclude a purchaser from alleging fraudulent concealment of a latent defect; fraudulent concealment is established by showing that the hidden defect, which need not be unreason-

ably dangerous, was known to the vendor and that the purchaser had no knowledge of it.

2. VENDOR AND PURCHASER — REALTY — LATENT DEFECTS — UNINHABITABLE REALTY — REPAIR NOTICES AND ORDERS.

The issuance of a repair notice and order regarding realty following a township building department's declaration of the realty as uninhabitable is a latent defect that must be disclosed by the owner when selling the property.

Cline, Cline & Griffin (by *Timothy H. Knecht*), for the plaintiff.

Sotiroff Abramczyk & Rauss, P.C. (by *Lawrence A. Tower* and *Edward S. Toth*), for the defendant.

Before: HOOD, P.J., and CAVANAGH and D. A. TEEPLE,* JJ.

PER CURIAM. In this case alleging fraudulent omission, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant. We reverse and remand.

Plaintiff, Steven B. Shimmons, purchased a house "as is" from defendant, Mortgage Corporation of America. Before the sale, the Grand Blanc Township Building Department had inspected the house, declared it uninhabitable, and issued to defendant a repair notice and order. Defendant did not advise plaintiff of the existence of the repair notice and order.

Plaintiff alleged that the cost of rehabilitating the house to comply with the repair notice and order was considerably greater than it otherwise would have been.

The trial court granted summary disposition to defendant, finding it had no duty to disclose that the house had been deemed uninhabitable. This appeal followed.

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

A plaintiff may allege fraudulent concealment even where the purchase agreement includes an "as is" clause. *Clemens v Lesnek,* 200 Mich App 456, 460; 505 NW2d 283 (1993). Fraudulent concealment is established by showing that the hidden defect (which need not be unreasonably dangerous) was known to the vendor and that the purchaser had no knowledge of it. *Id.* at 459-461.

Plaintiff does not dispute that he was aware of the physical condition of the house. However, because plaintiff allegedly was required to carry out more extensive and expensive repairs because the house had been declared uninhabitable, we conclude that issuance of the repair notice and order was a latent defect that must be disclosed. Cf. *Mulheron v Henry S Koppin Co,* 221 Mich 187, 189, 191; 190 NW 674 (1922), overruled on other grounds *Witte v Hobolth,* 224 Mich 286; 195 NW 82 (1923).

Defendant asserts that plaintiff should be charged with constructive knowledge of the repair notice and order because it was a matter of public record. We disagree. It is not reasonable to assume, as a matter of law, that every prospective purchaser should examine the local building inspector's records before purchasing a residential home. Whether such an assumption should be made in this case is a question of fact for the jury.[1]

There remains a further issue of material fact whether plaintiff had actual knowledge of the building department's determination. The trial court could not weigh the credibility of the affidavits to decide this issue. Accordingly, summary

[1] *McMullen v Joldersma,* 174 Mich App 207; 435 NW2d 428 (1988), cited by defendant, is distinguishable because (1) that case concerned a proposed highway bypass plan that had been a matter of public record for years, and (2) the plaintiffs were represented by an attorney and a certified public accountant.

disposition pursuant to MCR 2.116(C)(10) was inappropriate. *Arbelius v Poletti,* 188 Mich App 14, 18; 469 NW2d 436 (1991).

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

SOKOLEK v GENERAL MOTORS CORPORATION (ON REMAND)

Docket No. 166408. Submitted May 5, 1994, at Lansing. Decided June 21, 1994, at 9:05 A.M. Leave to appeal sought.

Janet L. Sokolek sought and received an open award of Worker's Disability Compensation benefits for a 1980 back injury arising out of her employment with General Motors Corporation. In November 1985, the plaintiff sought payment of expenses for nursing or attendant care provided since February 1981 by her husband. The magistrate found that such care was required and ordered the defendant to pay nursing care benefits from February 1981. The Worker's Compensation Appeal Board, although modifying the amount of the weekly award of back benefits, otherwise affirmed the award and held that the award of back benefits should be paid from February 1981 because the one-year-back limitation of MCL 418.381(3); MSA 17.237(381)(3) was not applicable because it had not been in effect on the date of the injury. The defendant appealed, claiming that § 381(3) was applicable because it was in effect when the plaintiff petitioned for the nursing benefits in 1985. The Court of Appeals denied leave to appeal. The Supreme Court denied leave to appeal, 441 Mich 931 (1993), but, on reconsideration, vacated the prior order and remanded to the Court of Appeals for consideration of the question whether benefits for nursing or attendant care are awardable for services performed more than one year before the petition for benefits was filed. 442 Mich 924 (1993).

On remand, the Court of Appeals *held:*

In the absence of a clear indication to the contrary by the Legislature, the law in effect on the date of a compensable injury is the law to be applied, unless an amendment of the statute is deemed to be remedial in nature. Inasmuch as the defendant did not raise the question whether the 1985 amendment adding the one-year-back limitation on benefits for nursing and attendant care is remedial in nature, that limitation is not applicable in this case because it was not in effect at the time of the injury.

Affirmed.

Freid, Gallagher, Taylor & Associates, P.C. (by *Debra A. Freid*), for the plaintiff.

Munroe and Nobach, P.C. (by *Cameron C. McComb*), for the defendant.

ON REMAND

Before: HOOD, P.J., and CAVANAGH and D. A. TEEPLE,* JJ.

PER CURIAM. Defendant seeks reversal of that part of the November 1, 1991, order of the Worker's Compensation Appeal Board that held that the one-year-back rule for nursing or attendant care does not apply to this case.

On June 3, 1980, plaintiff filed a petition for a hearing, alleging a work-related injury to her back that occurred on April 16, 1980. An open award of benefits beginning on May 8, 1980, plaintiff's last day of work, was entered by a hearing referee. Neither party appealed.

In January 1982, plaintiff filed a new petition, requesting a change in the weekly rate of compensation, reimbursement of medical expenses, and penalties. The hearing referee found that plaintiff's petition was barred by res judicata and denied her claim by order mailed on November 24, 1982. The WCAB affirmed in a decision dated April 14, 1983.

Plaintiff filed the petition at issue here on November 14, 1985, requesting payment of nursing care or attendant care expenses required as a result of the injuries sustained in April 1980. Plaintiff testified that beginning about ten months

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

after her injury, her condition severely deteriorated. Plaintiff testified that she now has tolerable days and bad days, which come in three-day cycles. She testified that on bad days she vomits frequently and has diarrhea at the same time. She is unable to take medication or eat and cannot go to the bathroom without assistance. She testified that on those days her husband, who provides the home care, never leaves her side. Plaintiff testified that by the third day of the cycle, she is able to eat and feed herself. However, she testified that even on her tolerable days, she has bowel movements four to six times a day, after which she requires extensive care by her husband. Plaintiff testified that her husband gives her baths and washes her hair, because she passes out when she lifts her hands over her head to rinse her hair or otherwise wash herself. She testified that her husband helps her move from room to room, because she has difficulty walking and orienting herself. Her husband performs all the work around the house, including meal preparation for the two of them.

In a decision mailed on December 7, 1987, a worker's compensation magistrate granted plaintiff's petition, finding that she had proven by a preponderance of the evidence that her husband provided reasonable and necessary home nursing care eight hours a day, seven days a week. The magistrate ordered defendant to pay nursing care benefits in the amount of $480 a week from February 16, 1981, until further order.

Defendant appealed, and, in a decision and order dated November 1, 1991, the WCAB affirmed with modification. The WCAB reduced the award of benefits to $262.50 a week from March 1, 1981, to November 4, 1987, with the benefits thereafter being in the amount specified by the magistrate. The WCAB found that the record demonstrated that

plaintiff's need for nursing care had increased with time.

In addition to finding that plaintiff had proven the need for nursing or attendant care, the WCAB rejected defendant's argument that plaintiff's claim was barred by res judicata or limited by the one-year-back rule of § 381(3), MCL 418.381(3), MSA 17.237(381)(3), which provides:

> Payment for nursing or attendant care shall not be made for any period which is more than 1 year before the date an application for hearing is filed with the bureau.

The WCAB held that § 381(3) applies only to injuries occurring on or after the effective date of the statute, July 30, 1985. Because plaintiff's original injury occurred in 1980, the WCAB held that § 381(3) is inapplicable.

This Court denied defendant's original application for leave to appeal. Although the Supreme Court initially denied defendant's application to that Court, on motion for reconsideration the Supreme Court remanded to this Court for consideration as on leave granted of defendant's claim that § 381(3) applies here.

In *Ivezaj v Federal Mogul Corp (On Remand)*, 197 Mich App 462, 465; 495 NW2d 800 (1992), this Court held:

> The long-standing rule in workers' compensation cases requires application of the law in effect at the time of the relevant injury unless the Legislature clearly indicates a contrary intention. *Nicholson v Lansing Bd of Ed*, 423 Mich 89, 93; 377 NW2d 292 (1985). We find no clear indication by the Legislature that [§ 381(3)] should apply retroactively. Furthermore, we decline to assert that subsection 3 must be applied retroactively as "re-

> medial" legislation when it would divest [plaintiff] of her right to ten years of benefits—a right established with the filing of her petition and introduction of sufficient proofs to establish the need for nursing services.

Although defendant admits that the general rule is that the law in effect on the date an injury is received controls, defendant notes that plaintiff did not request nursing care benefits until she filed the supplemental petition in October, 1985, after the effective date of § 381(3). Defendant contends that the one-year limitation should apply and that plaintiff should not be entitled to benefits payable for any week before October 1984.

This issue of first impression did not arise in *Ivezaj,* because the petition for reimbursement of nursing or attendant care expenses in that case was filed well before the amendment took effect. We note, however, that *Ivezaj* cites *Nicholson* as authority for the general rule regarding application of the worker's compensation law in effect the date of injury. *Nicholson* in turn cites *Wallin v General Motors Corp,* 317 Mich 650, 652-653; 27 NW2d 122 (1947), and *Wallin* quotes with approval the following passages from *Thomas v Continental Motors Corp,* 315 Mich 27, 35-36; 23 NW2d 191 (1946):

> "[P]laintiff relies on *Allen v Kalamazoo Paraffine Co,* 312 Mich 575 [20 NW2d 731 (1945)]. However, the *Allen* case does not refer either to dependency compensation after death, or to death benefits. It holds that the cause of action for the loss of an eye accrues when the loss occurs, *i.e.,* when the employee suffers loss of industrial vision, and that compensation for the disability is fixed by the statute in effect at the time the loss of industrial vision occurred. Plaintiff also relies on *Mason v Michigan Trading Corp,* 308 Mich 702 [14 NW2d

> 545 (1944)]. This case dealt with a claim by the widow of a deceased employee for expenses of her husband's last illness and for $200 funeral expenses. No claim for dependency compensation was involved in the case. The court held that the widow's right of action *for death benefits,* namely, expenses of last sickness and funeral, did not accrue until the death of her husband, and therefore the statue in effect at the date of death controls.
>
> " . . . The instant case involves both dependency compensation and death benefits. While the right of action for death benefits accrues at the date of death of the employee, the right of action for dependency compensation because of death arises at the date of disability, at which time 'the right to the compensation springs into existence.' "

In this case, the WCAB affirmed the magistrate's finding that plaintiff had proved by a preponderance of the evidence that her husband provided reasonable and necessary home nursing care for her since 1981. We hold that, by analogy with *Thomas,* the statute in effect at the time plaintiff's claim for nursing benefits accrued applies. Because plaintiff's claim for such benefits accrued in 1981, before the addition of the one-year-back rule, the WCAB did not err in refusing to limit the award of nursing care benefits.

We note that in *Riza v Delray Baking Co,* 200 Mich App 169, 176-177, 177, n 1; 504 NW2d 193 (1993), a panel of this Court questioned the holding in *Ivezaj* that the one-year-back rule in § 381(3) is not remedial and should not be applied retroactively. Because the issue whether § 381(3) should be applied retroactively because it is remedial was not raised by defendant either before this Court or before the WCAB, that issue has not been preserved for appellate consideration and must be considered waived. *Achtenberg v East Lansing,* 421 Mich 765,

773; 364 NW2d 277 (1985); *Wiand v Wiand,* 178 Mich App 137, 150; 443 NW2d 464 (1989).

PEOPLE v WARD

Docket No. 160825. Submitted March 1, 1994, at Lansing. Decided June 21, 1994, at 9:10 A.M.

Jonathan D. Ward pleaded guilty in the Ingham Circuit Court, Michael G. Harrison, J., of three counts of child sexually abusive activity, one count of first-degree criminal sexual conduct, and one count of second-degree criminal sexual conduct. A plea agreement provided for the dismissal of sixteen similar counts and that the defendant's minimum sentence would not exceed fifteen years. The defendant was sentenced to ten to twenty years' imprisonment for each of the child sexually abusive activity convictions, fifteen to thirty years' imprisonment for the first-degree criminal sexual conduct conviction, and five to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction. The defendant appealed, alleging violation of the Double Jeopardy Clause's prohibition against multiple punishments and that his sentence for the first-degree criminal sexual conduct conviction is not proportionate.

The Court of Appeals *held:*

1. The Legislature intended that the crimes of criminal sexual conduct and child sexually abusive activity be punished separately. The criminal sexual conduct statutes and the child sexually abusive activity statute prohibit conduct that is violative of distinct social norms, and the statutes are not part of a hierarchy of crimes that build upon a single base statute. The defendant's convictions do not violate the double jeopardy protection against multiple punishments.

2. The defendant's sentence for his conviction of first-degree criminal sexual conduct is proportionate.

3. The rule announced in *People v Blount,* 197 Mich App 174 (1992), that a defendant who pleads guilty and is sentenced in accordance with a plea bargain and sentencing agreement waives the right to challenge the sentence unless there is also

REFERENCES

Am Jur 2d, Criminal Law §§ 155, 458 *et seq.*, 551.

See ALR Index under Abuse of Persons; Double Jeopardy; Guilty Plea.

an attempt to withdraw the plea for a sound legal reason is to be given full retroactive effect. Therefore, the defendant waived his right to challenge the proportionality of his sentence. In any event, the sentence was proportionate.

Affirmed.

1. CRIMINAL LAW — CONSTITUTIONAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENTS — CHILD SEXUALLY ABUSIVE ACTIVITY — CRIMINAL SEXUAL CONDUCT.

The Legislature intended that the crimes of criminal sexual conduct and child sexually abusive activity be punished separately; therefore, the Double Jeopardy Clause's prohibition against multiple punishments is not violated where a defendant is convicted of both child sexually abusive activity and first- and second-degree criminal sexual conduct for sexual penetration and sexual contact that occurred during the child sexually abusive activity (MCL 750.145c, 750.520b[1][c], 750.520c[1][c]; MSA 28.342a, 28.788[2][1][c], 28.788[3][1][c]).

2. CRIMINAL LAW — SENTENCING — GUILTY PLEAS — PRESERVING QUESTION.

The rule announced in *People v Blount*, 197 Mich App 174 (1992), that a defendant who pleads guilty and is sentenced in accordance with a plea bargain and sentencing agreement waives the right to challenge the sentence unless there is also an attempt to withdraw the plea for a sound legal reason is to be given full retroactive effect.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Donald E. Martin,* Prosecuting Attorney, and *Samuel R. Smith,* Chief Appellate Attorney, for the people.

Patrick K. Ehlmann, for the defendant on appeal.

Before: MACKENZIE, P.J., and GRIBBS and M. E. DODGE,* JJ.

PER CURIAM. Defendant was charged in three informations with a total of twenty-one counts of child sexually abusive activity, MCL 750.145c;

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

MSA 28.342a, second-degree criminal sexual conduct, MCL 750.520c(1)(c); MSA 28.788(3)(1)(c), and first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c). In exchange for the dismissal of sixteen counts and an agreement that his minimum sentence would not exceed fifteen years, defendant pleaded guilty of one count of child sexually abusive activity in each of the three case files. Additionally, he pleaded guilty of one count of second-degree CSC in one file and of one count of first-degree CSC in one file. Defendant was sentenced to ten to twenty years' imprisonment for each of the three child sexually abusive activity convictions, five to fifteen years' imprisonment for his second-degree CSC conviction, and fifteen to thirty years' imprisonment for the first-degree CSC conviction. He appeals as of right. We affirm.

Defendant's convictions arise out of three instances in which he and another individual brought thirteen- and fourteen-year-old girls to a house for photography sessions. Both still photographs and videotapes were taken of the girls in nude or erotic poses. Photographs were also taken of defendant fondling the girls and digitally penetrating them, and of the girls licking defendant's penis.

I

Defendant contends that his convictions of both child sexually abusive activity and first- or second-degree criminal sexual conduct violate the Double Jeopardy Clause's prohibition against multiple punishments.

MCL 750.520b(1)(c); MSA 28.788(2)(1)(c) provides:

> (1) A person is guilty of criminal sexual conduct

> in the first degree if he or she engages in sexual penetration with another person and . . .
>
> * * *
>
> (c) Sexual penetration occurs under circumstances involving the commission of any other felony.

Similarly, MCL 750.520c(1)(c); MSA 28.788(3)(1)(c) provides:

> (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and . . .
>
> * * *
>
> (c) Sexual contact occurs under circumstances involving the commission of any other felony.

The other, or predicate, felony at issue in this case is child sexually abusive activity. MCL 750.145c; MSA 28.342a provides that a person is guilty of that offense when the person "persuades, induces, entices, coerces, causes, or knowingly allows" a child to engage in "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity" "for the purpose of producing" "a developed or undeveloped photograph, film, slide, electronic visual image, or sound recording" of such acts. MCL 750.145c(1)(e), (h), (i), and (2); MSA 28.342a(1)(e), (h), (i), and (2).

The concept of multiple punishment in double jeopardy jurisprudence has as its purpose the avoidance of more than one punishment for the same offense arising out of a single prosecution. *People v Harding,* 443 Mich 693, 705; 506 NW2d 482 (1993) (opinion by BRICKLEY, J.). The double jeopardy protection against multiple punishment serves to ensure that a defendant is not subjected

to more punishment than that authorized by the legislative branch of government. *People v Sturgis,* 427 Mich 392, 403; 397 NW2d 783 (1986), citing *Wayne Co Prosecutor v Recorder's Court Judge,* 406 Mich 374; 280 NW2d 793 (1979). Multiple convictions for legislatively linked compound and predicate crimes, such as the offenses in this case, do not necessarily violate the double jeopardy protection against multiple punishments. Rather, the determinative inquiry is what punishment the Legislature intended to be imposed. *People v Robideau,* 419 Mich 458, 485-486; 355 NW2d 592 (1984).

In determining legislative intent, a court must identify the type of harm the Legislature was intending to prevent, and the amount of punishment authorized by it. *Robideau, supra,* p 487. Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments. *Id.* Further, where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. *Id.*

Here, it is apparent that the criminal sexual conduct statutes and the child sexually abusive activity statute prohibit conduct that is violative of distinct social norms. The criminal sexual conduct statutes involve sexual assaults on persons of all ages. The focus of first-degree CSC is clearly on penetration, *Robideau, supra,* p 488, while the focus of second-degree CSC is on sexual contact. The offense of engaging a child in sexually abusive activity, on the other hand, focuses on protecting children from sexual exploitation, assaultive or otherwise. The purpose of the statute is to combat the use of children in pornographic movies and

photographs, and to prohibit the production and distribution of child pornography. See Senate Fiscal Agency Bill Analysis, SB 426, December 1, 1987.

Further, while the punishments for the criminal sexual conduct offenses and for the underlying predicate felony of child sexually abusive activity are not identical,[1] as they were in *Robideau,* neither are they part of a hierarchy of crimes that build upon a single base statute. This, too, suggests that the Legislature intended imposing dual punishment. See *Robideau, supra,* pp 487-488.

Because the Legislature intended to punish conduct violative of distinct social norms and did not authorize punishments based on a continuum of culpability, it is apparent that the Legislature intended that the crimes of criminal sexual conduct and child sexually abusive activity be punished separately. *Robideau, supra.* Accordingly, we hold that defendant's convictions do not violate the double jeopardy protection against multiple punishments.

II

Defendant also argues that the sentence for his first-degree CSC conviction was disproportionate. *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). In *People v Blount,* 197 Mich App 174, 175-176; 494 NW2d 829 (1992), this Court held that a defendant who pleads guilty and is sentenced in accordance with a plea bargain and sentencing

[1] Child sexually abusive activity is part of the child protection laws and not one of the series of laws prohibiting criminal sexual conduct. Producing child sexually abusive material is a felony punishable by twenty years in prison. MCL 750.145c(2); MSA 28.342a(2). Second-degree CSC is a felony punishable by fifteen years in prison, MCL 750.520c(2); MSA 28.788(3)(2), while the aggravated crime of first-degree CSC is punishable by imprisonment for life or any term of years, MCL 750.520b(2); MSA 28.788(2)(2).

agreement waives the right to challenge the sentence unless there is also an attempt to withdraw the plea for a sound legal reason. Defendant argues that the *Blount* waiver rule should be given prospective effect only and that, because he was sentenced before the release of the *Blount* decision, he is entitled to appellate review of his sentence. We disagree.

The general rule in Michigan is that appellate court decisions are to be given full retroactivity unless limited retroactivity is justified. *Moorhouse v Ambassador Ins Co, Inc,* 147 Mich App 412, 420-421; 383 NW2d 219 (1985). The *Blount* decision did not overrule prior law or settled precedent and did not involve a vested property right. *Jahner v Dep't of Corrections,* 197 Mich App 111, 114; 495 NW2d 168 (1992). Further, the *Blount* decision was clearly foreshadowed by *People v Vitale,* 179 Mich App 420, 422; 446 NW2d 504 (1989), where this Court stated:

> The trial court accepted defendant's plea and sentenced him under a sentence recommendation to which he agreed. Why should defendant now be heard to complain? It seems pointless to remand such a case to the trial court. Here, where the prosecution and defendant agreed to the minimum sentence imposed, what are we to review and what are we to demand of the trial court?

Accordingly, we give the rule announced in *Blount* full retroactive effect. Defendant has, therefore, waived his right to challenge the proportionality of his sentence where he entered into a sentence agreement, the trial court abided by the agreement, and defendant did not move to withdraw his guilty plea. *Blount, supra,* pp 175-176.

In any event, defendant's sentence for his first-degree CSC conviction was proportionate to the

seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra.* The sentence was within the guidelines' recommended minimum sentence range and defendant benefited from a plea bargain resulting in the dismissal of a substantial number of other charges. *People v Broden,* 428 Mich 343, 354; 408 NW2d 789 (1987); *People v Duprey,* 186 Mich App 313; 463 NW2d 240 (1990).

Affirmed.

SUMMERS v CITY OF DETROIT

Docket No. 145399. Submitted January 18, 1994, at Detroit. Decided June 21, 1994, at 9:15 A.M. Leave to appeal sought.

Elon Summers, individually and as personal representative of the estate of Brian A. Summers, brought an action in the Wayne Circuit Court against the City of Detroit and several individual city officials and employees. The action arose out of the drowning death of Brian Summers in an outdoor swimming pool owned by the city after the boy had gained access to the closed pool by going through a gap in a chained gate. The court, Samuel A. Turner, J., granted summary disposition for the defendants, holding that the action against the city was barred by governmental immunity and the action against the individual defendants failed to state a claim on which relief could be granted. The plaintiff appealed.

The Court of Appeals *held:*

1. Because the parties do not dispute that the city's operation of the pool was the exercise of a governmental function, the city is immune from tort liability unless subject to an exception from immunity.

2. The pool and fence do not constitute a public building within the meaning of the public building exception, MCL 691.1406; MSA 3.996(106).

3. Public nuisance is not an exception to governmental immunity.

4. Because the fence, gate, and pool do not constitute a nuisance at all times and under all circumstances, the plaintiff has failed to plead a nuisance per se.

5. Because the doctrine of attractive nuisance was not recognized as an exception to governmental immunity before July 1, 1965, attractive nuisance does not constitute an exception to governmental immunity. Accordingly, the trial court properly

REFERENCES

Am Jur 2d, Municipal, County, School, and State Tort Liability § 148.

See ALR Index under Attractive Nuisances; Governmental Immunity or Privilege.

granted summary disposition for the city on the basis of governmental immunity.

6. The plaintiff alleged no special relationship or other circumstances that would have created a duty of care by the individual defendants for the decedent. Because no duty of care was pleaded, the trial court properly concluded that the individual defendants were entitled to judgment as a matter of law with respect to the negligence claim.

7. The doctrine of attractive nuisance is applicable only to those who both possess and control land and, thus, is not applicable to these individual defendants.

8. The question of the alleged violation of the Detroit Building Code was not preserved for appellate review. In any event, violation of an ordinance is not in itself sufficient to impose a legal duty.

Affirmed.

MARILYN KELLY, J., concurring, stated that while this plaintiff has no action for attractive nuisance, it is unnecessary to conclude that an action for attractive nuisance can never survive the defense of governmental imunity.

GOVERNMENTAL IMMUNITY — NUISANCE — ATTRACTIVE NUISANCE.

There is no attractive nuisance exception to governmental immunity from tort liability.

Mark Granzotto and *Julie H. Hurwitz,* for the plaintiff.

Donald Pailen, Corporation Counsel, and *Joanne D. Stafford,* Supervising Assistant Corporation Counsel, for the defendants.

Before: CAVANAGH, P.J., and MARILYN KELLY and J. R. ERNST,* JJ.

PER CURIAM. Plaintiff, Elon Summers, appeals as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) (claim barred by governmental immunity) with respect to defendant City of Detroit, and pursuant to MCR 2.116(C)(8) (failure to

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

state a claim) with respect to the individual defendants. We affirm.

Plaintiff's decedent, nine-year-old Brian Summers, drowned in an outdoor swimming pool owned by defendant City of Detroit, after gaining access to the pool through a gap in a chained gate at a time when the pool was closed. Plaintiff brought suit against the city and several individual city officials and employees.

We first consider whether the circuit court erred in concluding that plaintiff's claims against the city were barred by governmental immunity. When reviewing a grant of summary disposition based on a finding that the claim is barred by governmental immunity, we consider all documentary evidence submitted by the parties. All well-pleaded allegations are accepted as true and construed most favorably to the nonmoving party. To survive a motion for summary disposition, the plaintiff must allege facts that justify the application of an exception to governmental immunity. *Wade v Dep't of Corrections,* 439 Mich 158, 163; 483 NW2d 26 (1992); *Maurer v Oakland Co Parks & Recreation Dep't (On Remand),* 201 Mich App 223, 228; 506 NW2d 261 (1993).

The parties do not dispute that defendant city was engaged in the exercise of a governmental function and, hence, was immune from tort liability unless there is an applicable exception to immunity. MCL 691.1407(1); MSA 3.996(107)(1).

The public building exception to governmental immunity, MCL 691.1406; MSA 3.996(106), does not apply on these facts, because the pool and surrounding fence do not constitute a public building. *Reardon v Dep't of Mental Health,* 430 Mich 398, 406-413; 424 NW2d 248 (1988); *Richardson v Warren Consolidated School Dist,* 197 Mich App

697, 700-701; 496 NW2d 380 (1992); *Dew v Livonia,* 180 Mich App 676, 679; 447 NW2d 764 (1989).

Public nuisance is not an exception to governmental immunity. *Li v Feldt (After Second Remand),* 439 Mich 457, 474; 487 NW2d 127 (1992) (*Li II*).

There is no nuisance per se in this case, because the fence, gate, and pool do not constitute a nuisance at all times and under all circumstances, regardless of location or surroundings. *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139, 152-153; 422 NW2d 205 (1988).

Our Supreme Court has not ruled definitively whether the doctrine of attractive nuisance constitutes an exception to governmental immunity. See *Taylor v Detroit,* 182 Mich App 583, 589; 452 NW2d 826 (1989). We believe that no such exception exists.

Section 7(1) of the governmental tort liability act, MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.,* preserved judicially created exceptions to immunity that were formulated before July 1, 1965. *Li v Feldt (After Remand),* 434 Mich 584, 591-592; 456 NW2d 55 (1990) (*Li I*); *Hadfield, supra* at 147-148. The question is whether the claimed exception was *recognized clearly in authoritative Michigan case law* before that date. *Li II, supra* at 468 (emphasis added). Our research has disclosed no pre-1965 cases that discussed whether there is an attractive nuisance exception to immunity. It appears likely that the Court in *Lyshak v Detroit,* 351 Mich 230; 88 NW2d 596 (1958), applied the proprietary function exception to immunity, and in *Swanson v Marquette,* 357 Mich 424, 432; 98 NW2d 574 (1959), the proprietary function exception was clearly pleaded. See *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567, 610-614; 363 NW2d 641 (1984); 18 McQuillin, Municipal Corporations

(rev 3d ed), § 53.59.60, pp 419-420 (municipal liability for attractive nuisance depends upon whether a governmental or a proprietary function was involved). Thus, neither *Lyshak nor Swanson* clearly recognizes an attractive nuisance exception as required by *Li II.*

We are aware that in *Rosario v Lansing,* 403 Mich 124, 139-141; 268 NW2d 230 (1978) (FITZGERALD, J), a plurality of the Court held that, although attractive nuisance law is essentially negligence law, attractive nuisance is an exception to governmental immunity. However, a plurality decision in which no majority of the justices participating agree concerning the reasoning is not binding authority under the doctrine of stare decisis. *Swickard v Wayne Co Medical Examiner,* 438 Mich 536, 570, n 15; 475 NW2d 304 (1991) (LEVIN, J). We find the dissenting opinion of Justice RYAN in *Rosario* to be more persuasive, because it more closely resembles the reasoning in *Hadfield* and the two *Li* opinions (and it was indeed cited with favor in *Hadfield.*) Justice RYAN would have held that the "nuisance exception" is limited to two subclasses of nuisance, "nuisances per se" and "intruding nuisances." 403 Mich 146 (RYAN, J, dissenting).

We conclude that an attractive nuisance exception to governmental immunity was not recognized clearly in authoritative Michigan case law before July 1, 1965, and thus did not survive the enactment of § 7(1). *Li II, supra* at 468. Accordingly, the trial court properly granted summary disposition in favor of defendant city.

The second issue on appeal is whether the circuit court erred in concluding that the individual defendants were entitled to judgment as a matter of law on the basis that they owed no duty to the decedent. When reviewing a grant of summary

disposition pursuant to MCR 2.116(C)(8), we accept all factual allegations in support of the claim as true, as well as any reasonable inferences that can be drawn from them. *Azzar v Primebank, FSB,* 198 Mich App 512, 516; 499 NW2d 793 (1993).

The threshold question in a negligence action is whether the defendant owed the plaintiff a legal duty. *Scott v Harper Recreation, Inc,* 192 Mich App 137, 140; 480 NW2d 270 (1991), rev'd on other grounds 444 Mich 441; 506 NW2d 857 (1993).

As a rule, there is no duty that obligates a person to aid or protect another. Plaintiff has alleged no special relationship or other special circumstance that would have created such a duty in the individual defendants with respect to the decedent. *Schultz v Consumers Power Co,* 443 Mich 445, 450; 506 NW2d 175 (1993); *Harrison v Corrections Dep't Director,* 194 Mich App 446, 459; 487 NW2d 799 (1992); *Bell & Hudson, PC v Buhl Realty Co,* 185 Mich App 714, 717-718; 462 NW2d 851 (1990). Any duty owed by the individual defendants was for the benefit of the general public; there has been no showing that performance of that duty would have affected the decedent differently from the general public. *Harrison, supra* at 459-460.

We reject plaintiff's attractive nuisance argument as applied to the individual defendants, because the doctrine of attractive nuisance extends only to those who both possess and control the land. See *Merritt v Nickelson,* 407 Mich 544, 552; 287 NW2d 178 (1980); *Ellsworth v Highland Lakes Development Associates,* 198 Mich App 55, 63; 498 NW2d 5 (1993); *Rand v Knapp Shoe Stores,* 178 Mich App 735, 740-741; 444 NW2d 156 (1989).

Finally, we note that plaintiff's argument relating to the alleged violation of the Detroit Building Code was not raised before the court below and,

thus, is not preserved for review. *Deal v Deal,* 197 Mich App 739, 741; 496 NW2d 403 (1993). In any event, although violation of an ordinance may be some evidence of negligence, it is not in itself sufficient to impose a legal duty cognizable in negligence. *Ward v Frank's Nursery & Crafts, Inc,* 186 Mich App 120, 135; 463 NW2d 442 (1990).

Accordingly, the trial court properly granted summary disposition in favor of the individual defendants.

Affirmed.

MARILYN KELLY, J. *(concurring).* I concur in the result reached in this case. However, in contrast to my colleagues, I am not persuaded that an attractive nuisance exception to a defense of governmental immunity can never exist in this state.

First, our Supreme Court has not ruled definitively that the doctrine of attractive nuisance does not constitute an exception to governmental immunity. See *Taylor v Detroit,* 182 Mich App 583, 589; 452 NW2d 826 (1989). Second, I believe the majority overstates the correct test for making such a determination when it says: "The question is whether the claimed exception was *recognized clearly in authoritative Michigan case law,*" *ante,* p 49, before July 1, 1965, citing *Li v Feldt (After Second Remand),* 439 Mich 457, 468; 487 NW2d 127 (1992) (*Li II*).

The historical analysis of common law causes preserved in the face of the governmental immunity statute was developed in *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139, 146-149; 422 NW2d 205 (1988). In *Hadfield,* six justices agreed that the Legislature intended to codify common law exceptions to governmental immunity. *Li v Feldt (After Remand),* 434 Mich 584, 591, n 7; 456 NW2d 55 (1990). However, a vast difference exists between conducting an historical analysis to deter-

mine which causes existed before July 1, 1965[1] and applying the absolute test articulated by the *Li II* plurality and adopted here.

In my estimation, an historical analysis of the cases dealing with the question of attractive nuisance does not conclude that an exception to governmental immunity could never exist. Admittedly, in the oldest case, our Supreme Court concluded that a swimming pond in a public park was not to be classed as a dangerous or attractive nuisance. *Heino v Grand Rapids,* 202 Mich 363, 370; 168 NW 512 (1918). However, the conclusion in *Heino* that the pond was not an attractive nuisance did not unequivocally rule out the possibility that attractive nuisances could exist on governmental property. Furthermore, in both *Lyshak v Detroit*[2] and *Swanson v Marquette,*[3] our Supreme Court did not specifically conclude that an attractive nuisance exception to governmental immunity could never be sustained.

Therefore, I do not believe that an attractive nuisance cause of action was as clearly rejected by our Courts before 1965 as the majority concludes. I think the correct analysis in cases such as this was aptly expressed by Justice ARCHER when he wrote:

> [I]t is important to focus on the responsibility of government for its actions or omissions, not its immunity from liability. This requires the conclusion that the Legislature did intend that case law continue to be developed in this area to address policy-based governmental liability which may be at issue in future cases. [*Hadfield,* p 215, ARCHER, J., concurring in part and dissenting in part.]

While I agree that plaintiff has no attractive nuisance claim, I would not hold that a cause of

[1] The effective date of MCL 691.1407(1); MSA 3.996(107)(1).

[2] 351 Mich 230; 88 NW2d 596 (1958).

[3] 357 Mich 424; 98 NW2d 574 (1959).

action for attractive nuisance can never survive the defense of governmental immunity.

PEOPLE v GOMER

Docket No. 155343. Submitted February 16, 1994, at Grand Rapids. Decided June 21, 1994, at 9:20 A.M. Leave to appeal sought.

Christopher C. Gomer pleaded guilty in the Kent Circuit Court, Donald A. Johnston, J., of possession of more than 50 grams but less than 225 grams of cocaine, unsuccessfully moved to withdraw his plea before sentencing, and was sentenced to ten to twenty years of imprisonment. He appealed.

The Court of Appeals *held:*

1. The trial court did not err in denying the motion to withdraw the guilty plea. Pursuant to MCR 6.310(B), a trial court may allow a defendant to withdraw a guilty plea before sentencing if the defendant establishes that withdrawal of the plea would be in the interest of justice and the prosecutor fails to demonstrate that substantial prejudice would result from withdrawal. In this case, the defendant failed to establish that withdrawal of his plea would be in the interest of justice in the absence of an assertion of innocence, a coerced confession, or ineffective assistance of counsel as a basis for withdrawal.

2. The imposition of a sentence that is the same as that provided by the statute under which the defendant was convicted is not an indication that the trial court was unaware of its sentencing discretion.

Affirmed.

CRIMINAL LAW — GUILTY PLEAS — WITHDRAWAL OF PLEAS BEFORE SENTENCING.

A trial court may allow a defendant to withdraw a guilty plea before sentencing where the defendant establishes that withdrawal of the plea would be in the interest of justice and the prosecutor fails to demonstrate that substantial prejudice would result from withdrawal (MCR 6.310[B]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *William A. Forsyth,* Pros-

REFERENCES

Am Jur 2d, Criminal Law §§ 501-505.

See ALR Index under Guilty Plea.

ecuting Attorney, and *Timothy K. McMorrow,* Chief Appellate Attorney, for the people.

State Appellate Defender (by *James Krogsrud*), for the defendant on appeal.

Before: TAYLOR, P.J., and MACKENZIE and M. J. MATUZAK,* JJ.

PER CURIAM. Defendant was charged with possession with intent to deliver 50 to 225 grams of cocaine and with possession of 50 to 225 grams of cocaine. Trial began on January 6, 1992, and a jury was selected. On the second day of trial, defendant moved to suppress his confession. The motion was denied. Defendant then pleaded guilty of possession of more than 50 but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). After defendant pleaded guilty but before sentencing, he moved to withdraw his plea. That motion was also denied. Defendant was subsequently sentenced to ten to twenty years' imprisonment. He appeals as of right, contending that the trial court erred in denying his motion to withdraw his plea and that his sentence was excessive. We disagree and affirm.

There is no absolute right to withdraw a guilty plea once it has been accepted. *People v Sanders,* 112 Mich App 585, 586; 316 NW2d 266 (1982). Before October 1, 1989, however, courts applied the "great liberality" standard set forth in *People v Bencheck,* 360 Mich 430; 104 NW2d 191 (1960), to presentencing motions to withdraw guilty pleas. Under this standard, trial courts were obligated to allow the withdrawal of a guilty plea before sentencing unless the reasons for the withdrawal were clearly frivolous or motivated by dissatisfac-

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

tion with a probable sentence. See, e.g., *People v Camargo,* 163 Mich App 581, 584-585; 415 NW2d 211 (1987).

Defendant contends that the "great liberality" standard should have been applied in ruling on his motion to withdraw his plea. The claim is without merit. The Supreme Court in promulgating MCR 6.310(B) of the Rules of Criminal Procedure (effective October 1, 1989), discarded the "great liberality" standard in favor of a more restrictive standard that considers the interests of justice and potential prejudice to the prosecution. *People v Holmes,* 181 Mich App 488, 497; 449 NW2d 917 (1989). MCR 6.310(B) states:

> Withdrawal Before Sentence. On the defendant's motion or with the defendant's consent, the court in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by MCR 6.311(B).

In *People v Spencer,* 192 Mich App 146, 151; 480 NW2d 308 (1991), this Court discussed the parameters of MCR 6.310(B) and how it should be applied:

> [I]n order to withdraw a guilty plea before sentencing, the defendant must first establish that withdrawal of the plea is supported by reasons based on the interests of justice. If sufficient reasons are provided, the burden then shifts to the prosecution to demonstrate substantial prejudice. To constitute substantial prejudice, the prosecution must show that its ability to prosecute is somehow hampered by the delay. This would appear to require more than mere inconvenience in

> preparing for trial. Ultimately, the trial judge should bear in mind what is in the interests of justice in deciding if a plea may be withdrawn. Accordingly, what constitutes substantial prejudice may vary from case to case.

See also *People v Thew,* 201 Mich App 78; 506 NW2d 547 (1993).

Recently, in *People v Jackson,* 203 Mich App 607, 613; 513 NW2d 206 (1994), this Court provided further guidance regarding the application of the "in the interest of justice" standard of MCR 6.310(B):

> [The trial court] must allow defendant to attempt to show that withdrawal of the plea is in the interest of justice. Defendant can do this, for example, by showing that " 'the plea was the product of fraud, duress, or coercion.' " [*People v Sledge (On Rehearing)*, 200 Mich App 326, 329; 503 NW2d 672 (1993)] (quoting *People v Taylor,* 383 Mich 338, 361; 175 NW2d 715 [1970]). We stress that "bad advice of defense counsel alone generally is not enough to warrant the withdrawal of a plea." *Sledge, supra* at 329; also *People v Mayes (After Remand),* 202 Mich App 181, 192; 508 NW2d 161 (1993). On the other hand, it is incumbent upon the trial court to allow the defendant to withdraw his plea where the plea may have been induced by inaccurate legal advice and the defendant refuses or is unable to personally recount a sufficient basis to substantiate the charge. *Spencer, supra* at 151-152. The same is true where the defendant can show ineffective assistance of counsel combined with the existence of a meritorious defense. See *Thew, supra* at 95-97. We note that the issue is not whether the trial court believes the defendant's asserted defense, but rather, "whether the defendant has a valid defense to the charge . . . even if he might be guilty of other offenses." *Id.* at 96.

In this case, defendant pleaded guilty on the second day of trial, after the jury had been selected. A motion to suppress his confession had already been heard and denied. Defendant did not assert innocence as a basis to withdraw the plea, and the defense he asserted—that his confession to the police was coerced—had been rejected. He did not allege ineffective assistance of counsel or that he had received inaccurate legal advice; he stated only that his attorney had "convinced" him to plea. The trial court followed the proper steps for taking the plea and we find nothing in the record to convince us that defendant's plea was involuntary. Because defendant failed to demonstrate that the interest of justice would be served by allowing him to withdraw his guilty plea, the trial court properly denied the motion.

We also reject defendant's argument that the sentencing judge must have not realized his discretion in sentencing. Just because defendant's sentence is the same as the statute provides—imprisonment for not less than ten nor more than twenty years—is not an indication that the judge was unaware of his discretion in sentencing. We find no error.

Affirmed.

MEERMAN v MURCO, INC

Docket No. 146860

ORDER ENTERED JUNE 21, 1994

The Judges of this Court having been polled pursuant to Administrative Order No. 1994-4, and the result of the poll being that sixteen Judges opposed convening a special panel, seven were in favor, and one abstained, it is ordered that a special panel shall not be convened.

PEOPLE v DIVIETRI

Docket No. 163923. Submitted March 8, 1994, at Grand Rapids. Decided April 6, 1994; approved for publication June 23, 1994, at 9:00 A.M. Leave to appeal sought.

James E. DiVietri pleaded guilty in the Eaton Circuit Court, Thomas S. Eveland, J., of possession of more than 225 grams but less than 650 grams of cocaine. As required by MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii) and MCL 791.234(4); MSA 28.2304(4), the defendant was sentenced to twenty to thirty years of imprisonment without parole. The defendant moved for correction of sentence. The court ruled the defendant eligible for parole, determining that the mandatory penalty for the defendant's offense constituted cruel or unusual punishment under Const 1963, art 1, § 16 insofar as parole was prohibited. The defendant appealed, and the prosecution cross appealed.

The Court of Appeals *held:*

1. The statutorily mandated sentence did not strip the trial court of the ability to impose a proportionate sentence inasmuch as the trial court, at its discretion, could have imposed a sentence below the mandatory minimum in the presence of substantial and compelling reasons to do so. MCL 333.7403(3); MSA 14.15(7403)(3).

2. The statutorily mandated sentence for the defendant's offense is not cruel or unusual. *People v Bullock,* 440 Mich 15 (1992), which struck down the portion of MCL 791.234(4); MSA 28.2304(4) that denied parole consideration, is limited in application to cases of possession of more than 650 grams, MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i).

3. The defendant's claim that he was denied effective assistance of counsel at sentencing cannot be reviewed meaningfully because the defendant failed to cite supporting authority for his claim and failed to move for a remand for an evidentiary hearing.

4. The trial court did not abuse its discretion in refusing to

REFERENCES

Am Jur 2d, Criminal Law § 539.

See ALR Index under Cruel and Unusual Punishment.

depart from the mandatory minimum sentence after finding no substantial and compelling reasons for such departure.

Affirmed in part and reversed in part.

CONTROLLED SUBSTANCES — SENTENCES — POSSESSION OF MORE THAN 225 GRAMS BUT LESS THAN 650 GRAMS OF COCAINE.

The mandatory sentence of not less than twenty years nor more than thirty years of imprisonment without parole for possession of more than 225 grams but less than 650 grams of cocaine is not cruel or unusual punishment under the state constitution (Const 1963, art 1, § 16; MCL 333.7403[2][a][ii], 791.234[4]; MSA 14.15[7403][2][a][ii], 28.2304[4]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Jeffrey L. Sauter,* Prosecuting Attorney, and *William M. Worden,* Assistant Prosecuting Attorney, for the people.

Reid & Reid (by *Stuart R. Shafer*), for the defendant.

Before: SAWYER, P.J., and FITZGERALD and D. A. ROBERSON,* JJ.

PER CURIAM. Defendant was charged with possession of more than 650 grams of cocaine, possession with intent to deliver between 50 and 225 grams of cocaine, and conspiracy to deliver more than 225 but less than 650 grams of cocaine. Pursuant to a plea agreement, defendant pleaded guilty of possession of more than 225 grams but less than 650 grams of cocaine, MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii). On August 22, 1991, defendant was sentenced to a prison term of twenty to thirty years.

Defendant subsequently filed, inter alia, a "motion for correction of sentence pursuant to MCR 6.429." On March 31, 1993, the trial court found that the mandatory sentencing provision of MCL

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii) is so grossly disproportionate as to constitute cruel or unusual punishment under Const 1963, art 1, § 16. The trial court then ruled that defendant is to be subject to the jurisdiction of the parole board and be eligible for parole consideration in accordance with MCL 791.234(4)(a)-(d),(5); MSA 28.2304(4)(a)-(d), (5).

On appeal, defendant argues that the trial court's remedy of permitting parole eligibility does not create constitutional proportionality. On cross appeal, the prosecutor argues that the trial court erred in permitting parole eligibility because the mandatory sentence for possession of more than 225 grams but less than 650 grams of cocaine does not constitute cruel or unusual punishment.

In regard to defendant's argument that statutorily mandated sentences strip the trial court of the ability to proportion a sentence to an individual defendant, we note that in *People v Williams,* 189 Mich App 400, 403-404; 473 NW2d 727 (1991), this Court held that legislatively mandated sentences are presumptively proportionate and valid.[1] Further, the trial court was not "mandated to sentence defendant to the maximum possible indeterminate sentence." The trial court had discretion to impose a sentence below the mandatory minimum sentence if presented with substantial and compelling reasons to do so. See MCL 333.7403(3); MSA 14.15(7403)(3).

Next, we address the prosecutor's argument that the trial court erred in finding MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii) unconstitutional and ordering defendant eligible for parole consideration.

In *People v Bullock,* 440 Mich 15; 485 NW2d 866

[1] Judge FITZGERALD continues to adhere to his dissent in *Williams, supra.*

(1992), the Court held that the statutory penalty of mandatory life in prison without possibility of parole for possession of 650 grams or more of any mixture containing cocaine, MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i), is so disproportionate as to be cruel or unusual. The Court struck down the portion of MCL 791.234(4); MSA 28.2304(4) denying parole consideration to persons convicted of possession of more than 650 grams. In limiting its decision to convictions for possession of more than 650 grams, the Court stated:

> We acknowledge that our decision today may have the effect of creating an arguable incongruity in the statutory scheme governing cocaine possession. The penalty for possessing 225 to 650 grams of cocaine is arguably more severe than the penalty for possessing 650 grams or more as modified by our decision today, in that the penalty for the former offense is a mandatory minimum sentence of twenty years in prison with no possibility of parole. MCL 333.7403(2)(a)(ii), 791.234(4); MSA 14.15(7403)(2)(a)(ii), 28.2304(4). On the other hand, the penalty for possessing 225 to 650 grams, unlike that for possessing 650 grams or more, permits a downward departure from the minimum sentence "if the court finds on the record that there are substantial and compelling reasons to do so." MCL 333.7403(3); MSA 14.15(7403)(3). In any event, the validity of the penalty for possession of 225 to 650 grams is not before us in this case. Furthermore, the Legislature remains free to modify the statutory scheme in response to our decision today, either prospectively or, in the case of any ameliorative modifications, both prospectively and retrospectively. See *People v Schultz,* 435 Mich 517; 460 NW2d 505 (1990). [*Bullock, supra* at 43, n 26.]

Bullock does not apply to the statutory provisions under which defendant was sentenced, but only to the provision calling for a mandatory

sentence of life imprisonment without parole for mere possession. Indeed, our Supreme Court has stated that the reasoning in *Bullock* is not applicable to controlled substance violations involving delivery. See, e.g., *People v Fluker,* 442 Mich 891 (1993); *People v Williams (After Remand),* 198 Mich App 537, 543; 499 NW2d 404 (1993); *People v Loy-Rafuls,* 198 Mich App 594; 500 NW2d 480 (1993), rev'd 442 Mich 912 (1993).

This Court has denied this exact challenge to the mandatory penalty provision of MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii). See, e.g., *People v Hahn,* 183 Mich App 465, 471; 455 NW2d 310 (1989), rev'd in part on other grounds 437 Mich 867 (1991). Although *Hahn* was decided before *Bullock,* neither *Bullock* nor its progeny compel a different result. Thus, the order of the trial court is reversed insofar as it ruled MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii) unconstitutional and ordered defendant eligible for parole consideration in accordance with MCL 791.234(4)(a)-(d), (5); MSA 28.2304(4)(a)-(d), (5).

Next, given the record before us, we are unable to grant meaningful review of defendant's argument that he was denied the effective assistance of counsel at sentencing. First, having failed to cite any authority in support of his position, defendant has abandoned this issue. *People v Hunter,* 202 Mich App 23, 27; 507 NW2d 768 (1993). Second, having failed to base his motion for resentencing on this ground, and having failed to move for a timely remand from this Court for an evidentiary hearing, we are left with a record on which the alleged deficiency in representation is not apparent. See *People v Stammer,* 179 Mich App 432, 441; 446 NW2d 312 (1989). To the contrary, the record demonstrates that both defense counsel and defendant affirmatively stated that they had re-

viewed the presentence report and that no corrections, additions, or deletions were necessary. The record also reveals that defense counsel did indeed advise the court of defendant's post-conviction accomplishments.

Last, defendant asserts that he is entitled to resentencing because the trial court failed to properly consider whether there were substantial and compelling reasons to support a downward departure from the mandatory minimum sentence. Although the trial court did not state specifically at sentencing that it did not find substantial and compelling reasons to justify a downward departure, the court's thorough explanation of the reasons for imposing the mandatory minimum reveal that the court considered and rejected a downward departure. Further, in a written opinion following defendant's motion for resentencing, the trial court specifically stated that "the court looked for substantial and compelling reasons to depart from the mandatory minimum sentence" but could not find a basis for doing so. We find that the trial court did not abuse its discretion in sentencing defendant. *People v Mouat,* 194 Mich App 482, 486; 487 NW2d 494 (1992).[2]

Affirmed in part and reversed in part.

[2] Contrary to defendant's assertion that the trial court relied on the prosecutor's argument that defendant had received already a sentencing bargain as the result of the plea agreement in refusing to depart from the mandatory minimum, we note that the trial court specifically stated: "The Court did not consider that defendant had already received the benefit of a plea bargain."

LAUTZENHEISER v JOLLY BAR & GRILLE, INC

Docket No. 158533. Submitted April 12, 1994, at Grand Rapids. Decided May 20, 1994; approved for publication June 23, 1994, at 9:05 A.M.

Robert L. and Nancy Lautzenheiser brought an action in the Allegan Circuit Court against Jolly Bar & Grille, Inc., Brian D. Vandermeer, and others, seeking damages for injuries sustained in an automobile accident that allegedly occurred after Vandermeer was served alcohol at the Jolly Bar & Grille. The accident occurred on October 13, 1990, and the plaintiffs retained counsel to investigate all possible theories of recovery on November 5, 1990. The court, George R. Corsiglia, J., granted summary disposition for Jolly Bar after determining that the March 5, 1991, service on Jolly Bar of notice of a claim under the dramshop act did not satisfy the 120-day notice requirement of the dramshop act, MCL 436.22(5); MSA 18.993(5). The plaintiffs appealed by leave granted.

The Court of Appeals *held:*

The trial court properly determined that Jolly Bar was not notified within the 120-day notice period.

1. The 120-day notice period expired on March 5, 1991. The plaintiffs reasonably could have been expected to know of their claim under the dramshop act before that date because within the first ten days of the 120-day period they knew that, as a result of the accident, Vandermeer had been charged with driving while intoxicated and that he had been drinking at the Jolly Bar before the accident.

2. Whether Jolly Bar was prejudiced by the delay is not relevant.

3. Whether the plaintiffs' counsel originally was retained with the specific task of pursuing a claim under the dramshop act is not relevant because he was retained to investigate all possible theories of recovery. Whether the facts available to the plaintiffs during the 120 days were enough to ensure a fully verifiable claim under the dramshop act is not relevant because

REFERENCES

Am Jur 2d, Intoxicating Liquors § 581.

See ALR Index under Dramshop Acts.

MCL 436.22(5); MSA 18.993(5) only requires notice where the dramshop owner might be liable under the act.

Affirmed.

INTOXICATING LIQUORS — DRAMSHOP ACT — NOTICE — PREJUDICE.

A plaintiff seeking damages under the dramshop act must give written notice to all defendants within 120 days after entering into an attorney-client relationship for the purpose of pursuing a claim under the act; the failure to give such notice may serve as a basis for dismissal of an action without a showing of prejudice resulting from the lack of notice; the failure to give such notice is grounds for dismissal of a claim against any defendants that did not receive notice unless sufficient information for determining that a retail licensee might be liable under the act was not known and reasonably could not have been known within the 120 days (MCL 436.22[5]; MSA 18.993[5]).

William G. Reamon, P.C. (by *William G. Reamon, Sr.*), for the plaintiffs.

Frank S. Spies, for Jolly Bar and Grille, Inc.

Before: MICHAEL J. KELLY, P.J., and HOOD and S. B. MILLER,* JJ.

PER CURIAM. Plaintiffs appeal by leave granted an order of the circuit court dismissing their suit against defendant Jolly Bar & Grille, Inc. (hereinafter defendant) for failure to fulfill the 120-day notice requirement in the dramshop act. We affirm.

MCL 436.22(5); MSA 18.993(5) provides in relevant part:

> An action under this section shall be instituted within 2 years after the injury or death. A plaintiff seeking damages under this section shall give written notice to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing a claim under this section. Failure to give written notice within the time

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

> specified shall be grounds for dismissal of a claim as to any defendants that did not receive such notice unless sufficient information for determining that a retail licensee might be liable under this section was not known and could not reasonably have been known within the 120 days.

Plaintiffs' automobile accident occurred on October 13, 1990. Plaintiffs signed a contingent fee retainer agreement with their attorney on November 5, 1990. On November 14, 1990, an investigator for plaintiffs' counsel interviewed a passenger in the other (Vandermeer) car and learned that the occupants of the other car, including the driver, had been drinking at defendant's establishment just before the accident. Although later interviews revealed some inconsistences in the passenger's story, the November 14 interview established that the driver drank three or four rum and colas at defendant's bar that evening after already having shared a case of beer with four friends late that afternoon. Plaintiffs' counsel also had access to a UD-10 accident report form that showed that the driver was charged with operating a vehicle while under the influence of intoxicating liquor, MCL 257.625; MSA 9.2325. Plaintiffs did not send notice of their claim under the dramshop act to defendant until August 27, 1991.

The 120-day notice period expired on March 5, 1991. The issue is whether plaintiffs could reasonably have been expected to know of their claim under the dramshop act before that date. We hold they could. Within the first ten days of the 120-day period, plaintiffs knew that the driver of the other car had been charged with driving while intoxicated and that he had been drinking at the Jolly Bar & Grille just before the accident. This is sufficient to satisfy the requirements of MCL 436.22(5); MSA 18.993(5).

Whether defendant was prejudiced by the delay in notice is irrelevant under the language of the notice provision. *Brown v JoJo-Ab, Inc,* 191 Mich App 208, 212; 477 NW2d 121 (1991). Whether plaintiffs' counsel was originally retained with the specific task of pursuing a dramshop act claim is also irrelevant because it was clear in the retainer agreement that he was hired to investigate all possible theories of recovery. Whether the facts available to plaintiffs during the 120 days were enough to ensure a solid, fully verifiable dramshop act claim is irrelevant because the notice provision only requires notice where a dramshop owner *might* be liable under the act.

Affirmed.

WILLIAMS v DEPARTMENT OF TRANSPORTATION

Docket No. 156135. Submitted October 14, 1993, at Marquette. Decided January 7, 1994; approved for publication June 23, 1994, at 9:10 A.M. Leave to appeal denied, 447 Mich —.

Pamela K. and Brian H. Williams brought an action in the Court of Claims against the Department of Transportation and an action in the Mackinac Circuit Court against Sally Schroeder, seeking damages for injuries suffered by Pamela while she was the passenger in an automobile driven by Schroeder that skided and rolled over as a result of hitting a patch of ice on a highway overpass. The plaintiffs alleged that the Department of Transportation was aware of the icy condition, but did nothing about it. The actions were consolidated in the circuit court. The court, Nicholas J. Lambros, J., granted summary disposition for the Department of Transportation with respect to the count alleging failure to remove the accumulation of ice, holding that the ice was a natural accumulation and that the department was immune from liability for failure to remove from the highway a natural accumulation of ice. The plaintiffs appealed.

The Court of Appeals *held:*

A government agency that fails to remove a natural accumulation of ice and snow from a public highway is not negligent and is not liable for injuries resulting from the accumulation, even if the agency had actual or constructive notice of the ice and snow. Accordingly, because there is no dispute concerning the fact that the ice on the overpass was a natural accumulation, the court properly granted summary disposition for the Department of Transportation.

Affirmed.

Dettmer, Thompson & Parsons, P.C. (by *Daniel P. O'Neil*), for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Brenda E. Turner,* Assistant in Charge, and *John P. Mack,* Assistant Attorney General, for the defendant.

Before: SAWYER, P.J., and GRIFFIN and R. M. PAJTAS,* JJ.

PER CURIAM. Plaintiffs appeal as of right from the circuit court's order granting partial summary disposition in favor of defendant, the Department of Transportation (DOT), and dismissing count one of their complaint. We affirm.

On the morning of October 12, 1988, a DOT repair crew was working on a stretch of U.S. Highway 2 (US-2) in Mackinac County, just east of the Gould City overpass. When the crew arrived at 7:00 A.M., the temperature was below freezing and the road surface was dry. Two crew members, Ronald Clark and Roger Shoemaker, drove over the bridge to set up safety cones on the west side of the overpass. During their return to the work site, the vehicle in which they were traveling began to slide, but did not go out of control. Clark informed the foreman that the bridge deck was icy. The foreman declined Clark's suggestion to request salting of the bridge deck. The foreman did not recall this conversation with Clark.

At approximately 8:15 A.M., plaintiff Pamela Williams was traveling west on US-2 in a vehicle driven by Sally Schroeder. As the vehicle crossed the overpass, Schroeder lost control, and the vehicle slid and rolled over. Pamela Williams sustained a closed head injury, despite the fact she was wearing a seatbelt. After the accident, the foreman ordered one of the crew members to obtain salt from the maintenance garage.

On September 27, 1990, plaintiffs filed suit against Schroeder in the circuit court and against the DOT in the Court of Claims. Plaintiffs' cause of action against the DOT was based upon the highway exception to governmental immunity, MCL 691.1402; MSA 3.996(102). Plaintiffs claimed that

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

the DOT failed to maintain the highway in a condition that was reasonably safe and fit for public travel. On April 2, 1991, Court of Claims Judge James R. Giddings ordered consolidation of the cases in the circuit court.

On May 7, 1992, the DOT filed a motion for partial summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing, in part, that it had no duty to remove the natural accumulation of ice and snow from the roadway. Plaintiffs responded that the natural accumulation doctrine did not apply because the DOT had actual knowledge of the icy condition and failed to remedy it. The trial court held that the ice resulted from natural accumulation and that the DOT was immune from liability for failing to remove the accumulation. Afterward, the parties stipulated dismissal of plaintiffs' remaining counts.

A governmental agency's failure to remove the natural accumulation of ice and snow on a public highway does not signal negligence of that public authority. *Reese v Wayne Co,* 193 Mich App 215, 217; 483 NW2d 671 (1992); *Stord v Dep't of Transportation,* 186 Mich App 693, 694; 465 NW2d 54 (1991); *Sweetman v State Hwy Dep't,* 137 Mich App 14, 22; 357 NW2d 783 (1984). However, if the ice on the roadway was the result of unnatural accumulation, the agency may be liable. *Id.*

We decline to modify the natural accumulation doctrine where it appears that the governmental agency has actual knowledge of an isolated dangerous icy condition and allegedly had the ability to remedy it. The doctrine applies regardless of whether the governmental agency has actual or constructive notice of ice and snow. Because there was no dispute that the ice naturally accumulated on the road, the trial court did not err in summarily dismissing count one of plaintiffs' complaint.

Affirmed.

PARAGON PROPERTIES COMPANY v CITY OF NOVI

Docket No. 136645. Submitted October 6, 1993, at Detroit. Decided April 7, 1994; approved for publication June 23, 1994, at 9:15 A.M. Leave to appeal sought.

Paragon Properties Company brought an action in the Oakland Circuit Court against the City of Novi, seeking damages for the alleged unconstitutional taking of real property resulting from the defendant's refusal to rezone the plaintiff's property from use for single-family dwellings to use for a mobile-home park. The defendant moved for summary disposition, arguing that the claim was not ripe for adjudication in the absence of a request by the plaintiff for a zoning variance and a final decision thereon by the zoning board of appeals and in the absence of an action by the plaintiff for inverse condemnation. The plaintiff argued that the defendant had waived the issue of finality by failing to raise it as an affirmative defense in its first responsive pleading. The court, John N. O'Brien, J., denied the motion and, after a bench trial, entered a judgment and award of damages for the plaintiff. The defendant appealed, and the plaintiff cross appealed.

The Court of Appeals *held:*

The doctrine of finality requires a property owner to obtain a final decision from the governmental agency alleged to have taken the property unconstitutionally and also to attempt to obtain just compensation through inverse condemnation before bringing an action alleging an unconstitutional taking. Because the issue of finality is relevant to subject-matter jurisdiction, it need not be raised as an affirmative defense.

Reversed.

Hyman & Lippitt (by *Norman L. Lippitt* and *H. Joel Newman*), for the plaintiff.

Fried & Levitt, P.C. (by *Dennis Watson*), and *Cummings, McClorey, Davis & Acho, P.C.* (by *Stuart Trager* and *Gail P. Massad*), for the defendant.

Before: TAYLOR, P.J., and HOOD and B. A. JASPER,* JJ.

PER CURIAM. In 1980, plaintiff Paragon Properties Company bought property located in the City of Novi that was zoned for single-family residential use. In 1984, Paragon requested that Novi rezone it for a mobile-home park, but Novi declined to rezone the property. After a first lawsuit was dismissed upon the parties' stipulation, Paragon recommenced its suit against Novi in June 1989. Paragon's claim was that Novi had effected an unconstitutional taking of Paragon's property. Novi moved for partial summary disposition on the ground that Paragon's claim was not ripe for adjudication because no final decision had been made, i.e., it was impossible to say there had been a taking because Paragon neither had sought a variance from the zoning board of appeals nor had exhausted its state remedies by making an inverse condemnation claim. Paragon, in turn, argued that Novi's denial of its rezoning application constituted a final decision from which it was entitled to seek damages, and asserted that Novi was barred from asserting ripeness because it had failed to raise it as an affirmative defense in its first responsive pleading as required by MCR 2.111(F)(3). After a hearing, the trial court agreed with Paragon and denied Novi partial summary disposition.

Novi's application to this Court for leave to appeal the trial court's ruling was denied, and after Novi was allowed to file its affirmative defenses, a bench trial was held in July 1990. The thrust of Paragon's case was that it was not economically feasible to develop the property for single-family residences under the existing zoning

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

classification because the property lacks a sewer system and the soil does not percolate sufficiently to allow individual septic systems; the cost of installing a packaged water-treatment system could be borne if it was amortized over a great number of units, i.e., over a mobile-home park with 240 to 400 units, a cost that would be overwhelming if it was borne by a subdivision with 11 to 26 single-family residences. The trial court found that Paragon had been deprived of all reasonable use of the property and, therefore, the zoning classification was an unconstitutional taking of Paragon's property.

Accordingly, a judgment entered, enjoining Novi from enforcing the single-family residential zoning classification and awarding Paragon damages of $12,000 per acre plus interest from 1984, as well as attorney and witness fees. After Novi unsuccessfully moved for a new trial or judgment notwithstanding the verdict, it appealed to this Court from the judgment. Paragon cross appeals concerning the amount of damages. We reverse.

The dispositive issue is whether Novi's denial of Paragon's rezoning application constituted a final determination from which Paragon could seek redress in the circuit court. Of course, Paragon contends that Novi's denial was a final determination; Novi argues that Paragon was obliged to seek a zoning variance from the zoning board of appeals and to bring an inverse condemnation action before its constitutional claim was ripe. We agree with Novi.

Under Michigan law, the doctrine of finality requires a property owner to obtain a final decision from the governmental entity alleged to have unconstitutionally taken the property and also attempt to obtain just compensation through inverse condemnation. The purpose of the finality

requirement is to ensure that there actually was a taking. *Electro-Tech, Inc v H F Campbell Co,* 433 Mich 57, 61; 445 NW2d 61 (1989), cert den 493 US 1021 (1990); *Lake Angelo Associates v White Lake Twp,* 198 Mich App 65; 498 NW2d 1 (1993).

We also reject Paragon's contention that Novi waived the defense of finality because it failed to raise it as an affirmative defense in its first responsive pleading. Finality is relevant to subject-matter jurisdiction and thus need not be listed as an affirmative defense. *Campbell v St John Hosp,* 434 Mich 608, 616; 455 NW2d 695 (1990); *Grand Blanc Landfill, Inc v Swanson Environmental, Inc,* 200 Mich App 642, 646; 505 NW2d 46 (1993); *Pearson v Grand Blanc,* 961 F2d 1211, 1214-1215 (CA 6, 1992).

Finally, Paragon attempts to overcome the finality requirement by arguing that it would have been futile, as well as a measure taken in bad faith, to have sought a variance from the zoning board of appeals. We disagree, in light of the exceptional hardship exception that affords the zoning board of appeals the opportunity to grant the variance regardless of Paragon's ability to qualify otherwise.

Because we reverse the judgment on finality grounds, we do not reach or consider the other issues raised in this case by Novi in its direct appeal or Paragon in its cross appeal.

Reversed.

PEOPLE v F P BOOKS AND NEWS, INC

Docket No. 154779. Submitted December 7, 1993, at Detroit. Decided April 14, 1994; approved for publication June 23, 1994, at 9:20 A.M. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for consideration, 446 Mich 869.

F.P. Books and News, Inc., and others were charged in the 51st District Court with several counts of first-degree obscenity. The court, Robert Carr, J., dismissed the charges after finding the criminal obscenity act, MCL 752.361 *et seq.*; MSA 28.579(361) *et seq.*, unconstitutionally overbroad. The prosecution appealed, and the Oakland Circuit Court, Edward Sosnick, J., affirmed. The prosecution appealed by leave granted.

The Court of Appeals *held:*

The act was amended by 1992 PA 216 after the commission of the alleged offenses. Because this action was dismissed and was not pending on the effective date of the new law, March 31, 1993, it is impossible for the Court of Appeals to grant the prosecution a remedy in this case. An issue is moot when the occurrence of an event renders it impossible for the Court to fashion a remedy.

Affirmed.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Richard Thompson,* Prosecuting Attorney, *Michael J. Modelski,* Chief, Appellate Division, and *Richard H. Browne,* Assistant Prosecuting Attorney, for the people.

Carl L. Rubin, for the defendants.

Before: CAVANAGH, P.J., and BRENNAN, and R. A. BENSON,* JJ.

PER CURIAM. Defendants were charged with sev-

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

eral counts of first-degree obscenity, MCL 752.365; MSA 28.579(365). The criminal charges, however, were dismissed subsequently by the district court on the basis of its finding that the Michigan criminal obscenity act, MCL 752.361 *et seq.*; MSA 28.579(361) *et seq.*, is unconstitutionally overbroad. The people appealed, and the district court's decision was affirmed by the Oakland Circuit Court. The people now appeal to this Court by leave granted. We affirm.

The sole issue raised by the people on appeal is whether the Michigan obscenity act is constitutionally valid and enforceable. The people contend that the act is constitutional and, consequently, request that this Court remand this case for reinstatement of the first-degree obscenity charges. At the time of the alleged offenses, MCL 752.365; MSA 28.579(365) stated in pertinent part:

> A person is guilty of obscenity in the first degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, any obscene material if dissemination of obscene material is a predominant and regular part of the person's business at a particular theater, store, warehouse, or other establishment and if obscene materials are a principal or substantial part of the stock in trade at that theater, store, warehouse, or other establishment.

"Knowledge of content and character" was defined in pertinent part as:

> general knowledge or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, of the nature and character of the material involved. A person has such knowledge when he or she knows or is aware that the material contains, depicts, or describes sexual conduct whether or not such person has precise

knowledge of the specific contents of the material. [MCL 752.362(3); MSA 28.579(362)(3).]

These particular statutory provisions, however, have been amended by the Legislature.[1] Currently, a person is guilty of obscenity only when, "knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, any obscene material." MCL 752.365(1); MSA 28.579(365)(1). To know the content and character of the material for purposes of the current obscenity act means simply to have "general knowledge of the nature and character of the material involved." MCL 752.362(3); MSA 28.579(362)(3). An issue is moot when the occurrence of an event renders it impossible for the court to fashion a remedy. *People v Wershe,* 166 Mich App 602; 421 NW2d 255 (1988); *Crawford Co v Secretary of State,* 160 Mich App 88, 93; 408 NW2d 112 (1987). It would now be impossible for this Court to grant the people a remedy in this case because this particular action was dismissed and was not pending on the effective date of the new law. *People v Dalby,* 181 Mich App 673; 451 NW2d 201 (1989); *People v Gravedoni,* 172 Mich App 195, 197-198; 431 NW2d 221 (1988).

Affirmed.

[1] 1992 PA 216, § 1, effective March 31, 1993.

PEOPLE v MANSOUR

Docket No. 153468. Submitted December 8, 1993, at Detroit. Decided April 6, 1994; approved for publication June 23, 1994, at 9:25 A.M.

Athir Mansour was charged in the 36th District Court with second-degree obscenity, MCL 752.366; MSA 28.579(366). The district court, Chris E. Stith, J., dismissed the charge, holding that the obscenity statute was unconstitutional because of overbreadth. The Recorder's Court of Detroit, Dalton A. Roberson, 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:*

Because the second-degree obscenity statute has been repealed by the Legislature, and, thus, it is impossible for the Court of Appeals to fashion a remedy for the prosecution, the issue raised in this appeal is moot.

Affirmed.

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 A. Napp,* Assistant Prosecuting Attorney, for the people.

Rubin & Rubin (by *Carl L. Rubin*), for the defendant.

Before: CAVANAGH, P.J., and BRENNAN, and R. A. BENSON,* JJ.

PER CURIAM. Defendant, Athir Mansour, was charged with second-degree obscenity, MCL

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

752.366; MSA 28.579(366). Before trial, defendant filed a motion to dismiss based upon the constitutionality of the Michigan criminal obscenity statute. A hearing concerning defendant's motion to dismiss subsequently was held, and the trial court entered an order of dismissal, finding that the statute was unconstitutional. The prosecution appeals by leave granted, and we affirm.

The prosecution's sole claim on appeal is that the trial court erred in dismissing the charge of second-degree obscenity. The prosecution contends that the statute is constitutional and, consequently, requests that this Court allow this case to proceed on its merits. MCL 752.366; MSA 28.579(366) specifically provides in pertinent part:

> (1) A person is guilty of obscenity in the second degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, to the public any obscene material.

This particular statutory provision, however, has been repealed by the Legislature.[1] An issue is moot when the occurrence of an event renders it impossible for the court to fashion a remedy. *People v Wershe,* 166 Mich App 602; 421 NW2d 255 (1988); *Crawford Co v Secretary of State,* 160 Mich App 88, 93; 408 NW2d 112 (1987). Because it would now be impossible for this Court to grant the prosecution a remedy in this case, we find that this issue is moot.

Affirmed.

---

[1] 1992 PA 216, § 2 effective March 31, 1993.

STEHLIK v JOHNSON (ON REHEARING)

Docket No. 153523. Submitted June 4, 1993, at Detroit. Decided March 7, 1994, at 9:25 a.m. Submitted on rehearing April 19, 1994. Decided on rehearing July 5, 1994, at 9:00 A.M. Leave to appeal sought.

Earl and Betty Stehlik brought an action in the Wayne Circuit Court against Andrew F. Johnson and Papoos Electric, Inc., seeking damages arising out of the injuries suffered by Earl Stehlik, a Detroit police officer, when the motorcycle he was riding collided with a vehicle owned by Papoos and driven by Johnson. The accident occurred as Stehlik returned from the 36th District Court, where he had appeared as part of his duties as a police officer, to his assigned precinct, where he was to undertake traffic patrol. The court, John H. Gillis, Jr., J., granted summary disposition for the defendants, ruling that the action was barred by the so-called fireman's rule. The plaintiffs appealed. The Court of Appeals, MURPHY and JANSEN, JJ. (WEAVER, P.J., dissenting), reversed, holding that the fireman's rule was not applicable, because the injury arose neither from the negligence that created the officer's presence nor from the performance of a police function. 204 Mich App 53 (1994). The defendants moved for a rehearing, which was granted.

On rehearing, the Court of Appeals *held:*

The fireman's rule bars recovery by a policeman for those injuries suffered by the officer as a result of the negligence causing the officer's presence or for those injuries stemming from the normal risks of the officer's profession. Because the officer's deposition testimony establishes that, at the time of the accident, he was in his assigned patrol area, and thus could be considered to be on duty, and because a traffic accident is an inherent risk associated with traffic enforcement, his injuries arose out of the normal risks of his duties as a traffic enforcement officer. Accordingly, the fireman's rule is applicable under these circumstances, and the trial court did not err in granting summary disposition for the defendants.

Affirmed.

MURPHY, J., dissenting, stated that the trial court erred in granting summary disposition for the defendants under these circumstances, because the injury did not occur as a result of

the officer's performance of a police function and, even if the officer was engaged in a police function at the time of the accident, this case does not present the type of risk contemplated by the fireman's rule.

Chambers Steiner (by *Michelle J. Harrison*), for the plaintiffs.

Grier & Copeland, P.C. (by *Benjamin N. Grier*), for the defendants.

ON REHEARING

Before: WEAVER, P.J., and MURPHY and JANSEN, JJ.

JANSEN, J. This case is before us on rehearing. We originally reversed the circuit court's order granting defendants' motion for summary disposition. *Stehlik v Johnson,* 204 Mich App 53; 514 NW2d 508 (1994) (WEAVER, P.J., dissenting). Defendants argue in their motion for rehearing that our original opinion, in considering the circumstances of this case, applied the fireman's rule too narrowly. Upon further review, we affirm the trial court's grant of summary disposition.

Plaintiff Earl Stehlik, a Detroit police officer, was injured in a traffic accident on August 2, 1990, when the police department motorcycle he was riding collided with a van owned by defendant Papoos Electric, Inc., and driven by defendant Andrew Johnson. The accident occurred at approximately 3:00 P.M. on westbound Holbrook near the intersection of Delmar in the City of Detroit. On the day of the accident, plaintiff appeared in the 36th District Court at 9:00 A.M., as part of his police duties, and remained there until the afternoon. Plaintiff stated that his normal shift hours were from 11:00 A.M. to 7:00 P.M., but contends

that he was "en route" to his patrol area and was not on patrol at the time of the accident. Upon further review, we now find that plaintiff's contention in this regard is not supported by the facts and that the fireman's rule precludes his claim.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that the fireman's rule barred plaintiffs' claims of negligence and loss of consortium. The trial court agreed and granted the motion for summary disposition. We now affirm.

Summary disposition is reviewed de novo, because this Court must review the record to determine whether the moving party was entitled to judgment as a matter of law. *Michigan Mutual Ins Co v Dowell,* 204 Mich App 81, 86; 514 NW2d 185 (1994). MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts. Only if the allegations fail to state a legal claim is summary disposition pursuant to MCR 2.116(C)(8) valid. *Radtke v Everett,* 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. *Radtke,* p 374.

The fireman's rule is a common-law doctrine

that prohibits police officers and fire fighters from recovering damages from a private party for negligence in the creation of the reason for the safety officer's presence. *Kreski v Modern Wholesale Electric Supply Co,* 429 Mich 347, 358; 415 NW2d 178 (1987). The Supreme Court adopted the rule on the basis of public policy considerations. *Id.,* p 370. In so doing, the Supreme Court stated that the foundational policy rationale is that the purpose of the public safety profession is to confront danger and the public should not be liable for damages for injuries occurring in the performance of the function that police officers and fire fighters are intended to fulfill. *Id.,* p 368. Therefore, as a matter of public policy, police officers or fire fighters may not recover for injuries created by the negligence that caused their presence on the premises in their professional capacities. The scope of this rule includes those risks inherent in fulfilling the police or fire-fighting duties. *Id.,* p 372.

In *Woods v City of Warren,* 439 Mich 186, 190; 482 NW2d 696 (1992), the Supreme Court held that the fireman's rule prevents police officers and fire fighters from recovering for injuries sustained in the course of duty. The Court went on to state that the analytical focus must be on whether the injury stems directly from an officer's police functions. If the circumstances indicate that it does, then the fireman's rule applies. If the circumstances indicate otherwise, then it likely does not apply. *Id.,* p 193. The Court in *Woods* summarized the fireman's rule as barring recovery for two types of injury: those deriving from the negligence causing the safety officer's presence and those stemming from the normal risks of the safety officer's profession. *Id.,* p 196.

In this case, we believe that the second prong of the fireman's rule bars plaintiff's claim. Plaintiff

was assigned to traffic enforcement in the Thirteenth Precinct. His duties were to patrol the entire Thirteenth Precinct area for traffic violations. His duties also included appearing in the 36th District Court on alternate Thursdays regarding citations he issued. He rode the only police motorcycle in his precinct. At the time of the accident, he had left the 36th District Court, and he stated at his deposition that it was not necessary for him to check into the police station. Plaintiff was in the Thirteenth Precinct, the area that he patrolled, at the time of the accident. Thus, the totality of the circumstances suggest, contrary to plaintiff's claim, that he was on duty and in his patrol area at the time of the accident. Plaintiff could not have been en route to his patrol area when he was in the very precinct to which he was assigned.

We find that the risk of a traffic accident is inherent in fulfilling the duties of a police officer, such as plaintiff, assigned to traffic enforcement. Therefore, the circumstances of this case indicate that plaintiff's injury stemmed directly from his duty as a traffic enforcement officer. *Id.,* pp 193-194. Plaintiff's claim is barred by the fireman's rule.

We recognize that the scope of the rule does not include all risks encountered by a safety officer, nor is the rule a license to act without regard for the well-being of the safety officer. *Kreski, supra,* p 372. The circumstances of this case, however, are that plaintiff was a traffic enforcement officer assigned to patrol the area in which he was hit and the accident occurred during his normal job hours. While it is true that this case does not involve injury during a high-speed chase (a classic police function), thereby invoking application of the fireman's rule, *Woods, supra,* p 192; *McGhee v Dep't*

of State Police, 184 Mich App 484, 486-487; 459 NW2d 67 (1990), the starting point is to consider the kind of duty involved, and it was plaintiff's duty to patrol the Thirteenth Precinct on his police motorcycle for traffic violations. Therefore, although a safety officer may be able to recover for injuries suffered while merely on patrol under other circumstances, see *Woods, supra,* p 192, the circumstances of this case indicate that the injury stemmed directly from this officer's police functions. *Id.,* p 193.

Accordingly, the fireman's rule applies to the circumstances of this case where plaintiff, a traffic enforcement officer while on his police motorcycle during his normal work hours, was involved in an automobile accident in the precinct in which he patrolled. The risk of being involved in a traffic accident is a risk inherent in the duties of a traffic enforcement police officer. The trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

WEAVER, P.J., concurred.

MURPHY, J. *(dissenting).* I would reverse the circuit court's order granting defendants' motion for summary disposition for the reasons stated in the previous majority opinion in this case. *Stehlik v Johnson,* 204 Mich App 53; 514 NW2d 508 (1994). I further question whether driving upon the public highway in a normal fashion, even if it could be concluded that the officer was on patrol, is the type of risk contemplated by the fireman's rule so as to bar recovery for a police officer injured by a negligent driver. See *Woods v City of Warren,* 439 Mich 186, 192; 482 NW2d 696 (1992).

PEOPLE v BORDEAU

Docket No. 163419. Submitted May 16, 1994, at Grand Rapids. Decided July 5, 1994, at 9:05 A.M.

Wayne K. Bordeau pleaded guilty in the Kent Circuit Court, Robert A. Benson, J., of breaking and entering a motor vehicle with the intent to steal property valued over $5 and of being a second-time habitual offender. The defendant was sentenced to 1½ to 5 years of imprisonment, and he appealed.

The Court of Appeals *held:*

1. The trial court did not clearly err in denying the defendant's motion to suppress evidence obtained by the police in an investigatory stop of an automobile in which the defendant was a passenger. Under the facts of this case, the officer who stopped the automobile had a reasonable, articulable, and particular suspicion that the automobile was the getaway vehicle of the perpetrators of the breaking and entering.

2. The sentence imposed was proportionate to the offense and the offender.

Affirmed.

William A. Forsyth, Prosecuting Attorney, and *Melody R. Leavenworth,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *James Krogsrud*), for the defendant on appeal.

Before: DOCTOROFF, C.J., and TAYLOR and M. G. HARRISON,* JJ.

TAYLOR, J. Defendant pleaded guilty of breaking and entering a motor vehicle with the intent to steal property valued over $5, MCL 750.356a; MSA 28.588(1), and habitual offender-second offense, MCL 769.10; MSA 28.1082. A condition of defen-

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

dant's plea bargain was that he be allowed to appeal the denial of his motion to suppress the evidence. Defendant argues that the evidence was obtained illegally because the police did not have an individualized and objective basis for the investigative stop. Alternatively, defendant argues that his sentence of 1½ to 5 years is disproportionate. We affirm.

At approximately 4:30 A.M. on August 27, 1992, a witness phoned police to report three men breaking into a pickup truck across the street from her home on Curwood Street in Kentwood, Michigan. The witness stated that the men seemed to be taking things from the truck, that one of the men was carrying a large object, and that the men made several trips back and forth to the truck as if they were "going to a car or something." The police dispatcher put the report out over the radio and then called the witness back to ask if the suspects were still there. The witness said that they were, but that they were starting to head south on her street on foot. At that point, the witness testified, it started to rain.

Sergeant Hiram Collins of the Kentwood Police Department testified that when he heard the radio report he was very close to the location of the reported crime and that it took him only a minute to get to Curwood Street. He parked his car at the corner of Curwood and Pickett, the nearest cross street south of the witness' address. Sergeant Collins was aware that another police car had arrived at a location to the north of the witness' address and that nobody had left the area in that direction.

Within one minute of the time he arrived on Curwood Street, Sergeant Collins observed a car heading south on Curwood from the same area in which the reported crime had occurred. Although

he knew that the witness had not seen the three men get into a car, he knew from experience that use of a getaway vehicle "was consistent with what these guys do when they're going to rip off a car. They park a car down the road. . . ." Sergeant Collins testified that he had dealt with twenty or thirty similar crimes that summer alone and that he had been a Kentwood police officer for twenty-two years. He also testified that the car he observed heading south on Curwood was the only car on the street at that time.

Sergeant Collins observed two men in the front seat of the car. He knew that the witness had reported seeing three men, but it was dark and the back windows of the car were smoked glass, preventing him from seeing if there were any passengers in the back seat. He pulled the car over and, subsequently, stereo equipment was observed in the back, which the owner of the pickup truck later identified as his property. Defendant was a passenger in the car.

Defendant was charged with breaking and entering a motor vehicle with the intent to steal property valued at over $5, MCL 750.356a; MSA 28.588(1), and habitual offender-third offense, MCL 769.11; MSA 28.1083. In exchange for the prosecutor's agreement not to bring an additional charge of breaking and entering a dwelling, and to dismiss the habitual offender-third offense information against him, defendant pleaded guilty of breaking and entering a motor vehicle and habitual offender-second offense, MCL 769.10; MSA 28.1082.

Defendant also filed a motion to suppress the evidence against him, which was denied. An additional condition of defendant's plea bargain was that he would be allowed to appeal this denial of his motion to suppress. It is the denial of this

motion that is the precise legal issue presented for review.

"This Court will not disturb a trial court's ruling at a suppression hearing unless that ruling is found to be clearly erroneous." *People v Burrell,* 417 Mich 439, 448; 339 NW2d 403 (1983). However, the underlying issue before us is "the strict application of a constitutional standard to uncontested facts. Application of constitutional standards by the trial court is not entitled to the same deference as factual findings." *People v Nelson,* 443 Mich 626, 631, n 7; 505 NW2d 266 (1993).

The requirements of a constitutionally proper investigative stop are:

> The totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, must yield a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity. That suspicion must be reasonable and articulable . . . . [*Nelson* at 632 (citations omitted).]
>
> * * *
>
> The [law enforcement officer's assessment of the circumstances] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. [*United States v Cortez,* 449 US 411, 418; 101 S Ct 690; 66 L Ed 2d 621 (1981).]

In the instant case, Sergeant Collins testified that within a minute of receiving the radio report he was at a location where he would see anyone leaving the scene of the crime in the direction testified to by the witness; that in his experience these types of thieves have a getaway car in the

area; that there were no cars on the road other than the one that he stopped to investigate in which defendant was a passenger; and that, in the totality of these circumstances, he had a particular suspicion that the vehicle and its passengers were involved in the reported crime.

> There is no bright line rule to test whether the suspicion giving rise to an investigatory stop was reasonable, articulable, and particular. Common sense and everyday life experiences predominate over uncompromising standards. Therefore, deference should be given to a law enforcement officer of twenty-[two] years. . . . In analyzing the totality of the circumstances, the law enforcement officers are permitted, if not required, to consider "the modes or patterns of operation of certain kinds of lawbreakers. From [this] data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person." [*Nelson, supra* at 635-636 (citations omitted).]

The suspicion which led Sergeant Collins to stop defendant's vehicle was reasonable in the context of the circumstances and the sergeant's experience of twenty-two years. It was particular in that the vehicle was coming from the area of the reported crime, in the direction reported by the witness, and was the only vehicle on the road in that area.

Defendant's reliance on *People v Coscarelli,* 196 Mich App 724; 493 NW2d 525 (1992), is unavailing. In *Coscarelli,* this Court held that the trial court's denial of the defendant's motion to suppress was clearly erroneous because "the officers candidly admitted that they had no probable cause to believe that defendant was engaged in criminal activity." *Id.* at 727. In the case before us, Sergeant Collins had a reasonable and particularized suspicion directed at the vehicle in which defendant

was a passenger. We also note that *Coscarelli* was decided without the benefit of our Supreme Court's meticulous explication in *Nelson, supra,* of the proper analysis in such cases. The trial court's denial of defendant's motion to suppress was not clearly erroneous.

"Although the sentencing guidelines do not apply to an habitual offender's sentence, the principle of proportionality is still applied to the review of the defendant's sentence." *People v Derbeck,* 202 Mich App 443, 446; 509 NW2d 534 (1993). However, the guidelines are a tool to assist the determination whether defendant's sentence as an habitual offender is proportionate. The habitual offender statute under which defendant was sentenced allows for a maximum term not more than 1½ times the longest term prescribed for a first conviction of the underlying offense. The guidelines range for breaking and entering a motor vehicle with the intent to steal property valued over $5 is 0 to 12 months. Defendant's minimum sentence of 18 months is precisely 1½ times the longest term prescribed for a first conviction of that offense. This is "an indication that defendant's sentence is proportionate." *People v Williams,* 191 Mich App 685, 687; 479 NW2d 36 (1991).

The sentencing judge stated on the record that he had spent extra time considering the appropriate sentence. He cited defendant's juvenile offenses and his previous felony offenses as an adult, one of which occurred while defendant was on probation. The judge did not abuse his discretion. The sentence is proportionate to the offense and the offender. *People v Milbourn,* 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed.

ZULCOSKY v FARM BUREAU LIFE INSURANCE COMPANY OF MICHIGAN

Docket No. 146189. Submitted April 12, 1994, at Grand Rapids. Decided July 5, 1994, at 9:10 A.M. Leave to appeal sought.

Jean Zulcosky brought an action in the Wayne Circuit Court against Farm Bureau Life Insurance Company of Michigan, seeking the proceeds of a life insurance policy that named her as the beneficiary. The insurer moved for summary disposition, alleging that the deceased insured misrepresented a material fact concerning his driving record in his application for the insurance and that recovery was barred because the insurance policy would not have been issued had such material misrepresentation not been made. The court, Susan D. Borman, J., granted the defendant's motion. The plaintiff appealed.

The Court of Appeals *held:*

Summary disposition was not appropriate because a question of fact existed regarding whether the defendant would have refused to issue the policy had it known the truth concerning the insured's driving record. The insurer bears the burden of proving that the insured's misrepresentation was material, i.e., that it would not have issued the policy had the insured's true driving record been known.

Reversed and remanded.

INSURANCE — RESCISSION OF CONTRACT — MATERIAL MISREPRESENTATIONS — BURDEN OF PROOF.

The insurer bears the burden of proving materiality in determining whether a misrepresentation in an application for insurance was material and, therefore, whether rescission of an insurance contract is allowed on that basis; evidence of the insurer's practices with regard to the acceptance or rejection of similar risks is admissible; a material misrepresentation is one that, if known, would have led the insurer to refuse to make the contract (MCL 500.2218[3]; MSA 24.12218[3]).

REFERENCES

Am Jur 2d, Insurance §§ 1011-1014.

See ALR Index under Insurance and Insurance Companies.

Honigman Miller Schwartz & Cohn (by *Norman C. Ankers* and *Daniel G. Helton*), for the plaintiff.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. (by *Frederick B. Plumb* and *Robert D. Goldstein*), for the defendant.

Before: MICHAEL J. KELLY, P.J., and HOOD and S. B. MILLER,* JJ.

HOOD, J. Plaintiff asserted a claim for proceeds as beneficiary under a life insurance policy. Defendant responded that the deceased insured misrepresented a material fact concerning his driving record in the application for the policy and, thus, recovery is barred. The trial court granted defendant's motion for summary disposition.[1] We reverse.

The relevant facts are as follows.

Plaintiff's son, Mark, applied for life insurance with defendant in 1988. The application was completed by defendant's agent-employee, who checked a box indicating that Mark had not received any traffic tickets in the preceding five years. (For purposes of this discussion, we will assume that the agent correctly transcribed Mark's response to the question.) In fact, Mark had received several such citations. Mark's signature appeared on the life insurance application below a preprinted statement declaring that he had read the questions and answers in the application, and that they were complete and true. Mark made timely premium payments until he was shot to death in January of

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

[1] It is not clear from the records and briefs whether defendant's motion was under MCR 2.116(C)(8) or MCR 2.116(C)(10). However, because both parties and the court referred to evidence beyond the pleadings and whether there was a dispute of material fact, we treat it as a motion within MCR 2.116(C)(10).

1990. Plaintiff applied for benefits under the policy and defendant denied coverage after an investigation revealed that Mark had several alcohol-related traffic citations.

Plaintiff initiated the instant action in the Wayne Circuit Court. Defendant moved for summary disposition, claiming that Mark made a material misrepresentation regarding his driving record in completing the application for life insurance. According to defendant, the policy would not have been issued had it known that Mark had several alcohol-related traffic offenses within the five-year period preceding his completion of the application. Plaintiff responded that summary disposition was inappropriate because a number of triable issues of fact existed. The trial court granted defendant's motion for summary disposition. Plaintiff's subsequent motions for rehearing and peremptory reversal were denied.

Plaintiff raises several arguments to support her contention that the trial court improperly granted defendant's motion for summary disposition. We find persuasive plaintiff's argument that a question of fact existed regarding whether defendant would have refused to issue the policy had it known the truth concerning Mark's driving record.

In Michigan, a misrepresentation must be "material" in order to allow rescission of an insurance contract. MCL 500.2218(1); MSA 24.12218(1); *In re Certified Question, Wickersham v John Hancock Mutual Life Ins Co,* 413 Mich 57, 65; 318 NW2d 456 (1982). In determining the issue of materiality, evidence of the insurer's practices with regard to the acceptance or rejection of similar risks is admissible. MCL 500.2218(3); MSA 24.12218(3). The insurer bears the burden of proving materiality. *Szlapa v Nat'l Travelers Life Co,* 62 Mich App 320, 325; 233 NW2d 270 (1975).

To support its motion for summary disposition, defendant presented an affidavit from its underwriter that stated that had Mark's driving record been accurately related, the policy of life insurance would not have been issued. Defendant also presented an affidavit from the head of its underwriting department that stated that it was defendant's policy at the time of Mark's application to decline insurance to any applicant with two or more alcohol-related driving violations. (Mark had received two careless driving tickets and three convictions for driving under the influence of intoxicating liquor within the *five* years preceding his application.)

To rebut this claim, plaintiff introduced a copy of defendant's "Driving Guidelines," which were an integral part of its underwriting manual at the time Mark submitted his application. These guidelines seek to divide applicants into different groups according to the amount of driving violation "points" accumulated and the type of insurance policy sought. Notably, the guidelines take into consideration only those driving violations less than *three* years old and assign each possible type of violation a certain number of points.

Applying this formula, Mark would have been assessed thirteen points for driving violations received within the *three*-year period immediately preceding completion of the application. The guidelines do not state that a person with thirteen points would automatically be excluded from consideration for life insurance. In fact, Mark's point total did not even place him in the highest category, but, rather, the second highest. Admittedly, given his point total, Mark would have been subject to a higher premium rate than he actually paid. Nonetheless, the fact remains that applicants with as many as sixteen points were eligible for

life insurance coverage pursuant to the guidelines utilized by defendant.

More significantly, the guidelines do not support defendant's stated "policy" position that an applicant with two or more alcohol-related driving violations would automatically be excluded from consideration for life insurance. To the contrary, the guidelines appear to be comprehensive, quite mechanical in application, and seem to leave no room for "individual considerations."

Thus, the question remains whether the misrepresentation was "material." In *Keys v Pace,* 358 Mich 74, 82; 99 NW2d 547 (1959), the Supreme Court, quoting 29 Am Jur, Insurance, § 525, stated:

> The generally accepted test for determining the materiality of a fact or matter as to which a representation is made to the insurer by an applicant for insurance is to be found in the answer to the question whether reasonably careful and intelligent underwriters would have regarded the fact or matter, communicated at the time of effecting the insurance, as *substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium.*

In subsequent cases, regarding the question of "materiality," the courts of this state have not focused on whether the insurer would have been entitled to charge an increased premium but for the misrepresentation. Instead, the inquiry has been limited to whether the insurer would have rejected the application altogether had the true facts been known. See *Wickersham, supra; Clark v John Hancock Mutual Life Ins Co,* 180 Mich App 695, 699-700; 447 NW2d 783 (1989). In drafting § 2218(1), the Legislature specifically defined "material" misrepresentations as those misrepresenta-

tions that, if known, would have led to a refusal by the insurer to make the contract. Therefore, we are inclined to follow the recent line of cases that limit the analysis on the issue of "materiality" to whether the insurer would have refused to make the contract had it known of the misrepresentation.

Defendant supported its motion for summary disposition by averring that it would not have issued the policy had it known the truth concerning Mark's driving record. In this regard, defendant made an initial showing that the misrepresentation was "material." However, plaintiff presented documentary evidence in the form of defendant's "Driving Guidelines" in an effort to establish that defendant would not have refused to issue the policy had it known the truth about Mark's driving record. Again, the insurer bears the burden of proving materiality. *Szlapa, supra.*

Clearly, plaintiff presented relevant documentary evidence that squarely addressed the issue whether defendant would have accepted or rejected Mark as a risk. Thus, despite defendant's assertions to the contrary, a disputed question of fact existed regarding whether it would have refused to issue the policy had it known the truth about Mark's driving record. Accordingly, summary disposition pursuant to MCR 2.116(C)(10) was inappropriate. *Paterek v 6600 Limited,* 186 Mich App 445, 447; 465 NW2d 342 (1990).

Having found error requiring reversal, it is unnecessary to review in detail the remaining arguments raised by plaintiff. Suffice it to say, we do not find error in the other portions of the trial court's ruling.

Reversed and remanded. We do not retain jurisdiction.

PINKA v PINKA

Docket No. 147519. Submitted January 18, 1994, at Lansing. Decided July 5, 1994, at 9:15 A.M. Leave to appeal sought.

Ugis Pinka was granted a judgment of divorce from Connie Pinka in the Oakland Circuit Court, Robert C. Anderson, J. The judgment provided that in full discharge of the plaintiff's obligation to provide for the support and maintenance of the defendant, the plaintiff would pay the defendant a certain sum each month until her death or remarriage or the expiration of four years, whichever occurred first. The judgment further provided that thereafter alimony for the defendant would be barred forever. Less than four years later, the defendant filed a motion seeking an extension and increase in alimony based upon a change of circumstances. The court granted the plaintiff's motion for summary disposition, finding the alimony order to be nonmodifiable. The defendant appealed.

The Court of Appeals *held:*

The language of the alimony award indicates an intent to make the award final. The parties intended to create alimony in gross, which is nonmodifiable.

Affirmed.

1. DIVORCE — ALIMONY — MODIFICATION.

The intent of the parties is the overriding concern in determining whether an award of alimony in a judgment of divorce was for periodic alimony or alimony in gross; the number and type of contingencies included in the award should be considered only as factors in determining intent.

2. DIVORCE — ALIMONY — JUDGMENTS — INTENT.

The parties' or the trial court's intent regarding whether the alimony provided in a judgment of divorce is in gross or periodic should be expressed clearly and unequivocally on the record and in the ultimate instrument that incorporates the alimony provision; where the parties agree to provide for alimony in gross, the payee should articulate clearly, through

REFERENCES

Am Jur 2d, Divorce and Separation §§ 635-637, 704.

See ALR Index under Alimony.

testimony or otherwise, that the payee understands that the alimony is in gross and therefore nonmodifiable; where the alimony is periodic, the payor should articulate clearly that the payor fully understands that a change in circumstances may cause the award to be modified.

Butzel Long (by *Edward D. Gold* and *Patricia L. Sadler*), for the plaintiff.

Schmidt, Isgrigg & McMillen (by *Phyllis C. McMillen*), for the defendant.

Before: DOCTOROFF, C.J., and MICHAEL J. KELLY and D. G. TYNER,* JJ.

DOCTOROFF, C.J. Defendant appeals an order of the circuit court granting plaintiff's motion for summary disposition. The sole issue on appeal is whether the alimony in the divorce settlement reached by the parties and relied upon by the circuit court in its judgment of divorce is nonmodifiable as alimony in gross. The circuit court concluded that it is. We affirm.

The judgment of divorce included the following alimony provision:

> In full discharge of the Husband's obligation to provide for the support and maintenance of the Defendant . . . the Plaintiff shall pay to the Defendant . . . the sum of $1,083.33 every month commencing on September 11, 1987, and continuing until the death or remarriage of the Defendant or the expiration of four years, whichever first occurs. Thereafter alimony for the Defendant shall be forever barred. Alimony payments shall be excludable to Plaintiff and includable by Defendant in their respective income tax returns.

At the time of the divorce, December 23, 1987, the

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

parties had been married for twenty-one years. Defendant was fifty-one years old. During the marriage defendant worked only sporadically. After the divorce, she returned to college to obtain a master's degree and pursue a career in psychology. However, she suffered various health problems and was involved in an accident that required surgery. Her mental health also deteriorated after the divorce.

In January 1991, defendant filed a motion seeking an extension and increase in alimony based upon a change of circumstances. A hearing was held before a friend of the court referee, who recommended an extension of alimony, which plaintiff rejected. Plaintiff then moved for summary disposition, which the circuit court granted on the basis that the alimony order was nonmodifiable.

In determining whether an alimony agreement or order provides for periodic alimony, which is modifiable, MCL 552.28; MSA 25.106, or alimony in gross, which is nonmodifiable, *Tomblinson v Tomblinson,* 183 Mich App 589, 593; 455 NW2d 346 (1990), this Court generally construes the agreement to give effect to the parties' intent expressed in that agreement. *Id.*

In *Tomblinson, supra* at 594, this Court held that the alimony order was modifiable because the consent judgment of divorce provided that the alimony payments would continue until the wife's death or remarriage, the expiration of ten years, or "until the further Order of this Court." It was the inclusion of this final contingency that persuaded this Court to conclude that the parties intended the alimony to be periodic and, therefore, modifiable.

In this case, plaintiff argues that the absence of such language indicates an intent by both parties

to make the alimony nonmodifiable. While we cannot agree that the absence of a provision requires us to read in a provision to the contrary, we nevertheless arrive at plaintiff's conclusion for other reasons. The judgment of divorce provided, first, that plaintiff would provide the alimony payments "[i]n full discharge of [his] obligation to provide for the support and maintenance of the Defendant," and, second, that "[t]hereafter alimony for the Defendant shall be forever barred." Such language indicates an intent to make the alimony award final.

Defendant argues in response that the contingencies attached to plaintiff's duty to pay alimony —in this case, death or remarriage of defendant— are determinative of a finding of periodic, modifiable alimony. Defendant cites *Hall v Hall,* 157 Mich App 239, 242; 403 NW2d 530 (1987), for the proposition that such contingencies show that "the actual amount of the obligation was not specifically ascertainable and, therefore, the obligation itself cannot be considered alimony in gross." See also *Van Houten v Van Houten,* 159 Mich App 713, 717; 407 NW2d 69 (1987); *Couzens v Couzens,* 140 Mich App 423, 428; 364 NW2d 340 (1985); *Welch v Welch,* 112 Mich App 524, 526; 316 NW2d 258 (1982).

However, subsequent decisions of this Court have rejected such a bright-line approach. In *Turner v Turner,* 180 Mich App 170, 174; 446 NW2d 608 (1989), this Court held that the intent of the parties should be the overriding concern, while the number and type of contingencies should be considered only as factors in determining intent. Essentially, the *Turner* panel, which included a member of the *Hall* majority, rejected the majority opinion in *Hall* in favor of the concurring opinion. *Turner, supra* at 173-174, 175, n 1. The

Turner Court concluded that the contingencies of death and remarriage did not show an intent to create periodic alimony in that case. *Id.* at 175. See also *Blake v Blake,* 178 Mich App 315, 317-318; 443 NW2d 408 (1989); *Pierce v Pierce,* 166 Mich App 579, 582; 420 NW2d 855 (1988); *Macoit v Macoit,* 165 Mich App 390, 392-393; 418 NW2d 476 (1988).

This Court adopted the *Turner* approach in *Bonfiglio v Pring,* 202 Mich App 61; 507 NW2d 759 (1993), which we must follow pursuant to Administrative Order No. 1994-4. *Bonfiglio* concerned an alimony order very much like the one in this case —a series of payments over a set period of time, subject to early termination upon the death or remarriage of the recipient. The Court found the following factors determinative of the parties' intent to create alimony in gross: the specificity of the amount to be paid each month; the fact the purpose of the alimony was to provide the recipient support until she found gainful employment; and the fact the alimony award was not subject to further order of the court, as in *Tomblinson, supra.*

Because these same factors are present in this case, and because we see no other unusual circumstances to suggest otherwise, we conclude that the parties in this case intended to create alimony in gross. The trial court did not err in denying defendant's motion to modify the alimony award.

Having reached a resolution regarding the intent of the parties, we now express our conviction that it is a waste of precious judicial and client resources for the parties to leave to this Court the determination of the parties' intent regarding whether the alimony is in gross or periodic. In order to prevent this very type of protracted litigation, the parties' or the court's intent should be

clearly and unequivocally expressed upon the record and in the ultimate instrument that incorporates the alimony provision.

All too often, the parties involved have no idea what the differences are between alimony in gross and periodic alimony, much less how those intentions should be expressed in the judgment. Accordingly, it should be incumbent upon the bench and bar to make it crystal clear to the parties what it is they are agreeing to and what the implications of their acquiescence may be. In cases where the parties agree to provide for alimony in gross, the payee should clearly articulate, through testimony or otherwise, that the payee understands that the alimony is in gross and therefore nonmodifiable. In cases where the alimony is periodic, the payor should clearly articulate that the payor fully understands that a change in circumstances may cause the award to be modified.

It does not seem overly burdensome to request that the bench and bar conduct a full inquiry regarding the nature of the award at the time the parties express their agreement. That inquiry could easily be expressed at the time the judgment is entered, through affidavits filed with the judgment or, better yet, within the judgment itself. If the parties agree that the alimony is in gross, it would be prudent to use those exact words within the divorce judgment. If the parties agree that the alimony will be periodic, then that should be clearly articulated in the judgment. At a time when this Court and the trial courts of this state are feeling the heavy burdens of backlog, it is unfortunate that our dockets must become cluttered with litigation that could well have been averted had the parties and the trial court insisted upon clarity and simplicity.

We thus direct the bench and bar to make it absolutely clear in future cases of this nature that the alimony is in gross or periodic.

Affirmed.

FIRE INSURANCE EXCHANGE v DIEHL

Docket No. 147298. Submitted March 9, 1994, at Lansing. Decided July 5, 1994, at 9:20 A.M. Leave to appeal sought.

Fire Insurance Exchange, the homeowner's insurer of Clifford and Michelle Buckmaster and their minor son, brought an action in the Oakland Circuit Court against Mary A. Diehl and the Buckmasters, seeking a declaration that Fire Insurance Exchange had no duty to defend or provide liability coverage to the Buckmasters in a personal injury action by Diehl, individually and as next friend of her minor daughter, relating to two instances in which the Buckmaster boy, at age seven to nine years, asked the Diehl girl, at age four to six years, to perform a sexual act on him. The court, John N. O'Brien, J., granted summary disposition for Fire Insurance Exchange, ruling that, under a provision in the insurance policy excluding coverage for bodily injury or property damage resulting from an occurrence caused by an intentional act of an insured person where the results are reasonably foreseeable, there was no coverage for the Buckmasters. In making its ruling, the court assessed the foreseeability of bodily injury to the Diehl girl from the intentional acts of the Buckmaster boy from the standpoint of a reasonable adult rather than a child of age, ability, intelligence, and experience similar to that of the Buckmaster boy. Diehl appealed.

The Court of Appeals *held:*

The foreseeability of bodily injury to the Diehl girl resulting from the intentional sexual acts of the Buckmaster boy should have been determined by the trial court from the perspective of a child of age, ability, intelligence, and experience similar to that of the Buckmaster boy. When so assessed under the record in this case, there is no genuine issue of material fact that the Buckmaster boy did not foresee bodily injury to the Diehl girl. Accordingly, the intentional-acts exclusion of the Fire Insur-

REFERENCES

Am Jur 2d, Insurance § 708.

Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured. 31 ALR4th 957.

ance Exchange policy is inapplicable. Summary disposition for Fire Insurance Exchange must be reversed, and summary disposition for Diehl must be granted on remand.

Reversed and remanded.

INSURANCE — HOMEOWNER'S INSURANCE — INTENTIONAL-ACTS EXCLUSION — CHILDREN.

For purposes of a homeowner's insurance policy that excludes liability coverage for reasonably foreseeable bodily injury resulting from an occurrence caused by an intentional act of an insured person, the foreseeability of bodily injury to a child caused by an intentional sexual act by an insured child is to be determined from the standpoint of a child of age, ability, intelligence, and experience similar to that of the insured child.

Harvey, Kruse, Westen & Milan, P.C. (by *Michael F. Schmidt* and *Christine M. Hewlett*), for Fire Insurance Exchange.

Campbell, Keenan, Harry, Cooney & Karlstrom (by *C. Daniel Harry*), for Mary A. Diehl.

Before: HOOD, P.J., and NEFF and T. E. JACKSON,* JJ.

NEFF, J. This appeal involves an action for declaratory judgment brought by plaintiff, Fire Insurance Exchange (the insurer), to determine whether it had a duty to defend or provide coverage to its insureds, Clifford Buckmaster, Michelle Buckmaster, and their son (hereinafter referred to as the boy), in an underlying civil action brought by defendant, Mary Ann Diehl, individually and as next friend of her minor daughter. (The minor daughter hereinafter will be referred to as the girl). Diehl brought a counterclaim against the insurer, alleging breach of a third-party beneficiary contract and requesting imposition of sanctions and reasonable attorney fees. Diehl appeals as of right from an order of the circuit court

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

granting summary disposition in favor of the insurer. The Buckmasters are not parties to this appeal. We reverse and remand for entry of an order granting summary disposition in favor of Diehl.

I

In the underlying case against the Buckmasters, Diehl sought to recover for physical insult, bodily injury, and damages suffered by the girl as a result of two alleged sexual assaults committed by the boy. The alleged assaults involved the boy coercing or otherwise forcing the girl to engage in "oral sex."

The first alleged assault occurred in the summer of 1988 or the summer of 1989. However, the deposition testimony of Mary Ann Diehl suggests the possibility that the first assault may have occurred before or during June 1988. The girl began seeing a therapist in June 1988 because of behavioral changes. The second alleged assault occurred around July 1990. At the time of the first alleged assault, the boy was either seven or eight years old, and the girl was four or five years old. At the time of the second alleged assault, the boy was nine years old, and the girl was six years old.

The underlying complaint also alleges a count of negligent supervision against Michelle and Clifford Buckmaster based on their failure to prevent the alleged acts by not exercising reasonable parental authority over the boy.

The insurer filed a declaratory action, seeking a judgment that it had no duty to provide a defense or coverage to the Buckmasters for any of the allegations in the underlying complaint. The insurer claimed, inter alia, that the boy's conduct constituted intentional acts that are specifically

excluded under the language of the homeowner's policy issued to the Buckmasters.

After discovery was completed in this case, the trial court granted the insurer's motion for summary disposition, which was brought pursuant to MCR 2.116(C)(10) (no genuine issue concerning any material fact). The trial court focused on the policy language and on whether the alleged injuries to the girl were reasonably foreseeable. It then applied an objective reasonable man standard in granting summary disposition in the insurer's favor. The court declined to apply a reasonable child standard, finding that to do so would "invite an analysis in each case of a complained-of actor's maturity or intellectual ability or that person's subjective circumstances."

II

The policy provides for personal liability coverage for an occurrence:

> We shall pay all damages from an occurrence which the insured is legally liable to pay because of bodily injury or property damages covered by this policy.
>
> At our expense we shall defend an insured against any covered claim or suit. We may investigate and settle any claim or suit that we consider proper.

An occurrence is defined as: "[A] sudden event, including continuous or repeated exposure to the same conditions, resulting in bodily injury or property damage neither expected nor intended by the insured."

The policy in effect from July 1987 to July 1988 also contains an intentional-acts exclusion, which provides:

We do not cover bodily injury or property damage:

* * *

3. Either;

a. caused intentionally by or at the direction of an insured, or

b. resulting from an occurrence caused by an intentional act of an insured person where the results are reasonably foreseeable.

The policies in effect after July 1988 contain an endorsement that changes the phrase "an insured person" in exclusion 3b to "any insured."

There is no dispute between the parties that the boy's acts were intentional. The parties do, however, dispute whether the boy's acts constitute occurrences. In arguing that there was no occurrence, the insurer focuses only on whether the bodily injury was expected or intended by the insured. For there to be an occurrence, the bodily injury must be "neither expected nor intended by the insured." As will be discussed further, on the record before the trial court and before this Court, there is no question that the boy neither expected nor intended the claimed bodily injury to the girl even though his sexual acts were clearly intentional. Accordingly, the boy's acts constitute occurrences under the policy, and the insurer cannot avoid its duties to defend and provide coverage on the basis of this argument. If the insurer is to avoid these duties, it must be able to do so on the basis of the language of the intentional-acts exclusion in the policy.

III

It is clear from the boy's deposition testimony that, although the sexual acts were clearly intentional, the boy did not intend to harm the girl and

did not understand that his sexual acts would or could cause harm to her. His testimony indicates an understanding that one would be injured if shot with a gun:

> *Q.* Have you ever seen [movies or television shows] when they pull out a gun?
> *A.* Uh-huh.
> *Q.* Did you ever see anybody get shot with that gun?
> *A.* Yes.
> *Q.* When somebody shoots that gun, what do you think happens to the person that gets hit with the gun?
> *A.* They either get hurt bad or die.
> *Q.* Why is that?
> *A.* Because the gun is very powerful.
> *Q.* What comes out of the gun?
> *A.* A bullet.
> *Q.* And when somebody gets hit with that bullet, what do you see happen?
> *A.* Blood.
> *Q.* Is that how you know somebody gets hurt?
> *A.* Yes.

Thus, it is clear that the boy could reasonably foresee the harm caused by such physical violence.

However, his testimony indicates that he has no understanding whatsoever of the potential for harm from sexual acts by either himself or others. The boy admitted that he had seen "bad movies" of people "mating" on television:

> *Q.* I think you told us a minute ago that you've seen people mating on television, right?
> *A.* Yes.
> *Q.* Did it look like they were hurting each other?
> *A.* No.
> *Q.* Did it look like they were having fun?

A. No.

Q. Did you ever think in watching that that they were hurting each other?

A. No.

The boy also admitted asking another young boy to perform fellatio upon him before the first alleged act upon the girl, but testified that he did not know that he was hurting the boy:

Q. Do you remember asking [another boy] to suck your penis?

A. Yes.

Q. Did you do that?

A. Yes.

Q. Did he do that?

A. Yes.

Q. Now why did you ask [him] to do that?

A. I don't know.

* * *

Q. Did you ever have anybody else suck your penis?

A. Not before that.

Q. That's the first time.

A. Uh-huh.

* * *

Q. Did your mom talk to you after she found out what you and [the other boy] did?

A. Yes.

Q. Did she ever tell you, when she talked to you, that you might be hurting [the other boy]?

A. No.

Q. Did she ever tell you that you might be hurting yourself?

A. No.

Q. Do you know what I mean when I say hurt somebody in the head versus hurt somebody someplace else on their body?

A. Yes.

The boy admitted both of the acts against the girl, but testified that he had no idea he was hurting her:

Q. Do you want to tell us in your own words what happened [in your basement] with the girl?
A. Well, I told her to suck my penis, and she did.

* * *

Q. Did you know when you were doing it that you were doing something bad?
A. No.
Q. Did you think you were doing something good?
A. No.
Q. Did you think you were doing something fun?
A. No.
Q. You were just doing it to do it.
A. Yes.
Q. Were you being curious?
A. Yes.

* * *

Q. Did you have any idea that you would be hurting the girl?
A. No.
Q. Did you ever mean to hurt the girl?
A. No.
Q. The girl was your friend, wasn't she?
A. Yes.
Q. Did you have any idea that you may be hurting the girl in her head?
A. No.

* * *

Q. (*By Mr. Harry*:) Did you ever go up into the girl's closet with her, at her house?
A. Yes.
Q. Did you guys do anything there?
A. Yes.
Q. What did you do?
A. The same thing.

Q. What did you guys do in the closet? When you said "the same thing," what same thing?

A. She sucked my penis.

* * *

Q. Did you mean to hurt the girl in any way then?

A. No.

In addition to the boy's deposition testimony, the trial court also had before it a letter from David A. Vore, Ph.D., a clinical psychologist regarding the capability of average 8½- to 9-year-old children to foresee the expected or intended results of sexual acts:

> 2. In a general sense, children within the 8½ to 9 year age range display limitations in the capacity to develop empathy for and understand the feelings of other individuals. This is largely due to the fact that the average child within this age range is markedly ego centered and experiences difficulty perceiving or responding to the world from any framework other than his/her own perspective.
>
> 3. In my opinion, clinically, I would not expect the average child within the 8½ to 9 year age range to have the ability to understand the potential emotional damage which sexual abuse perpetrated upon another minor child might cause the victim in the future.
>
> 4. Consequently, while the average child within the 8½ to 9 year age range might well be able to state understanding of the wrongfulness of sexually abusive behavior toward another child and, to some extent, express feelings of guilt regarding such behavior, these statements would more typically reflect concerns in that child regarding possible punishment for their behavior rather than an understanding of the potential damage such behavior might inflict upon the victim in the future.

The letter also addresses the facts of the underlying case and the boy's capabilities in particular:

> 5. School records reviewed by this Examiner pertaining to the boy reflect a history of problems developing and maintaining relationships with peers both within the home and school environments, history of verbal and physical aggressiveness toward peers and younger children, diagnosis of depression/oppositional disorder and qualification for Special Education programming under the Emotionally Impaired (EI) category of the Michigan Special Education Law. . . .
>
> 6. The information presented above provide grounds for serious questioning of the capability of an average child to reasonably foresee the "expected or intended" results of sexually abusive behavior in terms of the potential long term emotional impact upon the victim. In my opinion, given the history suggested in deposition records reviewed by this Examiner, the probability of the boy being capable of foreseeing such results would be clinically expected to be considerably below that of the average child within the 8½ to 9 year age range. More specifically, it would be my clinical opinion that the boy would be very limited in the ability for either cognitive or emotional empathy or understanding of the long term future consequences of the sexually abusive behavior admittedly carried out toward the girl upon the victim.

IV

Diehl argues that, because the bodily injury suffered by the girl as a result of the boy's sexual acts was neither expected nor intended by the boy, the trial court erred in granting summary disposition to the insurer. The insurer argues that the trial court properly granted summary disposition

in its favor because there is no material question of fact that the boy acted intentionally and that the girl's claimed injuries occurred as a natural, foreseeable, expected, and anticipated result of the boy's intentional acts.

As a general rule, an insurer may avoid liability for an "expected" or "intended" injury if the injury suffered by the victim is the natural, foreseeable, expected, and anticipatory result of an intentional act by the insured. *Frankenmuth Mutual Ins Co v Piccard,* 440 Mich 539, 550-551; 489 NW2d 422 (1992); *Allstate Ins Co v Freeman,* 432 Mich 656, 687; 443 NW2d 734 (1989).

This Court has held that engaging in sexual contact with a child is an intentional act and that the intent to injure or harm can be inferred as a matter of law from the sexual contact itself. *State Mutual Ins Co v Russell,* 185 Mich App 521, 526-527; 462 NW2d 785 (1990); *Auto-Owners Ins Co v Gardipey,* 173 Mich App 711, 714-715; 434 NW2d 220 (1989); *Linebaugh v Berdish,* 144 Mich App 750, 762-763; 376 NW2d 400 (1985). The insurer urges this Court to follow these cases and find that, in this case, the intent to injure may be inferred as a matter of law. Were we dealing with the sexual assault of a child by a competent adult, there would be no question that intent to injure would be inferred as a matter of law. However, because the perpetrator of the sexual assault was a child, we find that such an inference is improper.

We have found no Michigan cases construing the exact language of the exclusionary clause at issue here. However, if the insured were an adult, the exclusionary clause would require us to apply an objective standard in determining whether the results of an intentional act are "reasonably foreseeable."

We are faced with the task of determining what

standard should be applied to determine whether bodily injury is reasonably foreseeable where the perpetrator of a sexual assault upon a child is another child. The trial court found as a matter of law that an objective reasonable man standard should be applied. We find that it is untenable that the trial court applied an objective adult standard to a child between seven and nine years old. A different standard must be applied in a case where the insured is a young child who has engaged in sexual activity with another child.

Diehl argues persuasively that the extension of an adult objective standard of foreseeability to the boy's acts is without authority in Michigan law and is inconsistent with the policy of requiring different objective standards of conduct between children and adults within the context of negligence actions. The insurer argues that, because this case involves an intentional act and not negligence, the differing standards applicable to adults and children in the negligence context should not be applied here. We disagree with the insurer and find that the standard to be applied in this case is that of a reasonable child of like age, ability, intelligence, and experience under like circumstances. In applying standards of behavior to a child in a noncriminal context, the child's age and developmental level must be taken into account.

Children under seven years of age are conclusively incapable of negligence. *Burhans v Witbeck,* 375 Mich 253; 134 NW2d 225 (1965); *Queen Ins Co v Hammond,* 374 Mich 655; 132 NW2d 792 (1965); *Baker v Alt,* 374 Mich 492; 132 NW2d 614 (1965). This conclusive presumption does not apply to children seven years of age or older. Rather, in the context of negligence actions, the capability of children seven years of age or older is a question of fact for the jury, which is to determine the issue

> on the basis of whether the child had conducted himself as a child of his age, ability, intelligence and experience would reasonably have been expected to do under like circumstances. [*Burhans, supra,* p 255.]

We are not convinced that this case is the proper vehicle to even consider adopting a bright-line test for children above or below a certain age. However, we are convinced that a mixed objective/subjective reasonable child standard similar to the standard applied in the negligence context must be applied in cases involving intentional acts by children to determine whether the results of those acts were reasonably foreseeable.

The task of applying this reasonable child standard to the facts presented in a given case should generally be left to the trier of fact. However, on the basis of the record presented to the trial court in this case, we find that Diehl, not the insurer, is entitled to summary disposition.

Applying the reasonable child standard we announce today strictly to the record that was presented to the trial court in this case, we find that there is no genuine issue of material fact that an average seven- to nine-year-old child could not reasonably foresee that his or her sexual acts could cause harm to another child. Had there been expert testimony to the contrary, summary disposition would not be appropriate.[1] However, there is nothing on the record that was presented to the trial court to indicate that an average seven- to nine-year-old child could appreciate the potential for harm to another child as a result of the first child's sexual acts.

In addition, there is nothing on the record that

[1] We note that discovery was closed at the time of the hearing and ruling on the insured's motion for summary disposition.

was presented to the trial court that would indicate that the boy's capabilities were above that of an average child of his age, ability, intelligence, and experience. Indeed, if anything, the boy's capabilities would fall well below that of the average seven- to nine-year-old child. There is no question that, on this record, the boy could not reasonably foresee that his sexual acts could cause any harm to the girl. Under these circumstances, the intentional-acts exclusion is inapplicable as a matter of law. Accordingly, we reverse the order granting summary disposition in favor of the insurer and remand this case to the trial court for entry of an order granting summary disposition in favor of Diehl in this declaratory action.

V

In light of our resolution of this case, we need not address Diehl's remaining arguments.

VI

At oral argument before this Court, the insurer waived its argument that Diehl lacks standing in this case.

Reversed and remanded. We do not retain jurisdiction.

PEOPLE v JOHNSON

Docket No. 156677. Submitted April 13, 1994, at Lansing. Decided July 5, 1994, at 9:25 A.M. Leave to appeal denied, 447 Mich —.

Gary E. Johnson was convicted by a jury in the Oakland Circuit Court, Frederick C. Ziem, J., of armed robbery and, thereafter, pleaded guilty of being an habitual offender, second offense. The victim testified that after the robbery he chased the defendant and that the defendant stopped, put his hand in his shirt, and then resumed running. The victim gave conflicting testimony concerning whether the defendant told him to "stop" or "freeze." There was no testimony that there was any bulge or outline under the shirt that appeared to be a gun, that the defendant used his hand or anything else under his shirt to suggest he had a gun, or that the defendant made any direct statement that he was armed. The defendant appealed.

The Court of Appeals *held:*

1. The evidence was not sufficient to support the jury's finding that the defendant was armed. Neither the victim's subjective belief that the defendant was armed nor the equivocal testimony that the defendant told the victim to stop or freeze is objective evidence sufficient to support a finding that the defendant was armed. Accordingly, it was error to charge the jury regarding armed robbery, and the conviction of armed robbery must be reversed. However, because the other elements of robbery were established, there was sufficient evidence to support a conviction of unarmed robbery.

2. The trial court did not abuse its discretion in denying the defendant's motion for dismissal based on the prosecutor's alleged failure to comply with a pretrial discovery order.

3. There was probable cause to bind over the defendant for trial, there being testimony at the preliminary examination that something of value had been taken by the defendant.

Reversed and remanded for entry of a judgment of conviction of unarmed robbery and for resentencing.

REILLY, J., dissenting, stated that the conviction of armed robbery should be affirmed, because the evidence, if viewed in a light most favorable to the prosecution, was sufficient to allow reasonable jurors to determine that the defendant was guilty beyond a reasonable doubt of armed robbery.

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

Charles P. Reisman, for the defendant on appeal.

Before: HOLBROOK, JR., P.J., and REILLY and G. W. HOOD,* JJ.

HOLBROOK, JR., P.J. Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and, thereafter, pleaded guilty of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to four to twenty years' imprisonment and appeals as of right. We reverse.

Defendant claims on appeal that there was insufficient evidence presented at trial to support his conviction of armed robbery. We agree. When reviewing such a claim following a jury trial, this 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 proven beyond a reasonable doubt. *People v Hampton,* 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980).

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the statute. *People v Newcomb,* 190 Mich App 424, 430; 476 NW2d 749 (1991). We find that insufficient evidence was presented to lead the victim to believe that defendant had a gun; therefore, the

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

"armed" element of the offense was not proven. *People v Jolly,* 442 Mich 458; 502 NW2d 177 (1993); *People v Parker,* 417 Mich 556; 339 NW2d 455 (1983), cert den 466 US 962 (1984). The victim testified that after the robbery he chased defendant until defendant stopped and put his hand inside his "baggy" shirt. At that point, the victim stopped as well, assuming that defendant had a gun. He testified to no specific circumstances, such as a bulge or outline of an object under defendant's shirt that would be indicative of a gun, and testified, when asked if he thought defendant had a gun, "possibly, I wasn't going to just assume that he didn't, so I did stop." The victim also testified that defendant then picked up the two boxes that he had been carrying and ran again and that he pursued the defendant because "if he's got a gun why is he running?" Finally the victim first testified that when defendant stopped during the chase "he didn't say stop or freeze," but on redirect examination claimed that defendant said freeze or stop "or something like that."

In *Jolly, supra,* the defendant's companion told the victim during the course of the robbery that the defendant had a gun, and the victim testified that there was a bulge in the defendant's vest. The victim stated at trial that he did not know if the bulge was a gun, but assumed that it was, because the defendant's accomplice stated that the defendant had a weapon. The *Jolly* Court explained:

> A fair reading of *Parker* does not require submission of a dangerous weapon or other article into evidence, nor does it require that a witness see the make or model number of a gun or knife before the issue can be submitted to the jury. What cannot reach the jury is proof that only focuses on the subjective belief of the victim. In other words, there must be some objective evi-

> dence of the existence of a weapon or article before a jury will be permitted to assess the merits of an armed robbery charge. [442 Mich 468.]

In *Jolly,* there was objective evidence that the defendant was armed, e.g., the defendant's accomplice told the victim that the defendant was armed, and the victim saw a bulge in the defendant's vest. In this case, however, the only evidence indicating the existence of a weapon was the subjective belief of the victim, e.g., the victim assumed that the defendant had a gun when he put his hand under his shirt. Defendant did not hold his hand under his shirt in such a manner as to suggest a weapon, nor did he fashion an article in such a manner as to lead a reasonable person to believe that he had a weapon. *Id.* at 465. We do not find the victim's equivocal testimony that defendant told the victim to stop or freeze to be sufficient objective evidence to warrant sending the armed robbery charge to the jury. *Id.* at 469-470.

Where, as here, reversal is required because the jury was permitted to consider a charge unwarranted by the proofs, the appropriate remedy is to remand for entry of a conviction on the lesser included offense and for resentencing, with the prosecutor having the option to retry the defendant on the original charge if additional evidence is discovered to support it. See, e.g., *People v Kamin,* 405 Mich 482, 501; 275 NW2d 777 (1979); *People v Gridiron,* 185 Mich App 395, 404; 460 NW2d 908 (1990). In this case, the jury was instructed on charges of armed robbery, unarmed robbery, larceny from a building, larceny over $100, and larceny under $100. The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force or violence or

assault or putting in fear, and (3) being unarmed. MCL 750.530; MSA 28.798; *People v Himmelein,* 177 Mich App 365, 378-379; 442 NW2d 667 (1989). Here, because the victim testified that defendant's actions put him in fear, we find that sufficient evidence was presented to sustain a conviction of unarmed robbery. *People v Hearn,* 159 Mich App 275, 282; 406 NW2d 211 (1987); *People v Denny,* 114 Mich App 320, 323-324; 319 NW2d 574 (1982).

Accordingly, we reverse defendant's conviction of armed robbery and remand for entry of a judgment of conviction of the lesser included offense of unarmed robbery. Defendant is also entitled to resentencing.

The trial court did not abuse its discretion in denying defendant's motion for dismissal, which was based on the prosecutor's alleged failure to comply with a discovery order. *People v Loy-Rafuls,* 198 Mich App 594; 500 NW2d 480 (1993), rev'd in part on other grounds 442 Mich 915 (1993). Defendant showed only that the prosecutor failed to produce a list of exhibits before trial. However, the order did not contain a time for compliance, and the trial court did not abuse its discretion under the facts of this case in ruling that delivery on the first day of trial was adequate compliance.

Finally, the district court did not abuse its discretion in finding that there was probable cause to bind over defendant for trial. *People v Flowers,* 191 Mich App 169; 477 NW2d 473 (1991). The testimony of the victim at the preliminary examination provided probable cause to believe that something of value was taken from the victim by defendant.

Reversed and remanded for entry of a judgment of conviction of unarmed robbery and for resentencing. We do not retain jurisdiction.

G. W. HOOD, J., concurred.

REILLY, J. *(dissenting).* I respectfully dissent. The victim testified on reexamination that the defendant, when making his getaway, stopped and put his hand in his shirt and said "freeze" or "stop" or "something like that." The victim thought the defendant had a gun; at least he "wasn't going to just assume that [defendant] didn't, so I did stop." A few moments later, after defendant had grabbed two boxes, the victim again took up the chase. When asked why he pursued the defendant if he thought he had a gun, the victim responded "and why—if he's got a gun, why is he running?" I believe, when viewed in a light most favorable to the prosecutor, that there is sufficient objective evidence of the presence of a gun to allow reasonable jurors to determine that defendant was guilty beyond a reasonable doubt of armed robbery. *People v Jolly,* 442 Mich 458; 502 NW2d 177 (1993); *People v DeMeyers,* 183 Mich App 286; 454 NW2d 202 (1990). The credibility of the equivocal testimony of the witness was an issue for the jury. *People v Herbert,* 444 Mich 466; 511 NW2d 654 (1993); *People v Wolfe,* 440 Mich 508, 513-516; 489 NW2d 748 (1992).

LOWE v DEPARTMENT OF CORRECTIONS (ON REHEARING)

Docket No. 138095. Submitted September 8, 1993, at Lansing. Decided November 15, 1993, at 9:35 A.M. Submitted on rehearing December 21, 1993. Decided on rehearing July 5, 1994, at 9:30 A.M.

Michael C. Lowe, an inmate in the custody of the Department of Corrections following his July 9, 1981, sentencing for convictions of Proposal B offenses, MCL 791.233b; MSA 28.2303(3), brought an action in the Muskegon Circuit Court against the Department of Corrections and its director, seeking a writ of mandamus compelling the department to grant disciplinary credits against his maximum sentence pursuant to MCL 800.33; MSA 28.1043. Pursuant to a policy directive of the department, PD-DWA-35.05, the plaintiff was earning disciplinary credits against his minimum sentence beginning on January 1, 1983, and earning good-time and special good-time credits against his maximum sentence beginning on the effective date of his sentence. The court, R. Max Daniels, J., refused to issue a writ of mandamus. The Court of Appeals (WEAVER, P.J., and SHEPHERD and CAVANAGH, JJ.), in an unpublished memorandum opinion decided June 17, 1993 (Docket No. 138095), reversed and remanded. On remand, the trial court ruled that the plaintiff was eligible for disciplinary credits against his maximum and minimum sentences, but was not eligible for good-time credits on his maximum sentence after December 30, 1982. However, the trial court again refused to issue a writ because the plaintiff was receiving good-time credits on his maximum sentence pursuant to the policy directive at a faster rate than the disciplinary credits he would otherwise receive pursuant to MCL 800.33; MSA 28.1403, as amended by 1986 PA 322. After remand, the Court of Appeals (WAHLS, P.J., and SHEPHERD and CAVANAGH, JJ.), in an opinion decided November 15, 1993, and originally scheduled for publication (Docket No. 138095), held that the plaintiff was entitled to disciplinary

REFERENCES

Am Jur 2d, Penal and Correctional Institutions § 228.

See ALR Index under Prisons and Prisoners; Sentence and Punishment.

credits against his maximum sentence after December 30, 1982, but that, in order to avoid double credit, he was not entitled to good-time credits after December 30, 1982. The department moved for a rehearing. The Court of Appeals granted the motion and withdrew from publication its November 15, 1993, opinion.

On rehearing, the Court of Appeals *held:*

PD-DWA-35.05 conforms to the legislative scheme in a way that is consistent with the intent behind MCL 800.33(5); MSA 28.1403(5), as well as the constitutional prohibition against ex post facto laws.

1. MCL 800.33(5); MSA 28.1403(5), as amended by 1982 PA 442, effective December 30, 1982, provides that accumulated disciplinary credits are to be deducted from a prisoner's minimum and maximum sentences. However, persons in the plaintiff's position who were sentenced before the inception of disciplinary credits on December 30, 1982, were also eligible to receive good-time credits on their maximum sentences. It is obvious that the Legislature could not have intended to give Proposal B offenders a higher total of early release credits on their maximum sentences than other offenders. Therefore, the plaintiff should not receive both good-time and disciplinary credits on his maximum sentence.

2. In view of the faster rate at which the plaintiff can earn early release credits through good-time credits against his maximum sentence rather than through disciplinary credits against the maximum sentence, the constitutional prohibition against ex post facto laws would be violated if the plaintiff were allowed to earn disciplinary credits against the maximum sentence instead of good-time credits against the maximum sentence as provided under the policy directive.

Affirmed in part and reversed in part.

SENTENCES — GOOD-TIME CREDITS — DISCIPLINARY CREDITS — PROPOSAL B OFFENDERS.

A person convicted of a Proposal B offense and receiving good-time credits against the maximum sentence before December 30, 1982, is thereafter entitled to continue receiving good-time credits against the maximum sentence and to receive disciplinary credits against the minimum sentence (MCL 791.233b, 800.33[5]; MSA 28.2303[3]; 28.1403[5]).

Daniel E. Manville, for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L.*

Casey, Solicitor General, and *Chester S. Sugierski, Jr.,* Assistant Attorney General, for the defendants.

ON REHEARING

Before: WAHLS, P.J., and SHEPHERD and CAVANAGH, JJ.

SHEPHERD, J. This opinion on rehearing concerns the calculation of various credits that are awarded to prisoners in the custody of the Department of Corrections (DOC) as an incentive for good behavior. The credits represent days that are subtracted from a prisoner's term of imprisonment.

Before December 30, 1982, these credits were generally known as "good time" credits. Under MCL 800.33(2); MSA 28.1403(2), as it existed before December 30, 1982, a prisoner who had neither breached prison rules nor violated the laws of this state received good-time credit as follows:

> (a) During the first and second years of his sentence, 5 days for each month.
>
> (b) During the third and fourth years, 6 days for each month.
>
> (c) During the fifth and sixth years, 7 days for each month.
>
> (d) During the seventh, eighth, and ninth years, 9 days for each month.
>
> (e) During the tenth, eleventh, twelfth, thirteenth, and fourteenth years, 10 days for each month.
>
> (f) During the fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth years, 12 days for each month.
>
> (g) From and including the twentieth year, up to and including the period fixed for the expiration of

> the sentence, 15 days for each month. [MCL 800.33(2)(a)-(g); MSA 28.1403(2)(a)-(g).[1]]

In addition to these "regular" good-time credits, prisoners were also eligible for "special" good-time credits, which were not to exceed fifty per cent of the amount of regular good-time credit.[2]

As a general rule, these good-time credits were applied to a prisoner's minimum and maximum sentences. However, with the approval of Proposal B in the November 1978 general election, the electorate circumscribed the early release of certain offenders. Proposal B, codified at MCL 791.233b; MSA 28.2303(3), and effective December 12, 1978, provided that the minimum sentence of a person convicted of certain enumerated offenses could not be reduced "by allowances for good time, special good time, or special parole." Thus, after December 12, 1978, Proposal B offenders were no longer eligible to receive good-time or special good-time credit on their minimum terms; but, they continued to be eligible to receive good-time and special good-time credit on their maximum terms. In this case, it is undisputed that the offenses for which plaintiff was sentenced on July 9, 1981, are Proposal B offenses.

After the imposition of plaintiff's sentence, MCL 800.33; MSA 28.1403 was amended, creating a new type of credit for Proposal B offenders. Effective December 30, 1982, Proposal B offenders became eligible for "disciplinary" credits and "special disciplinary" credits. 1982 PA 442. On December 30,

[1] MCL 800.33(2)(a)-(g); MSA 28.1403(2)(a)-(g) remains substantially the same today as in 1982. However, as will be discussed *infra,* the addition of a subsection 5 as a new exception to subsection 2 on December 30, 1982, would change the nature of these credits.

[2] Before December 30, 1982, special good-time credits were provided for under MCL 800.33(8); MSA 28.1403(8). Following a number of recent statutory amendments, special good-time credits are now provided for under MCL 800.33(12); MSA 28.1403(12).

1982, MCL 800.33; MSA 28.1403 provided as follows in relevant part:

> (2) *Except as provided in* subsections (3), (4), and *(5),* a convict who does not have an infraction of the rules of the prison or a violation of the laws of this state recorded against him shall receive a reduction from his sentence as follows:
>
> (a) During the first and second years of his sentence, 5 days for each month.
>
> (b) During the third and fourth years, 6 days for each month.
>
> (c) During the fifth and sixth years, 7 days for each month.
>
> (d) During the seventh, eighth, and ninth years, 9 days for each month.
>
> (e) During the tenth, eleventh, twelfth, thirteenth, and fourteenth years, 10 days for each month.
>
> (f) During the fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth years, 12 days for each month.
>
> (g) From and including the twentieth year, up to and including the period fixed for the expiration of the sentence, 15 days for each month.
>
> * * *
>
> *(5)* All prisoners serving a sentence on the effective date of this 1982 amendatory act or incarcerated after the effective date of this 1982 amendatory act for the conviction of a crime enumerated in section 33b(a) to (cc) of Act No. 232 of the Public Acts of 1953, being section 791.233b of the Michigan Compiled Laws, shall receive a disciplinary credit of 5 days per month for each month served after the effective date of this 1982 amendatory act. *Accumulated disciplinary credits shall be deducted from a prisoner's minimum and maximum sentence* in order to determine his or her parole eligibility dates.
>
> * * *
>
> In addition to disciplinary credits, a prisoner

> may be awarded 2 days per month special disciplinary credits for good institutional conduct on the recommendation of the disciplinary credit committee and the concurrence of the warden or superintendent based on an annual review of the prisoner's institutional record. [Emphasis added.]

It is undisputed that the statutory plan for the accumulation of disciplinary credits is less favorable than that of good-time credits. Good-time credits under subsection 2 simply accrue faster than disciplinary credits under subsection 5.

Effective April 1, 1987, MCL 800.33; MSA 28.1403 was amended again to do away with good-time credits altogether for offenses committed on or after April 1, 1987. After that date all new offenders became eligible to receive disciplinary and special disciplinary credits only. See 1986 PA 322; MCL 800.33(3); MSA 28.1403(3).

Given the complexity of the statutory framework, DOC adopted Policy Directive PD-DWA-35.05 in an attempt to comply with the Legislature's intent. DOC Policy Directive PD-DWA-35.05 became effective April 1, 1987, and provided as follows in relevant part:

> Disciplinary credits are earned as follows:
>
> 1) When serving for a Proposal B crime committed on or after January 1, 1983 prisoners earn disciplinary credit on both their minimum and maximum sentence. (Type A)
>
> 2) When serving for a Proposal B crime committed on or after December 10, 1978 but prior to January 1, 1983 prisoners earn disciplinary credit on their minimum sentence beginning January 1, 1983, but earn special and regular good time on their maximum sentence beginning from the date the sentence is effective. (Type B)

This means that under the current practice of the

DOC, a person in plaintiff's position is eligible for disciplinary credit on his minimum term beginning January 1, 1983, but is eligible for special and regular good-time credit on his maximum term dating back to the time of sentencing.

The genesis of this appeal was an order of the trial court denying plaintiff's request for a writ of mandamus to compel defendant to grant disciplinary credits against his maximum sentence pursuant to MCL 800.33(5); MSA 28.1403(5). In the first opinion in this case, we reversed and remanded for further proceedings because the trial court had failed to address plaintiff's issue concerning the applicability of MCL 800.33(5); MSA 28.1403(5) to his two remaining sentences[3] of ten to fifteen years for unarmed robbery and breaking and entering. *Lowe v Dep't of Corrections,* unpublished memorandum opinion of the Court of Appeals, decided June 17, 1993 (Docket No. 138095).

On remand, the trial court found that plaintiff was eligible to have disciplinary credits deducted from his maximum and minimum terms, but was not eligible for good-time credits on his maximum term after December 30, 1982. However, the trial court again denied plaintiff's petition for mandamus because plaintiff had been receiving good-time credits on his maximum term pursuant to DOC Policy Directive PD-DWA-35.05, under which plaintiff accumulated good-time credits faster than the disciplinary credits for which plaintiff claimed he was eligible under MCL 800.33(5); MSA 28.1403(5).

After remand, the matter came before this Court a second time. We then issued an opinion that was sent to the parties and was scheduled for publication. *Lowe v Dep't of Corrections,* decided Novem-

[3] An additional sentence of six to ten years for felonious assault has been terminated.

ber 15, 1993 (Docket No. 138095). In sum, we concluded in that opinion that the plain language of MCL 800.33(5); MSA 28.1403(5) compelled the result that Proposal B offenders in plaintiff's position were entitled to disciplinary credits on their maximum sentences after December 30, 1982. However, in order to prevent the accumulation of double credits, we also concluded that the Legislature must have intended the discontinuation of good-time credits after December 30, 1982.

On November 29, 1993, a motion for rehearing was filed by defendant. We granted rehearing on February 3, 1994, and ordered the parties to file supplemental briefs addressing the questions whether and how MCL 800.33(5); MSA 28.1403(5) can be reconciled with the constitutional prohibition against the enactment of ex post facto laws. On February 16, 1994, plaintiff moved for a stay of our November 15, 1993, opinion. On February 17, 1994, we granted plaintiff's motion for a stay of our November 15, 1993, opinion pending our decision on rehearing.

After careful review of the parties' supplemental briefs on rehearing, it appears that our prior opinion after remand was erroneous, and this opinion constitutes the proper evaluation of MCL 800.33(5); MSA 28.1403(5) and DOC Policy Directive PD-DWA-35.05. MCR 7.216(A)(7). Notably, at this point in the litigation, it appears that both parties are in agreement that our prior opinion was incorrect. In fact, both parties now agree that plaintiff should not have disciplinary credits deducted from his maximum sentence.[4] As such, we find that DOC Policy Directive PD-DWA-35.05 conforms to the

[4] Of particular interest, plaintiff's original position as stated in his initial in propria persona brief on appeal was that defendant should be compelled via a writ of mandamus "to follow the clear requirement of statute 800.33(5) and deduct accumulated disciplinary credits from his maximum sentence." More recently, in plaintiff's supplemen-

legislative scheme in a way that is consistent with the intent behind MCL 800.33(5); MSA 28.1403(5), as well as the constitutional prohibition against ex post facto laws.[5] Were we to hold otherwise, we would be in direct contradiction of the Michigan Supreme Court's holding in *In re Canfield,* 98 Mich 644; 57 NW 807 (1894), and the United States Supreme Court's holding in *Weaver v Graham,* 450 US 24; 101 S Ct 960; 67 L Ed 2d 17 (1981).

The following language from MCL 800.33(5); MSA 28.1403(5) is the centerpiece of this case:

> Accumulated disciplinary credits shall be deducted from a prisoner's minimum and maximum sentence in order to determine his or her parole eligibility dates.

In his original brief on appeal following the denial of his petition for a writ of mandamus, plaintiff argued that this statutory language required the deduction of disciplinary credits from his maximum sentence. However, persons in plaintiff's position who were sentenced before the inception of disciplinary credits on December 30, 1982, were also eligible to receive good-time credits on their maximum term. It being obvious that the Legislature could not have intended to give Proposal B offenders a higher total of early release credits on their maximum terms than other offenders, we can rule out the possibility that plaintiff should receive both good-time and disciplinary credits on

tal brief submitted pursuant to our February 3, 1994, order of rehearing, plaintiff takes the converse position that MCL 800.33(5); MSA 28.1403(5) "must be limited to being applied to the minimum sentences of those who were serving sentences prior to December 30, 1982."

[5] The state and federal constitutional prohibitions against the enactment of ex post facto laws are contained in Const 1963, art 1, § 10, and US Const, art I, §§ 9 and 10.

his maximum term. However, the question remains whether plaintiff should have either good-time or disciplinary credits applied to his maximum term.

Both *Canfield, supra* at 647, and *Weaver, supra* at 27, hold that a law enacted after the date of a prisoner's sentence that attempts to reduce the amount of credit given for good behavior—and that, in effect, increases the prisoner's sentence—violates the constitutional prohibition against ex post facto laws. Applying *Canfield* and *Weaver* to the instant case, an interpretation of MCL 800.33(5); MSA 28.1403(5) that would replace the more favorable good-time credits with less favorable disciplinary credits on a prisoner's maximum term would be unconstitutional.

In general, statutes are presumed to be constitutional. *People v Massey,* 137 Mich App 480, 486; 358 NW2d 615 (1984). Where there is doubt, the presumption of constitutionality justifies a construction that is somewhat contrary to the natural interpretation of the language used, if necessary to sustain the law. *People v Bandy,* 35 Mich App 53, 57; 192 NW2d 115 (1971).

In the present case, the language used in MCL 800.33(5); MSA 28.1403(5) that "disciplinary credits shall be deducted from a prisoner's minimum and maximum sentence" might appear to run contrary to the prohibition against ex post facto laws by the implication that it replaces good-time credits with disciplinary credits. However, we will presume that the Legislature intended a constitutional interpretation. *Massey, supra* at 486; *Bandy, supra* at 57. In other words, we will presume a constitutional interpretation that retains plaintiff's right to continue to receive good-time credits under the statutory scheme that was in effect at the time of sentencing.

We hold that Policy Directive PD-DWA-35.05 provides such a constitutional interpretation of MCL 800.33(5); MSA 28.1403(5) by retaining a prisoner's right to receive good-time credits on the maximum term while applying disciplinary credits to the minimum term after December 30, 1982. The DOC's Policy Directive PD-DWA-35.05 is an appropriate response to the statutory scheme enacted by the Legislature. As such, plaintiff is entitled to good-time and disciplinary credits in accordance with Policy Directive PD-DWA-35.05.

This opinion supersedes our November 15, 1993, opinion in this case. To the extent that the trial court's statutory interpretation differs from that expressed in this opinion, the trial court's decision is reversed. However, we affirm the trial court's decision to deny plaintiff's request for a writ of mandamus.

Affirmed in part and reversed in part.

CURIS BIG BOY, INC v DEPARTMENT OF TREASURY

Docket No. 146213. Submitted December 8, 1993, at Lansing. Decided July 5, 1994, at 9:40 A.M.

Curis Big Boy, Inc., filed a petition in the Michigan Tax Tribunal appealing the denial by the Department of Treasury of a claim for a refund of single business taxes for 1985-87. The Tax Tribunal dismissed the petition on the ground that it was not filed thirty days after the final decision of the respondent as required by MCL 205.22; MSA 7.657(22), finding that the November 20, 1990, letter from the respondent to the petitioner was a final decision and holding that, because the petition was not filed within thirty days, the Tax Tribunal was without jurisdiction to consider it. The petitioner appealed.

The Court of Appeals *held:*

1. Review of an assessment, decision, or order of the Department of Treasury involving a claim for refund of taxes is governed by the provisions of MCL 205.22; MSA 7.657(22); accordingly, the respondent was not required to give notice to the petitioner of its right to appeal.

2. The record does not support the petitioner's contention that the November 20, 1990, letter was not a final decision or the contention that the statutory period should have been tolled because of ongoing negotiations between the petitioner and the respondent.

3. The Tax Tribunal had no authority to grant the petitioner's request for a delayed appeal. The tribunal was divested of jurisdiction over this matter when the petition was not filed within the statutorily mandated thirty-day period.

Affirmed.

TAXATION — APPEAL — TAX TRIBUNAL.

The Tax Tribunal has no authority to grant a delayed appeal where the petition for appeal has not been filed within the statutorily mandated thirty-day period after a final decision of the Department of Treasury (MCL 205.22, 205.735; MSA 7.657[22], 7.650[35]).

REFERENCES

Am Jur 2d, State and Local Taxation §§ 1138-1174.

See ALR Index under Taxes.

Gregory J. Boulahanis, for the petitioner.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Russell E. Prins* and *Daniel M. Greenberg,* Assistant Attorneys General, for the respondent.

Before: TAYLOR, P.J., and REILLY and M. J. TALBOT,* JJ.

TAYLOR, P.J. Petitioner appeals as of right from the order of the Michigan Tax Tribunal dismissing petitioner's claim for a single business tax refund. The claim was dismissed on jurisdictional grounds because petitioner failed to file its appeal with the Tax Tribunal within thirty days of the final decision as required by MCL 205.735(2); MSA 7.650(35)(2) and MCL 205.22; MSA 7.657(22). On appeal, petitioner claims that its appeal was timely, that the statutory period for filing an appeal was tolled during the negotiations between petitioner and respondent, and, alternatively, that a delayed appeal should have been granted for equitable reasons. We affirm.

In December 1988, petitioner filed a refund request for alleged overpayment of the single business tax for the years 1984-87. In a letter dated November 20, 1990, David Kirvan, the administrator of respondent's single business tax division, denied petitioner's refund requests for the years 1985-87. Petitioner sent letters to Kirvan on November 29, 1990, and December 5, 1990, in which it acknowledged receipt of Kirvan's letter denying those refund requests and expressed its disagreement with the denial. Kirvan's response to these letters and his statements in subsequent telephone conversations uniformly reiterated the original denial.

Petitioner effectively filed its claim of appeal in

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

the Tax Tribunal on February 11, 1991.[1] The Tax Tribunal granted respondent's motion to dismiss on the ground that petitioner had failed to comply with the relevant statutes, which mandate that an appeal be filed within thirty days of the final decision being challenged.[2] Petitioner's motion for reconsideration was denied on the same basis.

Petitioner argues that the original denial was not a final decision, because Kirvan's letter did not advise petitioner of its right to appeal, citing MCL 205.21; MSA 7.657(21). This statutory section is irrelevant to the case at bar because it deals with situations where returns or payments are not made as required. Cases involving refunds of taxes already paid are controlled by § 22, which does not mandate notice of a petitioner's right to appeal.[3]

Petitioner next argues that the statutory period for an appeal was tolled during the negotiations between petitioner and respondent. We disagree.

The record does not support petitioner's contention that a settlement was being negotiated. Petitioner expressed its disagreement with Kirvan's final decision, but each of Kirvan's communications to petitioner uniformly reiterated the original denial. Furthermore, Revenue Administrative

[1] Petitioner originally filed its claim of appeal on February 4, 1991. By letter dated February 7, 1991, respondent informed petitioner that its proof of service was defective. Petitioner then filed a proper proof of service on February 11, 1991.

[2] Both statutory sections relevant to this issue set forth the thirty-day period, although they do so in slightly different terms. MCL 205.22(1); MSA 7.657(22)(1) states: "A person aggrieved by an assessment, decision, or order of the department may appeal the contested portion of an assessment, decision, or order to the tax tribunal within 30 days . . . ." MCL 205.735(2); MSA 7.650(35)(2) states that in cases such as the one presented here "the jurisdiction of the tribunal shall be invoked by the filing of a written petition by a party in interest, as petitioner, within 30 days after the final decision, ruling, determination, or order which the petitioner seeks to review."

[3] Although not requiring specific notice to the petitioner of its right to appeal, all three subsections of § 22 contain references to the right to appeal one of respondent's decisions to the Tax Tribunal.

Bulletin 89-35, cited by petitioner, allows submission of additional information by a petitioner, but still requires proper filing of an appeal within thirty days from the date of the decision or order. This thirty-day period was not tolled.

Finally, petitioner argues that the Tax Tribunal should have exercised its equitable power to grant the delayed appeal. There is no authority for petitioner's contention.

In *Campbell v Dep't of Treasury,* 77 Mich App 435; 258 NW2d 508 (1977), this Court remanded the action to the Board of Tax Appeals for a delayed appeal. Subsequent to that decision, the Legislature added subsections 2 and 3 to MCL 205.22; MSA 7.657(22). These subsections state that final decisions not appealed in accordance with the thirty-day period "shall be final and shall not be reviewable in any court by mandamus, appeal, or other methods of direct or collateral attack," MCL 205.22(2); MSA 7.657(22)(2), "and [are] not subject to further challenge," MCL 205.22(3); MSA 7.657(22)(3).

> [W]hile there may be an extraordinary case which justifies the exercise of equity jurisdiction in contravention of a statute, this is not such a case. Where the Legislature has provided a plain, adequate remedy at law, it has the constitutional authority to impose limitations on other available remedies. . . . The legal remedy available in this case is a proceeding before the Tax Tribunal. [*Wikman v Novi,* 413 Mich 617, 648; 322 NW2d 103 (1982).]

The Tax Tribunal had no authority to grant petitioner's request for a delayed appeal. The tribunal

was divested of jurisdiction over this matter when the thirty-day period expired.[4]

Our review of Tax Tribunal decisions, absent fraud, is limited to whether the tribunal made an error of law or adopted a wrong principle. We accept the factual findings of the tribunal as final, provided they are supported by competent, material, and substantial evidence. *Dow Chemical Co v Dep't of Treasury,* 185 Mich App 458, 462-463; 462 NW2d 765 (1990). After careful review of the record, we find no error of law and that the tribunal's factual findings are supported by competent, material, and substantial evidence on the whole record.

Affirmed.

[4] In *Bickler v Dep't of Treasury,* 180 Mich App 205, 212; 446 NW2d 644 (1989), this Court, in dicta, cited *Wikman, supra,* for the proposition that the Tax Tribunal has equitable powers to review decisions of a revenue commissioner. We are not compelled to follow *Bickler* under Administrative Order No. 1994-4, and therefore, because its statement as to the equitable powers of the Tax Tribunal is mistaken, we decline to do so. Petitioner's reliance on *Bickler* is unavailing.

PEOPLE v YOUNG

WAYNE COUNTY PROSECUTOR V DEPARTMENT OF CORRECTIONS

Docket Nos. 157780, 161307, 161438. Submitted March 15, 1994, at Detroit. Decided July 5, 1994, at 9:45 A.M. Leave to appeal sought.

Gregory L. Young was convicted in the Recorder's Court of Detroit, Lawrence D. Silverman, J., of breaking and entering an unoccupied dwelling and was sentenced to a prison term of 42 to 120 months. In July 1983, the defendant had been sentenced to a prison term of six to fifteen years, but on September 15, 1989, he had been paroled, with the term of his parole status being two years. On September 9, 1991, while still on parole, the defendant committed the breaking and entering that gave rise to this conviction, was arrested, and was housed in the Wayne County Jail. Despite the fact that the defendant's parole officer was aware of his arrest on the new felony charge, the Department of Corrections discharged the defendant from parole on September 15, 1991. The Wayne County Prosecutor sought in the Recorder's Court an order to show cause why the parolee consecutive sentence statute, MCL 768.7a(2); MSA 28.1030(1)(2), should not be enforced with respect to the latest offense. The Recorder's Court, upon the admission of the Department of Corrections that it mistakenly had discharged the defendant from his parole, set aside the discharge of parole and resentenced the defendant to the same prison term, but ordered the term to be served consecutively to the sentence for which the defendant was on parole. The defendant appealed. (Docket No. 157780.)

The Wayne County Prosecutor brought an action in the Wayne Circuit Court against the Department of Corrections, seeking a declaration concerning when a consecutive sentence under the parolee consecutive sentence statute should begin to run. The Department of Corrections interpreted the statute to mean that

REFERENCES

Am Jur 2d, Pardon and Parole §§ 84, 113.

See ALR Index under Concurrent and Consecutive Sentences; Parole, Probation, and Pardon.

the consecutive term began upon the expiration of the minimum term of the earlier sentence, while the prosecutor argued that the consecutive sentence should not begin to run until the expiration of the maximum term of the prior sentence. The circuit court, Susan B. Neilson, J., granted summary disposition for the prosecutor, holding that the statute required that a reoffending parolee serve the entire maximum sentence for the prior offense before serving the consecutive sentence and that only after the maximum sentence for the prior offense and the minimum sentence of the later offense had been served could the reoffending parolee again be eligible for parole. Gregory L. Young was allowed to intervene. Motions for a rehearing, relief from judgment, or summary disposition were denied. Young and the Department of Corrections each appealed. (Docket Nos. 161307 and 161438.) The appeals were consolidated.

The Court of Appeals *held:*

1. Because Young committed a new felony before the expiration of his parole, he did not complete successfully his parole and, thus, his discharge from parole by the Department of Corrections was in violation of statute. Accordingly, the Recorder's Court had jurisdiction to set aside the illegal discharge of Young's parole and to sentence Young to a consecutive sentence in accordance with the parolee consecutive sentence statute. However, in the interests of due process, a remand for a parole violation hearing in accordance with the statutory requirements is necessary.

2. The Wayne County Prosecutor had standing to file the declaratory judgment action.

3. The Wayne Circuit Court's determination concerning the proper application of the parolee consecutive sentence statute is applicable to Young, inasmuch as the Recorder's Court had authority to set aside his illegal discharge from parole and to impose a consecutive sentence pursuant to the parolee consecutive sentence statute.

4. The interpretation of the parolee consecutive sentence statute by the Department of Corrections is contrary both to the plain meaning of the statute and to the legislative intent. The language of the statute clearly indicates that the consecutive sentence shall begin to run at the expiration of the remaining portion of the term imposed for the previous offense. The Legislature's intent in making the sentences consecutive was to deter criminal activity by those on parole; however, the department's interpretation would nullify that intent in cases like this where the parolee has already served the minimum term of the prior sentence.

5. To the extent that the provisions of MCL 768.7a(2); MSA

28.1030(1)(2), which became effective in 1988, are in conflict with the provisions of MCL 791.238(5); MSA 28.2308(5), which became effective in 1982, the former impliedly repealed the latter.

6. Because the ruling in this case represents a departure from the consistent prior interpretation of the Department of Corrections of the parolee consecutive sentence statute, it is to be given prospective application only.

The sentence imposed by the Recorder's Court is affirmed, but the matter is remanded for a parole violation hearing. The judgment of the Wayne Circuit Court is affirmed.

E.C. PENZIEN, J., concurring, stated that an adequate basis for the interpretation of the statute is found in its clear language and there is no need to rely on perceived legislative intent. Further, any announcement concerning whether the ruling should be given prospective application only should await presentation and full argument in a case requiring that decision.

1. PRISONS AND PRISONERS — PAROLE — DISCHARGE FROM PAROLE — COURTS — JURISDICTION.

A trial court has jurisdiction to set aside a discharge from parole by the Department of Corrections where the discharge was granted before the parolee had completed successfully the term of parole, because until the parole has been completed successfully any discharge would be illegal.

2. CRIMINAL LAW — SENTENCES — CONSECUTIVE SENTENCES — PAROLE — STATUTES — JUDICIAL CONSTRUCTION.

A consecutive sentence imposed under the parolee consecutive sentence statute commences to run upon the completion of the maximum term of the sentence previously imposed; a reoffending parolee sentenced under the parolee consecutive sentence statute is not eligible for parole until the maximum term of the previous sentence and the minimum term of the consecutive sentence have been served (MCL 768.7a[2]; MSA 28.1030[1][2]).

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 *George E. Ward,* Chief Assistant Prosecutor, for the people in No. 157780.

John D. O'Hair, Prosecuting Attorney, *Timothy*

A. Baughman, Chief of Research, Training, and Appeals, and *George E. Ward,* Chief Assistant Prosecutor, for the Wayne County Prosecutor in Nos. 161307 and 161438.

Stuart G. Friedman and *Neal Bush,* for Gregory L. Young in Nos. 157780 and 161307.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Chester S. Sugierski, Jr.,* Assistant Attorney General, for the Department of Corrections in No. 161438.

Before: JANSEN, P.J., and HOLBROOK, JR., and E. C. PENZIEN,* JJ.

JANSEN, P.J. This case arises out of a dispute in the interpretation of the consecutive sentencing statutes as they apply to parolees. In No. 157780, defendant Gregory Young appeals as of right following a resentencing at which he was sentenced to 42 to 120 months' imprisonment for a conviction of breaking and entering an unoccupied dwelling. His sentence is to be served consecutively to his sentence for a prior armed robbery conviction. In Nos. 161307 and 161438, intervenor, Gregory Young, and defendant, Department of Corrections, appeal as of right from the January 6, 1993, order of the Wayne Circuit Court granting summary disposition for the plaintiff, the Wayne County Prosecutor. Wayne Circuit Court Judge Susan Bieke Neilson ruled that the applicable consecutive sentencing statutory provision required that parole violators' sentences must begin to run at the end of the maximum sentence of the prior conviction. We affirm, but remand in No. 157780.

On January 31, 1983, Gregory Young was con-

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

victed of armed robbery. He was sentenced to a prison term of six to fifteen years on July 14, 1983. Young was paroled on September 15, 1989. His parole status was set for a term of two years, with an expiration date of September 15, 1991. On April 25, 1991, Young was convicted of assault and battery and sentenced to a term of probation. On September 9, 1991, Young committed a breaking and entering offense while he was still on parole. Young was held in the Wayne County Jail, and his parole officer was aware of this fact. Inexplicably, the Department of Corrections discharged Young from his parole on September 15, 1991, despite the fact that it knew that Young had violated his parole and was being held in the Wayne County Jail on a new offense. Young also violated his probation, and a warrant was issued for his arrest on March 12, 1992.

On May 26, 1992, Young was convicted of breaking and entering an unoccupied dwelling following a bench trial in the Detroit Recorder's Court. The Recorder's Court sentenced defendant to a prison term of 42 to 120 months on June 10, 1992, and expressed its bewilderment at the fact that the Department of Corrections had discharged Young's parole despite the fact that it knew that Young had committed a felony offense while still on parole.

The Wayne County Prosecutor then sought an order to show cause why the consecutive sentencing statute should not be enforced. On August 7, 1992, a hearing was held. At the hearing, the Department of Corrections admitted that Young had been "mistakenly discharged" from his parole, although no other explanation was given. The Recorder's Court set aside the discharge of parole and resentenced defendant to a consecutive sentence, which, while the same length as before, was

to be served consecutively to the sentence for the prior armed robbery conviction for which he had been on parole.

Because there was a dispute between the Department of Corrections and the prosecutor's office concerning when the second sentence would begin to run, the Wayne County Prosecutor requested that the Department of Corrections state how it interpreted and applied MCL 768.7a(2); MSA 28.1030(1)(2). The Department of Corrections did not respond. The prosecutor then filed a declaratory judgment action in the Wayne Circuit Court concerning the parolee consecutive sentencing statute. The court granted summary disposition to the prosecutor, ruling that the statute required that a reoffending parolee serve the entire maximum sentence of the prior offense before serving the new minimum sentence and only after the maximum sentence for the prior conviction and the minimum sentence for the subsequent conviction were served could the reoffending parolee be eligible for parole.

After the opinion and order was filed, Young sought to intervene, and the request was permitted. Young and the Department of Corrections moved for a rehearing, relief from judgment, or for summary disposition, which were denied.

DOCKET NO. 157780

In this appeal, defendant Young argues that the Recorder's Court was without authority to set aside his discharge from parole and resentence him to consecutive sentences.

The Department of Corrections is part of the executive branch. Const 1963, art 5, § 2. The power to parole is vested in the Department of Corrections, subject to constitutional powers vested in

the judiciary. MCL 791.204; MSA 28.2274; *People v Raihala,* 199 Mich App 577, 579; 502 NW2d 755 (1993). Parole is merely a conditional release, and a paroled prisoner is still in the custody of the Department of Corrections. *Id.* Whether a prisoner is in prison or on parole, the Department of Corrections is merely executing the sentence imposed by the trial court. *Id.*

As this Court has noted, unless and until parole is *successfully* completed, the prisoner is deemed to be serving out the sentence imposed by the trial court. *Id.*, pp 579-580; MCL 791.238(6); MSA 28.2308(6). In the case before us, there is no dispute that Young did not complete successfully his parole, because he committed a felony offense while he was still on parole. The Department of Corrections has admitted that Young mistakenly was discharged from parole. Because Young did not faithfully perform all the conditions and obligations of his parole for the period fixed in the order (here two years), the Department of Corrections' discharge of Young's parole was in violation of MCL 791.242; MSA 28.2312.

Here, Young did not complete successfully his parole, and, therefore, he was still serving out his sentence. Young was discharged improperly from parole in violation of a statute. Therefore, the effect of setting the discharge aside was to require Young to complete the sentence for the armed robbery conviction from which he had been discharged improperly. No new sentence was imposed. The trial court thus had jurisdiction over defendant despite the apparent "discharge" from his parole. *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections,* 199 Mich App 681, 694; 503 NW2d 465 (1993).

Contrary to defendant's argument, *People v Gregorczyk,* 178 Mich App 1; 443 NW2d 816 (1989),

does not compel a different result. In *Gregorczyk,* the defendant was sentenced originally to an invalid sentence of five to twenty years for a controlled substances violation. During the appeals process, the Department of Corrections discharged the defendant from parole, despite the fact that the defendant had not served even the minimum of his five-year sentence. Thus, not only was the defendant's sentence invalid, but also the Department of Corrections discharged the defendant from parole in violation of the applicable controlled substances statute. However, this Court held that the parole discharge operated as a remission of the remaining portion of the defendant's sentence even though the Department of Corrections' actions were illegal. This Court determined that the defendant could not be compelled on resentencing to serve an additional sentence. *Id.*, p 12.

In *People v Lamb (After Remand),* 201 Mich App 178, 180; 506 NW2d 7 (1993), this Court limited *Gregorczyk* to its facts. In *Lamb,* the defendant was sentenced originally to an invalid sentence of probation, and, just one day before the release of this Court's opinion vacating that invalid sentence, the Department of Corrections discharged the defendant from his probation. The defendant then was resentenced to a term of imprisonment. This Court held that the trial court properly resentenced the defendant despite his discharge from probation, because MCR 6.429(A) permits a court to correct an invalid sentence. *Lamb, supra,* p 181.

Further, in *People v Hill (After Remand),* 202 Mich App 520; 509 NW2d 856 (1993), this Court followed *Lamb* and held that resentencing was not precluded where the defendant was sentenced originally to an invalid sentence and the defendant then was discharged unconditionally from his sen-

tence just twelve days before this Court's opinion remanding the matter to the trial court for resentencing. This Court specifically noted that the case did not involve an executive commutation of the defendant's original sentence and that the defendant was entitled to credit for time served. *Id.*, p 524.

Likewise, we believe that the *Gregorczyk* case should be limited strictly to its unique facts, and we decline to extend its holding to this case. We find *Gregorczyk* to be sufficiently factually distinguishable from the case at bar. In *Gregorczyk, supra,* p 10, this Court assumed that the Department of Corrections was satisfied that the defendant was an appropriate candidate for discharge from parole, and there was no claim of fraud, misrepresentation, or other irregularities. Here, the Department of Corrections admits that Young was discharged mistakenly from parole and that there is no question that the discharge was illegal. Defendant Young may not rely on a separation of powers argument to evade judicial review where the Department of Corrections' actions are so clearly illegal.

Because the parole discharge was in violation of a statute, and therefore illegal, the trial court properly could set aside that parole discharge. It was then within the trial court's authority to resentence Young to a valid consecutive sentence. MCR 6.429(A). The prior sentence was invalid because Young was not sentenced to consecutive sentences as mandated by MCL 768.7a(2); MSA 28.1030(1)(2). Because no new sentence was imposed, Young is required only to complete the sentence from which he was discharged improperly and to serve the consecutive sentence for the subsequent breaking and entering conviction, and, therefore, there is no double jeopardy concern. The

trial court had jurisdiction to resentence Young. *Oakland Co Prosecutor, supra,* p 694.

In the interests of due process, however, we remand for a parole violation hearing that comports with the requirements of MCL 791.239a; MSA 28.2309(1) and MCL 791.240a; MSA 28.2310(1), because this was not done at the resentencing hearing.

DOCKET NOS. 161307 AND 161438

At issue in these appeals is the interpretation of the consecutive sentencing statute for reoffending parolees. MCL 768.7a(2); MSA 28.1030(1)(2).

Defendant Young initially argues that the Wayne County Prosecutor does not have standing to bring this action for a declaratory judgment. This argument was recently rejected by this Court in *Oakland Co Prosecutor, supra,* pp 693-694. We agree that the prosecutor had standing to file this action on behalf of the people of the State of Michigan pursuant to MCL 49.153; MSA 5.751. Thus, MCL 49.72; MSA 5.825 does not prevent the prosecutor from seeking a declaratory judgment even though the Wayne County Board of Commissioners did not authorize such action. *Oakland Co Prosecutor, supra,* p 693.

We likewise reject defendant Young's argument that the Wayne Circuit Court's ruling concerning the consecutive sentence provision for reoffending parolees should not apply to him because the Recorder's Court did not have the authority to review the Department of Correction's decision to discharge him. We have already rejected defendant Young's claim that the Recorder's Court did not have the authority to set aside the illegal parole discharge; therefore, the Wayne Circuit Court's interpretation of the consecutive sentenc-

ing provision applies to him. Defendant Young cannot rely on that prior illegal parole discharge to escape the subsequent interpretation of MCL 768.7a(2); MSA 28.1030(1)(2).

Next, we must determine if the Wayne Circuit Court erred in interpreting the reoffending parolee statute concerning consecutive sentences. MCL 768.7a(2); MSA 28.1030(1)(2). Statutory interpretation is a question of law. *Smeets v Genesee Co Clerk,* 193 Mich App 628, 633; 484 NW2d 770 (1992). Questions of law are reviewed de novo on appeal. *Rapistan Corp v Michaels,* 203 Mich App 301, 306; 511 NW2d 918 (1994).

MCL 768.7a(2); MSA 28.1030(1)(2) provides:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

We must construe this provision in conjunction with MCL 791.238(5); MSA 28.2308(5), which provides:

> A prisoner committing a crime while at large on parole and being convicted and sentenced for the crime shall be treated as to the last incurred term as provided under section 34 [MCL 791.234; MSA 28.2304].

MCL 791.234(2); MSA 28.2304(2) provides:

> If a prisoner is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board shall have jurisdiction over the prisoner for purposes of parole when the prisoner has served

> the total time of the added minimum terms, less the good time and disciplinary credit allowed by statute. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served less good time and disciplinary credits, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

The Department of Corrections maintains that parolees who commit an offense while on parole are subject to consecutive sentences, but that the subsequent sentence begins to run at the end of the minimum term of the prior offense. Thus, under the Department of Corrections' interpretation of MCL 768.7a(2); MSA 28.1030(1)(2), Young's subsequent sentence for the conviction of breaking and entering begins to run at the expiration of the minimum term for the armed robbery conviction (here, the six-year minimum term). Because Young already had served the minimum sentence for the armed robbery conviction before he had been placed on parole status, Young's breaking and entering sentence would begin to run immediately, because he has already served his minimum term for the prior offense.

The prosecutor's position is that MCL 768.7a(2); MSA 28.1030(1)(2) requires that when a parolee commits an offense while on parole, the subsequent sentence must begin to run at the expiration of the maximum term of the prior offense. Thus, in Young's case, his breaking and entering sentence would not begin to run until Young had served his fifteen-year maximum sentence for the prior armed robbery conviction. The Wayne Circuit Court agreed with the prosecutor's position.

A fundamental rule of statutory construction is

to ascertain the purpose and intent of the Legislature in enacting a provision. *Farrington v Total Petroleum, Inc,* 442 Mich 201, 212; 501 NW2d 76 (1993). Where the language of a statute is clear, there is no need for judicial interpretation, and it must be applied as written. *Id.*, p 208. In this case, however, we are faced with two apparently conflicting statutory provisions, MCL 768.7a(2); MSA 28.1030(1)(2) and MCL 791.234(2); MSA 28.2304(2). When two statutes address the same subject, courts must endeavor to read them harmoniously and to give both statutes a reasonable effect. *House Speaker v State Administrative Bd,* 441 Mich 547, 568; 495 NW2d 539 (1993).

In *People v Watts,* 186 Mich App 686; 464 NW2d 715 (1991), this Court, in dicta, noted the conflict between MCL 768.7a(2); MSA 28.1030(1)(2) and MCL 791.234(2); MSA 28.2304(2). This Court noted that while the Department of Corrections' procedure in adding the minimums and the maximums appeared to be "reasonable," it did not strictly comply with the statutes. *Watts, supra,* pp 690-691. While a court will accord deference to the construction placed upon statutory provisions by a particular department of the government for a long period, the agency's interpretation is not binding on a court and cannot be used to overcome the statute's plain meaning. *Ludington Service Corp v Acting Comm'r of Ins,* 444 Mich 481, 490, 503-504; 511 NW2d 661 (1994).

We find that the interpretation of the Department of Corrections is contrary to a plain reading of MCL 768.7a(2); MSA 28.1030(1)(2) and contrary to the legislative intent. The legislative history of the statute evidenced in House Legislative Analysis, SB 397, February 17, 1988, in advancing the arguments for the bill, indicates that the bill would ensure that a prisoner finishing a sentence

on parole would be subject to the same sort of consecutive sentencing that existed for crimes committed while in prison or escape. Further, the bill would punish the behavior of committing a crime while on parole and ensure that such prisoners are incarcerated for a greater period, thereby protecting the public for a greater period than concurrent sentencing would. The bill was also advanced as possibly having a deterrent effect on criminals contemplating further crime while on parole. Fiscal implications were considered, but only an "indeterminate increase" was considered to result from passage of the statute. Moreover, this Court has acknowledged that the purpose of the consecutive sentencing statute is to deter persons convicted of one crime from committing other crimes by removing the security of concurrent sentencing. The statute should be construed liberally to achieve the deterrent effect intended by the Legislature. *People v Dukes,* 198 Mich App 569, 570; 499 NW2d 389 (1993).

The statute reads in part that "the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense." MCL 768.7a(2); MSA 28.1030(1)(2). Were we to accept the interpretation of the Department of Corrections, we would essentially nullify the provision itself and the Legislature's intent. In reoffending parolee cases, the Department of Corrections adds the minimum of the prior sentence and the minimum of the subsequent sentence to determine the "new" minimum sentence. Once the new minimum sentence is served, the defendant is again eligible for parole. However, because the defendant would have already served the minimum term of the prior sentence, adding the minimum terms serves to negate

any penalty for violating parole because only the term of the later minimum sentence is actually served. This interpretation is clearly contrary to the mandate of the statute that the later sentence shall begin to run at the expiration of the *remaining portion* of the term imposed for the previous offense and eliminates any meaning to the term "remaining portion" of the term imposed for the previous offense. See *People v Brown,* 186 Mich App 350, 359; 463 NW2d 491 (1990); *People v Johnson,* 205 Mich App 144; 517 NW2d 273 (1994). This interpretation is also contrary to the Legislature's intent that a consecutive sentence be served by parole violators, that parole violators be incarcerated for a greater period, and that there be a deterrent effect on prisoners contemplating further crime while on parole. See House Legislative Analysis, SB 397, February 17, 1988.

We therefore conclude that the Legislature impliedly repealed MCL 791.238(5); MSA 28.2308(5), which became effective in 1982, when it implemented MCL 768.7a(2); MSA 28.1030(1)(2), which became effective in 1988. From the language of the subsequent provision and the legislative history, it is clear that the subsequent legislative act conflicts with the prior act and repeal by implication may be inferred by this Court. *House Speaker, supra,* p 563.

The Department of Corrections has essentially advanced a number of policy arguments concerning why we should uphold its interpretation of MCL 768.7a(2); MSA 28.1030(1)(2). While it may be that prison overcrowding, monetary expenditures, and no real deterrent effect later prove that the statute is essentially ineffective, these are policy issues for our Legislature. The policy arguments advanced by the Department of Corrections may better serve the taxpayers in the long run, but it is

not for this Court to nullify a statute over a disagreement of policy considerations.

Accordingly, we hold that the reoffending parolee statute, MCL 768.7a(2); MSA 28.1030(1)(2), impliedly repealed MCL 791.238(5); MSA 28.2308(5), because the subsequent statute clearly conflicts with the prior provision. Under a clear reading of the statute and in accordance with the Legislature's intent, the subsequent sentence of a parolee who commits an offense while still on parole must begin to run at the end of the maximum sentence for the prior offense. MCL 768.7a(2); MSA 28.1030(1)(2). Therefore, a reoffending parolee is not eligible for parole again until the remainder of the maximum sentence for the prior offense and the minimum sentence for the subsequent offense have been served.

Because this ruling represents a departure from the consistent prior interpretation and application of the Department of Corrections of MCL 768.7a(2); MSA 28.1030(1)(2) to parole violators, it is to be given prospective application only. Cf. *People v Russo,* 439 Mich 584, 594; 487 NW2d 698 (1992).

Accordingly, we affirm in No. 157780, but remand to the Recorder's Court for a parole violation hearing. We affirm the judgment of the Wayne Circuit Court in Nos. 161307 and 161438.

HOLBROOK, JR., J., concurred.

E. C. PENZIEN, J. *(concurring).* I agree with the results announced by this Court in the opinion by Judge JANSEN, and I agree for the most part with her analysis of the law.

I am unable to find any "intent" in the minds of the majority of the legislators. However, it seems undeniable that the Legislature has spoken in clear and unmistakable language by the enact-

ment of MCL 768.7a(2); MSA 28.1030(1)(2), which requires the results reached in these cases.

Defendant Young argues that the legislative enactments should not be followed, claiming that under facts different from those in his case, the results could be Draconian. The results are certainly not Draconian as applied to the facts in defendant Young's case. Whether there may be some constitutional prohibition against the application of the legislative enactments to the facts of a different case should await announcement in a case clearly presenting such facts.

Finally, I do not concur in the announcement, in dicta, in the opinion by Judge JANSEN that the ruling in this case should be given prospective application only. In my judgment, such an announcement should await presentation and full argument of a case requiring the decision.

KENTWOOD PUBLIC SCHOOLS v KENT COUNTY EDUCATION ASSOCIATION

Docket No. 149882. Submitted November 4, 1994, at Grand Rapids. Decided July 5, 1994, at 9:50 A.M. Leave to appeal sought.

The Kentwood Public Schools brought an action in the Kent Circuit Court against the Kent County Education Association, seeking to enjoin the arbitration of a grievance filed by the defendant on behalf of a probationary teacher whose contract was not renewed by the plaintiff. The plaintiff alleged that the grievance was not subject to arbitration under the terms of the collective bargaining agreement between the defendant and the Kentwood Board of Education. The court, George S. Buth, J., granted summary disposition for the plaintiff and enjoined the arbitration. The defendant appealed.

The Court of Appeals *held:*

The trial court erred in determining that the grievance was not subject to arbitration under the collective bargaining agreement.

1. The probationary teacher did not acquire tenure and, therefore, cannot seek a remedy under the teacher tenure act, MCL 38.81 *et seq.*; MSA 15.1981 *et seq.* Therefore, the teacher's claim is not exempted by the collective bargaining agreement because there is not "another remedial procedure or forum established by law" under which the teacher may seek a remedy.

2. There is no express provision in the collective bargaining agreement excluding a nonprobationary dismissal grievance from arbitration, nor is there forceful evidence of a purpose to exclude the issue of a probationary teacher's dismissal.

3. The defendant's claim that the dismissal violated certain articles of the collective bargaining agreement is governed by the agreement.

4. The order granting summary disposition and enjoining

REFERENCES

Am Jur 2d, Labor and Labor Relations §§ 1856, 1862; Schools § 137.

Matters arbitrable under arbitration provisions of collective labor contract. 24 ALR2d 752.

Bargainable or negotiable issues in state public employment labor relations. 84 ALR3d 242.

arbitration must be vacated. The defendant may submit the claim to arbitration.

Reversed. Order vacated.

P.J. CONLIN, J., dissenting, stated that the decision to enjoin the arbitration was not erroneous because the grievance was not subject to arbitration under the terms of the collective bargaining agreement. Nonrenewal of probationary teachers is subject to the procedures specified in the teacher tenure act. The collective bargaining agreement contains forceful evidence of a purpose to exclude the issue of nonrenewal of probationary teachers from arbitration. The defendant did not make any claim that on its face is governed by the collective bargaining agreement.

1. LABOR RELATIONS — COLLECTIVE BARGAINING AGREEMENTS — DISPUTES — ARBITRATION — QUESTIONS OF LAW.

Whether a dispute is arbitrable under a collective bargaining agreement is a question for the court, but the inquiry is confined to ascertaining whether the party seeking arbitration is making a claim that on its face is governed by the agreement; whether the moving party is right or wrong is a question of contract interpretation for the arbitrator; doubts about the arbitrability of an issue should be resolved in favor of arbitration.

2. LABOR RELATIONS — COLLECTIVE BARGAINING AGREEMENTS — DISPUTES — ARBITRATION.

Absent an express provision in a collective bargaining agreement excluding a particular grievance from arbitration under the arbitration clause, or the most forceful evidence of a purpose to exclude such a claim, the matter should go to arbitration.

3. SCHOOLS — TEACHER TENURE ACT — PROBATIONARY TEACHERS.

A probationary teacher who does not complete a two-year probationary period and therefore does not acquire tenure may not seek a remedy under the teacher tenure act (MCL 38.91, 38.101, 38.121; MSA 15.1991, 15.2001, 15.2021).

Varnum, Riddering, Schmidt & Howlett (by *John Patrick White*), for the plaintiff.

White, Beekman, Przybylowicz, Schneider & Baird, P.C. (by *James A. White* and *Kathryn A. VanDagens*), for the defendant.

Before: JANSEN, P.J., and FITZGERALD and P. J. CONLIN,* JJ.

JANSEN, P.J. Defendant Kent County Education Association appeals as of right from a February 14, 1992, order of the Kent Circuit Court granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

This case arises out of the trial court's order enjoining arbitration of a grievance proceeding between plaintiff and defendant. Rebecca Wingeier was a probationary teacher under a contract with the Kentwood Public Schools for the 1991-92 school year. On March 19, 1991, the school board notified her pursuant to the teacher tenure act, MCL 38.81-38.83; MSA 15.1981-15.1983, that the contract would not be renewed because of unsatisfactory service. Defendant then filed a grievance on her behalf under the collective bargaining agreement between it and the Kentwood Board of Education. Specifically, defendant alleged: (1) it did not approve an appointment to the faculty tenure advisory committee, which reviews the performance of probationary teachers, in violation of article 10(A)(1)(b)(3) of the bargaining agreement; (2) Wingeier's nonrenewal breached article 10(B)(2) of the bargaining agreement that no teacher shall be disciplined without just cause; and (3) Wingeier was given only a one-week notice regarding her performance in violation of article 11(C)(3). The school board denied the grievance.

Defendant then filed a demand for arbitration. However, the school district filed a complaint in the circuit court, seeking to enjoin the arbitration on the basis that the grievance was not subject to arbitration under the terms of the bargaining agreement. The trial court agreed and enjoined

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

the arbitration. Defendant contends on appeal that the grievance was subject to arbitration under the bargaining agreement. We agree with defendant.

Appellate review of a motion for summary disposition is de novo because this Court must review the record to determine if the moving party is entitled to judgment as a matter of law. *Adkins v Thomas Solvent Co,* 440 Mich 293, 302; 487 NW2d 715 (1992); *Coleman-Nichols v Tixon Corp,* 203 Mich App 645, 650; 513 NW2d 441 (1994). A motion under MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A court reviewing such a motion must consider the affidavits, depositions, admissions, pleadings, and any other evidence in favor of the party opposing the motion and grant the benefit of any reasonable doubt to the opposing party. *Radtke v Everett,* 442 Mich 368, 374; 501 NW2d 155 (1993).

The question whether a dispute is arbitrable is for the court's determination. *Kaleva-Norman-Dickson School Dist No 6 v Kaleva-Norman-Dickson School Teachers' Ass'n,* 393 Mich 583, 591; 227 NW2d 500 (1975). The court's inquiry " 'is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.' " *Id.,* quoting *United Steelworkers of America v American Mfg Co,* 363 US 564, 568; 80 S Ct 1343; 4 L Ed 2d 1403 (1960). Absent an express provision excluding a particular grievance from arbitration, or the most forceful evidence of a purpose to exclude the claim, the

matter should go to arbitration. *Kaleva, supra,* p 592.

The relevant provisions of the collective bargaining agreement provide:

ARTICLE 2

BOARD RIGHTS

A. The Board, on its own behalf on behalf of the electors of the district, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Michigan, and of the United States including, and without limiting the generality of the foregoing, the right:

* * *

2. To hire all employees, and subject to the provisions of law, to determine their qualification and the conditions for their continued employment, or their dismissal, or demotion; and to promote, and transfer all such employees;

* * *

ARTICLE 10

CONTRACTUAL RELATIONS

A - TENURE COMMITTEE

1. All probationary teachers eligible for tenure with initial employment dates as of the first day of school in September shall have their performance records (formal observations and evaluation) reviewed by a faculty tenure advisory screening committee and results made known to the probationary teacher prior to March 1. Those probationary teachers whose initial employment date other than the first day of September shall have their performance records (defined above) reviewed and the results made known to the teacher at least 90 days prior to the completion of the probationary period.

a. The committee shall have the responsibility of recommending either dismissal proceedings, third year probationary status, or tenure to the princi-

pal who in turn shall recommend to the Superintendent of Schools.

b. The committee shall consist of the cognizant principal as the non-voting chairperson, one teacher with a comparable assignment, one teacher from the same building, and one teacher-at-large.

(1) The building Association representatives shall appoint the teacher-at-large.

(2) The chairperson shall appoint all other members and convene the committee.

(3) If a teacher with a comparable assignment is not assigned to the building, the chairperson shall appoint this member of the tenure committee; this appointment shall be approved by the building Association representative.

(4) The Tenure Committee shall be appointed and notified of their responsibilities within two weeks after the start of school or within two weeks of the date of hire of the individual concerned.

c. The approval or disapproval of the recommendation of the tenure committee by the Superintendent of Schools shall be final, subject only to the review and final action of the Board of Education.

* * *

B - DISMISSALS

1. All dismissals shall be handled in accordance with the Michigan Tenure Act as amended.

2. No teacher shall be disciplined, reprimanded, reduced in rank or compensation without just cause.

* * *

ARTICLE 11

TEACHER EVALUATION

C - OBSERVATIONS

1. There shall be at least one extended evaluative observation of classroom teaching for 30 consecutive minutes.

2. All monitoring or observation of the work performance of a teacher shall be conducted openly and with full knowledge of the teacher.

3. When improvement is needed the principal shall provide suggestions for improvement with a copy to the teacher.

ARTICLE 13

GRIEVANCE PROCEDURE AND ARBITRATION

A - GRIEVANCE DEFINITION

1. A grievance shall be defined as a complaint of an alleged violation, misinterpretation, or misapplication of provisions of the Master Agreement, Board Policy, or Administrative and Building Regulations as described in sections 2, 3, and 4 of this article.

2. Class I - Grievance - Master Agreement - Any teacher or group of teachers believing that there has been a violation, misinterpretation, or misapplication of any provision of this Agreement may process the complaint of the alleged violation through Step 5.

* * *

B - GRIEVANCE STEPS

* * *

Step 5. (Arbitration)

a. If a satisfactory disposition of the grievance is not made as a result of the meeting provided for in Step 4, the Association shall have the right to appeal the dispute to an impartial arbitrator who may be selected in accordance with the rules of the American Arbitration Association.

* * *

G - POWERS OF THE ARBITRATOR

It shall be the function of the arbitrator, and he shall be empowered, except as his powers are limited below, after due investigation, to make a decision in cases of alleged violation of the specific articles and sections of this Agreement.

1. He shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement.

2. He shall have no power to rule on any claim or complaint for which there is another remedial procedure or forum established by law or by regu-

> lation having the force of law, including any matter subject to the procedures specified in the Teacher's Tenure Act [Act IV Public Acts (extra session), of 1937 of Michigan, as amended.].

Plaintiff argues that the teacher tenure act includes probationary teachers and that the dismissal of probationary teachers is regulated by that act. The applicable provisions of the teacher tenure act provide (1) that all teachers are probationary teachers during their first two years of teaching, MCL 38.81; MSA 15.1981; (2) that no teacher shall be required to serve more than one probationary period in any one school district or institution, although a third year of probation may be granted in certain circumstances, MCL 38.82; MSA 15.1982; and (3) that at least sixty days before the close of the school year the board shall provide the probationary teacher with a statement indicating whether the teacher's work is satisfactory and that any probationary teacher not notified in writing within at least sixty days before the close of the school year shall be employed for the ensuing year, MCL 38.83; MSA 15.1983.

There is no dispute that Wingeier did not complete a two-year probationary period and therefore did not acquire tenure. MCL 38.91; MSA 15.1991. In *Cantu v Grand Rapids Public Schools Bd of Ed,* 186 Mich App 488, 491; 464 NW2d 900 (1990), this Court held that an uncertified teacher does not fall under the provisions of the teacher tenure act and therefore could not seek a remedy under the act. Similarly, Wingeier, as a probationary teacher is not tenured and cannot seek a remedy under the teacher tenure act. MCL 38.101; MSA 15.2001; MCL 38.121; MSA 15.2021. Therefore, Wingeier's claim is not exempted by article 13(G)(2) because there is not "another remedial procedure or forum

established by law" under which Wingeier may seek her remedy.

Plaintiff's reliance on *Lanting v Jenison Public Schools,* 103 Mich App 165; 302 NW2d 631 (1981), is misplaced. In *Lanting,* the only possible provision under which the arbitration could have been filed was one that stated that no teacher shall be disciplined without just cause. However, the teacher in *Lanting* had been dismissed and was not merely disciplined. Further, the provision came under the heading of "Teacher Evaluation and Progress." This Court held that only if the clause was taken completely out of context could it apply to a discharge. *Id.,* p 174. In the instant case, defendant contends not only that Wingeier's dismissal violated a clause that no teacher shall be disciplined without just case (under a heading of "Dismissals"), but also that the association did not approve an appointment to the faculty tenure advisory committee in violation of article 10(A)(1)(b)(3) and that Wingeier was not given sufficient notice under article 11(C)(3).

Accordingly, we find that Wingeier was not exempted from seeking to arbitrate her claim pursuant to article 13 of the collective bargaining agreement because her claim is not within the purview of the teacher tenure act. There is no express provision in the collective bargaining agreement excluding a nonprobationary dismissal grievance from arbitration, nor is there forceful evidence of a purpose to exclude the issue of a probationary teacher's dismissal. *Kaleva, supra,* p 592. Defendant's claim that the dismissal violated articles 10(A)(1)(b)(3), 10(B)(2), and 11(C)(3) is on its face governed by the contract. This is especially so because any doubts about the arbitrability of an issue should be resolved in favor of arbitration. *Huntington Woods v Ajax Paving Industries, Inc*

(After Remand), 196 Mich App 71, 75; 492 NW2d 463 (1992). Whether defendant is correct that the dismissal violated these provisions is for the arbitrator to determine. *Kaleva, supra,* p 591.

The trial court's order granting plaintiff summary disposition and enjoining arbitration is vacated. Defendant may submit its claim to arbitration. We retain no further jurisdiction.

FITZGERALD, J., concurred.

P. J. CONLIN, J. *(dissenting).* I respectfully dissent. Nonrenewal of probationary teachers is subject to the procedures specified in the teacher tenure act, MCL 38.71 *et seq.*; MSA 15.1971 *et seq.* Although the act does not provide for a hearing at the school board level or for review of a board's decision that a probationary teacher's contract would not be renewed, article 10(A)(1) of the collective bargaining agreement established a faculty tenure advisory committee to review a probationary teacher's performance. Article 10(A)(1)(c) unequivocally dictates that the superintendent's approval of the committee's recommendation is subject only to the review and final action of the board of education. In construing these provisions, I would find that the agreement contained forceful evidence of a purpose to exclude the issue of nonrenewal of probationary teachers from arbitration. *Kaleva-Norman-Dickson School Dist No 6 v Kaleva-Norman-Dickson School Teachers' Ass'n,* 393 Mich 583, 592; 227 NW2d 500 (1975); *Lanting v Jenison Public Schools,* 103 Mich App 165, 175; 302 NW2d 631 (1981). Accordingly, I would hold that an arbitrator does not have the authority under article 13(G)(2) of the bargaining agreement to rule on Wingeier's claims.

I also note that defendant alleges that Wingeier

was unjustifiably discharged because article 10(B)(2) provides that no teacher shall be disciplined without just cause. However, defendant's reliance on this provision is misplaced because Wingeier was not "disciplined, reprimanded, reduced in rank or compensation"; thus, the just-cause provision was not invoked. Notably, the preceding provision, article 10(B)(1), provides that all dismissals shall be handled in accordance with the teacher tenure act. Defendant also alleged that article 11(C)(3) was violated in that Wingeier was provided only a one-week notice regarding her performance. This provision does not refer to a period in which the principal must provide suggestions for improvement. Because there is no allegation that Wingeier did not receive suggestions, the claim did not fall under article 11(C)(3). Defendant, therefore, has not made any claim that on its face is governed by the contract.

Accordingly, I would find that Wingeier's grievance was not subject to arbitration under the terms of the collective bargaining agreement and, therefore, that the trial court's decision to enjoin the arbitration was not erroneous.

ZOPPI v CHRYSLER CORPORATION

Docket No. 142058. Submitted February 3, 1994, at Detroit. Decided July 6, 1994, at 9:00 A.M.

Richard Zoppi brought an action in the Wayne Circuit Court against Chrysler Corporation, alleging reverse age discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, after the defendant denied the plaintiff's application for early retirement under its selective special early retirement program. The program required, in part, that an applicant be fifty-five years or older. The plaintiff was forty-nine years old. The court, Kaye Tertzag, J., granted the defendant's motion for summary disposition. The plaintiff appealed.

The Court of Appeals *held:*

The plaintiff cannot establish an age discrimination case where the defendant denied him special early retirement because he was too young. The Civil Rights Act is intended to deter discrimination against older workers who still are capable. The plaintiff is not a member of a protected class under the act. The defendant's early retirement program is valid as a bona fide retirement policy under MCL 37.2202(2); MSA 3.548(202)(2) because it exists and pays benefits.

Affirmed.

1. CIVIL RIGHTS — CIVIL RIGHTS ACT — AGE DISCRIMINATION — PRIMA FACIE CASE.

A plaintiff must establish membership in a protected class and subjection to adverse employment action because of age to establish a prima facie case of age discrimination (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*).

2. CIVIL RIGHTS — CIVIL RIGHTS ACT — AGE DISCRIMINATION.

The Civil Rights Act was conceived to deter discrimination

REFERENCES

Am Jur 2d, Civil Rights §§ 229, 237, 238.

Application of state law to age discrimination in employment. 96 ALR3d 195.

"Bona fide employee benefit plan" exception to general prohibition of age discrimination in employment (29 USCS sec. 623 (f) (2)). 70 ALR Fed 110.

against older workers who still are capable (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*).

3. CIVIL RIGHTS — CIVIL RIGHTS ACT — AGE DISCRIMINATION.

The determination whether a plaintiff is a member of a protected class for age discrimination claims is not based on the age of the plaintiff per se; also to be considered is the age of the person or persons who benefit from a defendant's discriminatory actions (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*).

4. CIVIL RIGHTS — CIVIL RIGHTS ACT — BONA FIDE RETIREMENT POLICIES.

A retirement policy that exists and pays benefits is bona fide and therefore exempt from the provisions of the Civil Rights Act (MCL 37.2202[2]; MSA 3.548[202][2]).

James Schuster, for the plaintiff.

Gregory S. Muzingo and *Kim R. Kolb,* and *Patterson, Phifer & Phillips* (by *Randolph D. Phifer*), for the defendant.

Before: WAHLS, P.J., and REILLY and R. M. DANIELS,* JJ.

PER CURIAM. Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition of his age discrimination claim. We affirm.

Plaintiff's claim arose from defendant's denial of his application for early retirement under its "selective special early retirement program" that was offered for a limited time. In order to qualify for the program, an employee was required (1) to have been on the active payroll on or after August 1, 1987; (2) to be age fifty-five or older; (3) to be a participant in the pension plan; (4) to be selected by management to participate; and (5) to voluntarily agree to participate. Plaintiff did not qualify because he was forty-nine years old. Consequently,

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

he filed an age discrimination claim pursuant to the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, alleging that defendant discriminated against him by refusing his application on the basis of his age. The trial court granted defendant's motion pursuant to MCR 2.116(C)(10), finding that the plan was a "bona fide retirement plan" and therefore exempt from the act.

The relevant provision of the Civil Rights Act regarding employment, MCL 37.2202; MSA 3.548(202), provided in part at the time of this action:

> (1) An employer shall not:
> (a) Fail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age . . . .
> (b) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of . . . age . . . .[1]

Notwithstanding the above prohibition, subsection 2 of § 202 exempted bona fide retirement policies:

> This section shall not be construed to prohibit the establishment or implementation of a bona fide retirement policy or system that is not a subterfuge to evade the purpose of this section.

This case presents a unique situation: plaintiff is claiming defendant discriminated against him on the basis of age because he was too young to

[1] The act was amended in 1991. 1991 PA 11. The amendment restructured the language of subsection 1(a) to clarify that failure or refusal to discharge an employee is not actionable.

qualify for defendant's early retirement program, or essentially a reverse age discrimination claim. However, as we shall discuss, we hold that the Civil Rights Act does not protect plaintiff in this situation.

To establish a prima facie case of age discrimination, a plaintiff must establish that he was a member of a protected class and that he was subjected to adverse employment action because of his age. *Barnell v Taubman Co, Inc,* 203 Mich App 110, 120-121; 512 NW2d 13 (1993); *Featherly v Teledyne Industries, Inc,* 194 Mich App 352; 486 NW2d 361 (1992). Obviously, whether a person is a member of a protected class for racial, sexual, or religious discrimination is easily identified by a person's race, sex, or religion. However, whether a plaintiff is a member of the protected class for age discrimination is not so easily identified because the determination is not based on the age of the plaintiff per se; also to be considered is the age of the person or people who benefit from a defendant's discriminatory actions.

In this case, plaintiff has not been denied a benefit by reason of advanced age, but, rather, because he was too young to qualify. The Civil Rights Act was conceived to deter discrimination against older workers who still are capable. *Klammer v Dep't of Transportation,* 141 Mich App 253, 259; 367 NW2d 78 (1985). Therefore, we believe that plaintiff is not a member of the protected class in a reverse age discrimination case under the Civil Rights Act in light of its intended purpose.[2]

We further find support for our position in two

[2] Plaintiff's reliance on two cases to support his argument that he falls within the protected class is misplaced. In *Ewers v Stroh Brewery Co,* 178 Mich App 371; 443 NW2d 504 (1989), a forty-year-old employee was among eighty-seven employees discharged because of a reorganization and reduction in the work force. This Court held that

federal cases involving similar claims under the federal Age Discrimination in Employment Act (ADEA), 29 USC 621 *et seq. Hamilton v Caterpillar Inc,* 966 F2d 1226 (CA 7, 1992), and *Wehrly v American Motors Sales Corp,* 678 F Supp 1366 (ND Ind, 1988). In rejecting the plaintiff's reverse age discrimination claim, the Seventh Circuit Court astutely observed:

> There is no evidence in the legislative history that Congress had any concern for the plight of workers arbitrarily denied opportunities and benefits because they are too *young.* Age discrimination is thus somewhat like handicap discrimination: Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities. The young, like the non-handicapped, cannot argue that they are similarly victimized. [*Hamilton, supra,* p 1228.]

Accordingly, this Court holds that plaintiff cannot establish an age discrimination case where his employer denied him special early retirement because he was too young.

Assuming arguendo that plaintiff could establish a case of age discrimination, we also find that defendant's early retirement program was valid as a bona fide retirement policy under MCL 37.2202(2); MSA 3.548(202)(2). To date, only one decision has discussed this exemption. In *Klammer, supra,* this Court upheld the mandatory retirement age for state employees against an age discrimination claim under the Civil Rights Act. Although the central issue was "whether the pas-

summary disposition was precluded where the plaintiff showed that his position was filled by younger workers with less experience. The plaintiff fell within the protected class not merely on the basis of his age, but also because he was replaced by younger workers. *Cheeseman v American Multi-Cinema, Inc,* 108 Mich App 428; 310 NW2d 408 (1981), involved a claim brought by minors, who were denied admission into a movie theatre, under the public accommodation section of the Civil Rights Act, MCL 37.2302; MSA 3.548(302).

sage of Elliott-Larsen in 1977 impliedly repealed the compulsory retirement provision of MCL 38.19(3); MSA 3.981(19)(3)," *id.,* p 258, this Court noted the exemption and asserted:

> Generally, retirement under a plan which is not a subterfuge, is applied uniformly and is funded, is not considered discrimination and is socially beneficial. . . .
>
> * * *
>
> . . . The language of Elliott-Larsen, however, clearly excepts retirement policies and systems which apply uniformly and contain provisions for pension or other economic systems to protect the worker economically on retirement. [*Id.,* p 259.]

Admittedly, defendant's plan is not applied uniformly because workers must be invited to participate and, thus, people of the same age group are treated dissimilarly. However, we are not bound by the above definition because whether the mandatory retirement policy was bona fide was not an issue in *Klammer,* and therefore the statements were dicta. Because we believe the definition is overly restrictive, we decline to follow it.

Instead, we are persuaded to utilize the definition articulated by the United States Supreme Court regarding the ADEA's "bona fide" retirement policy exemption, 29 USC 623(f)(2). A retirement policy is bona fide if it "exists and pays benefits." *Public Employees Retirement System of Ohio v Betts,* 492 US 158, 166; 109 S Ct 2854; 106 L Ed 2d 134 (1989); *United Air Lines, Inc v McMann,* 434 US 192, 194; 98 S Ct 444; 54 L Ed 2d 402 (1977). Because it is undisputed that defendant's policy exists and pays benefits, it is exempted under MCL 37.2202(2); MSA 3.548(202)(2). Accordingly, the trial court did not err in granting summary disposition in favor of defendant.

Affirmed.

ARIM v GENERAL MOTORS CORPORATION

AMERICAN TRANSMISSIONS, INC v GENERAL MOTORS CORPORATION

AMERICAN TRANSMISSIONS, INC v CURTIS

JAY ENTERPRISES, INC v PIROCHTA

BOSSIO v PIROCHTA

Docket Nos. 145204, 145205, 147502, 148304, 154046. Submitted April 20, 1994, at Detroit. Decided July 6, 1994, at 9:05 A.M.

An investigation was conducted by the Department of State's Bureau of Automotive Regulation (BAR) in conjunction with the Office of the Attorney General (OAG) into fraudulent practices by transmission repair facilities pursuant to the Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq.*; MSA 9.1720(1) *et seq.* The BAR and its director, Frederick Pirochta, and its mechanic, Walter Curtis, together with the OAG, received the technical support and assistance of General Motors Corporation, Lucille Treganowan and her Pennsylvania corporation, Transmissions by Lucille, and the Fairfax Group Ltd. (hereinafter referred to as the private defendants), in implementing the investigation. As a result of the investigation, thirteen repair facilities were charged with violating the act. In addition, various administrative and civil complaints were filed. The actions resulted in the suspension and revocation of certifications, registrations, or licenses, and the issuance of cease and desist orders with regard to certain of the repair facilities and their owners and employees. Those corporations and individu-

REFERENCES

Am Jur 2d, Constitutional Law § 528; Fraud and Deceit § 12; Judgments § 415; Monopolies, Restraints of Trade, and Unfair Trade Practices § 108.

Application of doctrine exempting from federal antitrust laws joint efforts to influence legislative or executive action. 17 ALR Fed 645.

"Sham" exception to application of Noerr-Pennington Doctrine, exempting from federal antitrust laws joint efforts to influence governmental action. 71 ALR Fed 723.

Right of petition and assembly under Federal Constitution's First Amendment—Supreme Court cases. 86 L Ed 2d 758.

als, and others, thereafter brought several civil actions in the Wayne Circuit Court against the private defendants. In each case, the court, Helene N. White, J., granted summary disposition or partial summary disposition for the defendants. The plaintiffs appealed, and their appeals were consolidated.

In Docket No. 145204, plaintiffs William Arim and Robert Ditta, and Pentco Enterprises, Inc., and in Docket No. 145205, plaintiffs American Transmissions, Inc., John F. Folino, Mario Bossio, and others, brought actions against the private defendants, alleging violation of due process under 42 USC 1983, fraud, injurious falsehood, tortious interference with advantageous business relationship, and intentional infliction of emotional distress, and in Docket No. 145204, abuse of process. After the defendants had the cases removed to the federal district court, the court granted the defendants' motion to dismiss on the basis of First Amendment immunity and, alternatively, on the ground that the Folino plaintiffs' § 1983 claim was barred by collateral estoppel as a result of the administrative proceedings. The court remanded the pendent state law claims to the Wayne Circuit Court. The plaintiffs appealed, and the Court of Appeals for the Sixth Circuit affirmed the judgment. 935 F2d 269 (CA 6, 1991). On remand, the Wayne Circuit Court granted summary disposition for the defendants. The plaintiffs appealed.

In Docket No. 148304, plaintiffs Jay Enterprises, Inc., American Transmissions, John F. Folino, Mario Bossio, Emilio Daloisio, and others, brought state law claims against Pirochta and Curtis, and in Docket No. 147502, Bossio, B & C Corporation, Inc., and Trans-4, Inc., brought state law claims against Curtis, Pirochta, and General Motors. The Wayne Circuit Court granted summary disposition for the defendants in both cases, but allowed the Bossio plaintiffs to file an amended complaint regarding their claims of injurious falsehood and tortious interference with an advantageous business relationship. Following the filing of an amended complaint, the court granted summary disposition for the defendants. American Transmissions, Inc., Bossio, and Daloisio (Docket No. 147502), and Jay Enterprises, Inc. (Docket No. 148304) appealed from the former orders of summary disposition. Bossio, B & C Corporation, Inc., and Trans-4, Inc. (Docket No. 154046) appealed from the latter order regarding the amended complaint.

The appeals were consolidated.

The Court of Appeals *held:*

1. In Docket Nos. 145204 and 145205, the trial court properly found the defendants to be entitled to immunity from the tort

claims because their assistance and cooperation with the state in a law enforcement operation was constitutionally protected under the *Noerr-Pennington* doctrine (*Eastern Railroad Presidents Conference v Noerr,* 365 US 127 [1961]; *United Mine Workers of America v Pennington,* 381 US 657 [1965]). The doctrine protects First Amendment petitioning of the government from claims brought under federal and state laws, including § 1983 claims and tortious interference claims. The plaintiffs failed to establish the "sham" exception to the doctrine, and the defendants did not exceed the permissible grounds of petitioning under the First Amendment.

2. In Docket No. 148304, the trial court properly found that collateral estoppel barred Jay Enterprises, Inc., which is owned by the Folino plaintiffs who were subjected to the administrative proceedings, from asserting claims against Pirochta and Curtis for improper conduct during the investigation. The defendant state employees were entitled to assert collateral estoppel defensively against Jay Enterprises, which is in privity with the Folinos.

3. In Docket No. 147502, the trial court did not err in dismissing the plaintiffs' fraud claims. These plaintiffs were not charged with any violation of the act and were not among the thirteen transmission repair shops mentioned in public statements by the Attorney General or the Secretary of State. Summary disposition was appropriate because the plaintiffs failed to allege that Curtis and Pirochta made material false representations upon which the plaintiffs detrimentally relied. The court properly granted summary disposition of the claim of intentional infliction of emotional distress because the plaintiffs did not allege outrageous conduct by Curtis or Pirochta. The trial court properly found that Curtis and Pirochta were entitled to governmental immunity.

4. In Docket No. 154046, the trial court properly granted the defendants' motion for summary disposition regarding the claims of tortious interference with business relations and injurious falsehood. The court properly concluded that there was no genuine issue of material fact because the defendants participated in a lawful investigation under the authority of the Secretary of State and the defendants had no motive to interfere with the business relations of the plaintiffs, who were not charged with any violations of the act. There is no evidence that the allegedly false statements made by the Secretary of State and the Attorney General were based on false statements made by Curtis or Pirochta, or that the statements referred to the plaintiffs.

Affirmed.

1. TORTS — CONSTITUTIONAL LAW — PETITIONING GOVERNMENT — ANTITRUST LIABILITY.

Parties who, pursuant to the First Amendment, petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent; the protection of this doctrine extends to efforts to influence administrative agencies and the courts; the doctrine is not limited to federal antitrust actions and extends to protect First Amendment petitioning of the government from claims brought under federal and state laws, including claims under 42 USC 1983 or alleging tortious interference with contractual relations in violation of the common law (US Const, Am I).

2. TORTS — CONSTITUTIONAL LAW — PETITIONING GOVERNMENT — SHAM EXCEPTION — ANTITRUST LIABILITY.

The "sham" exception to the doctrine that parties who, pursuant to the First Amendment, petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even through their petitions are motivated by anticompetitive intent applies when one party begins litigation not to win that litigation but to force its competitor to waste time and money in defending itself or engages in the administrative process only to preclude or delay its competitor's access to the process (US Const, Am I).

3. ESTOPPEL — COLLATERAL ESTOPPEL.

Collateral estoppel bars a plaintiff from relitigating issues in a second action where the litigants in the second action are the agents, servants, or employees of the litigants involved in the first action, the issues raised in the second action were fully and fairly litigated in the first action, and those issues were decided against the plaintiff in the first action.

4. FRAUD — ELEMENTS.

To state an action for fraud or misrepresentation, a plaintiff must prove: the defendant made a material misrepresentation; it was false; when the defendant made it, the defendant knew it was false or made it recklessly without knowledge of its truth or falsity; the defendant made it with the intent that the plaintiff would act upon it; the plaintiff acted in reliance upon it; and the plaintiff suffered damage.

Stringari, Fritz, Kreger, Ahearn, Hunsinger, Bennett & Crandall, P.C. (by *Martin E. Crandall* and *Janice A. Kyko*), for William Arim and Robert

Ditta, and American Transmissions, Inc., American Transmissions Land Company, Inc., Jay Enterprises, Inc., J J & T, Inc., Commercial Transmissions, Inc., John F. Folino, Joyce Folino, John A. Folino, Thomas A. Folino, and B & C Corporation, Inc., and Trans-4, Inc.

James T. Loftus and *Lee A. Schutzman,* and *Kirkland & Ellis* (by *Jeffrey A. Rosen* and *Karen A. Walker*), for General Motors Corporation, Transmissions by Lucille, Lucille Treganowan, and Fairfax Group, Ltd.

Bendure & Thomas (by *Mark R. Bendure*), for Mario Bossio, B & C Corporation, Inc., and Trans-4, Inc.

Williams, Schaefer, Ruby & Williams (by *James J. Williams*), for Emilio Daloisio, Mary Daloisio, and M & E Corporation, Inc.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Stewart H. Freeman,* Assistant in Charge, and *Brian D. Devlin,* Assistant Attorney General, for Frederick Pirochta and Walter Curtis.

Before: FITZGERALD, P.J., and CONNOR and M. O. BATTANI,* JJ.

PER CURIAM. These consolidated appeals arise from a 1986 investigation, known as "Operation Shifty," that was conducted by the Department of State's (DOS) Bureau of Automotive Regulation (BAR) in conjunction with the Office of the Attorney General (OAG) into fraudulent practices by transmission repair facilities pursuant to the Mo-

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

tor Vehicle Service and Repair Act (the Act), MCL 257.1301 *et seq.*; MSA 9.1720(1) *et seq.*

The BAR and its director, Frederick Pirochta, and its mechanic, Walter Curtis, together with the OAG, received the technical support and assistance of General Motors Corporation, Lucille Tregowan and her Pennsylvania corporation, Transmissions by Lucille, and the Fairfax Group Ltd. (hereinafter referred to as the private defendants) in implementing the investigation. General Motors supplied four vehicles, twenty transmissions, garage facilities, and technical engineering assistance. Transmissions by Lucille rebuilt the transmissions and prepared them for use. Pursuant to the directions of state officials, Transmissions by Lucille filled the transmissions with used transmission fluid, sprayed the pans with graphite to create the appearance of "dirty pans," and added metallic debris to the pans. Fairfax provided the "cover stories" to explain why the cars were brought in for servicing.

During the summer of 1986, state employees took the vehicles with rebuilt transmissions to various franchised facilities, posing as customers in response to advertisements for low-priced transmission tune-ups. At thirteen repair facilities, expensive "tear-down" inspections were performed even though the transmissions were in good working order.

As a result of the investigation, the thirteen transmission repair facilities were charged on August 6, 1986, with violations of the Act. Among them were the AAMCO repair shop in Grand Rapids operated by Pentco Enterprises, Inc., that was owned by plaintiffs Arim and Ditta, and three American Transmissions, Inc., repair shops in Plymouth, Garden City, and Ann Arbor that were owned and operated by the Folino plaintiffs (who

also owned plaintiffs Jay Enterprises, Inc., J J & T, Inc., and Commercial Transmissions, Inc.). On the same day, the Secretary of State summarily suspended the certifications and registrations of the three American Transmissions repair facilities owned by the Folinos.

On August 11, 1986, the OAG filed an administrative complaint against Pentco and its owners and their repair facility licenses were also summarily suspended. On the same day, the OAG also filed a civil complaint for injunctive relief and penalties against Pentco in the Kent Circuit Court. The OAG also filed criminal charges against plaintiff Jay Enterprises, Inc. (owned by the Folinos) and its employee, Michael Rutherford, for obtaining money under false pretenses.[1] Plaintiff Mario Bossio, the owner of B & C Corp., Inc., and Trans-4, Inc. (hereinafter the Bossios), and plaintiffs Emilio and Mary Daloisio, the owners of M & E Corporation, Inc. (hereinafter the Daloisios), which also operated transmission repair facilities, were investigated but were not charged with any violations under the Act.

On August 12, 1986, at the close of the investigation, Attorney General Frank Kelley and Secretary of State Richard Austin held a joint press conference and issued a press release stating the nature of the undercover investigation and the identity of thirteen registered transmission repair facilities that had been charged with violation of the Act. On that same day, Attorney General Kelley discussed the investigation and the prosecution of the thirteen repair shops when he was interviewed by Bill Bonds of WXYZ-TV in Detroit.

On August 19, 1986, the DOS commenced admin-

[1] This Court reversed the conviction against Jay Enterprises in *People v Jay Enterprises, Inc,* unpublished opinion per curiam of the Court of Appeals, decided May 9, 1991 (Docket No. 105861).

istrative hearings regarding the suspension and revocation of the certification and registration of the three American Transmissions facilities owned and operated by the Folino plaintiffs. In the final administrative decision issued by the administrative hearing officer and entered by the Secretary of State on February 17, 1989, it was determined that all three American Transmissions shops owned by the Folinos committed unfair and deceptive acts and violated §§ 7 and 33 of the Act, MCL 257.1307; MSA 9.1720(7) and MCL 257.1333; MSA 9.1720(33), as well as various provisions of the BAR's General Rules. As a result, a cease and desist order was entered against the Folinos, whose registrations and certifications were permanently revoked. The hearing officer specifically found that these American Transmissions shops had misrepresented the condition of the transmissions and the need for expensive "tear-down" work, charged for services not performed, unnecessarily replaced a working transmission, or performed unnecessary repairs in order to profit.

During the administrative proceedings, the Folino plaintiffs attacked the integrity of Operation Shifty, contending that the BAR had violated § 26(2)(d) of the Act, MCL 257.1326(2)(d); MSA 9.1720(26)(2)(d), which prohibits the BAR from "deliberately misrepresent[ing] the condition of the vehicle" used in an investigation. Specifically, the Folinos argued that GM improperly cooperated with state officials, and that the use of old transmission fluids, the failure to flush the cooling lines, the alteration of the transmission pans to make them appear dirty, and the use of "coercive cover stories" would be misleading to an honest and reasonable transmission repair facility employee or mechanic. The hearing referee rejected these

claims and found that the investigative method was not improper.

The administrative decision was affirmed on appeal by the Wayne Circuit Court on May 8, 1990.[2] On September 11, 1990, application for leave to appeal was denied by this Court.[3] On March 29, 1991, the Michigan Supreme Court denied leave to appeal.[4]

During the pendency of the administrative proceedings involving the Folinos' American Transmissions repair shops, the Pentco plaintiffs, Arim and Ditta, agreed to waive trial and surrender their repair facility license under an administrative decision entered on May 19, 1987. Subsequently, on March 9, 1988, the Kent Circuit Court entered a consent injunction that permanently enjoined the Pentco plaintiffs from having an ownership interest in any repair facility or performing any automotive repair work for five years. In late 1991, Pentco was dissolved.

On July 10, 1989, the plaintiffs in Docket No. 145204 (plaintiffs Arim and Ditta, owners of Pentco) filed the instant action against the private defendants alleging a violation of due process under 42 USC 1983, as well as claims of fraud, injurious falsehood, tortious interference with advantageous business relationship, intentional infliction of emotional distress, and abuse of process. Principally, these plaintiffs contend that defendant GM initiated the Operation Shifty investigation to shut down franchised transmission repair facilities because the franchisees were informing their customers of their rights under a 1982 Federal Trade

[2] *American Transmissions, Plymouth v Dep't of State,* Docket No. 89-910378.

[3] *American Transmissions v Dep't of State,* unpublished order of the Court of Appeals (Docket No. 130457).

[4] 437 Mich 936 (1991).

Commission (FTC) consent decree that required GM to submit to binding arbitration to repair defective transmissions in approximately five million automobiles.

On July 18, 1989, the plaintiffs in Docket No. 145205 (the Folino and Bossio plaintiffs) filed a complaint alleging a violation of due process under § 1983, as well as fraud, injurious falsehood, tortious interference with a business relationship, and intentional infliction of emotional distress. As in Docket No. 145204, these plaintiffs alleged that GM initiated the investigation to disparage the franchised transmission repair facilities in order to avoid its warranty obligations under the FTC consent decree.

The private defendants then moved to dismiss the complaints in Docket Nos. 145204 and 145205 on the grounds that plaintiffs failed to state a claim under § 1983, that defendants' alleged conduct was privileged under the First Amendment, and that the complaints were barred by collateral estoppel because the factual core claims had already been adjudicated in the state administrative proceedings.

After the cases were removed by defendants to federal district court for the Eastern District of Michigan, the federal court granted the motion to dismiss on February 9, 1990, on the basis of First Amendment immunity under the *Noerr-Pennington* (*Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc,* 365 US 127; 81 S Ct 523; 5 L Ed 2d 464 [1961]; *United Mine Workers of America v Pennington,* 381 US 657; 85 S Ct 1585; 14 L Ed 2d 626 [1965]) doctrine and, alternatively, on the ground that the Folino plaintiffs' § 1983 claim was barred by collateral estoppel because the "allegations forming the core of plaintiffs' claim, i.e., that the investigation was improper,

were considered and rejected in the underlying administrative proceedings." However, the court noted that the collateral estoppel ground for dismissal did not apply to the "non-Folino plaintiffs." Having dismissed the § 1983 claim, the court remanded the pendent state law claims to the Wayne Circuit Court on the ground that the court did not have authority to rule after dismissal of the federal claim. On June 4, 1991, the federal district court's judgments were affirmed in *American Transmissions, Inc v General Motors Corp,* 935 F2d 269 (CA 6, 1991).

On remand to the Wayne Circuit Court, the trial court granted summary disposition in favor of defendants in Docket Nos. 145204 and 145205 on July 18, 1991, and dismissed plaintiffs' state claims. Reconsideration was denied on September 12, 1991, and a final order was entered on September 27, 1991.

Plaintiff Jay Enterprises, Inc. (Docket No. 148304) and plaintiffs American Transmissions, Inc., Mario Bossio, and Emilio Daloisio (Docket No. 147502) filed state law claims against defendants Curtis and Pirochta. After a hearing held on November 22, 1991, the Wayne Circuit Court issued an order granting in part defendants' motion for summary disposition in Docket Nos. 147502 and 148304, but allowed the Bossio plaintiffs to file an amended complaint regarding their claims of injurious falsehood and tortious interference with an advantageous business relationship (Docket No. 154046).

On December 6, 1991, the Bossio plaintiffs filed the amended complaint. After a hearing on May 20, 1992, the trial court granted defendants' motion for summary disposition under MCR 2.116(C)(10).

Plaintiffs now appeal as of right.

DOCKET NOS. 145204 AND 145205

Plaintiffs first contend that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(8) based upon *Noerr-Pennington* immunity. We disagree.

The doctrine and the exceptions thereto arose from *Noerr, supra,* and *Pennington, supra,* which essentially held, as summarized in *Video Int'l Production, Inc v Warner-Amex Cable Communications, Inc,* 858 F2d 1075, 1082 (CA 5, 1988), cert den sub nom *City of Dallas v Video Int'l Productions, Inc,* 490 US 1047 (1989), "that parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent."

In *Potters Medical Center v City Hosp Ass'n,* 800 F2d 568, 578 (CA 6, 1986), the Sixth Circuit Court of Appeals similarly observed "that attempts to influence the legislative process, even if prompted by an anticompetitive intent, are immune from antitrust liability." In *Potters,* at 578, the Sixth Circuit Court of Appeals, citing *Noerr, supra* at 137-138, noted two reasons for conferring immunity:

> [T]he First Amendment's protection of the right to petition the government, and the recognition that a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government.

In *Potters,* supra at 578, the Sixth Circuit Court of Appeals also noted, citing *California Motor Transport Co v Trucking Unlimited,* 404 US 508, 510; 92 S Ct 609; 30 L Ed 2d 642 (1972), that "the protection of the *Noerr-Pennington* doctrine [extends] to

efforts to influence administrative agencies and the courts."

Until recently, courts have identified two separate exceptions to the *Noerr-Pennington* doctrine: (1) the "sham" exception and (2) the "coconspirator" exception. As set forth in *Video Int'l, supra* at 1082:

> The "sham" exception comes into play when the party petitioning the government is not at all serious about the object of that petition, but engages in the petitioning activity merely to inconvenience its competitor. Thus, the sham exception is said to apply when one party has begun litigation not to win that litigation, but rather to force its competitor to waste time and money in defending itself. Similarly, a party that "petitions" the government by engaging in administrative processes only to preclude or delay its competitor's access to those processes may be liable for antitrust damages under the "sham" exception.

The "coconspirator" exception was applied where "a government official or body has been influenced by the petitioner through some corrupt means." *Id.* at 1083. However, in *City of Columbia v Omni Outdoor Advertising, Inc,* 499 US 365, 382-384; 111 S Ct 1344; 113 L Ed 2d 382 (1991), the Court rejected a "conspiracy" exception to the *Noerr-Pennington* doctrine.

In the instant case, defendants were entitled to *Noerr-Pennington* immunity to plaintiffs' tort claims because their assistance and cooperation with the State of Michigan in a law enforcement operation was constitutionally protected under the First Amendment.

Contrary to plaintiffs' contention, the *Noerr-Pennington* doctrine is not limited to federal antitrust actions. As explained in *Video Int'l, supra* at 1084:

> Although the *Noerr-Pennington* doctrine initially arose in the antitrust field, other circuits have expanded it to protect first amendment petitioning of the government from claims brought under federal and state laws, including section 1983 and common-law tortious interference with contractual relations. . . . There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust. [Citations omitted.]

Furthermore, contrary to plaintiffs' contention, there is nothing in *City of Columbia, supra,* to indicate that the Court limited the application of the doctrine to antitrust cases. The Sixth Circuit Court of Appeals, in affirming the decision of the federal district court, rejected plaintiffs' argument in *American Transmissions, Inc v General Motors Corp,* 935 F2d 269 (CA 6, 1991), cert den — US —; 112 S Ct 308; 116 L Ed 2d 250 (1991).

Moreover, plaintiffs fail to establish the "sham" exception to the *Noerr-Pennington* doctrine. In view of the license revocation actions undertaken by the BAR against plaintiffs Arim and Ditta and the Folino plaintiffs, defendants' conduct in cooperating with the state government could scarcely be considered "baseless." *Potters, supra* at 579.

Further, there is nothing to indicate that defendants—specifically GM—exceeded the permissible bounds of petitioning under the First Amendment. The record indicates that the state conducted and controlled the entire operation with the assistance of defendants. According to the administrative hearing officer, defendant Pirochta initially contacted GM, requesting assistance with regard to the BAR's ongoing investigation, and GM replied that "it was up to the State of Michigan to investigate the matter on its own." Subsequently, GM and the

other private defendants agreed to provide assistance to the state investigation, which was controlled by the OAG and the BAR. Thus, there is no basis for plaintiffs' contention that GM initiated the Operation Shifty investigation in order to avoid its warranty requirements pursuant to the FTC consent decree.

Notwithstanding, plaintiffs argue that evidence discovered in a companion case in the Court of Claims allegedly shows that GM approached the OAG and DOS and asked if "[the State] would be willing to join forces and conduct a number of investigations in Michigan [concerning franchised transmission repair shops]." But a perusal of the evidence clearly shows that the BAR, which was already considering an investigation of unnecessary transmission repairs at the time, contacted GM. It was only after the BAR found out that GM was also paying for unnecessary repairs that GM offered to "join forces and conduct a number of investigations in Michigan."

Even if GM cooperated with the state in order to avoid its warranty requirements under the FTC decree, plaintiffs still have failed to show that defendants engaged in "excessive" or improper cooperation with the State of Michigan beyond the permissible scope of the First Amendment. Here, the trial court agreed with the federal court's conclusion that defendants' actions were comparable to the immunized assistance given to law enforcement activities in *Ottensmeyer v Chesapeake & Potomac Telephone Co of Maryland,* 756 F2d 986 (CA 4, 1985), and *Forro Precision, Inc v Int'l Business Machines Corp,* 673 F2d 1045 (CA 9, 1982).

In *Ottensmeyer,* an antitrust case, the Fourth Circuit Court of Appeals held that private telephone companies that actively assisted in a law

enforcement investigation of a rival answering service were entitled to First Amendment immunity, notwithstanding anticompetitive motives or purposes. In *Forro,* the Ninth Circuit Court of Appeals similarly held that IBM's active participation with the police in investigating Forro's suspected theft of IBM trade secrets was entitled to First Amendment immunity. See also *Stachura v Truszkowski,* 763 F2d 211 (CA 6, 1985), rev'd in part on other grounds *Memphis Community School Dis v Stachura,* 477 US 299; 106 S Ct 2537; 91 L Ed 2d 249 (1986), where the Sixth Circuit Court of Appeals held that a private party does not lose First Amendment protection, notwithstanding improper means or motives.

In short, plaintiffs have offered nothing to show that allowing immunity for the private defendants in these cases "would abuse the First Amendment into becoming the ultimate weapon—both a sword for achieving evil and a shield for preventing liability."

Thus, the trial court correctly concluded, as did the federal district court and the Sixth Circuit Court of Appeals, that defendants' conduct was protected by their First Amendment right to petition the government, and that neither GM nor the other private defendants exceeded the scope of their First Amendment protection. In view of defendants' immunity, the trial court properly granted their motions for summary disposition under MCR 2.116(C)(7). Because this issue is dispositive in these cases, we need not reach the other issues raised in Docket Nos. 145204 and 145205.

DOCKET NO. 148304

Plaintiff Jay Enterprises, Inc., which is owned

by the Folino plaintiffs, argues that the trial court erred in finding that collateral estoppel barred the Folino plaintiffs, who were subjected to the administrative proceedings, from asserting claims against defendants Pirochta and Curtis for improper conduct during the investigation. We disagree.

First, even though defendants Pirochta and Curtis were not parties to the prior administrative proceeding, they may assert collateral estoppel defensively so as to preclude plaintiff Jay Enterprises' claim against them. A well-established exception to the mutuality requirement is where the litigants in the second suit are the agents, servants, or employees of the litigants involved in the first suit. *Braxton v Litchalk,* 55 Mich App 708; 223 NW2d 316 (1974); see also *Lichon v American Universal Ins Co,* 435 Mich 408, 428, n 16; 459 NW2d 288 (1990). As plaintiff acknowledges in its complaint, defendants Pirochta and Curtis are state employees, and, thus, they are entitled to assert collateral estoppel defensively against plaintiff Jay Enterprises, which is in privity with the Folinos. *Howell v Vito's Trucking & Excavating Co,* 386 Mich 37; 191 NW2d 313 (1971).

Second, plaintiff's claims that defendants conducted an improper investigation of the Folino plaintiffs' transmission repair facilities by deliberately misrepresenting the condition of the vehicles used in the investigation in violation of § 26(2)(d) of the Act are the same issues raised by the Folino plaintiffs and decided against them during the state administrative proceedings. *Senior Accountants, Analysts & Appraisers Ass'n v Detroit,* 399 Mich 449; 249 NW2d 121 (1976).

Third, the factual questions central to these claims were fully and fairly litigated by the Folino plaintiffs in their defense during the administra-

tive proceedings. Hence, because plaintiff had a full and fair opportunity to litigate the same issues during the prior adversarial administrative proceedings, and because the issues were decided adversely to plaintiff, collateral estoppel bars plaintiff from relitigating these claims before this Court in the action against defendants Curtis and Pirochta. The trial court properly granted summary disposition for defendants.

DOCKET NO. 147502

Plaintiffs argue that the trial court erred in dismissing their claim of fraud without permitting them to amend their complaint, in finding that plaintiffs failed to set forth a prima facie case of intentional infliction of emotional distress, and in determining that plaintiffs' claims of injurious falsehood and tortious interference with advantageous business relationships were barred by governmental immunity.

First, the trial court did not err in dismissing plaintiffs' fraud claim. To show fraud or misrepresentation, plaintiffs must prove: (1) defendants made a material misrepresentation; (2) it was false; (3) when defendants made it, defendants knew that it was false or made recklessly without knowledge of its truth or falsity; (4) defendants made it with the intent that plaintiffs would act upon it; (5) plaintiffs acted in reliance upon it; and (6) plaintiffs suffered damage. *Hi-Way Motor Co v Int'l Harvester Co,* 398 Mich 330, 336; 247 NW2d 813 (1976). Here, plaintiffs were not charged with any violation of the Act and were not among the thirteen transmission repair shops mentioned in the public statements by Attorney General Kelley and Secretary of State Austin. Because plaintiffs were not the "object of fraud" and were not sub-

jected to the administrative process, no factual development could justify a right of recovery.

Nevertheless, plaintiff Bossio alleges in plaintiffs' joint amended complaint that the Bossio plaintiffs were included on a DOS inquiry form for license applicants listing facilities that had been charged with violations as a result of Operation Shifty. Even accepting this claim as true, plaintiffs still fail to allege that defendants Curtis and Pirochta made materially false representations upon which plaintiffs detrimentally relied. *Hi-Way, supra.* Because summary disposition is appropriate under either MCR 2.116(C)(8) or (10), there is no need to disturb the result. *Ellsworth v Highland Lakes Development Associates,* 198 Mich App 55, 57; 498 NW2d 5 (1993).

Second, the trial court properly granted summary disposition pursuant to MCR 2.116(C)(8) of plaintiffs' claims of intentional infliction of emotional distress. A review of plaintiffs' complaint does not reveal any allegations of outrageous conduct on the part of defendants Curtis and Pirochta. *McCahill v Commercial Union Ins Co,* 179 Mich App 761, 768; 446 NW2d 579 (1989).

Last, the trial court did not err in granting summary disposition on the ground that defendants were entitled to governmental immunity. There is no doubt that defendants Curtis and Pirochta, in carrying out the Operation Shifty investigation, were acting in the course of their employment and within the scope of their authority in the discharge of a governmental function. Thus, the only question is whether defendants' conduct amounted "to gross negligence that is the proximate cause of the injury or damage." *Dedes v South Lyon Community Schools,* 199 Mich App 385, 388-391; 502 NW2d 720 (1993). Given the methodical integrity of Operation Shifty, plaintiffs'

claim that defendants' conduct in carrying out the investigation amounted to gross negligence cannot be sustained. Assuming, arguendo, that defendant Pirochta provided false information to Attorney General Kelley and Secretary of State Austin that was then conveyed to the media, there is no showing that Pirochta's conduct rose to the level of gross negligence. Given that plaintiffs were not charged with any violations of the Act and their names were never published in connection with the investigation, plaintiffs suffered no apparent injury or damage. Thus, defendants were entitled to summary disposition pursuant to MCR 2.116(C)(7) of all the tort claims of plaintiffs Bossio and Daloisio.

DOCKET NO. 154046

The Bossio plaintiffs contend that the trial court improperly granted defendants' motion for summary disposition regarding their claim of tortious interference with business relations. We disagree. The trial court properly concluded that there was no genuine issue of material fact regarding plaintiffs' claim because defendants participated in a lawful investigation under the authority of the Secretary of State and because there was no indication that defendants had any motive to interfere with the business relations of plaintiffs, who were not charged with any violations of the Act. *Michigan Podiatric Medical Ass'n v Nat'l Foot Care Program, Inc,* 175 Mich App 723, 735; 438 NW2d 349 (1989).

The plaintiffs also contend that the trial court improperly granted defendants' motion for summary disposition regarding their claim of injurious falsehood. Again, we disagree. The record provides no evidence to support plaintiffs' claim that the

allegedly false statements made by Secretary of State Austin and Attorney General Kelley were based upon false statements made by defendants Curtis or Pirochta, or that these statements referred to plaintiffs. *Kollenberg v Ramirez,* 127 Mich App 345, 352; 339 NW2d 176 (1983).

Affirmed.

PHIPPS v STATE FARM MUTUAL INSURANCE COMPANY
(AFTER REMAND)

Docket No. 146858. Submitted March 17, 1994, at Lansing. Decided July 6, 1994, at 9:10 A.M. Leave to appeal sought.

Lawrence H. Phipps brought an action in the Genesee Circuit Court against State Farm Mutual Insurance Company, Mary C. Markell and Jack D. Watkins, doing business as Watkins Insurance Agency, seeking a declaration that State Farm was liable for no-fault benefits for injuries the plaintiff sufferd when his motorcycle collided with an automobile driven by Richard Craven. The automobile was titled in the name of Markell, Craven's fiancee, but the policy of insurance issued by State Farm listed Craven as the named insured and Markell as an occasional driver. The address furnished on the application was that of Markell's grandmother, with whom Markell and Craven were living. Before the accident, State Farm sent notice of cancellation to Craven at the address on the application; however, by that time, Craven had moved out, and neither Craven nor Markell were aware of the cancellation at the time of the accident. Following a bench trial, the court, Donald R. Freeman, J., entered a declaratory judgment for State Farm, holding that the policy had been canceled validly and that no contract of insurance existed between State Farm and Markell. The plaintiff appealed. The Court of Appeals, CAVANAGH, P.J., and JANSEN, J. (GRIFFIN, J., dissenting), affirmed the determination that no valid contract of insurance existed between Markell and State Farm, but remanded for the trial court to address the question whether Markell was entitled to notice of cancellation as an insured under Craven's policy. Unpublished opinion per curiam, decided February 8, 1991 (Docket No. 115999). On remand, the trial court ruled that Markell was not entitled to notice of cancellation of the policy. The plaintiff appealed.

After remand, the Court of Appeals *held:*

Because Markell was listed on the application as a regular driver of the automobile rather than as a named insured and there was nothing on the application to indicate to State Farm that Markell had an insurable interest in the automobile, she

was not entitled to notice of cancellation under these circumstances.

Affirmed.

Michael J. Mangapora, P.C. (by *Rex A. Ziebarth*), for the plaintiff.

Douglas M. Philpott, P.C. (by *Douglas M. Philpott*), for the defendants.

AFTER REMAND

Before: TAYLOR, P.J., and WEAVER and M. R. SMOLENSKI,* JJ.

PER CURIAM. The facts of this case were ably set out in the dissent in *Phipps v State Farm Mutual Ins Co,* unpublished opinion per curiam of the Court of Appeals, decided February 8, 1991 (Docket No. 115999).

On August 14, 1985, plaintiff, while driving his motorcycle, collided with an automobile driven by Richard Craven. Although the automobile apparently was titled in the name of Craven's fiancee, Mary Markell, a policy of automobile insurance with State Farm was obtained for the vehicle that listed Richard Craven as the named insured, with Mary Markell designated as an occasional (forty percent) driver.

The State Farm policy was obtained on May 7, 1985, through the joint efforts of Craven and Markell. On that date, Craven and Markell were living together with their two children at the home of Markell's grandmother, Ella Markell. Despite the two children that were the product of their long-standing relationship, Craven and Markell were not legally married; they termed their relationship as being engaged to be married.

On May 7, 1985, Markell went to a State Farm

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

> insurance agency to obtain automobile insurance for the vehicle. Before the visit, Craven had telephoned the agency advising of the visit and had supplied essential information. During the brief meeting with the insurance agency, Markell signed an insurance application in her capacity as fiancee of the named insured, Richard Craven. The only address furnished on the application was Markell's grandmother's: 11605 S. Morrice Road, Morrice, Michigan, 48857. With payment of the initial premium, a certificate of no-fault insurance was issued to Richard L. Craven.
>
> * * *
>
> Shortly after its issuance, State Farm decided to cancel the policy, after reviewing Craven's bad driving record. On May 24, 1985, State Farm mailed a notice of cancellation by certified mail to Richard L. Craven at the address listed on the application, 11605 S. Morrice Road, Morrice, Michigan, 48857. The certified letter was received and signed for by Ella Markell, grandmother of Mary Markell, on May 25, 1985. Ella Markell, thereafter, gave the certified letter to Mary Markell, who delivered it to Craven. Mary Markell claims that she did not open the certified letter from State Farm and was unaware of its contents. At the time of the delivery of the certified letter, Craven had moved out of the grandmother's house because of a fluctuating "marital" dispute with Mary.

Plaintiff brought a declaratory judgment action against State Farm Mutual Insurance Company, Watkins Insurance Agency, and Mary Markell, seeking to establish that defendant State Farm was liable for no-fault benefits for injuries resulting from the accident. State Farm denied liability, alleging that the insurance policy was written for Richard Craven, not Mary Markell, and that the policy had been canceled. Following a bench trial, the trial court entered a declaratory judgment in favor of State Farm, holding that the insurance

policy issued to Craven was validly canceled and that a valid contract of automobile insurance was not entered into between Markell and State Farm.

Plaintiff appealed as of right. This Court ruled that there was no valid contract of automobile insurance between Markell and State Farm and remanded for the trial court to address the question whether Markell was entitled to notice of cancellation as an insured under Craven's policy. On remand, the trial court ruled that Markell was not entitled to notice, because Markell and Craven were family members living in the same household when State Farm canceled the policy.

Plaintiff now appeals as of right. We affirm.

MCL 500.3020; MSA 24.13020 requires an insurance company to provide notice of cancellation of a policy to each party who qualifies as an "insured" under the policy. *Lease Car of America, Inc v Rahn,* 419 Mich 48; 347 NW2d 444 (1984). The Court in *Lease Car* explained the purpose of this rule as follows:

> The obvious objective of this statute is to make certain that all of those who are insured under a policy are afforded a period of time, ten days, either to satisfy whatever concerns have prompted cancellation and thus revive the policy or to obtain other insurance, or simply to order their affairs so that the risks of operating without insurance will not have to be run. [*Id.,* p 54.]

In the instant case, Richard Craven was listed as the insured on the application for insurance. Mary Markell was listed on the application only as a regular driver of the car. There is nothing on the application to indicate that Markell had an insurable interest in the car, or that she would otherwise need to receive notice of the cancellation for the reasons listed.

Thus, we hold that under the facts of this case, there was no need for Markell to receive notice of the cancellation.

We affirm.

PEOPLE v CORTEZ

Docket No. 164949. Submitted June 8, 1994, at Detroit. Decided July 6, 1994, at 9:15 A.M.

Michael J. Cortez pleaded guilty in the Saginaw Circuit Court, Leopold P. Borrello, J., of intentional discharge of a firearm from a motor vehicle, carrying a concealed pistol in a motor vehicle, and possession of a firearm during the commission of a felony and was sentenced to concurrent prison terms for the convictions of intentional discharge of a firearm and carrying a concealed weapon, those sentences to run consecutively to a two-year sentence for the felony-firearm conviction. The defendant appealed.

The Court of Appeals *held:*

1. Because the statute prohibiting the intentional discharge of a firearm from a motor vehicle and the statute prohibiting the carrying of a concealed pistol in a motor vehicle address distinct social norms, the Legislature intended to prevent separate types of conduct by the enactment of separate statutes for the crimes. Accordingly, multiple punishment was intended, and a conviction of each of the crimes, even though arising out of a single incident, do not abridge the constitutional prohibition against double jeopardy.

2. Because a person cannot be guilty of felony-firearm if the underlying felony is carrying a concealed weapon, only the sentence for intentional discharge of a firearm from a motor vehicle should run consecutively to the sentence for felony-firearm. The sentences must be modified accordingly.

Affirmed as modified.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Michael D. Thomas,* Prosecuting Attorney, and *Edwin R. Brown,* Assistant Prosecuting Attorney, for the people.

Jeanice Dagher-Margosian, for the defendant.

Before: MICHAEL J. KELLY, P.J., and FITZGERALD and CORRIGAN, JJ.

PER CURIAM. Defendant pleaded guilty of intentional discharge of a firearm from a motor vehicle (IDFMV), MCL 750.234a; MSA 28.431(1), carrying a concealed pistol in a motor vehicle (CCW), MCL 750.227(2); MSA 28.424(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to concurrent prison terms of 1½ to 4 years for the IDFMV conviction and 1½ to 5 years for the CCW conviction. These terms were to run consecutively to a two-year mandatory term for the felony-firearm conviction. Defendant appeals as of right.

These charges all arose out of a single shooting incident. Defendant argues that his conviction of both IDFMV and CCW violates the Double Jeopardy Clauses of the United States and Michigan Constitutions.[1] We disagree. In cases involving sentences for the same offense under different statutory provisions, this Court must determine whether the Legislature intended multiple punishment. *People v Robideaux,* 419 Mich 458, 485; 355 NW2d 592 (1984); *People v Kaczorowski,* 190 Mich App 165, 169; 475 NW2d 861 (1991). "[S]tatutes prohibiting conduct that violates distinct social norms can generally be viewed as separate and as permitting multiple punishment. The key is to identify the type of harm or conduct the Legislature intended to prevent." *Id.,* citation omitted. This Court cannot apply the "factual identity" test advocated by defendant, set forth in *People v Jankowski,* 408 Mich 79, 86; 289 NW2d 674 (1980), and rejected by the Supreme Court in *Robideaux, supra,* and *People v Wakeford,* 418 Mich 95; 341 NW2d 68 (1983).

The IDFMV statute provides in relevant part: "[A]n individual who intentionally discharges a firearm from a motor vehicle . . . in such a man-

[1] US Const, Am V; Const 1963, art 1, § 15.

ner as to endanger the safety of another individual is guilty of a felony . . . ." MCL 750.234a; MSA 28.431(1). The CCW provision at issue here reads as follows: "A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person . . . without a license to carry the pistol as provided by law . . . ." MCL 750.227(2); MSA 28.424(2).

We believe the IDFMV and CCW statutes address different social norms. The CCW statute is designed to prevent the carrying of unlicensed pistols in motor vehicles. It recognizes the facility of motor vehicles for concealing and transporting arms. On the other hand, the IDFMV statute is directed against the firing of a weapon from the vehicle. It addresses the particular danger posed by shootings in which rapid flight is possible for the shooter. Also relevant to the analysis is the fact that the sanction for the carrying of a concealed weapon is greater (five years or $2,500) than that for shooting the weapon (four years or $2,000, or both).

Another helpful tool in determining legislative intent is the test outlined in *Blockburger v United States,* 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). *People v Sturgis,* 427 Mich 392, 404-405; 397 NW2d 783 (1986); *Kaczorowski, supra* at 170-171. The *Blockburger* test focuses on whether two separate statutes each include an element the other does not. *Sturgis, supra* at 409. In this case, one statute does not simply build upon the other. The CCW provision at issue requires proof that the firearm was an unlicensed pistol. The IDFMV statute requires proof that the firearm was discharged from a vehicle.

Accordingly, we conclude that defendant's conviction on both the IDFMV and CCW charges does

not violate his constitutional rights against double jeopardy.

Defendant also contends that the trial court erred in ordering his felony-firearm sentence to run consecutively to the CCW sentence. We agree, and the prosecutor concedes this issue to defendant. Under MCL 750.227b(1); MSA 28.424(2)(1), a defendant is not guilty of felony-firearm if the underlying felony is the carrying of a concealed weapon. Although the presence of a second underlying felony allows defendant's felony-firearm conviction to stand, *Sturgis, supra* at 410, it follows that the felony-firearm sentence may run consecutively only to that second underlying felony. We order defendant's sentences amended accordingly. MCR 7.216(A)(1) and (A)(7); *Brinson v Genesee Circuit Judge,* 403 Mich 676, 687; 272 NW2d 513 (1978).

Affirmed as modified.

PEOPLE v GREGG

Docket No. 158945. Submitted May 10, 1994, at Marquette. Decided July 6, 1994, at 9:20 A.M.

Billy J. Gregg was convicted by a jury in the Chippewa Circuit Court, Nicholas J. Lambros, J., of child abuse in the fourth degree. The defendant appealed, challenging the constitutionality of the child abuse statute.

The Court of Appeals *held:*

1. The term "physical harm" as used in the child abuse statute, MCL 750.136b; MSA 28.331(2), is sufficiently well-defined to provide persons of ordinary intelligence notice of the conduct proscribed. The statute clearly defines child abuse in the fourth degree as an omission or reckless act that causes any injury to a child's physical condition.

2. Although the term "reckless" is not defined in the child abuse statute, the term has a plain and ordinary meaning. The use of the term does not confer on a jury unstructured and unlimited discretion to determine whether an offense has been committed.

3. The child abuse statute is not overbroad by reason of impinging on any constitutional right of a parent to raise and reasonably discipline a child through the use of physical punishment. The child abuse statute specifically provides that it is not intended to prohibit a parent from reasonably disciplining a child, including the use of reasonable force.

Affirmed.

CONSTITUTIONAL LAW — CHILD ABUSE — CRIMINAL LAW — VAGUENESS — OVERBREADTH.

The child abuse statute in defining the crime of child abuse in the fourth degree is neither vague nor overbroad in the constitutional sense (MCL 750.136b[5]; MSA 28.331[2][5]).

Frank J. Kelley, Attorney General, *Thomas L.*

REFERENCES

Am Jur 2d, Constitutional Law §§ 459, 460; Criminal Law § 17; Infants § 16.

Validity and construction of penal statute prohibiting child abuse. 1 ALR4th 38.

Casey, Solicitor General, *Patrick M. Shannon,* Prosecuting Attorney, and *Steven B. Flancher,* Assistant Attorney General, for the people.

Lewinski & Brewster, P.C. (by *Paul M. Brewster*), for the defendant.

Before: MACKENZIE, P.J., and NEFF and R. L. OLZARK,* JJ.

PER CURIAM. Following a jury trial, defendant was convicted of fourth-degree child abuse, MCL 750.136b(5); MSA 28.331(2)(5), for abusing his four-year-old son. Defendant was sentenced to serve 120 days in jail. The trial court also placed defendant on probation for a period of eighteen months. Defendant now appeals as of right. We affirm.

I

Defendant struck the boy twice in the face and once in the leg while the boy was playing with some toy race cars. There is no indication why defendant struck the boy. The blows to the boy's face caused blood blisters, bruises, and a hand-shaped welt on the side of the boy's face. The bruises had lightened two days after the assault; however, the marks were still visible on the boy's face one week after the assault.

Defendant moved in the trial court to set aside his conviction, arguing that MCL 750.136b(5); MSA 28.331(2)(5) was unconstitutionally vague and overbroad. The trial court denied the motion.

II

Defendant contends that the statute under

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

which he was convicted is unconstitutional because it is impermissibly vague. We disagree.

Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Caterpillar, Inc v Dep't of Treasury,* 440 Mich 400, 413; 488 NW2d 182 (1992); *People v Trinity,* 189 Mich App 19, 21; 471 NW2d 626 (1991). The party challenging a statute's constitutionality has the burden of proving its invalidity. *Id.*

A criminal statute may be challenged for vagueness on three grounds: (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. *Doe v Attorney General,* 194 Mich App 432, 440; 487 NW2d 484 (1992). Defendant attacks MCL 750.136b(5); MSA 28.331(2)(5) on all three grounds.

MCL 750.136b(5); MSA 28.331(2)(5) provides:

> A person is guilty of child abuse in the fourth degree if the person's omission or reckless act causes physical harm to a child. Child abuse in the fourth degree is a misdemeanor punishable by imprisonment for not more than 1 year.

A

Defendant claims that this statute fails to provide fair notice of what conduct is proscribed, because it uses a circuitous definition of "physical harm" that explains nothing because it could include anything from a paper cut to death. We disagree.

To be constitutional, a contested statutory phrase must give persons of ordinary intelligence notice of the conduct that will subject them to criminal liability. *People v Hicks,* 149 Mich App 737, 741; 386 NW2d 657 (1986). The term "physical harm" is defined by MCL 750.136b(1)(d); MSA 28.331(2)(1)(d) as "any injury to a child's physical condition." Viewing the term "physical harm" in the context of the fourth-degree child abuse statute taken as a whole, we find that the statute clearly provides fair notice to persons of ordinary intelligence of the conduct proscribed, namely, an omission or reckless act that causes any injury to a child's physical condition. Defendant has failed to sustain his burden of proving the invalidity of MCL 750.136(b)(5); MSA 28.331(2)(5) on this basis.

B

Defendant next argues that the statute confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, because there are no guidelines to ascertain what conduct is permitted or prohibited. In so arguing, defendant claims that the word "reckless," as used in the statute, and the word "reasonable," as used in the instructions to the jury, are undefined and their meanings are unknown.

We will not review defendant's claim of error with regard to the jury instruction, because defendant expressed satisfaction at trial with the instructions given. *People v Taylor,* 159 Mich App 468, 488; 406 NW2d 859 (1987).

Unless defined in the statute, every word of the statute should be accorded its plain and ordinary meaning. MCL 8.3a; MSA 2.212(1); *People v Tracy,* 186 Mich App 171, 176; 463 NW2d 457 (1990). If a

statute does not expressly define its terms, a court may consult dictionary definitions. *People v Downey,* 183 Mich App 405, 409; 454 NW2d 235 (1990).

Black's Law Dictionary (6th ed) defines "reckless" as:

> Not recking; careless, heedless, inattentive; indifferent to consequences. According to circumstances it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent. For conduct to be "reckless" it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended.

The Random House College Dictionary, Revised Edition, defines "reckless" as:

> 1. utterly unconcerned about the consequences of some action; without caution; careless . . . . 2. characterized by or proceeding from such carelessness.

Given these dictionary definitions of the word "reckless" and applying its plain and ordinary meaning to the language of the statute, we find defendant's claim that the statute confers upon the jury unstructured and unlimited discretion to determine whether an offense has been committed to be without merit. The statute prohibits the commission of a reckless act that causes physical harm to a child.

C

Defendant's final claim is that the statute is overbroad and impinges on his First Amendment right to raise and reasonably discipline his child through the use of physical punishment. We disagree.

Statutory provisions must be read in the context of the entire statute so as to produce an harmonious whole. *Downey, supra.* Subsection 6 of the child abuse statute, MCL 750.136b(6); MSA 28.331(2)(6), expressly provides that the statute shall not be construed to prohibit a parent from taking steps to reasonably discipline a child, including using "reasonable force." It states:

> This section shall not be construed to prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force.

"Reasonable" is defined by Black's Law Dictionary (6th ed) as:

> Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason. Thinking, speaking, or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.

The term is also defined in *The Random House College Dictionary, Revised Edition,* as:

> 1. agreeable to or in accord with reason or sound judgment; logical. 2. not exceeding the limit prescribed by reason; not excessive . . . .

Given subsection 6 of the child abuse statute, which expressly provides that a parent may use "reasonable force" to discipline a child, defendant's claim that the fourth-degree child abuse statute is overbroad and impinges on his right to discipline his child is clearly without merit.

Affirmed.

FARMERS INSURANCE EXCHANGE v ANDERSON

Docket No. 156079. Submitted April 13, 1994, at Grand Rapids. Decided July 6, 1994, at 9:30 A.M. Leave to appeal sought.

Farmers Insurance Exchange brought an action in the Kalamazoo Circuit Court against Joyce Anderson, Jack Dillon, Cindi Gale, as conservator of the estate of Kayse Gale, and Andora Gale, as personal representative of the estate of Robert L. Gale, seeking a declaration of its liability under a policy of no-fault insurance issued to Anderson for damages arising out of the death of Robert Gale as a result of his vehicle colliding with Anderson's vehicle while it was being operated by Dillon, Anderson's son. The plaintiff alleged that Anderson procured the policy of insurance by representing that she would be the primary driver, but did not disclose that Dillon, whose driver's license had been revoked, would be operating the vehicle and that, accordingly, the policy should be declared void ab initio or, in the alternative, the policy should be reformed to provide only the statutorily required policy limits of $20,000 a person and $40,000 an accident rather than the stated policy limits of $100,000 a person and $300,000 an accident. The court, Donald E. Goodwillie, J., granted summary disposition for the defendants. The plaintiff appealed.

The Court of Appeals *held:*

1. Section 520(f)(1) of the financial responsibility act, MCL 257.520(f)(1); MSA 9.2220(f)(1), provides that the liability of a motor vehicle insurer becomes absolute upon the occurrence of an injury or damage covered by the policy and that fraud or misrepresentation in procuring the policy are not defenses once the claim arises. The plaintiff concedes that the language of § 520(f)(1) precludes its right to rescind the policy altogether, because the claims of the innocent third parties have already arisen.

2. Section 520(g), MCL 257.520(g); MSA 9.2220(g), provides that any coverage in excess of or in addition to the coverage required by the financial responsibility act shall not be subject

REFERENCES

Am Jur 2d, Automobile Insurance § 37.

See ALR Index under No-Fault Insurance.

to the provisions of the financial responsibility act. Because of this clear expression by the Legislature that it did not intend to deprive insurers of the defenses of fraud and misrepresentation with respect to any excess coverage that was provided, the plaintiff is entitled to assert those defenses with respect to the coverage in excess of that required by statute, even after the accrual of the claims of the third parties. Accordingly, the trial court should have granted summary disposition for the plaintiff and limited the plaintiff's liability to the statutorily required limits of $20,000 a person and $40,000 an accident, a liability that the plaintiff now concedes it has.

Reversed and remanded.

INSURANCE — NO-FAULT — APPLICANT'S FALSE REPRESENTATION — RESCISSION OF CONTRACT — LIMITS OF COVERAGE.

A no-fault insurer may rescind any coverage in excess of the statutory limits of coverage where there was a material misrepresentation made in an application for insurance even if, at the time the misrepresentation is discovered, a claim by an innocent third party has been made; under those circumstances, the insurer's liability to the third party is limited to the statutory limits of coverage (MCL 257.520[f][1], [g]; MSA 9.2220[f][1], [g]).

Wheeler Upham, P.C. (by *Gary A. Maximiuk* and *Jack L. Hoffman*), for the plaintiff.

Thorne & Schlee, P.C. (by *William N. Schlee*), for Andora Gale.

Benefiel, Farrer & Glista (by *William L. Benefiel*), for Cindi Gale.

Before: MICHAEL J. KELLY, P.J., and HOOD and S. B. MILLER,* JJ.

HOOD, J. This case arises from a motor vehicle accident in which Robert Gale was killed after his vehicle collided with a vehicle driven by defendant Dillon. The automobile driven by Dillon was owned and insured by Dillon's mother, Joyce Anderson. Plaintiff, Farmers Insurance Exchange,

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

claimed that Anderson procured the policy by fraud and that, therefore, it should not have to provide coverage. The trial court disagreed and granted summary disposition in favor of defendants pursuant to MCR 2.116(I)(2). Farmers now appeals as of right. We reverse.

Joyce Anderson applied for insurance on the subject vehicle and represented that she would be the primary driver. Anderson did not disclose that Dillon, whose driver's license had been revoked, would be operating the vehicle. In fact, as a person with a revoked license, Dillon was ineligible for motor vehicle insurance. The policy provided a liability limit of $100,000 a person, with a $300,000 limit in any one accident. At the time of the collision that resulted in Gale's death, Dillon not only was unlicensed and uninsured, but also was driving while intoxicated.

The Gale family initiated a wrongful death action against Dillon and Anderson. Farmers then filed a complaint for declaratory judgment, arguing that it had no duty to defend Dillon or to provide coverage, because Dillon had been using the vehicle without Anderson's permission. Farmers further argued that it had no duty to defend or indemnify Anderson, because Anderson had made fraudulent and material misrepresentations in procuring the insurance policy. More specifically, Farmers asserted that Anderson had represented that she would be the primary driver of the vehicle even though she knew that Dillon would be the primary driver.

Therefore, Farmers argued, the policy should be declared void ab initio and rescinded. Alternatively, Farmers argued that if it was precluded from declaring the entire policy void ab initio, then the policy should be reformed to provide only the statutorily required minimum limits of

$20,000/$40,000 rather than the stated policy limits of $100,000/$300,000.

Competing motions for summary disposition were filed. The trial court, relying on *Ohio Farmers Ins Co v Michigan Mutual Ins Co,* 179 Mich App 355; 445 NW2d 228 (1989), denied Farmers' motion for summary disposition and granted summary disposition in favor of defendants. This appeal followed.

Plaintiff now concedes liability for the statutory $20,000/$40,000 limits. Therefore, the issue we must decide is whether an automobile insurer who, upon discovering that the insured has made fraudulent and material misrepresentations in procuring the policy, may assert rescission as a basis to limit its liability to the statutory minimum, even when innocent third parties have been injured.

We first note that when an accident occurs in this state, the scope of liability coverage is determined by the financial responsibility act, MCL 257.501 *et seq.*; MSA 9.2201 *et seq. League General Ins Co v Budget Rent-A-Car of Detroit,* 172 Mich App 802, 805; 432 NW2d 751 (1988). Section 520 of the act, MCL 257.520; MSA 9.2220, provides in relevant part:

> (f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
>
> (1) The liability of the insurance carrier with respect to the *insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs*; . . . except as hereinafter provided, *no fraud, misrepresentation, . . . or other act of the insured in obtaining or retaining such policy . . . shall constitute a defense as against such judgment creditor.*

* * *

(g) *Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this chapter.* [Emphasis added.]

Generally, a material misrepresentation made in an application for no-fault insurance entitles the insurer to void or to cancel retroactively the policy. *Katinsky v Auto Club Ins Ass'n,* 201 Mich App 167, 170; 505 NW2d 895 (1993). However, this right to rescind a policy altogether ceases to exist once there is a claim involving an innocent third party. *Id.* As indicated previously, Farmers concedes that the language of § 520(f)(1) necessitates this result. However, Farmers contends that even though an innocent third party was injured, its liability should be limited to the statutory minimum, because the policy was fraudulently obtained. We agree.

As stated above, § 520(f)(1) prohibits an insurer from using fraud as a basis to void completely coverage under an insurance policy once an innocent third party has been injured. Thus, once an accident occurs, coverage in the amount of the statutory minimum of $20,000/$40,000 must be available for claims by innocent third parties, notwithstanding the fact that the policy in question may have been procured by fraud. However, this prohibition is found only in § 520(f)(1), which, again, deals with the statutorily mandated minimum coverage of $20,000/$40,000. By contrast, § 520(g), which addresses excess coverage, does not include such a limitation. In fact, in drafting § 520(g), the Legislature expressly provided that

the additional coverage contemplated in that section "shall not be subject to the provisions of this chapter."

Thus, reading §§ 520(f)(1) and 520(g) together, it is evident that the Legislature did not intend to preclude an insurer from using fraud as a defense to void optional insurance coverage. Had the Legislature intended to do so, the same prohibitory language found in § 520(f)(1) would have been included in § 520(g), namely, that, with regard to mandated minimum coverage, fraud on the part of the insured in obtaining or retaining a policy shall not constitute a defense for the insurer against a judgment creditor. See *Sebewaing Industries, Inc v Village of Sebewaing,* 337 Mich 530, 545; 60 NW2d 444 (1953). By failing to include this prohibitory language in § 520(g) and by specifically exempting the excess or additional coverage permitted by § 520(g) from the remaining provisions of the chapter, the Legislature made it clear that it did not intend to deprive insurers of this defense with respect to a claim for excess coverage.

Despite the holdings in *Ohio Farmers* and *Katinsky,* we do not go so far as to say that a validly imposed defense of fraud will absolutely void any optional excess insurance coverage in all cases. To the contrary, when fraud is used as a defense in situations such as these, the critical issue necessarily becomes whether the fraud could have been ascertained easily by the insurer at the time the contract of insurance was entered into. We think it unwise to permit an insurer to deny coverage on the basis of fraud after it has collected premiums, when it easily could have ascertained the fraud at the time the contract was formed—*Ohio Farmers* was such a case.

We are mindful that the *Ohio Farmers* panel concluded generally that "once an innocent third

party is injured in an accident in which coverage is in effect on the automobile, an insurer will be estopped from asserting rescission as a basis upon which it may limit its liability to the statutory minimum." *Id.* at 364-365. Again, unlike the present case, *Ohio Farmers* involved a situation where the fraud relied on by the insurer was readily ascertainable at the time the contract for insurance was formed. Moreover, neither *Ohio Farmers* nor *Katinsky* addressed §§ 520(f)(1) and 520(g) of the financial responsibility act. Instead, both panels analyzed the respective cases solely in light of public policy considerations.

As stated previously, when an accident occurs in this state, the scope of liability coverage is determined by the financial responsibility act. *League General, supra.* Because, as we have indicated, the financial responsibility act is controlling with respect to Farmers' responsibility, *Ohio Farmers* and its progeny are not controlling in our resolution of this case. To the extent that those cases may be found to be inconsistent with our holding here, we decline to follow them.

In the present case, Dillon's name was nowhere to be found on the application for insurance that was completed by Anderson. Therefore, the trial court properly concluded that it would have been virtually impossible for Farmers to know that it should obtain Dillon's driving record, because it had no reason to believe that he would be operating the subject vehicle. Additionally, we accept the trial court's assumption pursuant to the parties stipulation for purposes of the motion, that Anderson committed fraud to obtain the policy. Reviewing the issue de novo, we conclude that the trial court erred in granting summary disposition in favor of defendants, because Farmers was entitled

to use fraud as a defense to limit coverage under the policy to the statutory minimum. Therefore, defendants were not entitled to judgment as a matter of law. Sections 520(f)(1) and 520(g); *Borman v State Farm Fire & Casualty Co,* 198 Mich App 675, 678; 499 NW2d 419 (1993).

Reversed and remanded. We do not retain jurisdiction.

CONSOLIDATED ALUMINUM CORPORATION v DEPARTMENT OF TREASURY (AFTER REMAND)

Docket No. 150190. Submitted February 1, 1994, at Detroit. Decided July 18, 1994, at 9:00 A.M.

Consolidated Aluminum Corporation filed a petition with the Tax Tribunal contesting the Department of Treasury's assessment of a tax deficiency, pursuant to the Single Business Tax Act, MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.*, for the tax years 1976 through 1979. The assessment followed the department's recalculation of the petitioner's Michigan tax base, using the petitioner's financial statements but excluding therefrom information concerning a separate corporation, Ormet, of which the petitioner owned a sixty-six percent interest as a joint venture. The tribunal affirmed the assessment, holding that Ormet properly was excluded from the petitioner's tax base because they were separate entities. The petitioner appealed, and the Court of Appeals, DANHOF, C.J., and WAHLS and HOLBROOK, JR., JJ., in an order entered November 17, 1989 (Docket No. 96966), remanded the matter to the tribunal for reconsideration in light of *Trinova Corp v Dep't of Treasury,* 433 Mich 141 (1989). On remand, the tribunal adopted its prior opinion and judgment. The petitioner appealed.

After remand, the Court of Appeals *held:*

Ormet's financial information properly was excluded in the calculation of the petitioner's tax base because the two corporations are separate entities under the act. The petitioner's total interest expenses must be included in its tax base without any prior geographic apportionment. The petitioner is entitled to a capital acquisition deduction only for Michigan acquisitions. The respondent's tax assessment was constitutional. The tribunal's decision was in accordance with the law and was supported by competent, material, and substantial evidence on the whole record.

1. The act recognizes a joint venture as a separate and distinct taxpayer subject to the single business tax if conduct-

REFERENCES

Am Jur 2d, State and Local Taxation §§ 254-265, 704 *et seq.*
See ALR Index under Taxes.

ing business in the state regardless of whether the joint venture is part of a unitary business composed of other taxpayers. MCL 208.9(9); MSA 7.558(9)(9) excludes from the principal taxpayer's tax base income or loss from any other entity (including joint ventures) that is subject to the tax or that would be subject to the tax if it conducted business in the state. The statutory mechanics of the act require that Conalco and Ormet be treated as separate entities.

2. The individual tax base components of MCL 208.9; MSA 7.558(9) are not independent variables to be adjusted without reference to each other. Rather, they must be added together and then the total tax base is to be apportioned under MCL 208.45; MSA 7.558(45). Therefore, the petitioner errs in arguing that its interest expenses should be allocated geographically before being added to the tax base under § 9(4)(f).

3. The petitioner is entitled to a capital acquisition deduction under MCL 208.23(c); MSA 7.558(23)(c) only for capital acquisitions in Michigan, not elsewhere.

4. The fact that the respondent did not present evidence at the Tax Tribunal hearing to support the assessment does not mandate reversal of the tribunal's decision. The tribunal, in a case such as this involving primarily questions of law, may rely on the evidence presented by the taxpayer. Here, the tribunal's adoption and incorporation of the legal authority cited by the hearing officer and its separate findings of fact and conclusions of law, citing appropriate legal authority, provided competent, material, and substantial evidence for its decision.

Affirmed.

1. TAXATION — SINGLE BUSINESS TAX ACT — "AFFILIATED GROUP" — CONSOLIDATED TAX RETURNS.

An affiliated group may be permitted to file a consolidated tax return under the Single Business Tax Act; an affiliated group is two or more corporations, one of which owns or controls, directly or indirectly, eighty percent or more of the capital stock with voting rights of the other corporation or corporations (MCL 208.3[1], 208.77; MSA 7.558[3][1], 7.558[77]).

2. TAXATION — SINGLE BUSINESS TAX ACT — JOINT VENTURES — "PERSONS."

A joint venture is a separate and distinct taxpayer subject to the single business tax if it conducts business in the state regardless of whether it is a part of a unitary business composed of other taxpayers; a joint venture is a separate person under the Single Business Tax Act (MCL 208.6[1]; MSA 7.558[6][1]).

3. TAXATION — SINGLE BUSINESS TAX ACT — INCOME FROM OTHER ENTITIES.

The Single Business Tax Act excludes from the principal taxpayer's tax base income or losses from any other entity, including a joint venture of which the taxpayer is a member, that is subject to the tax or that would be subject to the tax if it conducted business in the state (MCL 208.9[9]; MSA 7.558[9][9]).

4. TAXATION — SINGLE BUSINESS TAX ACT — TAX BASE — APPORTIONMENT.

The individual tax base components stated in § 9 of the Single Business Tax Act are not independent variables to be adjusted without reference to each other; rather, they must be added together before they are apportioned under § 45 (MCL 208.9, 208.45; MSA 7.558[9], 7.558[45]).

5. TAXATION — TAX TRIBUNAL — HEARINGS — EVIDENCE — QUESTIONS OF LAW — APPEAL.

The Tax Tribunal may rely upon the evidence presented by the taxpayer when deciding to uphold an assessment by the Department of Treasury in an action involving primarily questions of law; the fact that the department does not present evidence to support the assessment at the tribunal's hearing does not mandate reversal of the tribunal's decision.

Van Til & Associates (by *Lawrence R. Van Til*), for the petitioner.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Russell E. Prins* and *Terry P. Gomoll,* Assistant Attorneys General, for the respondent.

AFTER REMAND

Before: SHEPHERD, P.J., and MARILYN KELLY and J. H. GILLIS, JR.,* JJ.

SHEPHERD, P.J. Petitioner, Consolidated Aluminum Corporation (Conalco), appeals as of right from a July 26, 1991, judgment of the Tax Tribunal, which reinstated an earlier tribunal judgment

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

of November 13, 1986, which, in turn, affirmed a March 29, 1982, assessment of tax deficiency by respondent, the Department of Treasury, against Conalco. This Court considered the November 13, 1986, judgment in Docket No. 96966 and, in an order issued on November 17, 1989, remanded the case to the Tax Tribunal for reconsideration in light of the Michigan Supreme Court's decision in *Trinova Corp v Dep't of Treasury,* 433 Mich 141; 445 NW2d 428 (1989), which the United States Supreme Court affirmed in *Trinova Corp v Michigan Dep't of Treasury,* 498 US 358; 111 S Ct 818; 112 L Ed 2d 884 (1991). The tribunal's subsequent July 26, 1991, decision on remand is the subject of this appeal. We affirm.

I

FACTS AND PROCEEDINGS

Conalco is a foreign corporation subject to Michigan's Single Business Tax Act (SBTA), MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.* Conalco manufactures and sells aluminum products in Michigan and elsewhere. During the period relevant to this appeal—i.e., for the tax years 1976 through 1979, inclusive—Conalco owned a sixty-six percent interest in a company known as Ormet. Ormet was a separate corporation, which produced raw aluminum from bauxite ore. Ormet served Conalco[1] as a "cost company." That is, Ormet sold sixty-six percent of its output to Conalco at cost.[2] Conversely, Conalco was responsible for sixty-six percent of Ormet's operating costs, including capital costs and interest expenses.

Because of Ormet's unique character, Conalco

[1] Revere Copper and Brass, not a party to this appeal, held the remaining thirty-four percent interest in Ormet.

[2] Ormet's corporate charter precluded it from operating at a profit.

consolidated sixty-six percent of Ormet's operations into its own financial statements for the tax years at issue. Conalco calculated its tax base under § 9 of the SBTA, MCL 208.9; MSA 7.558(9), using these consolidated financial statements. However, Conalco did not add back any interest expenses to its tax base as required by § 9(4)(f), MCL 208.9(4)(f); MSA 7.558(9)(4)(f), because, in its opinion, the majority of the interest expenses were attributable to collateralized debt on property located outside Michigan.

After conducting an audit of Conalco's 1976-79 tax returns, respondent concluded that Ormet should be excluded from Conalco's financial statements because it was a separate taxable entity. As a result, this exclusion of Ormet's financial information prevented Conalco from deducting certain expenses related to Ormet's operating costs. Respondent also added back all interest expenses to Conalco's tax base, including those interest expenses related to Ormet. Further, a capital acquisition deduction was allowed only for Michigan assets.

Respondent recalculated Conalco's tax base, then applied the three-factor apportionment formula of § 45, MCL 208.45; MSA 7.558(45), to determine Conalco's Michigan tax base. The recalculation resulted in an increase in Conalco's Michigan tax base, and, thus, an increase in single business tax. Respondent assessed Conalco an additional $156,843.51, including tax and interest.[3]

Conalco filed a petition of appeal with the Tax Tribunal, which affirmed the assessment. In an opinion and judgment dated November 13, 1986, the tribunal held that Ormet was properly excluded from Conalco's tax base because they were separate entities. In particular, the tribunal noted that Conalco did not meet the threshold of eighty

[3] Assessment No. B647924.

percent ownership of Ormet in order to be considered an "affiliated group"[4] under § 3(1), MCL 208.3(1); MSA 7.558(3)(1). The tribunal also held that Conalco's interest expenses were properly added back to Conalco's tax base because Conalco treated the interest as an expense rather than capitalized interest on its financial statements.

As noted above, this Court considered the 1986 judgment in Docket No. 96966, and remanded the matter to the tribunal for reconsideration in light of the Michigan Supreme Court's decision in *Trinova, supra.* On remand, in an opinion and judgment dated July 26, 1991, the tribunal adopted its prior opinion and judgment of November 13, 1986. Conalco now appeals as of right from the tribunal's judgment of July 26, 1991.

II

STANDARD OF REVIEW

On appeal, in the absence of fraud, our review of a decision of the Tax Tribunal is limited to whether the tribunal made an error of law or adopted a wrong legal principle. *Gillette Co v Dep't of Treasury,* 198 Mich App 303, 306; 497 NW2d 595 (1993). We will not disturb the factual findings of the Tax Tribunal when those findings are supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Gillette, supra.*

III

THE SINGLE BUSINESS TAX ACT

Michigan's Single Business Tax Act imposes a

[4] If Conalco and Ormet were found to be an affiliated group under MCL 208.3(1); MSA 7.558(3)(1), then they might be permitted to file a consolidated return according to MCL 208.77; MSA 7.558(77).

value added tax (VAT) upon business activity in Michigan. *Wismer & Becker Contracting Engineers v Dep't of Treasury,* 146 Mich App 690, 696; 382 NW2d 505 (1985). Section 31 of the SBTA, MCL 208.31; MSA 7.558(31), imposes a "specific tax of 2.35% upon the adjusted tax base of every person with business activity in this state which is allocated or apportioned to this state."[5] A "person" is defined under § 6(1) of the SBTA, MCL 208.6(1); MSA 7.558(6)(1), as follows:

> "Person" means an individual, firm, bank, financial institution, limited partnership, copartnership, partnership, joint venture, association, corporation, receiver, estate, trust, or any other group or combination acting as a unit.

The SBT is calculated by starting with a person's federal taxable income, MCL 208.3(3); MSA 7.558(3)(3), and then making certain additions and subtractions according to § 9 of the act, MCL 208.9; MSA 7.558(9). *Trinova,* 433 Mich 150-151. Our Supreme Court in *Trinova* described these adjustments as follows:

> Common adjustments to business income include additions to reflect the business consumption of labor and capital. Those include adding back compensation, depreciation, dividends, and interest *paid* by the taxpayer to the extent deducted from federal taxable income. Common deductions from business income include dividends, interest, and royalties *received* by the taxpayer to the extent included in federal taxable income. This income is deducted for the purpose of value added computation because it does not result from capital expenditure by the taxpayer. [*Id.*; emphasis in original.]

[5] MCL 208.31; MSA 7.558(31) recently has been amended, replacing the word "which" with "that."

Of particular relevance to this appeal, subsection 9 of § 9 provides for an adjustment for gain or loss attributable to other entities, as follows:

> To the extent included in federal taxable income, add the loss or subtract the gain from the tax base that is attributable to another entity whose business activities are taxable under this act or would be taxable under this act if the business activities were in this state. [MCL 208.9(9); MSA 7.558(9)(9).]

Once the § 9 tax base is determined, then the "apportioned" or Michigan tax base is determined by applying the three-factor apportionment formula found in § 45, as follows:[6]

> All of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3. [MCL 208.45; MSA 7.558(45).]

The property,[7] payroll,[8] and sales[9] factors are themselves a fraction representing the proportion

[6] MCL 208.45; MSA 7.558(45) was amended following the period relevant to this appeal.

[7] Section 46 defines the property factor as follows:

> The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented in this state during the tax year and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented during the tax year. [MCL 208.46; MSA 7.558(46).]

[8] Section 49 defines the payroll factor as follows:

> The payroll factor is a fraction, the numerator of which is the total wages paid in this state during the tax year by the

of Michigan property, payroll, and sales in relation to property, payroll, and sales everywhere. *Wismer & Becker, supra* at 699. In algebraic form, the formula for the Michigan tax base would look as follows:

$$\text{TAX BASE} \times \frac{\frac{\text{MICH PROPERTY}}{\text{TOTAL PROPERTY}} + \frac{\text{MICH PAYROLL}}{\text{TOTAL PAYROLL}} + \frac{\text{MICH SALES}}{\text{TOTAL SALES}}}{3} = \text{MICH TAX BASE}$$

Section 69, MCL 208.69; MSA 7.558(69), provides relief to a taxpayer when the § 45 apportionment formula results in a Michigan tax base that is "out of all appropriate proportion to the taxpayer's intrastate business activity or has led to a grossly distorted result." *Trinova,* 433 Mich 167. Section 69 has been described as a "constitutional circuit breaker," meaning that if the apportionment provisions of the SBTA result in an unconstitutional tax, then § 69 will afford a taxpayer relief, saving the SBTA. *Trinova,* 498 US 371-372. For the period relevant to this appeal, § 69 provided as follows:

> (1) If the apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may

taxpayer and the denominator of which is the total wages paid everywhere during the tax year by the taxpayer. For the purposes of this chapter only, "wages" means wages as defined in section 3401 of the internal revenue code. [MCL 208.49; MSA 7.558(49).]

[9] Section 51 defines the sales factor as follows:

> The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year. [MCL 208.51; MSA 7.558(51).]

petition for or the commissioner may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) Separate accounting.

(b) The exclusion of any 1 or more of the factors.

(c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state.

(d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.

(2) An alternate method will be effective only if it is approved by the commissioner.

Once the Michigan tax base has been determined, further adjustments are allowed in the form of exemptions under § 35, MCL 208.35; MSA 7.558(35), and deductions and additions under § 23, MCL 208.23; MSA 7.558(23), for the acquisition of tangible assets. Then, under § 31, MCL 208.31; MSA 7.558(31), the adjusted Michigan tax base is multiplied by 2.35 percent to determine the amount of SBT liability.[10]

IV

APPLICATION OF THE SBTA TO CONALCO

A

First, Conalco argues that all of Ormet's financial information should be included in the calculation of Conalco's tax base under the SBTA. Conalco argues that Ormet's unitary business nature requires consolidation of its financial information under § 69. In the alternative, Conalco argues that if Ormet is to be excluded, it must be excluded totally.

[10] Sections 36 through 39 of the SBTA provide credits to offset the amount of tax liability.

Respondent argues that this Court's decision in *Wismer & Becker, supra,* requires the exclusion of Ormet from Conalco's tax base because Ormet is a joint venture and is organized as a separate corporation. Respondent argues that § 69 does not permit the consolidation of two taxpayers' apportioned tax bases. We agree with respondent that Ormet's financial information should be excluded from Conalco's tax base.

Initially, there can be no doubt that Conalco's interest in Ormet is that of a joint venture. There is no other appropriate category under the SBTA in which to place Ormet; and, in fact, Conalco's own representatives have referred to Ormet as a joint venture. Conalco and Ormet do not qualify as an "affiliated group" under § 3(1) (which might permit the filing of a consolidated return under § 77, MCL 208.77; MSA 7.558[77]) because there is no dispute that Conalco does not own or control at least eighty percent of the voting capital stock of Ormet. Consequently, as a joint venture, Ormet is a separate "person" under § 6(1).

Once Ormet is recognized as a joint venture, this issue is controlled by this Court's decision in *Wismer & Becker.* In *Wismer & Becker, supra,* this Court was faced with a similar question involving a foreign corporation's interest in various out-of-state joint ventures. Therein, the taxpayer attempted to include its share of property, payroll, and sales of the out-of-state joint ventures in the total property component of the § 45 apportionment formula. *Wismer & Becker, supra* at 695. We concluded in *Wismer & Becker* that the taxpayer must exclude its interest in the joint ventures when calculating its SBT, as follows:

> Section 69 allows a taxpayer to petition for, or the Tax Commissioner to require, the use of vari-

> ous methods of apportionment, including separate accounting, where the Chapter 3 formulary apportionment does not fairly represent the extent of the taxpayer's business activity in this state. MCL 208.69; MSA 7.558(69). If the unitary concept has any relevance at all within the framework of the SBTA, it is only as a tool to determine whether a taxpayer should utilize the exceptional relief of separate accounting under § 69. It has absolutely no relevance to the determination of whether interdependent business entities are one or more taxpayers under the act. That determination expressly has been made by the Legislature in the act. As discussed above, the act does not allow petitioner to treat itself and its joint ventures as a single taxpayer either in calculating its tax base under § 9 or in apportioning its tax base under § 45. On the contrary, the act recognizes a joint venture as a separate and distinct taxpayer subject to the single business tax if conducting business in Michigan regardless of whether the joint venture is part of a unitary business composed of other taxpayers. Petitioner would have this Court read into the act an exception for unitary businesses that simply does not exist.
>
> Consistent with our interpretation, § 9(9) excludes from the tax base income or loss from any other entity (including joint ventures) which is subject to the tax or which would be subject to the tax if conducting business in the state. MCL 208.9(9); MSA 7.558(9)(9). [*Id.* at 702-703.]

In the present case, as in *Wismer & Becker,* the joint venture should be excluded from the principal taxpayer's tax base because the joint venture either is or would be subject to the SBTA if conducting business in the state. MCL 208.9(9); MSA 7.558(9)(9). Although the present case is somewhat distinguishable because the principal taxpayer desires to include the joint venture in the original calculation of the tax base rather than merely at the apportionment stage, this minor distinction is

immaterial to the underlying holding of *Wismer & Becker* that a joint venture is a separate entity under the SBTA. *Id.* at 701-702. Incidentally, this Court in *Wismer & Becker, supra* at 703, stated that consolidation would be inappropriate "either in calculating its tax base under § 9 or in apportioning its tax base under § 45."[11]

Conalco's alternative argument that Ormet either should be included totally or excluded totally from its tax base emphasizes its real economic interest in Ormet, but provides no direct challenge to respondent's accounting method of excluding Ormet. On this point, Conalco argues that separation of the two entities' financial statements artificially inflates Conalco's net income and, thus, its tax base. This is because Conalco buys aluminum from Ormet at cost, while paying a share of Ormet's operating expenses. Although this argument concerning the real economic consequences of operating a cost company raises interesting and challenging questions from a theoretical standpoint, the statutory mechanics of the SBTA nevertheless require that Conalco and Ormet be treated as separate entities. *Wismer & Becker* remains controlling. Further, because Conalco has not specified—either below or on appeal—how to allocate expenses that it believes are "attributable" to Ormet, this Court is not in a position to review the propriety of respondent's method of "wholly" excluding Ormet. *Rutherford v Dep't of Social Services,* 193 Mich App 326, 330; 483 NW2d 410 (1992). Thus, we conclude that the Tax Tribunal correctly affirmed the assessment, which was based in part upon respondent's exclusion of Ormet from Conalco's tax base.

[11] Also consistent with our opinion, § 78, MCL 208.78; MSA 7.558(78), prohibits consolidation of the tax base or apportionment factors of two or more corporations except as expressly provided in § 77 for affiliated groups.

B

Having determined that Ormet's financial information should be excluded from Conalco's tax base when computing SBT liability, we next address the question of interest expenses. Here, Conalco argues that its interest expenses should be allocated geographically before being added to the tax base under § 9(4)(f), MCL 208.9(4)(f); MSA 7.558(9)(4)(f). Conalco argues that this geographic apportionment would more accurately reflect its Michigan business activity because most of its interest expenses are attributable to collateralized loans on property located outside Michigan. In essence, Conalco seeks to use a one-factor apportionment formula based on the geographic location of the financed property.

In support of its decision to affirm the assessment, the Tax Tribunal emphasized that Conalco's proposal would circumvent the three-factor apportionment formula of § 45. Further, the tribunal noted that Conalco had included these amounts as expenses rather than capitalized interest in its financial statements. On appeal, Conalco argues that § 69 should be utilized to permit the geographic apportionment of interest expenses. Further, in response to the tribunal's decision, Conalco argues that the prior treatment of the interest as an expense for accounting purposes does not foreclose its geographic apportionment because the financed property giving rise to the interest expense is recognized as a measure of value added through the inclusion of the property factor in the apportionment formula of § 45.

Ordinarily, interest expenses that are deducted for purposes of calculating federal income tax are added back to a taxpayer's tax base for purposes of

calculating Michigan's SBT. MCL 208.9(4)(f); MSA 7.558(9)(4)(f). As noted above, the tax base is then adjusted to reflect Michigan activity by application of the three-factor apportionment formula of § 45. Relief from the three-factor apportionment formula of § 45 is afforded under § 69 only when the business activity attributed to the state is out of all appropriate proportion to intrastate business activity or has led to a grossly distorted result. *Trinova,* 433 Mich 167, and 498 US 380.

We believe that this issue is controlled by the United States Supreme Court's decision in *Trinova, supra.* In *Trinova,* a foreign corporation doing business in Michigan sought to

> dissect the tax base as if the SBT were three separate and independent taxes: a tax on compensation, a tax on depreciation, and a tax on income, each apportioned. Trinova insists that compensation and depreciation can be located and can be separated from the total value added calculation. [498 US 374-375.]

Thus, in *Trinova,* the taxpayer attempted to apportion geographically two of the components that must be added back to the tax base under § 9, i.e., compensation under § 9(5), and depreciation under § 9(4)(c).

Similarly, in the present case, Conalco seeks to apportion geographically the interest expense component, which is ordinarily included in the tax base under § 9(4)(f). This approach was expressly rejected in *Trinova* when the Court concluded that the individual tax base components of § 9 "are not independent variables to be adjusted without reference to each other." 498 US 376. Rather, the various tax base components must be added together, and then the total tax base is to be apportioned under § 45.

Conalco's request for relief under § 69 must fail because Conalco's arguments focus upon geographic apportionment of these interest expenses, without making the requisite showing that the *total* business activity attributed to Michigan after application of the three-factor formula of § 45 is out of all appropriate proportion to actual business transacted in this state. *Trinova,* 433 Mich 167, and 498 US 380. As such, Conalco has not demonstrated a need for the "constitutional circuit breaker" of § 69 relief. *Trinova,* 498 US 371-372. The Tax Tribunal correctly affirmed the assessment, which was based in part upon respondent's inclusion of Conalco's interest expenses in the tax base.

C

Next, we briefly address Conalco's claim of entitlement to a capital acquisition deduction under § 23(c) for capital acquisitions everywhere, as opposed to a smaller deduction for capital acquisitions only in Michigan. Conalco made this argument in its brief on appeal, but abandoned the issue at oral argument, presumably in light of our Supreme Court's recent decision in *Caterpillar, Inc v Dep't of Treasury,* 440 Mich 400; 488 NW2d 182 (1992), which upheld the constitutionality of § 23. In accordance with *Caterpillar, supra,* we find that this issue is without merit.

D

Conalco makes a separate argument that to the extent that any portion of the assessment may be unconstitutional, respondent may not impose an unconstitutional tax. It is obvious that respondent may not impose an unconstitutional tax. However,

Conalco has not demonstrated *how* the assessment is unconstitutional. In accordance with our disposition of the preceding issues, this issue is without merit.

E

Finally, Conalco raises a number of issues concerning the sufficiency of the Tax Tribunal's findings. In particular, Conalco argues that the Tax Tribunal's decision made no direct findings of fact, made conclusions of law without citing legal authority, and failed to address the substantive issues raised. Further, Conalco argues that it was entitled to have all factual issues resolved in its favor because respondent presented no evidence at the hearing before the Tax Tribunal. We find these issues to be without merit.

The fact that respondent did not present evidence at the hearing to support the assessment does not, in itself, mandate reversal of the Tax Tribunal's decision. *Gillette, supra* at 317. In a case such as this, which involves primarily questions of law, the Tax Tribunal may rely upon the evidence presented by the taxpayer when deciding to uphold an assessment.

In the present case, the Tax Tribunal specifically adopted and incorporated by reference portions of the hearing officer's proposed judgment. The hearing officer's proposed judgment is replete with numerous citations of legal authority. To the extent that the Tax Tribunal disagreed with the proposed judgment, it made separate findings of fact and conclusions of law, citing appropriate legal authority. As such, we will not disturb the Tax Tribunal's decision because it was based upon competent, material, and substantial evidence on the whole record, and was in accordance with the law. *Gillette, supra* at 306; Const 1963, art 6, § 28.

V

CONCLUSION

In summary, we hold that Ormet's financial information should not be included in the calculation of Conalco's tax base because the two corporations are separate entities. Further, Conalco's total interest expenses must be included in its tax base without any prior geographic apportionment. Conalco is only entitled to a capital acquisition deduction for Michigan acquisitions. The tax assessment by respondent was constitutional; and the Tax Tribunal's decision was in accordance with the law and was supported by competent, material, and substantial evidence on the whole record.

Affirmed.

STATE FARM FIRE AND CASUALTY COMPANY v BASHAM

Docket No. 150459. Submitted April 8, 1994, at Detroit. Decided July 18, 1994, at 9:05 A.M.

State Farm Fire and Casualty Company brought an action in the Oakland Circuit Court against William and Karen Basham, seeking a declaration that State Farm, as the defendants' personal liability insurer under a homeowner's policy, had no duty to defend or indemnify the Bashams against an action by Jeannine Westwood because no bodily injury had been alleged by Westwood. The court, Barry L. Howard, J., granted summary disposition for State Farm, ruling that Westwood's claimed psychiatric injury was not bodily injury that was covered by the State Farm policy. The Bashams appealed.

The Court of Appeals *held:*

"Bodily injury," defined in the State Farm policy as bodily harm, sickness, or disease, does not encompass psychiatric injury where, as in this case, no physical manifestations of such injury are alleged.

Affirmed.

Draugelis & Ashton (by *Richard T. Haynes* and *Steven O. Ashton*), for the plaintiff.

Vincent J. Maloney, for the defendants.

Before: GRIBBS, P.J., and WEAVER and R. P. HATHAWAY,* JJ.

PER CURIAM. Defendants appeal as of right from the trial court order that granted summary disposition to plaintiff pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff filed this action for declaratory judgment to determine its obligations under a homeowner's insurance policy to defend defendants, its

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

insureds, in an underlying action filed by Jeannine Westwood for damages for mental anguish, suffering, embarrassment, ridicule, humiliation, loss of wages and earning capacity, attorney fees and expenses, invasion of privacy, and harm to reputation. Westwood also sought damages for psychological and psychiatric injury. The complaint pleaded causes of action for libel, slander, intentional infliction of emotional distress, negligence, malicious prosecution, and invasion of privacy.

Defendants requested plaintiff to defend them and to provide coverage if they were found liable to Westwood. Plaintiff denied the request, claiming that coverage was excluded under the insurance policy because Westwood had not alleged any bodily injury in the underlying action. The provision in the policy upon which plaintiff relied for its denial of coverage provides:

> COVERAGE L - PERSONAL LIABILITY
> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:
> 1. pay to our limit of liability for the damages for which the insured is legally liable; and
> 2. provide a defense at our expense by counsel of our choice . . . .

Bodily injury is defined in the policy as

> bodily harm, sickness or disease. This includes required care, loss of services and death resulting therefrom. Bodily injury does not include any of the following which are communicable: disease, bacteria, parasite, virus, or other organism, any of which are transmitted by any insured to any other person. It also does not include the exposure to any such disease, bacteria, parasite, virus, or other organism by any insured to any other person.

Plaintiff moved for summary disposition on the ground that there was no genuine issue of material fact that it did not have a duty to defend or provide coverage under the insurance policy. MCR 2.116(C)(10). The trial court granted the motion, finding that Westwood's injuries did not constitute the requisite "bodily injury" necessary to trigger coverage.

Defendants thereafter filed a motion for reconsideration, which was denied. In the motion, defendants included the affidavit of Dr. R. Curtis Bristol, who opined that physical manifestations result from psychiatric problems and that psychiatric damage is a form of bodily injury.

Whether an insurance carrier has a duty to defend its insured in an underlying tort action depends upon the allegations in the complaint. The duty extends to allegations that "even arguably come within the policy coverage." *Allstate Ins Co v Freeman,* 432 Mich 656, 662-663; 443 NW2d 734 (1989); *United States Fidelity & Guaranty Co v Citizens Ins Co of America,* 201 Mich App 491, 493; 506 NW2d 527 (1993). The duty to defend or indemnify, however, is not determined solely on the basis of the terminology used in the plaintiff's pleadings in the underlying action. *Freeman, supra* at 662. Rather, a court focuses on the cause of the injury to determine whether coverage exists. *Id.* at 662-663; *U S F & G, supra* at 493-494.

In *Greenman v Michigan Mutual Ins Co,* 173 Mich App 88; 433 NW2d 346 (1988), the plaintiff sued the defendant for failing to defend him in a lawsuit in which sexual harassment and discrimination were alleged. The trial court granted summary disposition in favor of the defendant on the ground that it was not required to provide coverage or a defense in the absence of bodily injury. *Id.* at 90. "Bodily injury" was defined in the policy as

bodily injury, sickness, or disease. This Court held, in pertinent part, that because the complainant in the underlying action did not allege any physical manifestations of her mental injuries, the plaintiff failed to fulfill the bodily injury requirement of the policy. As such, the defendant was not required to defend the plaintiff. *Id.* at 92. See also *Nat'l Ben Franklin Ins Co of Michigan v Harris,* 161 Mich App 86, 90; 409 NW2d 733 (1987) (the phrase "bodily injury," absent allegations of physical manifestations, does not encompass damages for humiliation, mental anguish, and mental distress); *Farm Bureau Mutual Ins Co of Michigan v Hoag,* 136 Mich App 326, 332, 335; 356 NW2d 630 (1984) (the phrase "bodily injury" does not encompass damages for humiliation, mental anguish, and mental suffering; at a minimum, physical manifestation of mental suffering is necessary to satisfy bodily injury requirement).

Defendants distinguish *Greenman, Harris,* and *Hoag* by claiming that psychiatric harm is a sickness or illness from which physical manifestations can result and as such constitutes "bodily injury" within the meaning of the policy. We disagree and hold that, absent physical manifestations, the phrase "bodily injury" does not include a claim for psychiatric damage. While we recognize that there are differences between "mental suffering" and "psychiatric damage," the distinction does not alter our analysis as it relates to insurance coverage. At a minimum, there must be allegations of physical manifestations supported by sufficient documented evidence in order for insurance coverage to be triggered.

In her complaint in the underlying action, Westwood did not allege any physical manifestations resulting from the psychiatric harm she claims to have suffered. Defendants did state in passing at

the summary disposition hearing that Westwood was suffering from alcoholism as a result of the psychiatric damage. However, defendants failed to present any documentary evidence in support of this allegation. Mere allegations are not sufficient to withstand a motion brought pursuant to MCR 2.116(C)(10). *McCart v J Walter Thompson USA, Inc,* 437 Mich 109, 115; 469 NW2d 284 (1991). Further, the affidavit of Dr. Bristol, which defendants presented at the hearing for the motion for reconsideration, was general in nature and did not address whether Westwood experienced any physical manifestations of injury. *Id.*

Accordingly, we conclude that the trial court properly granted summary disposition in favor of plaintiff because Westwood did not allege a bodily injury within the terms of the parties' insurance policy.

Affirmed.

BEAUDRIE v ANCHOR PACKING COMPANY
WRIGHT v ANCHOR PACKING COMPANY
SMITH v ARMSTRONG WORLD INDUSTRIES, INC

Docket Nos. 152023, 152024, 152025. Submitted April 7, 1994, at Detroit. Decided July 18, 1994, at 9:10 A.M.

Ruth Beaudrie, as personal representative of the estate of Merel Beaudrie, brought a wrongful death action in the Wayne Circuit Court against Anchor Packing Company and others. Emogene Wright, as personal representative of the estate of Ralph Wright, brought a similar action in the Wayne Circuit Court against Anchor Packing Company and others. Juanita Smith, as personal representative of the estate of Willie B. Smith, brought a wrongful death action in the Wayne Circuit Court against Armstrong World Industries, Inc., and others. In each action, the plaintiff sought damages for the death of the decedent from mesothelioma caused by exposure to asbestos. The Silicosis, Dust Disease, and Logging Industry Compensation Fund filed in each action a notice of lien on any settlement or judgment recovered by the plaintiff and was permitted to intervene in each action to protect its lien interest. Each plaintiff entered into a settlement with certain of the defendants, and the court, James E. Mies, J., entered a consent judgment in each action. Each judgment divided the recovery among the interested parties and provided that the fund could exercise its lien against the entire judgment, irrespective of whether payable for economic or noneconomic losses or whether payable to parties who were not beneficiaries of work-

REFERENCES

Am Jur 2d, Workers' Compensation § 457.

What law governs the distribution, apportionment, or disposition of damages recovered for wrongful death. 92 ALR2d 1129.

Third-party tortfeasor's right to have damages recovered by employee reduced by amount of employee's workers' compensation benefits. 43 ALR4th 849.

Right of workers' compensation insurer or employer paying to a workers' compensation fund, on the compensable death of an employee with no dependents, to indemnity or subrogation from proceeds of wrongful death action brought against third-party tortfeasor. 7 ALR5th 969.

er's compensation benefits. Each plaintiff appealed, and the fund cross appealed in the Beaudrie and Wright appeals. The appeals were consolidated.

The Court of Appeals *held:*

1. The fund's right to reimbursement is controlled by § 827(5) of the Worker's Disability Compensation Act, MCL 418.827(5); MSA 17.237(827)(5), which in *Eddington Estate v Eppert Oil Company,* 441 Mich 200 (1992), was construed by a majority of the Supreme Court as permitting reimbursement from the entire amount of a third-party recovery for the death of an employee irrespective of the type of damages recovered. Accordingly, the trial court properly allowed the fund to assert its lien with respect to those portions of the recovery designated for loss of consortium or loss of society and companionship.

2. The fund concedes that *Eddington* precludes its assertion of its lien with respect to any portion of the recovery designated for a party who was not eligible for worker's compensation benefits as a result of the decedents' deaths. Accordingly, the trial court's orders must be reversed to the extent that they permit the liens to attach to the recoveries of the decedents' adult, nondependent children.

3. The fund's failure to object in the trial court to the allocation of the proceeds or to examine witnesses with respect to the allocation of the proceeds precludes raising the question of the allocation of the proceeds by way of cross appeal.

Affirmed in part, reversed in part, and remanded.

WORKER'S COMPENSATION — WRONGFUL DEATH — REIMBURSEMENT.

An employer or a worker's compensation carrier may seek reimbursement from a third-party tort recovery for the death of an employee, including damages for loss of consortium or loss of society and companionship, where the recipient of the tort recovery also is eligible to receive worker's compensation benefits (MCL 418.827[5]; MSA 17.237[827][5]).

Zamler, Mellen & Shiffman, P.C. (by *Neil A. Kay*) and (*Daryl Royal,* of Counsel), for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Morrison Zack,* Assistant Attorney General, for the Silicosis, Dust Disease, and Logging Industry Compensation Fund.

Before: CAVANAGH, P.J., and JANSEN and D. C. KOLENDA,* JJ.

PER CURIAM. Plaintiffs in these three consolidated cases appeal as of right from the portion of the trial court's orders applying the worker's compensation lien of the Silicosis, Dust Disease, and Logging Industry Compensation Fund to all damages recovered in each case. In Docket Nos. 152023 and 152024, the fund cross appeals from the allocation of the tort recovery. We affirm in part and reverse in part.

Decedents, Merel Beaudrie, Ralph Wright, and Willie Smith, died from mesothelioma resulting from exposure to asbestos. The personal representative of each estate brought wrongful death actions against a number of defendants. Pursuant to §§ 531(3) and 827 of the Worker's Disability Compensation Act, MCL 418.531(3); MSA 17.237(531)(3), and MCL 418.827; MSA 17.237(827), the fund filed a notice of lien on any settlement or judgment recovered by plaintiffs. The court granted the fund's motion to intervene to protect the lien. Each case was ultimately settled. The court incorporated each settlement in a consent judgment that indicated the settlement in that case, the manner in which the recovery was to be divided among the interested parties, and the portion of the recovery that was subject to the fund's lien. This appeal and cross appeal followed.

Plaintiffs argue on appeal that the trial court erred in subjecting to the worker's compensation lien (1) damages payable for loss of consortium or loss of society and companionship and (2) damages payable to those interested parties who were not worker's compensation beneficiaries.

Where an employee who has received worker's

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

compensation benefits recovers in a third-party tort action, the employer or the compensation carrier that paid the benefits is entitled to reimbursement from the recovery under § 827(5), which provides:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits.

Our Supreme Court construed this subsection in *Eddington Estate v Eppert Oil Co,* 441 Mich 200; 490 NW2d 872 (1992). The lead opinion, written by Justice BRICKLEY and joined by Justices RILEY and GRIFFIN, would have held that the subsection entitled the worker's compensation carrier to seek reimbursement from the entire amount of the third-party tort recovery obtained as a result of the death of an employee, regardless of the classification of the damages (as either economic or noneconomic) and regardless of whether the recipient of the proceeds was entitled to receive compensation benefits. *Id.* at 204. Justice MALLETT agreed that the classification of the damages was immaterial, but argued that the status of the claiming party should dictate whether the lien would attach. *Id.* at 218-219.

Justice MALLETT agreed in part with the result of the lead opinion, but dissented from part IV(C) of

that opinion, which would permit the employer to recover from loss of society and companionship damages awarded to the deceased employee's non-dependent parents. *Id.* at 218. Because Justice MALLETT expressly dissented only from part IV(C) of the lead opinion, it is appropriate to read his opinion as concurring in both the reasoning and the result of the remainder of the lead opinion. Accordingly, with the exception of part IV(C), *Eddington* constitutes binding precedent under the doctrine of stare decisis. See *Negri v Slotkin,* 397 Mich 105, 109; 244 NW2d 98 (1976); *Breckon v Franklin Fuel Co,* 383 Mich 251, 279; 174 NW2d 836 (1970), overruled on other grounds in *Smith v Detroit,* 388 Mich 637, 651; 202 NW2d 300 (1972). *Eddington* thus stands for the proposition that, where the recipient is a worker's compensation beneficiary, a worker's compensation carrier is entitled to reimbursement from the entire amount of the third-party tort recovery awarded, regardless of the type of damages recovered.[1]

In the present case, therefore, the trial court did not err in permitting the fund's lien to attach to damages for loss of consortium or loss of society and companionship.[2]

The fund concedes that, under *Eddington,* any recovery made by a party who is not eligible for worker's compensation benefits is not subject to the worker's compensation lien. In light of the

[1] To the extent that Judge CAVANAGH may have stated otherwise in *Piper v Chrysler Corp,* unpublished opinion per curiam of the Court of Appeals, decided April 13, 1994 (Docket No. 145931), p 3, n 1, he is now of the view that Justice MALLETT's partially concurring opinion renders the applicable portion of *Eddington* binding authority.

[2] In *Tucker v Clare Bros Ltd,* 196 Mich App 513, 520; 493 NW2d 918 (1992), this Court asserted that the right to reimbursement does not extend to a spouse's recovery for loss of consortium. That case is distinguishable from the present case, because the employee in *Tucker* suffered nonfatal injuries. The distinction is a significant one. *Hearns v Ujkaj,* 180 Mich App 363, 370-371; 446 NW2d 657 (1989).

fund's concession, we decline to consider the merits of this issue, and we reverse the decision of the trial court to the extent that it permitted the lien to attach to the recoveries of the decedents' adult, nondependent children.

On cross appeal, the fund argues that the percentages of the third-party recoveries awarded to the adult, nondependent children in the Beaudrie and Wright cases constitute an effort to circumvent the fund's lien and are unsupported by the record.

By failing both to cross-examine witnesses when it had the opportunity to do so and to object to the allocation of the proceeds among the interested parties, which failure was not merely a procedural defect, the fund has waived this issue. See *Tucker v Clare Bros Ltd,* 196 Mich App 513, 519-520, 519, n 2; 493 NW2d 918 (1992).

Affirmed in part, reversed in part, and remanded for modification of the consent judgments. We do not retain jurisdiction.

GRISWOLD v SEALED POWER CORPORATION (ON REMAND)

Docket No. 152661. Submitted May 3, 1994, at Lansing. Decided July 18, 1994, at 9:15 A.M.

William F. Griswold sought worker's compensation benefits from Sealed Power Corporation and its insurer, Liberty Mutual Insurance Company, after receiving sickness and accident benefits and pension benefits. The employer and the insurer agreed to pay worker's compensation benefits, and the Silicosis, Dust Disease, and Logging Industry Compensation Fund agreed to reimburse the employer and the insurer pursuant to MCL 418.531(1); MSA 17.237(531)(1), but a dispute arose concerning whether the fund must commence reimbursement after $12,500 in worker's compensation benefits have been paid or after $12,500 in worker's compensation benefits and other benefits subject to coordination pursuant to MCL 418.354; MSA 17.237(354) have been paid. A hearing referee of the Bureau of Worker's Disability Compensation decided that reimbursement would commence once $12,500 in worker's compensation benefits only have been paid. The Worker's Compensation Appeal Board affirmed that decision. The Court of Appeals denied the employer and the insurer leave to appeal. The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 439 Mich 1009 (1992).

On remand, the Court of Appeals *held:*

Benefits coordinated pursuant to § 354 cannot be used in computing the threshold amount of worker's compensation benefits for silicosis or other dust disease that must be paid by an employer or its insurer before reimbursement by the Silicosis, Dust Disease, and Logging Industry Compensation Fund can begin as provided by § 531(1). The employer or its insurer must have an out-of-pocket loss exceeding the threshold amount before reimbursement can begin.

Affirmed.

REFERENCES

Am Jur 2d, Workers' Compensation § 456.

See ALR Index under Workers' Compensation.

WORKER'S COMPENSATION — SILICOSIS, DUST DISEASE, AND LOGGING INDUSTRY COMPENSATION FUND — REIMBURSEMENT.

Other benefits coordinated with worker's compensation benefits pursuant to MCL 418.354; MSA 17.237(354) are not to be considered when determining whether an employer or its insurer has paid the amount of worker's compensation benefits for silicosis or other dust disease required by MCL 418.531(1); MSA 17.237(531)(1) for commencement of reimbursement of the employer or its insurer by the Silicosis, Dust Disease, and Logging Industry Compensation Fund (MCL 418.531; MSA 17.237[531]).

Cholette, Perkins & Buchanan (by *Stephen C. Oldstrom*), for Sealed Power Corporation and Liberty Mutual Insurance Company.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Caleb B. Martin, Jr.,* Assistant Attorney General, for the Silicosis, Dust Disease, and Logging Industry Compensation Fund.

ON REMAND

Before: HOOD, P.J., and CAVANAGH and D. A. TEEPLE,* JJ.

PER CURIAM. This case has been remanded by the Supreme Court for consideration as on leave granted. 439 Mich 1009 (1992). Defendant Sealed Power Corporation appeals a decision of the Worker's Compensation Appeal Board affirming the decision of a hearing referee and finding that the Silicosis, Dust Disease, and Logging Industry Compensation Fund was required to reimburse defendant only after defendant had actually paid $12,500 in worker's compensation benefits to plaintiff Griswold. We affirm.

Plaintiff took a voluntary retirement from his

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

employment with defendant. From October 16, 1984, through February 24, 1985, plaintiff received sickness and accident benefits totaling $3,482.83. On March 1, 1985, plaintiff began receiving a pension from defendant in the amount of $688.88 a month.

Plaintiff sought worker's compensation benefits. Defendant agreed to pay benefits, and the fund agreed to reimburse defendant pursuant to MCL 418.531(1); MSA 17.237(531)(1). At issue below was whether the fund was required to begin reimbursing defendant after defendant had paid plaintiff $12,500 in compensation benefits, or whether the fund was required to begin reimbursing defendant after defendant would have paid $12,500 in benefits but for the coordination allowed by MCL 418.354; MSA 17.237(354). By order mailed on May 21, 1986, the hearing referee found that the plain language of § 531(1) required that defendant be reimbursed for all compensation paid in excess of $12,500. The hearing referee ordered the fund to begin reimbursing defendant's insurance carrier, Liberty Mutual Insurance Company, after the carrier had actually paid $12,500 in weekly compensation benefits to plaintiff. The carrier would not be allowed to take credit for any benefits paid to plaintiff that could have been coordinated.

On appeal, the WCAB affirmed the decision of the hearing referee. The WCAB rejected defendant's argument that the fund was required to begin reimbursement pursuant to § 531(1) when payments to plaintiff exceeded $12,500 regardless of the source of the payments. The WCAB noted that in several of its previous cases it had determined that the fund could not set off an amount received by the employer from a third party, and that the employer was required to pay the statutory amount before it could be reimbursed. Compensa-

tion coordinated pursuant to § 354 could not be credited to satisfy the $12,500 required by § 531(1) to be paid before reimbursement could begin.

MCL 418.531; MSA 17.237(531) reads in part:

> (1) In each case in which a carrier including a self-insurer has paid, or causes to be paid, compensation for disability or death from silicosis or other dust disease, or for disability or death arising out of and in the course of employment in the logging industry, to the employee, the carrier including a self-insurer shall be reimbursed from the silicosis, dust disease, and logging industry compensation fund for all sums paid in excess of $12,500.00 for personal injury dates before July 1, 1985, and for all compensation paid in excess of $25,000.00 or 104 weeks of weekly compensation, whichever is greater, for personal injury dates after June 30, 1985, excluding payments made pursuant to sections 315, 319, 345, and 801(2), (4), and (5) which have been paid by the carrier including a self-insurer as a portion of its liability.

On appeal, defendant argues that the threshold amount specified in § 531(1) may be met by payment of worker's compensation benefits in conjunction with other benefits. The dollar amount paid to the employee, as determined by MCL 418.351; MSA 17.237(351) or MCL 418.361; MSA 17.237(361), may consist of worker's compensation benefits only, or worker's compensation benefits and other benefits specified in § 354. Regardless of the source of the funds, the dollar amount paid to the employee remains consistent even if the employer is allowed to coordinate worker's compensation benefits with other benefits pursuant to § 354. The purpose of coordination is to reduce the burden on the employer while maintaining the benefit level of the employee. Nothing indicates that by enacting § 354 the Legislature sought to increase

the burden on any employer by denying it the right to add amounts coordinated with worker's compensation benefits paid to determine the date on which the payment of a total of $12,500 in benefits occurs.

We agree with the decision of the WCAB. Although the issue raised in this case is one of first impression in this Court, the Worker's Compensation Appellate Commission addressed it in *Grigonis v Northern Boiler,* 1988 WCACO 4. In *Grigonis,* the WCAC held that benefits coordinated pursuant to § 354 could not be used to compute the threshold amount of compensation that must be paid before reimbursement can begin as provided for by § 531(1). The WCAC noted that worker's compensation benefits are distinct from other benefits paid to an employee, and the fact that worker's compensation benefits may be coordinated with other payments pursuant to § 354 does not turn these other payments into worker's compensation benefits. Worker's compensation benefits are what the employer pays to the employee after any allowable coordination has occurred; therefore, the employer or its insurance carrier must pay actual compensation in the amount specified by § 531(1) before reimbursement can begin.

We find the reasoning in *Grigonis* persuasive and adopt it in this case. That decision comports with the clear language of § 531(1). Moreover, we note that in *Nelligan v Gibson Insulation Co,* 193 Mich App 274; 483 NW2d 460 (1992), we held that before an employer can obtain reimbursement from the fund, the employer must demonstrate an out-of-pocket loss exceeding the threshold amount specified in § 531(1). Any monies recouped from a third party cannot be counted toward the threshold amount. *Nelligan* at 279-280. While *Nelligan* does not address the issue of monies saved through

coordination, it supports the WCAB's finding in this case that the employer's actual out-of-pocket loss must exceed the threshold amount before reimbursement can begin. The same result should obtain in the instant case. In order to qualify for reimbursement from the fund pursuant to § 531(1), an employer or its insurance carrier must pay an employee the statutory threshold of $12,500, consisting solely of worker's compensation benefits.

Affirmed.

TOWNSEND v BROWN CORPORATION OF IONIA, INC

Docket No. 153510. Submitted April 19, 1994, at Grand Rapids. Decided July 18, 1994, at 9:20 A.M.

Pamela Townsend brought an action in the Calhoun Circuit Court against Brown Corporation of Ionia, Inc., alleging that after her husband ceased employment with the defendant, the defendant refused to extend health insurance coverage to which she was entitled under the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.*, as amended by the Comprehensive Omnibus Budget Reconciliation Act (COBRA), 29 USC 1161 *et seq.*, and seeking reinstatement of the health insurance coverage, reimbursement of medical expenses already paid, costs and attorney fees, and penalty damages. The defendant argued that it had given the required statutory notice and that it had refused to extend coverage only after the plaintiff had failed repeatedly to tender payment of the required premium. The court, Conrad J. Sindt, J., following a bench trial, entered a judgment of no cause of action, finding that the defendant had given the required statutory notice of rights, that the plaintiff had not tendered payment of the premium, that the defendant did not forestall the plaintiff from making the premium payment, and that the defendant had no duty to inform the plaintiff of the statutory forty-five-day period in which payment of the premium could be tendered. The plaintiff appealed.

The Court of Appeals *held:*

1. The trial court lacked jurisdiction to hear the plaintiff's claim to the extent that it was based on an alleged breach by the defendant of a fiduciary duty, the exclusive jurisdiction of such a claim being vested in the federal courts by the ERISA.

2. Neither the trial court nor the Court of Appeals has jurisdiction to entertain a claim that the defendant violated the notice provisions of the COBRA. Further, if state courts had jurisdiction to entertain a claim based on the alleged noncompliance with the notice provisions of the COBRA, the record

REFERENCES

Am Jur 2d, Pensions and Retirement Funds §§ 1197, 1213.
See ALR Index under Employee Retirement Security Act.

supports the trial court's findings that the defendant gave adequate notice concerning the right to continue coverage and that no error resulted from the failure of the plaintiff to notify the defendant of the forty-five-day grace period in which to tender payment of the insurance premium.

3. The trial court lacked jurisdiction to grant relief based on equitable estoppel.

4. The question whether the defendant prevented the plaintiff from paying the premium turned on the resolution of the question of the credibility of the witnesses. Because the trial court had a special opportunity to judge the credibility of the witnesses, the findings of the trial court cannot be said to be clearly erroneous.

Affirmed.

1. COURTS — JURISDICTION — EMPLOYEE RETIREMENT INCOME SECURITY ACT — FIDUCIARY DUTY.

State courts lack jurisdiction to hear claims brought pursuant to the Employee Retirement Income Security Act that allege a breach by a plan administrator of its fiduciary duty; exclusive jurisdiction of such claims lies in the federal courts (29 USC 1132[a][1][A], [e][1]).

2. COURTS — JURISDICTION — EMPLOYEE RETIREMENT INCOME SECURITY ACT — EQUITABLE ESTOPPEL.

State courts lack jurisdiction to hear claims brought pursuant to the Employee Retirement Income Security Act seeking relief based on equitable estoppel (29 USC 1132[e][1]).

Alan F. Giles, for the plaintiff.

Varnum, Riddering, Schmidt & Howlett (by *William E. Rohn*), for the defendant.

Before: CORRIGAN, P.J., and GRIFFIN and M. W. DRAKE,* JJ.

CORRIGAN, P.J. In this action under the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.,* as amended by the Comprehensive Omnibus Budget Reconciliation Act of 1986, 29 USC 1161 *et seq.* (COBRA), plaintiff appeals as of

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

right the judgment of no cause of action. We affirm.

Within fourteen days after plaintiff's husband ceased employment with defendant, defendant sent the required notice of COBRA rights to the couple's last known address, in compliance with 29 USC 1166(4). Because plaintiff and her husband had moved and had provided no forwarding address, they did not receive the first notice and a later follow-up notice. Plaintiff subsequently suffered a heart attack and incurred substantial medical expenses. She learned about her COBRA rights from an insurance agent and contacted defendant by telephone, seeking immediate delivery of the forms necessary to elect continuation coverage. Plaintiff informed defendant that she sought immediate payment of her medical bills. The necessary forms were sent out, accompanied by a note that plaintiff should forward her application and premium payment as soon as possible. Neither party disputed that plaintiff then made a timely application for continuation coverage. However, defendant denied that the required premium payment accompanied the completed forms. Plaintiff testified that she had mailed a check in payment of the premium, but also acknowledged that her check was never cashed. Thereafter, plaintiff was given opportunities to pay the premium, but never did so. The court found as a matter of fact that plaintiff had failed to include the premium payment with her election and never had made the necessary payment to continue coverage.

In her complaint, plaintiff alleged that defendant improperly denied her application and premium payment for continuation coverage to which she was entitled pursuant to 29 USC 1162, 1165. She sought reinstatement of health insurance benefits, costs and attorney fees, reimbursement of

medical bills less premium amounts, and penalty damages of $100 a day for noncompliance with COBRA provisions. She made no claim of equitable estoppel, nor did she assert that defendant violated the disclosure and notice provisions of the COBRA.

Section 502 of the ERISA, codified at 29 USC 1132, expressly prescribes the remedies available to plan beneficiaries and designates which courts have jurisdiction over such claims. Plaintiff's complaint falls within the provisions of 29 USC 1132(a)(1)(B) insofar as it seeks recovery of benefits under the terms of an ERISA plan. Because state and federal courts have concurrent jurisdiction over actions pursuant to subsection a(1)(B), the circuit court properly exercised jurisdiction over plaintiff's complaint. 29 USC 1132(e)(1); *McMartin v Central States, Southeast & Southwest Areas Pension Fund,* 159 Mich App 1, 4; 406 NW2d 219 (1987); *Bradwell v Silk Greenhouse, Inc,* 828 F Supp 940, 944 (MD Fla, 1993). Plaintiff's additional claims of violation of fiduciary duties and equitable estoppel are the exclusive province of the federal courts.

Plaintiff first claims that the circuit court erroneously determined that defendant had no duty to notify plaintiff of the forty-five day grace period within which a beneficiary may make premium payments after having elected continuation health coverage. We disagree. During trial, plaintiff expanded her theories to allege that defendant specifically violated its notification duties under the COBRA amendments of the ERISA, 29 USC 1161 *et seq.,* by failing to advise her that she had forty-five days within which to make the required premium payments. The circuit court rejected this argument. On appeal, plaintiff also contends that defendant violated its notification obligations under the COBRA. State courts lack subject-matter juris-

diction over this claim of breach of fiduciary duty. 29 USC 1132(e)(1) grants exclusive jurisdiction over all ERISA claims, except those brought under 29 USC 1132(a)(1)(B), to federal district courts. *McMartin, supra; Gorman v Life Ins Co of North America,* 811 SW2d 542, 547 (Tex, 1991); *Summers v United States Tobacco Co,* 214 Ill App 3d 878, 883; 574 NE2d 206 (1991). Plaintiff does not identify the statutory basis (nor, indeed, case authority) for her claim that defendant violated the notice provisions of the COBRA. However, her claim that defendant breached its fiduciary duties plainly falls within the purview of 29 USC 1132(a)(1)(A) and is subject to the exclusive jurisdiction of the federal district courts.

Subsections a(1)(A) and c(1) of 29 USC 1132 provide a cause of action for violations of the reporting and disclosure provisions of the COBRA set forth in 29 USC 1166(a)(1) and (a)(4), which require that (1) an ERISA health plan include written notice of a covered employee's rights under the COBRA at the time coverage commences, and (2) in the case of a qualifying event,[1] any qualified beneficiary receive the same written notice of the COBRA rights. Moreover, the ERISA provides no remedy for a violation of 29 USC 1166(a)(1) and (a)(4) other than that expressly provided in 29 USC 1132(c)(1). *Lewandowski v Occidental Chemical Corp,* 986 F2d 1006, 1009-1010 (CA 6, 1993). Plaintiff's allegation that defendant failed to disclose or to notify plaintiff of her rights under the COBRA falls squarely within subsection a(1)(A). *Hozier v Midwest Fasteners, Inc,* 908 F2d 1155, 1166-1167 (CA 3, 1990); *Gresham v Massachusetts Mutual*

[1] For purposes of this action, 29 USC 1163(2) provides in part that a "qualifying event" means the termination of the covered employee's employment that, but for the continuation coverage required under the COBRA, would result in the loss of coverage of a qualified beneficiary.

Life Ins Co, 248 NJ Super 64; 590 A2d 241 (1991). Both the circuit court and this Court are without jurisdiction to entertain plaintiff's claim that defendant violated the notice provisions of the COBRA.

Assuming that state courts enjoy any subject-matter jurisdiction, we would conclude that the circuit court properly rejected this argument. An administrator of an ERISA plan must provide qualified beneficiaries with adequate notice of their rights under the COBRA. 29 USC 1166(a)(4); *Lincoln General Hosp v Blue Cross/Blue Shield of Nebraska,* 963 F2d 1136, 1139-1140 (CA 8, 1992); *Meadows v Cagle's, Inc,* 954 F2d 686, 690-691 (CA 11, 1992). An administrator fulfills its obligations under 29 USC 1166 when it provides the qualified beneficiary with enough information to make an intelligent decision regarding election of continuation coverage. *Lincoln General Hosp, supra* at 1140.

Defendant provided plaintiff with adequate information to decide to elect continuation coverage. Defendant sent notice of plaintiff's COBRA rights to her husband's last known address pursuant to 29 USC 1166(a)(4). Plaintiff applied for coverage within the sixty-day period. Plaintiff contends that the COBRA also required defendant to notify her of the forty-five-day grace period for the payment of premiums. Plaintiff, however, fails to show why such information was necessary for her to make an intelligent decision to elect coverage when she had already indicated a desire for immediate coverage. Before the expiration of the grace period, plaintiff was aware of her right to make the premium payment, but did not make the required payment. Long after the forty-five-day period expired, defendant offered to accept payment, but again plaintiff declined to pay the premium. De-

fendant adequately preserved plaintiff's right to elect and receive continuation coverage under the COBRA.

Moreover, the COBRA does not require specifically that a plan administrator provide notice of the forty-five-day grace period to effect premium payments. Even if we had jurisdiction over the matter, we would decline to extend an employer's obligations under the notice and disclosure provisions of the COBRA beyond those already promulgated by the Secretary of Labor. The circuit court properly concluded that defendant satisfied its obligations under 29 USC 1166. We find no error warranting reversal.

Plaintiff also argues that the trial court erred in refusing to apply principles of equitable estoppel. We disagree. Once again, state courts lack jurisdiction to entertain claims of equitable estoppel in the context of the ERISA. *McMartin, supra* at 6; 29 USC 1132(e)(1); *Gresham, supra* at 69-70. Moreover, plaintiff failed to preserve this issue. Our failure to review it will not result in manifest injustice, inasmuch as the record does not support plaintiff's claim.

Lastly, plaintiff asserts that the circuit court erroneously found that defendant did not foreclose plaintiff from paying the initial premium necessary to receive continuation coverage. We disagree. Findings of fact by the trial court may not be set aside unless clearly erroneous. MCR 2.613(C); *Beason v Beason,* 435 Mich 791, 805; 460 NW2d 207 (1990). A finding of fact is not clearly erroneous unless there is no evidence to support it or the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Tallman v Cheboygan Area Schools,* 183 Mich App 123, 126; 454 NW2d 171 (1990).

Whether defendant prevented plaintiff from paying the premium ultimately turned on the resolution of a credibility contest between defendant's representative, Paul Fisher, and plaintiff. Fisher testified that he informed plaintiff on several occasions that defendant would continue her group health coverage if she would send the premium payment. Although plaintiff vigorously disputed Fisher's testimony, she conceded that she never mailed a second check, although she knew that the first check had never been cashed. The court concluded that defendant had not prevented plaintiff from making the necessary payment. This Court affords great deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C). The trial court's findings of fact were not clearly erroneous.

Affirmed.

MASSUCHUSETTS INDEMNITY AND LIFE INSURANCE COMPANY v THOMAS

Docket No. 148144. Submitted December 9, 1993, at Lansing. Decided July 18, 1994, at 9:25 A.M. Leave to appeal sought.

Massachusetts Indemnity and Life Insurance Company brought an interpleader action in the Saginaw Circuit Court naming as defendants Dorothy M. Thomas, Regina Bush, the estate of Willie B. Bush, deceased, and others, and seeking a determination regarding who was entitled to the proceeds of a life insurance policy insuring Willie. While Willie and Dorothy were married, she purchased life insurance on herself that included a spouse rider on Willie's life, which named her as the beneficiary. When Willie and Dorothy later divorced, the insurance waiver provision in the judgment stated that both waived any interest they may have had as beneficiary or otherwise in and to the proceeds of any policies of life insurance insuring the life of the opposite party. Regina was Willie's wife at the time of his death. The court, William A. Crane, J., granted summary disposition for Dorothy, ruling that the insurance waiver provision was inapplicable because Willie had no interest in the policy because he did not own it, i.e., it was Dorothy's policy. Regina appealed.

The Court of Appeals *held:*

The stipulation and property settlement agreement in the judgment of divorce that contained the insurance waiver provision is a contract, and the language is clear and unequivocal. The trial court erred as a matter of law in awarding the insurance proceeds to Dorothy. The insurance waiver provision satisfied the statutory requirements of MCL 552.101(2); MSA 25.131(2) by determining Dorothy's rights to the proceeds of the policy insuring Willie's life by expressly waiving any such rights.

Reversed and remanded.

REFERENCES

Am Jur 2d, Contracts §§ 2, 337, 339.

Property settlement agreement as affecting divorced spouse's right to recover as named beneficiary under former spouse's life insurance policy. 31 ALR4th 59.

1. JUDGMENTS — DIVORCE — SETTLEMENT AGREEMENTS — CONTRACTS.
Judgments entered pursuant to the agreement of the parties, such as a settlement agreement in a judgment of divorce, are of the nature of a contract and are to be construed and applied as such; absent a showing of factors such as fraud or duress, courts act properly when they enforce such agreements.

2. CONTRACTS — INTERPRETATION OF CONTRACTS.
The interpretation of unambiguous and unequivocal contracts is a question of law.

W. Kenneth Wright, for Dorothy M. Thomas.

Richard F. McNally, Jr., for Regina Bush.

Before: TAYLOR, P.J., and REILLY and M. J. TALBOT,* JJ.

TAYLOR, P.J. Defendant-appellant Regina Bush appeals as of right the circuit court order granting summary disposition to defendant-appellee Dorothy Thomas. The order also awarded to Dorothy the proceeds of a life insurance policy on her former husband, Willie Bush. On appeal, Regina, who was Willie's wife at the time of his death, argues that the proceeds belong to Willie's estate because of a provision in the judgment of divorce between Dorothy and Willie in which both parties waived all rights to the proceeds of any life insurance policies insuring the life of the other party. Alternatively, Regina argues that Dorothy's claim to the proceeds is invalid pursuant to MCL 552.101; MSA 25.131. We reverse.

In 1986, when Willie and Dorothy were husband and wife, Dorothy purchased life insurance on herself, naming Willie as the primary beneficiary and their four children as contingent beneficiaries. The policy also included a spouse rider in the amount of $50,000 on Willie's life, with Dorothy as the beneficiary.

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

In June 1988, Dorothy and Willie were divorced. Included in the judgment of divorce was a stipulation and property settlement containing a provision, entitled "Insurance Waiver," which stated "that each of the parties shall waive any interest he or she may have as beneficiary or otherwise in and to the proceeds of any policies of life insurance . . . standing in the name of or insuring the life of the opposite party, said interest being hereby terminated with the entry of this Judgment of Divorce." The effect of this provision is at issue here.

In February 1990, Willie married Regina. In July 1991, Willie died and, the following month, Dorothy submitted a claim to the insurance company requesting payment to her of the proceeds of the $50,000 spouse rider on Willie's life. The insurance company filed an interpleader action naming Dorothy, Regina, Willie's estate, and the four adult children of Dorothy and Willie as defendants. The court allowed the company to pay the $50,000 proceeds plus a premium refund of $44.13 into the court and dismissed the company from the action.

Subsequently, Regina moved for summary disposition, arguing that either she or Willie's estate was entitled to the insurance proceeds because Dorothy had waived any interest in those proceeds by agreeing to the judgment of divorce. At the motion hearing, Dorothy argued that she, not Willie, owned the insurance policy at issue and that she had paid all of the premiums on the policy. Furthermore, Dorothy argued, the judgment of divorce did not address the type of policy at issue here.

Ruling from the bench, the trial court granted summary disposition to Dorothy pursuant to MCR 2.116(I)(2) (opposing party is entitled to judgment). The court ruled that the insurance waiver provi-

sion was inapplicable because Willie had no interest in the policy because he did not own it, i.e., it was Dorothy's policy. The court also ruled that MCL 552.101; MSA 25.131 was inapplicable because it was "designed to avoid inadvertent bequests to divorced spouses."

Judgments entered pursuant to the agreement of the parties are of the nature of a contract, rather than a judicial order entered against one party. *Draughn v Hill,* 30 Mich App 548, 553-554; 186 NW2d 855 (1971). Furthermore, a settlement agreement, which is what the stipulation and property settlement is, is a contract and is to be construed and applied as such. *Bd of Co Road Comm'rs for the Co of Eaton v Schultz,* 205 Mich App 371; — NW2d — (1994). Absent a showing of factors such as fraud or duress, courts act properly when they enforce such agreements. *Balabuch v Balabuch,* 199 Mich App 661, 662; 502 NW2d 381 (1993). Interpretation of unambiguous and unequivocal contracts is a question of law. *In re Loose,* 201 Mich App 361, 366; 505 NW2d 922 (1993).[1]

In the instant case, there is no claim of any factors such as fraud or duress. The insurance waiver provision in the judgment of divorce is unambiguous and unequivocal. It clearly states that both Dorothy and Willie waived "any interest he or she may have as beneficiary or otherwise in and to the proceeds of any policies of life insurance . . . insuring the life of the opposite party." The trial court's apparent agreement with Dorothy's arguments regarding ownership of the policy

[1] The stipulation and property settlement was drafted by Dorothy's attorney. Therefore, according to well-settled principles of contract law, any ambiguities in the agreement would be construed against Dorothy. *Brauer v Hobbs,* 151 Mich App 769, 774; 391 NW2d 482 (1986). However, the provision at issue here is unambiguous and unequivocal.

and who paid the premiums was improper in light of this clear contractual language. Accordingly, we hold that the trial court erred as a matter of law in awarding the insurance proceeds to Dorothy.

Although not necessary to our holding, we note briefly that the trial court correctly determined that MCL 552.101; MSA 25.131 is inapplicable to these circumstances. The purpose of that statute is "to affect the interest of the *wife* in the insurance policy and thus cure the situation where a divorced wife could *inadvertently receive* the proceeds of a perhaps forgotten policy." *Starbuck v City Bank & Trust Co,* 384 Mich 295, 299; 181 NW2d 904 (1970). Furthermore, we note that the relevant statutory requirement was satisfied by the judgment of divorce. MCL 552.101(2); MSA 25.131(2) states: "Each judgment of divorce . . . shall determine all rights of the wife in and to the proceeds of any policy or contract of life insurance . . . upon the life of the husband in which the wife was named or designated as beneficiary." Here, the insurance waiver provision of the judgment of divorce determined Dorothy's rights to the proceeds of the policy on Willie's life by expressly waiving any such rights.

Reversed and remanded for determination of the proper disposition of the insurance proceeds. We do not retain jurisdiction.

PEOPLE v HAMM

Docket No. 159870. Submitted June 8, 1994, at Detroit. Decided July 18, 1994, at 9:30 A.M. Leave to appeal sought.

David L. Hamm pleaded guilty in the Ottawa Circuit Court, Wesley J. Nykamp, J., of delivery of less than fifty grams of cocaine and of being a second-offense habitual offender and was sentenced to five to thirty years of imprisonment. He appealed and moved for a remand for a hearing pursuant to *United States v Tucker,* 404 US 443 (1972), and *People v Moore,* 391 Mich 426 (1974), claiming that the trial court improperly considered a prior misdemeanor conviction at sentencing because he had not been represented by counsel at the proceeding that resulted in the prior conviction.

The Court of Appeals *held:*

1. The defendant's argument that his prior conviction was infirm for lack of counsel, and was therefore improperly considered by the trial court, is essentially a challenge to the information contained in the presentence report. Because the defendant expressly approved the contents of the presentence report at sentencing, he has not preserved the issue for appellate review.

2. Contrary to the defendant's assertion, the trial court did not sentence the defendant under the misconception that it was required to impose the maximum sentence for the habitual offender charge.

Affirmed.

CORRIGAN, J., concurring, stated that *Nichols v United States,* 511 US — (1994), forecloses relief on the claim that it was improper for the court to consider at sentencing the uncounseled prior conviction.

SENTENCES — CONSIDERATION OF PRIOR CONVICTIONS — APPEAL.

A claim on appeal that a prior misdemeanor conviction obtained without counsel for the defendant was improperly considered at

---

REFERENCES

Am Jur 2d, Appeal and Error § 545; Criminal Law § 527.

See ALR Index under Presentence Reports; Sentence and Punishment.

sentencing is essentially a challenge to the information contained in the presentence investigation report concerning the prior conviction; to preserve the issue for appellate review, the defendant must object in the trial court to the alleged inaccuracies in the presentence investigation report.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Ronald J. Frantz,* Prosecuting Attorney, and *Gregory J. Babbitt,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Anne Yantus*), for the defendant on appeal.

Before: MICHAEL J. KELLY, P.J., and FITZGERALD and CORRIGAN, JJ.

MICHAEL J. KELLY, P.J. Defendant pleaded guilty of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. The trial court sentenced defendant to a prison term of five to thirty years. Defendant appeals as of right.

Defendant argues that the sentencing court improperly considered a 1977 conviction without counsel for possession of marijuana. *United States v Tucker,* 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972); *People v Moore,* 391 Mich 426, 440; 216 NW2d 770 (1974). Although defendant did not raise this issue at sentencing, he filed a timely motion to remand for a *Tucker-Moore* hearing and supplemented the motion with proof that he had unsuccessfully sought access to court records of the prior conviction. This Court denied the motion on November 19, 1993, without prejudice to refiling if "accompanied by some evidence that . . . the conviction was obtained in violation of his right to counsel."

Because defendant's motion presented a prima facie case for remand under *Moore, supra,* and because preservation is an issue in this appeal, we revisit our previous ruling on the motion to remand. We must decide whether a defendant who has belatedly established a prima facie case for a *Tucker-Moore* hearing is automatically entitled to a remand even though no *Tucker-Moore* objection was raised before the trial court. We believe the automatic remand interpretation of *Moore* has been modified and conclude that denial of defendant's motion to remand was appropriate. We hold the issue has not been properly preserved.

Our conclusion is based on the recent Supreme Court decision in *People v Hernandez,* 443 Mich 1; 503 NW2d 629 (1993). There, the Supreme Court held that a defendant-appellant is not entitled to a remand so that he may file a motion for resentencing and thereby preserve a challenge to an alleged error in the scoring of the sentencing guidelines. "The remand procedure is necessary only for those issues that are preserved, but still requires [sic] additional proceedings in the trial court before being resolved." *Id.* at 20-21. "The remand procedure should not be utilized for presentence issues that can be raised contemporaneously with the event giving rise to the challenge." *Id.* at 18-19. Here, as in *Hernandez,* the presentence investigation report (PSIR) included the allegedly unreliable information, and there is no indication that the trial court failed to provide defendant a reasonable period to review the PSIR, as required under MCR 6.425(B). See *Hernandez, supra* at 13, n 16. In addition, even if defendant was not given sufficient time, he could have preserved his objection by filing a postjudgment motion for resentencing under MCR 7.208. See *Hernandez, supra* at 19-20.

Our conclusion is further supported by the language of the PSIR statute, which provides in perti-

nent part: "*At the time of sentencing,* either party may challenge, on the record, the accuracy or *relevancy* of any information contained in the presentence investigation report." MCL 771.14(5); MSA 28.1144(5) (emphasis added). See also MCR 6.425(D)(2)(b). On the basis of this language, this Court has declined to entertain PSIR challenges that are not presented at sentencing. See, e.g., *People v Sharp,* 192 Mich App 501, 504; 481 NW2d 773 (1992). Defendant's argument that his 1977 conviction was infirm for lack of counsel, and was therefore improperly considered by the trial court, is essentially a challenge to the information contained in the PSIR concerning the prior conviction. Because defendant expressly approved the contents of the PSIR at sentencing, he has not preserved the issue for appellate review.[1]

Finally, the sentencing transcript does not suggest that the trial court sentenced defendant under the misconception that it was required to impose the maximum sentence for the habitual offender charge.

Affirmed.

FITZGERALD, J., concurred.

CORRIGAN, J. *(concurring).* I join in Judge KELLY'S opinion. In addition, I also conclude that *Nichols v United States,* 511 US —; 114 S Ct 1921; 128 L Ed 2d 745 (1994), forecloses relief on the particular ground defendant has identified in this case.

[1] Though our holding is based on preservation grounds, we note the recent case of Nichols v United States, 511 US —; 114 S Ct 1921; 128 L Ed 2d 745 (1994), in which the United States Supreme Court held that a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction as long as it did not result in a sentence of imprisonment. According to defendant's PSIR, no term of imprisonment was imposed for his 1977 conviction. However, because *Nichols* has not been briefed by the parties, we decline to rule on its applicability in this case.

MANTUA v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 155418. Submitted March 10, 1994, at Detroit. Decided July 18, 1994, at 9:35 A.M. Leave to appeal sought.

Robert Mantua and others brought an action in the Wayne Circuit Court against Auto Club Insurance Association, seeking reformation of a contract of automobile insurance. Plaintiffs alleged that mutual mistake had resulted in coordinated medical coverage for one of the plaintiffs' business vehicles, representing a departure from plaintiff Robert Mantua and the defendant's agreement and practice of insuring the plaintiffs' business vehicles for full medical coverage and the plaintiffs' personal vehicles for coordinated medical coverage. The court, James Chylinski, J., granted summary disposition for the defendant. The plaintiffs appealed.

The Court of Appeals *held:*

1. The court erred in granting summary disposition, given that genuine issues of material fact existed concerning whether plaintiff Robert Mantua and the defendant, through an agent, had agreed that all business vehicles would receive full medical coverage and whether the vehicle in question was insured properly in accordance with the agreement.

2. Plaintiff Robert Mantua's failure to read the policy declaration of coverage for the vehicle in question does not estop the plaintiffs from seeking reformation of the insurance contract.

Reversed and remanded for further proceedings.

CONTRACTS — INSURANCE — REFORMATION.

The failure of an insured to read the terms of an insurance contract does not prevent reformation of the contract on the basis of mutual mistake.

Mindell, Panzer, Mulcahy & Malin (by *Michael T. Ratton*), for the plaintiffs.

REFERENCES

Am Jur 2d, Insurance §§ 370, 371.

Negligence in executing contract as affecting right to have it reformed. 81 ALR 2d 7.

Brandt, Hanlon, Becker, Lanctot, McCutcheon, Schoolmaster & Taylor (by *Elaine I. Harding*) (*John A. Lydick,* of Counsel), for the defendant.

Before: WHITE, P.J., and MICHAEL J. KELLY and W. J. CAPRATHE,* JJ.

PER CURIAM. Plaintiffs appeal as of right from a circuit court order granting summary disposition to defendant pursuant to MCR 2.116(C)(10), thereby dismissing plaintiffs' action seeking reformation of an automobile insurance contract to provide full medical coverage rather than the coordinated medical coverage provided by defendant insurer. We reverse and remand.

I

Plaintiffs Robert and Mary Mantua owned several vehicles. Some of the vehicles were for personal use, others were designated "work vehicles" and used in the course of conducting a family business, Architectural Exteriors. In 1984, the Mantuas obtained insurance for all their vehicles through Michael Ortkras, defendant Auto Club Insurance Association's agent. Until 1988, the Mantuas contracted for coordinated benefits coverage for all their vehicles.

In April 1988, Ortkras met with Robert Mantua and rewrote the coverage on the Mantuas' vehicles. According to Mantua, the discussion included an agreement that all business vehicles would thereafter carry full medical coverage. Ortkras could not remember whether such an agreement had been made at that time, but acknowledged that his records indicated that from that time, some vehicles had full medical coverage rather

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

than coordinated benefits coverage, and all vehicles with full medical coverage were used by a business driver or in a business capacity.

All subsequent changes to the policy resulted from phone calls made by Robert Mantua notifying Ortkras' office as vehicles were changed or added to the fleet. Ortkras or members of his staff would then delete vehicles from the policy, or add them after ascertaining title ownership, principal driver, financing, and intended use.

Effective August 17, 1989, a 1989 Geo Tracker, titled in the name of Architectural Exteriors, was added to the policy. According to Ortkras' records, Mary Mantua was the named insured and principal driver, and the vehicle's indicated use was as a pleasure, rather than a business, vehicle. Neither Robert Mantua nor Ortkras could later recall the specifics of the telephone conversation initiating the change. Robert Mantua testified that, while he could not recall the specifics of the conversation, when adding a vehicle he always told Ortkras who owned it and he would also have told him that the Tracker was to be used for company purposes. Plaintiffs concede, however, that the policy, which they did not review, thereafter listed the Tracker as a pleasure vehicle receiving coordinated benefits coverage.

On April 21, 1990, while on a nonbusiness-related trip, the Tracker was involved in a collision. Robert Mantua was driving; Mary Mantua and James Berry were passengers. All were seriously injured. Defendant paid coordinated benefits coverage, but refused to pay full medical coverage. Plaintiffs brought this action for full benefits. They claimed that because the Tracker was owned by Architectural Exteriors, with Mary DeAngelis (Mantua), an employee, designated the named insured and primary driver, it was therefore a work

vehicle, for which full medical coverage had been intended. Defendant, relying on the written contract terms, moved for summary disposition.

In response, plaintiffs argued that defendant's own records, which, with only two exceptions, appeared to correlate title ownership in the business with full medical coverage, confirmed the existence of an agreement to confer such coverage on business vehicles. Plaintiffs also argue that defendant's records indicate it was mistaken with respect to the ownership of those two vehicles, and that if the insurance coverage on those vehicles is viewed in light of defendant's belief concerning their ownership, there is even greater support for plaintiffs' assertions regarding the existence and terms of the agreement regarding coverage. Relying on the correlation between business vehicles and full coverage, and on Ortkras' deposition admissions that the two exceptions could have been mistakes, plaintiffs argued that title ownership in the business determined that a vehicle was a business vehicle, and was intended to have full medical coverage.

The trial court granted defendant's motion, ruling that despite evidence of

> at least some understanding that the general proposition was that business vehicles had full medical coverage and individual vehicles had coordinated benefits to save some money

plaintiffs had failed to establish

> a continuing agreement between the parties at an earlier time, that if certain vehicles came in, they were automatically listed certain ways.

The court also stated that because Ortkras' information would have been supplied by Robert Man-

tua, and neither he nor Ortkras remembered the specifics of the conversation involving the Tracker, there was insufficient evidence of mistake.

II

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. The trial court must give the benefit of any reasonable doubt to the nonmoving party, and must then determine whether a record might be developed that would leave open an issue on which reasonable minds might differ. *Coleman-Nichols v Tixon Corp,* 203 Mich App 645, 650; 513 NW2d 441 (1994).

Here, two questions of material fact were raised: (1) whether Robert Mantua and defendant affirmatively agreed in April 1988 that thenceforth all business vehicles would receive full medical coverage, and (2) whether the vehicle was properly insured in accordance with the agreement. Viewed in the light most favorable to plaintiffs, Robert Mantua's deposition testimony concerning the 1988 meeting, his practice with respect to obtaining coverage for new vehicles, the record evidence of an ongoing correlation between business ownership and full medical coverage, and Ortkras' concession that deviations from that correlation could have been mistakes were sufficient to establish genuine issues of material fact regarding these questions.

Moreover, the fact that Ortkras' information about the Tracker could only have come from Robert Mantua does not indisputably establish that the vehicle's designation as a pleasure vehicle arose from Mantua's unilateral mistake. Mantua understood the terms of his agreement with defendant to mean that a vehicle titled in the name of

his business and driven by an employee would qualify for full coverage. However, Ortkras' testimony that he did not realize that Mary Mantua was an employee leaves open the possibility that he or another staff member determined the Tracker to be a personal rather than a business vehicle on the basis of Mary Mantua's designation as the principal driver.

III

Defendant argues that plaintiffs are estopped from maintaining this action under *Drogula v Federal Life Ins Co,* 248 Mich 645; 227 NW 692 (1929). We disagree. The holding in *Drogula* did not rest merely on the plaintiff's failure to read the printed conditions of his policy, but on the policy's express limitation on the power of the agent. The policy stated, "No agent has authority to change this policy or to waive any of its provisions."[1] *Id.* at 649. The Court emphasized that such a provision, whether read by the insured or not, precluded any change in the conditions of the policy, either by parol or writing. *Id.* Under such circumstances, the plaintiff policyholder was

> estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy. [*Id.* at 649-650, quoting *Cleaver v Ins Co,* 65 Mich 527, 533; 32 NW 660 (1887).]

Moreover, although the circuit court in this case did not address whether plaintiff Robert Mantua

[1] Defendant has not asserted that its policy contains a similar provision. Even if such a provision is found in the policy, *Drogula* does not hold that the failure to read a policy precludes reformation where the policy was intended to provide one form of coverage but through a mutual mistake a different form of coverage was provided in its stead.

had been negligent in failing to read the terms of his contract and did not decide the case on estoppel grounds, a mere failure to read a policy does not prevent reformation of a contract based on mutual mistake. *Whitney v Nat'l Fire Ins Co,* 296 Mich 38, 43; 295 NW 551 (1941); *Heath Delivery Service v Michigan Mutual Liability Co,* 257 Mich 482, 486; 241 NW 191 (1932).

Here, the issue is not whether Robert Mantua's purported agreement with defendant was void by the contract's very terms, but whether he is entitled to reformation of the contract on the basis of its alleged inaccuracy in representing the agreement made between the parties.

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

SCHIER, DENEWETH & PARFITT, PC v BENNETT

Docket No. 141182. Submitted January 4, 1994, at Lansing. Decided July 18, 1994, at 9:40 A.M. Leave to appeal sought.

Schier, Deneweth & Parfitt, P.C., brought an action in the Oakland Circuit Court against Linda Bennett, seeking the payment of legal fees incurred as a result of the plaintiff's representation of the defendant's daughter in proceedings to enforce the daughter's judgment of divorce. The plaintiff alleged that before the representation began the defendant made an oral promise to pay the legal fees. The defendant denied making such promise and sought summary disposition. The court, Fred M. Mester, J., granted summary disposition for the defendant, finding that the alleged agreement was unenforceable under the statute of frauds. The plaintiff appealed.

The Court of Appeals *held:*

1. A person may assume original liability by a direct promise to pay for services to be rendered to another in the future. It is well established that the consideration for a promise may inure to one other than the promisor or may lie in a detriment to the promisee.

2. The defendant's promise, if any, was an original promise, not a collateral one, and therefore not within the statute of frauds.

3. Because a genuine issue exists regarding whether the defendant made the alleged promise, summary disposition was not appropriate.

Reversed and remanded.

CONTRACTS — STATUTE OF FRAUDS — ORAL PROMISE TO PAY FOR FUTURE SERVICES FOR ANOTHER.

A person may assume original liability by a direct promise to pay for services to be rendered to another in the future; such an original promise does not fall within the statute of frauds' provision requiring a special promise to answer for the debt,

REFERENCES

Am Jur 2d, Contracts §§ 1, 3; Statute of Frauds § 198.

Applicability of statute of frauds to promise to pay for legal services furinshed to another. 84 ALR4th 994.

default, or misdoings of another person to be in writing (MCL 566.132[1][b]; MSA 26.922[1][b]).

Schier, Deneweth & Parfitt, P.C. (by *Carl F. Schier*), for the plaintiff.

Barry S. Sigman, for the defendant.

Before: FITZGERALD, P.J., and TAYLOR and D. E. SHELTON,* JJ.

TAYLOR, J. Plaintiff brought suit alleging that defendant had orally agreed to pay the legal fees incurred as a result of plaintiff's representation of defendant's daughter in proceedings to enforce the daughter's judgment of divorce. The trial court granted summary disposition to defendant on the basis that the agreement was unenforceable under the statute of frauds, MCL 566.132(b)(1); MSA 26.922(1)(b). Plaintiff now appeals as of right. We reverse.

It is well established that one may assume original liability by a direct promise to pay for services to be rendered to another in the future. *Highland Park v Grant-Mackenzie Co,* 366 Mich 430, 443-444; 115 NW2d 270 (1962). Furthermore, "[t]hat the consideration for a promise may inure to one other than the promisor or may lie in a detriment to the promisee is a well-established principle of contract law." *Id.* at 446-447.

It is undisputed that plaintiff provided legal services to defendant's daughter, resulting in successful enforcement of the daughter's previously obtained divorce judgment. Plaintiff and defendant's daughter submitted affidavits stating that defendant agreed to pay all fees incurred in the enforcement proceedings that plaintiff was unable

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

to recover from the daughter's ex-husband. Defendant submitted an affidavit stating that she did not make such a promise. Therefore, a genuine issue exists regarding this dispositive fact.

Defendant's promise, if any, was an original promise, not a collateral one, and therefore not within the statute of frauds. *Id.* at 443. Accordingly, the trial court erred as a matter of law in holding that the alleged agreement was void and unenforceable on the grounds that it falls within the statute of frauds. The issue whether defendant actually made the alleged promise is a question for the factfinder.

Reversed and remanded.

PEOPLE v BIVENS

Docket No. 163762. Submitted June 8, 1994, at Detroit. Decided July 18, 1994, at 9:45 A.M. Leave to appeal sought.

Lynn D. Bivens pleaded nolo contendere in the Barry Circuit Court, Richard M. Shuster, J., of assault with intent to commit sexual penetration and assault with intent to commit criminal sexual conduct in the second degree and was sentenced to prison terms of 48 to 120 months and forty to sixty months respectively. The defendant appealed, arguing that the trial court erred in scoring Offense Variable 12 as fifty points on the basis of his prior sexual conduct with the victim.

The Court of Appeals *held:*

A panel of the Court of Appeals in *People v Polus,* 197 Mich App 197 (1992), erroneously concluded that the holding in *People v Warner,* 190 Mich App 26 (1991), relative to the proper application of OV 12 was dicta and that *Warner* was not controlling authority pursuant to Administrative Order No. 1990-6. Accordingly, because the holding in *Warner* is not dicta, it is controlling authority, and the trial court properly scored OV 12 as fifty points.

Affirmed.

MICHAEL J. KELLY, P.J., concurring, stated that affirmance of the defendant's sentence was proper, not because *Warner* was controlling authority, but rather because even if *Polus* was controlling and it was error to score OV 12 as fifty points and even if a reduced OV 12 score would have resulted in a reduced recommended sentence under the sentencing guidelines, the trial court anticipated that possibility and filed a sentencing guidelines departure form setting forth adequate reasons for the sentences imposed. Remanding the case for resentencing under these circumstances would be futile.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Dale A. Crowley,* Prosecuting Attorney, and *Steven B. Flancher,* Assistant Attorney General, for the people.

Gregory N. Veltema, P.C. (by *Gregory N. Veltema*), for the defendant.

Before: MICHAEL J. KELLY, P.J., and FITZGERALD and CORRIGAN, JJ.

PER CURIAM. Defendant was charged with two counts of first-degree criminal sexual conduct and three counts of second-degree criminal sexual conduct. Pursuant to a plea agreement, defendant pleaded nolo contendere of assault with intent to commit sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1), and assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2); MSA 28.788(7)(2). Defendant was sentenced to prison terms of 48 to 120 months and forty to sixty months for his respective convictions. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in considering prior criminal sexual conduct with the victim in assessing fifty points for Offense Variable 12. This issue has arisen in two published opinions since the adoption of Administrative Order No. 1990-6, which requires this Court to follow a prior published decision of this Court issued on or after November 1, 1990.

In *People v Warner,* 190 Mich App 26; 475 NW2d 397 (1991), this Court concluded that uncontroverted evidence of prior instances of sexual penetration between the defendant and the victim could be used to support the trial court's scoring of offense variables. In *Warner,* the trial court relied on the evidence of prior penetrations between the defendant and the victim that was contained within the presentence report in scoring fifty points for OV 12. In affirming the defendant's sentence, this Court stated:

> We note, for purposes of defendant's argument regarding the sentence imposed, that even if we were to find that the trial court improperly scored

ov 12, defendant's sentence would still fall within the minimum guidelines range. [*Id.* at 29.]

In *People v Polus,* 197 Mich App 197; 495 NW2d 402 (1992),[1] another panel of this Court (GRIFFIN, J., dissenting), held that prior conduct cannot be used in the scoring of ov 12. In so holding, the panel noted in a footnote that *Warner* was not controlling authority:

> While *Warner* does arguably support the proposition that prior conduct between the defendant and the victim may be considered in the scoring of Offense Variable 12, we conclude that *Warner* does not control the case at bar because any such conclusion is mere dicta. While the trial court in *Warner* did consider prior conduct in the scoring of Offense Variable 12, and this Court upheld the trial court's scoring of the guidelines, the *Warner* decision never explicitly addressed the question whether prior conduct is appropriate in considering the scoring of Offense Variable 12. Rather, the question addressed by the Court in *Warner* was whether the trial court could properly consider uncontroverted evidence in a presentence report in establishing the scoring of the sentencing guidelines. Furthermore, the *Warner* Court noted that it would not remand the matter for resentencing even if it were to find that the trial court had improperly scored Offense Variable 12 on the basis of the trial court's comments at sentencing. [*Id.* at 200-201, n 3.]

In his dissenting opinion in *Polus,* Judge GRIFFIN stated:

> I disagree with the majority's conclusion that the language in *Warner* addressing this scoring issue is mere dicta. In this regard, I note that,

[1] The prosecutor in *Polus* filed an application for leave to appeal to the Supreme Court on March 5, 1993. Leave is still pending.

until today, our Court has routinely followed *Warner* with regard to this issue. . . .

The decision in *Warner* is binding precedent pursuant to Administrative Order No. 1990-6, 436 Mich lxxxiv. In my view, the majority's failure to follow *Warner* is a violation of that order. [*Id.* at 206-207.]

In this case, we agree with the prosecutor's contention that the *Polus* Court erroneously concluded that *Warner* was not controlling on the issue whether prior conduct between the defendant and the victim may be considered in the scoring of OV 12. Although not the central issue raised in the case, the consideration of whether prior conduct can be considered in the scoring of OV 12 was essential to the determination whether OV 12 was scored properly. The appropriateness of the scoring of OV 12 was considered by the *Warner* Court, as evidenced by its statement that "even if we were to find that the trial court improperly scored OV 12 . . ." and its affirmance of the defendant's sentence.[2] Thus, the language in *Warner* is not dicta, and a rule of law to which Administrative Order No. 1990-6 applies resulted concerning the scoring of OV 12. Hence, the *Polus* Court violated Administrative Order No. 1990-6 by failing to follow *Warner.*

Applying *Warner,* the trial court properly scored fifty points for OV 12, because the presentence report reveals, and defendant admitted, that he digitally penetrated the victim on prior occasions.

Affirmed.

MICHAEL J. KELLY, P.J. *(concurring).* I believe

[2] The *Warner* Court's conclusion that it would find the defendant's sentence to be proportionate even if the guidelines were improperly scored does not render its conclusion that the trial court properly scored OV 12 dicta, as suggested by the *Polus* Court.

the majority in *People v Polus,* 197 Mich App 197; 495 NW2d 402 (1992), correctly characterized the issue addressed in *People v Warner,* 190 Mich App 26; 475 NW2d 397 (1991), as whether uncontroverted evidence in the presentence report may be used to score OV 12. The defendant merely argued that the lower court improperly scored points under OV 12 for the penetration involved in the subject offense. My reading of *Warner* indicates that the Court did not zero in on the specific issue whether prior incidents of sexual penetration reported in the presentence report may be considered in scoring OV 12. The only mention of prior penetrations in *Warner* is buried in a block quotation of the lower court's decision in that case.

I think both opinions in *Polus* and the majority opinion in this case incorrectly assess the *Warner* Court's treatment of prior sexual penetrations in terms of whether or not it is dicta. Because *Warner* never addressed the issue, there is nothing to debate with respect to dicta. Rather, *Warner* is simply inapplicable.

Accordingly, *Polus,* which did directly address the issue of prior penetrations with respect to the scoring of OV 12, applies in this case. Under *Polus,* the trial court should not have considered prior penetrations between defendant and the victim in scoring OV 12. I would follow the holding in *Polus.* Consideration of penetrations occurring months earlier violates the "same criminal transaction" requirement and overlaps with OV 25, which assigns offense variable points for "contemporaneous criminal acts," including acts similar to the subject offense that occur within six months of the offense.

I nonetheless agree with the majority in this case that defendant's sentence should be affirmed. While a scoring error normally entails remanding

to the sentencing court for reconsideration in light of the correct scoring, the trial court in this case indicated that it was filling out a sentencing guidelines departure form in the event this Court determined that the guidelines had been exceeded. The trial court noted numerous factors in support of its decision. In other words, the trial court clearly indicated its intent to stand by the sentences of four to ten years' and 3⅓ to 5 years' imprisonment, and it cited adequate reasons for doing so. Remanding under these circumstances would be futile.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY v PUBLIC SERVICE COMMISSION

Docket Nos. 148323, 152333. Submitted December 8, 1993, at Lansing. Decided March 9, 1994; approved for publication July 25, 1994, at 9:00 A.M.

Consumers Power Company filed an application with the Public Service Commission (PSC) requesting approval of an agreement it had reached with the PSC's staff that would limit the level of Consumers' gas-producing profits by the spending in 1992 of at least $200 million on operation and maintenance activities or, in the alternative, by the refunding to customers of revenues in the amount of the difference between $200 million and the amount actually spent on operation and maintenance activities and by the refunding of a portion of its earnings to the extent that its earnings on common equity exceeded 13.25 percent. The Attorney General and the Association of Businesses Advocating Tariff Equity (ABATE) opposed the application, claiming that the PSC could not approve the settlement in the absence of holding full evidentiary hearings at which interested parties could appear. The PSC approved the settlement agreement, holding that notice and an evidentiary hearing were not required before approval, because the settlement agreement did not result in an increase in rates and MCL 460.6a(1); MSA 22.13(6a)(1), at the time the orders were entered, specifically authorized approval without notice or a hearing of an alteration or amendment that would result in no increase in the cost of service to a utility's customers. The Attorney General appealed (Docket No. 148323). ABATE moved for a rehearing, which was denied by the PSC. ABATE appealed (Docket No. 152333). The appeals were consolidated.

The Court of Appeals *held:*

The PSC properly concluded that notice and public hearings were not required before its approval of the settlement agreement. At the time, § 6(a) clearly permitted approval without notice or a hearing where an amendment would result in no

increase in the cost of service to the customers. The amendments contained in the settlement resulted in no increased costs to the customers of the gas services at issue.

1. Neither the increase in operating and maintenance expenses nor the possibility of a refund resulted in an increase in rates paid by customers over and above those that would have been paid under the existing rate schedule.

2. Because the approval of the settlement agreement was not a contested case, there was no need for an evidentiary hearing. Accordingly, the PSC was not required to find facts on the record.

3. It has not been demonstrated that the PSC's orders approving the settlement agreement were unreasonable.

4. The refund mechanism did not constitute illegal retroactive ratemaking, because the settlement agreement did not change the rates adopted in the 1989 general rate case, was consensual in nature, was prospective only, and would not necessarily result in refunds.

5. The refund mechanism did not constitute an adjustment clause.

6. The Attorney General failed to support his assertion that the PSC was not authorized to negotiate with utilities where, as here, rates would not change as a result of the negotiations.

Affirmed.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Luis F. Fernandez* and *Donald E. Erickson,* Assistant Attorneys General, for the Attorney General.

Hill Lewis (by *Douglas H. West, Nancy L. Lukey,* and *Ronald A. King*), for the Association of Businesses Advocating Tariff Equity.

Donald L. Keskey and *Sharon L. Feldman,* Assistant Attorneys General, for the Public Service Commission.

Jon R. Robinson, for Consumers Power Company.

Before: TAYLOR, P.J., and REILLY and M. J. TALBOT,* JJ.

PER CURIAM. In Docket No. 148323, appellant Attorney General claims an appeal from an order entered on December 19, 1991, by the Michigan Public Service Commission (PSC) approving a settlement agreement between appellee Consumers Power Company and the PSC's staff. In Docket No. 152333, appellant Association of Businesses Advocating Tariff Equity (ABATE) claims an appeal from an order entered on April 15, 1992, by the PSC denying rehearing of the December 19, 1991, order. We affirm both orders.

In 1991, the PSC's staff expressed concern regarding Consumers' earnings level for its gas-producing business. Negotiations between the staff and Consumers resulted in the settlement agreement challenged here. While the settlement agreement continued the base rates for natural gas service established in Consumers' 1989 general rate case, Consumers agreed to spend at least $200 million on other operation and maintenance (O & M) activities in 1992. The agreement provided that if Consumers failed to spend at least this amount in 1992, it would refund the amount by which its O & M expenditures were less than $200 million. The agreement also provided that if Consumers' earnings on common equity exceeded 13.25 percent in 1992, Consumers would refund revenues equivalent to a portion of the excess. The amount to be refunded was to be determined according to a specified formula. The parties stipulated that the settlement agreement would not result in an increase in rates charged by Consumers.

Consumers filed an application with the PSC requesting approval of the settlement agreement.

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

The application stated that the settlement agreement would not result in an increase in rates and, therefore, ex parte approval was sought pursuant to MCL 460.6a(1); MSA 22.13(6a)(1). At the time the orders were entered, § 6a(1) provided in pertinent part:

> [A]ny alteration or amendment in rates or rates schedules . . . which will result in no increase in the cost of service to its customers may be authorized and approved without any notice or hearing.

Both the Attorney General and ABATE opposed the application.

In an order entered on December 19, 1991, the PSC approved the settlement agreement. The PSC determined that the agreement would not increase rates for any rate class. Consequently, pursuant to § 6a(1), notice and an evidentiary hearing was not required before approval of the agreement. The PSC noted that the concerns expressed by the Attorney General and ABATE could be dealt with through separate complaint proceedings or in Consumers' next general rate case.

ABATE filed a verified petition for rehearing of the PSC's order of December 19, 1991. On April 15, 1992, the PSC issued an order denying the petition. The PSC held that the fact that ABATE did not participate in discussions leading to the settlement agreement, or the fact that a hearing was not held, did not render the process unlawful or unreasonable, and that approval of the settlement was not inconsistent with due process. The PSC rejected the argument that it was required to make necessary findings of fact regarding the level of other O & M expenses, the authorized rate of return, the proper interest rate for refunds, and the refund allocation methods. The PSC found no support for

ABATE's statement that the agreement had no independent legal significance.

The appellants raise similar issues on appeal. For convenience, and to avoid repetition, the following analysis parallels the structure of ABATE's arguments, with reference to the Attorney General's arguments when appropriate.

The standard of review for PSC orders is narrow and well established. Pursuant to MCL 462.25; MSA 22.44, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm,* 389 Mich 624; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). The term "unlawful" has been defined as an erroneous interpretation or application of the law, and the term "unreasonable" has been defined as unsupported by the evidence. *Associated Truck Lines, Inc v Public Service Comm,* 377 Mich 259; 140 NW2d 515 (1966).

Pursuant to Const 1963, art 6, § 28, a final agency order shall be reviewed to determine whether it is authorized by law and, in cases where a hearing is required, whether it is supported by competent, material, and substantial evidence on the whole record. The same standard of review applies to a final order of the PSC. See *Attorney General v Public Service Comm,* 165 Mich App 230, 235; 418 NW2d 660 (1987). A reviewing court gives due deference to the PSC's administrative expertise and is not to substitute its judgment for that of the PSC. *Yankoviak v Public Service Comm,* 349 Mich 641, 648; 85 NW2d 75 (1975); *Building Owners & Managers Ass'n of*

Metropolitan Detroit v Public Service Comm, 131 Mich App 504, 517; 346 NW2d 581 (1984), aff'd 424 Mich 494 (1986).

Both ABATE and the Attorney General argue that the PSC's orders must be reversed because the PSC approved Consumers' application, authorizing an increase in rates, without providing notice and an opportunity for interested parties to be heard as required by § 6a. The appellants argue that the settlement agreement increases the cost of service to customers by requiring Consumers to spend at least $200 million on O & M expenses, which was more than was specified in Consumers' 1989 general rate case. They also contend that the agreement alters rates by requiring refunds under specific circumstances, and that refunds effectively change the rates paid by customers.

We reject these arguments. The agreement was reached at Consumers' request and with its approval. The agreement provides alternative methods for Consumers to reduce its profits. Consumers had the option to spend $200 million on O & M expenses and avoid paying a refund, or paying a refund if that full amount is not spent. A potential refund does not increase the rate charged to customers. The order approving the agreement did not increase the rates. Therefore, no hearing was required under § 6a(1).

ABATE also argues that the PSC's orders must be reversed because they are not supported by competent, material, and substantial evidence on the whole record. Additionally, ABATE contends that the PSC orders do not discuss the underlying facts that form the basis for approval of the agreement and, therefore, cannot be properly reviewed. *Consumers Power Co v Public Service Comm,* 78 Mich App 581, 585; 261 NW2d 10 (1977).

ABATE's argument is without merit. The require-

ment that the PSC support its findings by competent, material, and substantial evidence on the whole record applies only to orders issued in a contested case where a hearing is required. Const 1963, art 6, § 28; MCL 24.306; MSA 3.560(206); MCL 24.285; MSA 3.560(185); MCL 460.6a(1); MSA 22.13(6a)(1). As stated above, Consumers' application and the settlement agreement did not involve a rate increase. Therefore, the PSC was not required to hold an evidentiary hearing before approving the agreement.

Next, ABATE argues that the PSC's orders must be reversed because they are arbitrary and capricious. We disagree. MCL 462.26(8); MSA 22.45(8) requires a reviewing court to determine only whether an order is unlawful or unreasonable, not whether it is arbitrary and capricious. In any event, contrary to ABATE's claim, the voluntary agreement does not require Consumers to spend $200 million on O & M expenses. Because such spending is not mandated, it cannot be said to be unreasonable to have omitted detailed spending requirements. Further, the potential refunds, including interest, which benefit the customers, would not be possible absent Consumers' consent. ABATE does not demonstrate that the refund mechanism complained of is prohibited by statute or rule. The orders did not set rates to be charged by Consumers. Therefore, ABATE's characterization of the provisions of the agreement as "departures from traditional ratemaking" is inaccurate. ABATE has not demonstrated that the PSC's orders are unreasonable.

Both ABATE and the Attorney General argue that the agreement's refund mechanism is illegal because it retroactively adjusts the price paid by Consumers' customers for natural gas and constitutes retroactive ratemaking. Again, we disagree.

Retroactive ratemaking applies to a change, either upward or downward, in the rates charged by a utility for its service under a lawful order. *Michigan Bell Telephone Co v Public Service Comm,* 315 Mich 533, 547; 24 NW2d 200 (1946). Retroactive ratemaking is prohibited by law. *Building Homeowners & Managers Ass'n of Metropolitan Detroit v Public Service Comm,* 424 Mich 494; 383 NW2d 72 (1986).

The PSC's orders do not constitute the retroactive ratemaking prohibited in *Michigan Bell, supra,* because the agreement between Consumers and the PSC does not change the rates established in the 1989 general rate case. Unlike in *Michigan Bell, supra,* the agreement here is consensual, applies on a prospective basis only, and the one-time refunds are merely potential, not guaranteed.

Both ABATE and the Attorney General argue that by approving the agreement, the PSC approved an adjustment clause without providing notice and an opportunity for a hearing, contrary to MCL 460.6a(2); MSA 22.13(6a)(2). They contend that the agreement increased Consumers' O & M expenses above the level approved in the 1989 general rate case, and conditioned rates upon the new level by providing for refunds. This argument is also without merit. The refund mechanism in the settlement agreement does not constitute an adjustment clause. See *Detroit Edison Co v Michigan Public Service Comm,* 416 Mich 510; 331 NW2d 159 (1982).

Finally, the Attorney General argues that the PSC can modify the rate charged by a utility by considering either an application for modification or a complaint, but the PSC has no statutory authority to establish rates by negotiation.

Again, we point out that the possibility of a

voluntary one-time refund to customers is not the establishment of a rate. Further, the Attorney General cites no authority to support his assertion that the PSC was not authorized under § 6a(1) to engage in negotiations with Consumers. The PSC's interpretation and application of § 6a(1), allowing negotiation when rates are not changed, should be given deference. *Yankoviak, supra.*

Affirmed.

EASTWAY & BLEVINS AGENCY v CITIZENS INSURANCE COMPANY OF AMERICA

Docket No. 148309. Submitted December 9, 1993, at Grand Rapids. Decided March 24, 1994; approved for publication July 25, 1994, at 9:05 A.M.

Eastway & Blevins Agency brought an action in the Osceola Circuit Court against Citizens Insurance Company of America and others, alleging a breach of contract after Citizens terminated its agency agreement with the plaintiff for the plaintiff's failure to comply with a requirement that it obtain Citizens' consent for the sale or service of Citizens' policies at a location other than the plaintiff's main office. The court, Lawrence C. Root, J., granted summary disposition for Citizens, ruling that the agreement provided for its termination by Citizens upon the plaintiff's failure to comply with any provision of the agreement. The plaintiff appealed.

The Court of Appeals *held:*

1. Citizens was not under a duty to terminate the agreement only in good faith. Good faith in the termination of a contract is required only where the terminating party has unbridled discretion with respect to the other party's performance under the contract. Here, Citizens' discretion to terminate the agreement was limited, because it could terminate the agreement only upon the plaintiff's breach of the agreement.

2. The plaintiff's claim that the term "service" was ambiguous in the agreement and should be determined by a jury need not be addressed because the plaintiff did not raise the issue in the trial court.

Affirmed.

CONTRACTS — TERMINATION OF CONTRACTS — GOOD FAITH.

Good faith in the termination of a contract is required only where the terminating party has unbridled discretion with respect to the other party's performance under the contract; where a party's discretion to terminate is limited, good faith need only have existed at the time the agreement was made.

REFERENCES

Am Jur 2d, Contracts §§ 380, 539, 540, 558, 559.
See ALR Index under Contracts.

Elhart & Power, P.C. (by *Michael E. Hall*), for the plaintiff.

Dykema Gossett (by *Donald S. Young, Kathleen McCree Lewis,* and *Jeffrey S. Jones*), for the defendants.

Before: MICHAEL J. KELLY, P.J., and CONNOR and A. A. MONTON,* JJ.

PER CURIAM. Plaintiff appeals as of right the order of the circuit court granting defendant Citizens Insurance Company of America's motion for summary disposition. We affirm.

I

Plaintiff is an independent insurance agency owned and operated in part by Jack L. Eastway. Its office is located in the village of Marion. In May 1988, plaintiff opened a branch office in Lake City, which office Eastway's son helped operate until March 1990, when he bought the office from his father.

Before and during this period, plaintiff served as an agent for defendant Citizens Insurance Company of America (hereinafter defendant). Plaintiff permitted at least one of defendant's policyholders to make payments and ask questions at the Lake City branch office. Both parties agree that activities with respect to defendant's policies took place at plaintiff's Lake City office.

In 1986, before opening the Lake City office, plaintiff and all other agents of defendant were required to sign an addendum to their agency agreements, restricting them from selling or servicing defendant's products in branch offices with-

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

out defendant's express consent. On May 5, 1988, when plaintiff was contemplating opening a branch office in Lake City, defendant sent plaintiff a letter, reiterating the restriction on using and advertising defendant's products in a Lake City branch office. Defendant cited as a reason the fact that it already had adequate representation in the Lake City area.

On January 1, 1989, plaintiff and defendant executed a new agency agreement with the following provisions:

> YOUR DUTIES AND RESPONSIBILITIES
>
> * * *
>
> D. You will not sell or service our products through a branch(s) or affiliated agency(s) location without our prior written consent.
>
> * * *
>
> TERMINATION
>
> * * *
>
> B. We may terminate this agreement immediately in whole or in part upon written notice to you:
>
> * * *
>
> 5. If you fail to comply with any of the provisions of this agreement.

On July 13, 1989, defendant terminated the agency agreement, citing plaintiff's breach of the restriction on branch offices.

II

Plaintiff argues that a question of material fact exists concerning whether defendant terminated its agency agreement with plaintiff in good faith. We disagree.

The circuit court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)

(10). Under that provision, summary disposition is appropriate where there is no genuine issue of material fact. This Court examines the whole record to determine whether summary disposition is justified. *Borman v State Farm Fire & Casualty Ins Co,* 198 Mich App 675, 678; 499 NW2d 419 (1993). However, it does not weigh credibility or make findings of facts, *Arbelius v Poletti,* 188 Mich App 14, 18; 469 NW2d 436 (1991), and it gives the nonmoving party the benefit of every reasonable doubt. *Farm Bureau Ins Co v Stark,* 437 Mich 175, 184-185; 468 NW2d 498 (1991).

By servicing defendant's policyholders in its Lake City office, plaintiff breached the agency agreement. Plaintiff does not dispute the evidence in support of this. The terms of the agreement permitted defendant to terminate the contract if plaintiff breached any of its provisions. Thus, the termination was contractually justified.

Plaintiff argues nonetheless that defendant used the breach as a pretext for terminating the agreement. Plaintiff contends that defendant was actually motivated by its concern for plaintiff's loss ratio, its high percentage of automobile premiums in relation to commercial premiums, and the interests of defendant's designated representative in Lake City, who allegedly shared a mutual animosity with plaintiff. According to plaintiff, even where defendant was contractually justified in terminating the agency relationship, its decision to do so was discretionary and, thus, required good faith.

Plaintiff's position lacks legal support. In contract termination cases, good faith is required only where the terminating party has unbridled discretion with respect to the other party's performance under the contract. *See J R Watkins Co v Rich,*

254 Mich 82, 85; 235 NW 845 (1931); *Burkhardt v City Nat'l Bank,* 57 Mich App 649, 652; 226 NW2d 678 (1975); *Maida v Retirement & Health Services Corp,* 795 F Supp 210, 214 (ED Mich, 1992). A lack of good faith cannot override an express provision in a contract. *General Aviation, Inc v Cessna Aircraft Co,* 915 F2d 1038, 1041 (CA 6, 1990). Under the terms of the agency agreement in this case, defendant could only exercise its discretion if plaintiff breached the agreement. Where, as here, a party's discretion to terminate is limited, good faith need only have existed at the time the original agreement was made. *Id.* at 1042; *Cloverdale Equipment Co v Simon Aerials, Inc,* 869 F2d 934, 938 (CA 6, 1989). After reviewing the record, we find no evidence that defendant entered into the agency agreement, including the provisions regarding branch offices, in bad faith.

III

Plaintiff next argues that the term "service" in the agency agreement is ambiguous and that its meaning should be determined by a jury. We note that plaintiff failed to raise this issue before the circuit court. As a general rule, this Court declines to consider an issue raised for the first time on appeal. *American Nat'l Fire Ins Co v Frankenmuth Mutual Ins Co,* 199 Mich App 202, 210; 501 NW2d 237 (1993); *Berry v J & D Auto Dismantlers, Inc,* 195 Mich App 476, 480; 491 NW2d 585 (1992). We see no reason to deviate from the general rule in this case.

Affirmed.

PEOPLE v CHRISTIE (ON REMAND)

Docket No. 150313. Submitted January 13, 1994, at Lansing. Decided April 13, 1994; approved for publication July 25, 1994, at 9:10 A.M. Leave to appeal denied, 447 Mich —.

Robert D. Christie was charged in the 52nd District Court, 1st Division, with operating a vehicle while under the influence of intoxicating liquor. The court, Brian W. MacKenzie, J., dismissed the charge after finding that a police officer's investigatory stop of the defendant's vehicle was unreasonable and, therefore, the evidence obtained therefrom was obtained illegally. The prosecutor appealed, and the Oakland Circuit Court, Barry L. Howard, J., affirmed. The Court of Appeals, WAHLS, P.J., and HOOD and BRENNAN, JJ., denied leave to appeal (Docket No. 142935). The Supreme Court, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for consideration as on leave granted. 439 Mich 964 (1992).

On remand, the Court of Appeals *held:*

1. Erratic driving may give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop by a police officer. Here, the defendant's erratic driving gave the police officer reasonable cause to suspect that the defendant may have been intoxicated.

2. Fewer foundational facts are necessary to support a finding of reasonableness when moving vehicles are involved. The investigatory stop here was a minimal intrusion of the defendant's Fourth Amendment rights in light of the defendant's potential danger to the public. The district court erred in concluding that the investigatory stop was unreasonable, and the circuit court erred in affirming that determination.

Reversed and remanded.

REFERENCES

Am Jur 2d, Searches and Seizures §§ 69, 70.

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity—Supreme Court cases. 104 L Ed 2d 1046.

1. SEARCHES AND SEIZURES — AUTOMOBILES — REASONABLENESS — POLICE.

The following rules apply with respect to the stopping, searching, and seizing of motor vehicles: reasonableness is the test that is to be applied for both the stop and the search of moving motor vehicles; said reasonableness will be determined from the facts and circumstances of each case; fewer foundation facts are necessary to support a finding of reasonableness where moving vehicles are involved than if a house or a home were involved; and a stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search is conducted by the police.

2. SEARCHES AND SEIZURES — AUTOMOBILES — ERRATIC DRIVING — REASONABLENESS.

A person's erratic driving may give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop of the person's vehicle by a police officer.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Richard Thompson,* Prosecuting Attorney, *Michael J. Modelski,* Chief, Appellate Division, and *John S. Pallas,* Assistant Prosecuting Attorney, for the people.

Terrance E. Klump, for the defendant.

ON REMAND

Before: WEAVER, P.J., and SHEPHERD and D. A. JOHNSTON, III,* JJ.

PER CURIAM. This case has been remanded to us from the Supreme Court for consideration as on leave granted.[1] In this appeal, the prosecutor argues that the circuit court erred in affirming the decision of the district court to dismiss OUIL

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

[1] This Court originally denied plaintiff's application for leave to appeal, unpublished order of the Court of Appeals, decided November 21, 1991 (Docket No. 142935). The Michigan Supreme Court remanded the matter to us for consideration as on leave granted, 439 Mich 964 (1992).

charges[2] against defendant. The district court dismissed the case after finding that the police officer's stop of defendant's vehicle was unreasonable. We agree with the prosecutor's position that the stop was reasonable, and reverse and remand for further proceedings.

The prosecution developed the following evidence at the bench trial in the district court. On February 10, 1990, at approximately 10:30 P.M., Deputy Morgan of the Oakland County Sheriff's Department observed defendant's vehicle traveling west on Richardson Road in Commerce Township. Morgan recalled that he was in uniform in a fully marked patrol car at the time. Morgan followed defendant's vehicle for approximately one-half mile, and observed defendant's vehicle "drifting like to the right and left and driving on the lane markers." Morgan testified that the weather was dry and there was no ice or rain on the paved road.

At some point, defendant activated his left turn signal, traveling past numerous driveways and one side street before turning south at Newton Road. Morgan estimated that defendant had activated his turn signal approximately two-tenths of a mile before finally turning. Morgan followed defendant onto Newton Road and activated his overhead lights, and defendant pulled his vehicle over to the side of the road. Morgan testified that he stopped defendant to investigate defendant's extended use of his turn signal.

When Morgan asked defendant for his driver's license and vehicle registration, he immediately noticed a "very strong odor of alcohol or intoxicants coming out of the vehicle and from [defen-

[2] Defendant was charged with operating a vehicle while under the influence of intoxicating liquor, MCL 257.625(1); MSA 9.2325(1).

dant's] breath." Morgan recalled asking defendant why he had his turn signal on for so long, but could not remember defendant's answer. Next, Morgan asked defendant whether he had been drinking. Defendant replied that he had consumed a few beers. Morgan recalled that when defendant answered, his speech was slow and slurred. After defendant had some difficulty performing various field sobriety tests, he was arrested for OUIL.

The prosecution presented the foregoing testimony by Deputy Morgan at the bench trial in the district court. The prosecution also presented testimony by Deputy Scott, who had arrived on the scene while Morgan was administering the field sobriety tests. Scott's testimony confirmed much of Morgan's testimony. In particular, Scott confirmed defendant's difficulty with the field sobriety tests.

After presenting these two witnesses, the prosecution rested its case. Then, defendant moved for dismissal, arguing that the prosecution had presented insufficient evidence and that the police stop was unreasonable. The trial court then instructed the parties to submit briefs regarding the reasonableness of the police stop. At the close of a subsequent hearing concerning the matter, the district court ruled that the police stop was unreasonable and dismissed the charges against defendant. The circuit court affirmed the decision of the district court by an order dated July 9, 1991.

On appeal, we must first define the scope of our review. Our interpretation of the record is that the district court essentially dismissed the case on the basis of insufficient evidence. However, the district court's implicit finding of insufficient evidence was based on its decision that the evidence from the stop was obtained illegally. Accordingly, the prosecution has limited its argument on appeal to the issue of the reasonableness of the police stop.

Defendant's response is similarly focused on the reasonableness of the stop, but also includes a general argument contesting the sufficiency of the evidence. Herein, we limit our review to the question whether the district court could properly consider the evidence obtained during the police stop. On this question, the decision of the district court must be affirmed unless clearly erroneous, i.e., unless this Court is left with the definite and firm conviction that a mistake has been made. *People v Burrell,* 417 Mich 439, 448; 339 NW2d 403 (1983).

It is well established that brief investigative stops short of arrest are permitted where police officers have a reasonable suspicion of ongoing criminal activity. *Terry v Ohio,* 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Faucett,* 442 Mich 153, 168; 499 NW2d 764 (1993). The totality of the circumstances test is to be used in cases involving investigative stops. *Id.,* citing *United States v Cortez,* 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981). The *Cortez* Court warned against overly technical reviews of a police officer's common-sense assessment of the probability that criminal activity is afoot. *Faucett, supra* at 168.

In *People v Whalen,* 390 Mich 672, 682; 213 NW2d 116 (1973), our Supreme Court concluded that the following rules apply with respect to the stopping, searching, and seizing of motor vehicles and their contents:

> 1. Reasonableness is the test that is to be applied for both the stop of, and the search of moving motor vehicles.
>
> 2. Said reasonableness will be determined from the facts and circumstances of each case.
>
> 3. Fewer foundation facts are necessary to support a finding of reasonableness when moving

vehicles are involved, than if a house or a home were involved.

4. A stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search is conducted by the police.

In *People v Chinn,* 141 Mich App 92, 97; 366 NW2d 83 (1985), this Court found that Chinn's erratic driving supported a "reasonable suspicion that the defendant had ingested more alcohol than allowed under state law." Although the primary issue in *Chinn* was whether the officer had a duty to inform Chinn of his Miranda[3] rights, and although Chinn's driving appears to have been more erratic[4] than that of our defendant, we agree with the general principle that erratic driving can give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop by a police officer.

In the case at bar, we believe that Deputy Morgan had reasonable cause to suspect ongoing criminal activity, i.e., that defendant may have been intoxicated. *Faucett, supra* at 168. Defendant's vehicle was seen swerving in the lane and driving on the lane markers. Defendant had his turn signal flashing for two-tenths of a mile before turning at the second side street. This would appear to be classic indicia of an intoxicated driver. Because fewer foundational facts are necessary to support a finding of reasonableness when moving vehicles are involved, *Whalen, supra* at 682, we hold that the trial court erred in concluding that

[3] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] Chinn's vehicle was seen swerving onto the left shoulder of the freeway, and at one point accelerated to seventy miles per hour while negotiating a fifty-miles-per-hour curve. *Chinn, supra* at 94.

the investigatory stop of defendant's vehicle was unreasonable. The investigatory stop was a "minimal intrusion" of defendant's Fourth Amendment rights in light of defendant's potential danger to the public. *People v Nelson,* 443 Mich 626, 637; 505 NW2d 266 (1993).

Because the courts below resolved this case on the issue of the investigative stop, we reverse and remand for further proceedings consistent with this opinion. However, our decision to reverse on this one issue is made without prejudice to any other issues that might be raised in the courts below.

Reversed and remanded.

DART ENERGY CORPORATION v IOSCO TOWNSHIP

Docket No. 151317. Submitted April 14, 1994, at Lansing. Decided April 29, 1994; approved for publication July 25, 1994, at 9:15 A.M.

Dart Energy Corporation brought an action in the Ingham Circuit Court against Iosco Township and the Department of Natural Resources, seeking a declaration that the department has exclusive jurisdiction to regulate an oil and gas well that has been converted to a brine injection well. The court, William E. Collette, J., granted summary disposition for the plaintiff and the department. The township appealed.

The Court of Appeals *held:*

Iosco Township is expressly prohibited from regulating an oil and gas well that has been converted to a brine injection well. The Department of Natural Resources has exclusive jurisdiction to regulate such wells.

Affirmed.

GAS AND OIL — BRINE INJECTION WELLS — DEPARTMENT OF NATURAL RESOURCES.

A township may not regulate an oil and gas well that has been converted to a brine injection well; the regulation of such wells is within the exclusive jurisdiction of the Department of Natural Resources (MCL 125.271, 319.1 *et seq.*; MSA 5.2963[1], 13.139[1] *et seq.*).

James Anthony Siver and *Kevin V.B. Schumacher,* for Dart Energy Corporation.

Parker, Miller & Kehoe (by *Michael J. Kehoe*), for Iosco Township.

Frank J. Kelley, Attorney General, *Thomas L.*

REFERENCES

Am Jur 2d, Gas and Oil § 146.

Prohibiting or regulating removal or exploitation of oil and gas, minerals, soil, or other natural products within municipal limits. 10 ALR3d 1226.

Casey, Solicitor General, and *Thomas J. Emery* and *Roland Hwang,* Assistant Attorneys General, for the Department of Natural Resources.

Amici Curiae:

Bauckham, Sparks, Rolfe & Thomsen, P.C. (by *John H. Bauckham* and *Eileen W. Wicklund*), for Michigan Townships Association.

Mika, Meyers, Beckett & Jones (by *Michael C. Haines, Veryl N. Meyers,* and *William A. Horn*), for Michigan Oil and Gas Association.

Before: HOLBROOK, JR., P.J., and REILLY and G. W. HOOD,* JJ.

PER CURIAM. Plaintiff Dart Energy Corporation filed this action for a declaratory ruling and injunctive relief, claiming that defendant Department of Natural Resources had exclusive jurisdiction to regulate an oil and gas well that had been converted to a brine injection well. MCL 319.1 *et seq.*; MSA 13.139(1) *et seq.* The trial court granted plaintiff and defendant DNR's respective motions for summary disposition. MCR 2.116(C)(10). Defendant Iosco Township now appeals as of right. We affirm.

Defendant Iosco Township is expressly prohibited from regulating an oil and gas well that is converted to a brine injection well. MCL 125.271; MSA 5.2963(1). Defendant DNR has exclusive jurisdiction to regulate such wells. MCL 319.1 *et seq.*; MSA 13.139(1) *et seq., Addison Twp v Gout (On Rehearing),* 435 Mich 809; 460 NW2d 215 (1990).

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

Therefore, the trial court did not err in granting summary disposition to plaintiff and defendant DNR.

Affirmed.

SEABROOK v MICHIGAN NATIONAL CORPORATION

Docket No. 143793. Submitted February 10, 1994, at Lansing. Decided April 22, 1994; approved for publication July 25, 1994, at 9:20 A.M.

Tricia Seabrook brought an action in the Ingham Circuit Court against Michigan National Corporation, alleging violation of various statutory rights, civil conspiracy, invasion of privacy, tortious interference with a business relationship, and breach of an implied contract in connection with the termination of her employment as a vice president of Michigan National Bank, a subsidiary of the defendant. The court, Peter D. Houk, J., granted summary disposition for the defendant, finding that the record failed to support the plaintiff's assertion that she was an employee of the defendant. The plaintiff appealed.

The Court of Appeals *held:*

Because federal banking regulations prohibit a bank holding company from acting as a principal in dealings with third parties so as to benefit a subsidiary bank, and because it is clear that the plaintiff dealt with third parties to the benefit of Michigan National Bank, the plaintiff, as a matter of law, was an employee of the bank rather than the defendant, a conclusion that is also supported overwhelmingly by the facts on the record. Accordingly, the court properly concluded that there was no basis for the plaintiff's claims against the defendant.

Affirmed.

Frederick V. Greene, for the plaintiff.

Thomas J. Guyer, for the defendant.

Before: GRIFFIN, P.J., and CAVANAGH and H. A. KOSELKA,* JJ.

PER CURIAM. Plaintiff appeals as of right from the trial court's order granting defendant's motion

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

for summary disposition in this wrongful discharge case. We affirm.

Plaintiff, Tricia Seabrook, was hired by Michigan National Bank (MNB) in 1978. In 1986, she became a senior sales representative in the cash management division, and in 1987 she was appointed second vice president of MNB. Her job responsibilities included selling a bank service to other companies.

In July 1988, plaintiff resigned from her position with MNB. On September 28, 1989, she filed suit against MNB for wrongful discharge and negligent evaluation. The action was dismissed with prejudice. On October 19, 1990, plaintiff filed a second wrongful discharge suit against MNB, which was also dismissed. On March 15, 1991, plaintiff filed the instant action against defendant, Michigan National Corporation (MNC), alleging violations of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.,* and the Michigan Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.,* civil conspiracy, invasion of privacy, tortious interference with a business relationship, and breach of an implied contract.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), asserting that plaintiff's employer was MNB and, therefore, that she had no claims against defendant MNC. The court granted the motion. This appeal followed.

The only issue properly before this Court is whether the trial court erred in determining that there was no genuine issue of material fact with respect to whether defendant was plaintiff's employer. In reviewing a grant of summary disposition, we must give the benefit of reasonable doubt to the nonmovant and determine independently whether a record might be developed that would

leave open an issue upon which reasonable minds could differ. *Farm Bureau Mutual Ins Co v Stark,* 437 Mich 175, 184-185; 468 NW2d 498 (1991).

It is not disputed that defendant is a bank holding company that is regulated by Federal Reserve Regulation Y. 12 CFR 225.1 *et seq.* That regulation permits a holding company to perform certain personnel and accounting services for its subsidiaries, but prohibits it from acting as a principal in dealing with third parties. In other words, defendant cannot enter into contracts with third parties to benefit MNB.

In this case, plaintiff was clearly acting as an agent for MNB in dealing with third parties. If plaintiff was an employee of defendant, she would have been prohibited by Regulation Y from entering into contracts with third parties. Thus, as a matter of law, plaintiff must have been an employee of MNB and not of MNC.

The factual evidence also overwhelmingly supports the conclusion that plaintiff was an employee of MNB and not an employee of defendant MNC. Plaintiff initially filed suit against MNB, alleging it was her employer. Her letterhead and business card indicated that she worked for the cash management division of MNB. MNC was named on plaintiff's pay stubs and W-2 forms merely in its capacity as paying agent for MNB. This case is thus distinguishable from *Ambro v American Nat'l Bank & Trust Co of Mich,* 152 Mich App 613; 394 NW2d 46 (1986), where there was a genuine issue of fact concerning whether the plaintiff was an employee of the holding company. *Id.* at 621.

Giving the benefit of reasonable doubt to plaintiff, there is no foundation for her asserting this claim against defendant, and summary disposition was properly granted.

Affirmed.

HARKINS v DEPARTMENT OF NATURAL RESOURCES

Docket No. 145757. Submitted March 8, 1994, at Lansing. Decided May 24, 1994; approved for publication July 25, 1994, at 9:25 A.M. Leave to appeal denied, 447 Mich —.

Donald L. Harkins sought a permit from the Department of Natural Resources to fill the wetland portion of his lakefront property for the purpose of access to the lake. The DNR denied the application. Harkins petitioned for a contested case hearing before the Natural Resources Commission. During the pendency of the hearing, the DNR issued a modified permit allowing him to create a ten-foot-wide access path through the wetland and a small sandy beach at the shoreline. Harkins continued to pursue his appeal. A hearing referee found the DNR's decision to deny the application to be supported by the evidence. The Natural Resources Commission adopted the referee's proposal for decision. Harkins appealed to the Oakland Circuit Court, and the court, Jessica R. Cooper, J., affirmed the commission's decision. Harkins appealed.

The Court of Appeals *held:*

1. Harkins' arguments regarding the constitutionality of the Wetland Protection Act, MCL 281.701 *et seq.*; MSA 18.595(51) *et seq.*, were not raised in the circuit court and, therefore, were not preserved for appeal.

2. The decision of the DNR to deny the application for the permit was not arbitrary or capricious because a feasible and prudent alternative existed to accomplish Harkins' purpose of gaining access to the lake, i.e., a public-access route or the ten-foot-wide path approved in the modified permit.

3. The DNR did not violate the statutory requirement that where it does not hold a hearing on a wetland fill permit

---

REFERENCES

Am Jur 2d, Administrative Law § 253; Constitutional Law § 421; Pollution Control § 46.

Conservation: validity, construction, and application of enactments restricting land development by dredging or filling. 46 ALR3d 1422.

Local use zoning of wetlands or flood plain as taking without compensation. 19 ALR4th 756.

application it must either approve or disapprove the permit application within ninety days after the completed permit application is filed. Because Harkins' original application did not contain sufficient information to be acted upon by the DNR, it was not complete until the DNR received the additional information it required from him. The DNR's disapproval occurred within ninety days of its receipt of the completed application. The act does not require that the applicant be given notice of the action within ninety days; it only requires that the approval or disapproval occur within ninety days.

4. The DNR's denial of the application for the permit was not an unconstitutional taking of Harkins' land. Because Harkins will not be denied all economically viable use of his land and the act advances a legitimate state interest, no compensable taking occurred.

Affirmed.

1. ADMINISTRATIVE LAW — WETLAND PROTECTION ACT — WETLAND FILL PERMITS — DEPARTMENT OF NATURAL RESOURCES.

The Wetland Protection Act provides that the Department of Natural Resources, where it does not hold a hearing on a wetland fill permit application, must either approve or disapprove the permit application within ninety days after a completed application is filed; an application that cannot be acted upon because of a lack of information is not complete until it contains sufficient information to be acted upon; the act only requires that the department approve or disapprove the application within ninety days, not that the applicant be given notice of such action within ninety days (MCL 281.708[2]; MSA 18.595[58][2]).

2. STATUTES — WETLAND PROTECTION ACT — PURPOSE OF ACT.

The primary purpose of the Wetland Protection Act is to ensure that wetland habitats are preserved and protected; the act advances a legitimate state interest (MCL 281.701 *et seq.*; MSA 18.595[51] *et seq.*).

3. CONSTITUTIONAL LAW — WETLAND PROTECTION ACT — WETLAND FILL PERMITS — COMPENSABLE TAKINGS.

A compensable taking does not occur where the Department of Natural Resources, pursuant to the Wetland Protection Act, properly denies a property owner's request for a wetland fill permit if the owner is not denied all economically viable use of the property (MCL 281.701 *et seq.*; MSA 18.595[51] *et seq.*).

William J. Reisdorf, for Donald L. Harkins.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *James E. Riley,* Assistant Attorney General, for the Department of Natural Resources.

Before: HOOD, P.J., and NEFF and T. E. JACKSON,* JJ.

PER CURIAM. This is an appeal from a decision of the Oakland Circuit Court affirming the Natural Resources Commission's decision to deny petitioner a permit to fill the wetland portion of his property pursuant to the Wetland Protection Act (WPA), MCL 281.701 *et seq.*; MSA 18.595(51) *et seq.*

The relevant facts are as follows. Petitioner's residence is situated on a lakefront parcel of land on Woodhull Lake. On March 17, 1987, petitioner sought a permit from the Department of Natural Resources to fill the wetland portion of his property. Following a site evaluation, the DNR denied the application. Petitioner then filed a petition for a contested case hearing before the Natural Resources Commission (NRC). Petitioner then moved for summary disposition pursuant to MCR 2.116(C)(10), claiming that he was entitled to the permit as a matter of law. The motion was denied.

During the pendency of petitioner's hearing before the NRC, a modified permit was issued to him by the DNR. The modified permit enabled him to create a ten-foot-wide access path through the wetland for access to the lake and a small sanded beach at the shoreline. Despite having been issued the modified permit, he continued to pursue his appeal before the NRC.

During the course of the administrative proceeding, DNR personnel testified that the complete

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

filling of the wetland along the shore of Woodhull Lake was not required for appellant to accomplish his proposed activity (lake access). Instead, it was stated that the ten-foot-wide path called for in the modified permit would be sufficient for this purpose. Moreover, the testimony revealed that although the environmental impact of petitioner's contemplated wetland filling would be minimal, the cumulative environmental impact resulting from the issuance of similar pending permits to other landowners along Woodhull Lake would be so great that the resultant effect to the public trust outweighed the private interest in filling and developing the area. A hearing referee supported the DNR's original decision to deny petitioner a permit. The referee's "Proposal for Decision" was adopted by the NRC as its own. This decision was subsequently affirmed by the Oakland Circuit Court.

First, petitioner argues that the requirement under the WPA that an applicant show either that the proposed activity is dependent upon being located in a wetland or that no reasonable and prudent alternative exists is unconstitutional and, thus, the hearing referee's decision must be overturned. Petitioner failed to raise this constitutional argument before the lower court. Accordingly, we will not review this portion of his argument because the trial court must be given an opportunity to pass upon the constitutionality of the rule involved. *Hernandez v Consumers Power Co,* 51 Mich App 288, 291; 214 NW2d 846 (1974). Additionally, petitioner claims that as either a nuisance statute or a zoning regulation, the WPA is unconstitutional. Again, because this argument was not addressed below, we will not review it. *Id.*

Moreover, we decline petitioner's invitation to overturn the DNR's decision to deny his permit,

because the agency's decision was not arbitrary or capricious. MCL 24.306(1)(e); MSA 3.560(206)(1)(e). The primary purpose of the WPA is to ensure that wetland habitats are preserved and protected. *Citizens Disposal, Inc v Dep't of Natural Resources,* 172 Mich App 541, 551; 432 NW2d 315 (1988). Section 5 of the WPA provides that in order to fill certain wetlands a property owner must receive a permit from the DNR. MCL 281.705(a); MSA 18.595(55)(a). The DNR may not issue a permit to fill wetlands unless certain criteria are satisfied. A permit will not be issued unless (1) the proposed activity will not unacceptably disrupt the aquatic resources, and (2) either (a) the proposed activity is primarily dependent upon being located in the wetland, or (b) a feasible and prudent alternative does not exist. MCL 281.709(4); MSA 18.595(59)(4).

Petitioner's initial permit application listed lake access as the project's purpose. Below, the DNR stated that petitioner could have access to the water by alternative means—namely, a public-access route. Additionally, a modified permit was issued whereby petitioner was allowed to construct a ten-foot-wide path through the wetland in order to gain access to the lake from his property. Because a feasible and prudent alternative existed to accomplish petitioner's purpose of gaining access to the lake, it is clear that the hearing referee's decision was not arbitrary or capricious. *Id.*

Additionally, petitioner argues that he is entitled to the original permit as a matter of law because the DNR failed to act on his application within the statutorily designated ninety-day period. MCL 281.708(2); MSA 18.595(58)(2) provides that where the DNR does not hold a hearing on a wetland fill permit application, "the [DNR] *shall* approve or disapprove the permit application within 90 days after the completed permit applica-

tion is filed . . . . If the [DNR] does not approve or disapprove the permit application within the time provided . . . [it] *shall be considered approved,* and the [DNR] shall be considered to have made the determinations required by section 9." Petitioner's argument here is unavailing.

Petitioner's initial permit application was filed on March 19, 1987. On March 30, 1987, the DNR requested additional information from him, and received the information on April 7, 1987. The DNR denied the permit application through a letter dated June 16, 1987. However, the envelope was postmarked on June 22, 1987. Petitioner argues that the ninety-day period commenced when the DNR received his initial permit application on March 19, 1987. Hence, according to petitioner, the DNR failed to respond to the permit application within ninety days because the denial letter was postmarked June 22, 1987. We disagree.

The DNR was not in a position to act on petitioner's original application because it did not contain sufficient information. Hence, the request for additional information was made. Given the DNR's obligation to effectuate the purposes of the WPA, we agree with the DNR that requests for additional and more specific information from applicants are not unreasonable. Therefore, if an application is such that it cannot be acted upon because of a lack of information, we cannot fairly characterize the application as "complete." Instead, an application is to be considered "complete" when it contains sufficient information to be acted upon. In this case, the application was not "complete" until the DNR received the additional information from petitioner on April 7, 1987. Accordingly, the DNR had until at least July 7, 1987, to make a decision. Therefore, even if we were to use the postmark date (June 22, 1987) as urged by petitioner, it is

clear that the DNR did not violate the ninety-day statutory requirement.

Moreover, the statute does not require that the applicant be given notice of the action within ninety days; it only requires that the DNR either approve or disapprove the application within ninety days. *People v Keeth,* 193 Mich App 555, 558-559; 484 NW2d 761 (1992). Therefore, even if we were to agree with petitioner that his application was "complete" on March 19, 1987, we would still hold that the DNR did not violate the statute because the letter denying petitioner's application was dated June 16, 1987. Put another way, it does not matter if petitioner received notice of this after the expiration of the ninety-day period as long as the DNR's decision was made prior thereto. *Id.*

Petitioner next argues that the application of the WPA to his property violates the Fourteenth Amendment of the United States Constitution because the subject property was conveyed to a private citizen through a federal patent before Michigan's statehood. This issue was not raised or addressed below. Moreover, petitioner has attempted to expand the record by supplying exhibits that were not a part of the record below. Because reference to these exhibits is necessary to resolve the instant issue, and because this Court's review is limited to the record developed by the trial court, we decline to address the issue. MCR 7.210(A)(1); *Wiand v Wiand,* 178 Mich App 137, 143; 443 NW2d 464 (1989).

Finally, petitioner argues that the denial of his application for a permit to fill the wetland area of his property amounts to an unconstitutional taking of his land. Again, we disagree. Petitioner claims that the value of his property would double if he were allowed to fill the entire wetland area

as originally requested. We note that an owner who is deprived from making the most profitable use of his property is not necessarily entitled to compensation. *Penn Central Transportation Co v New York City,* 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978). Moreover, petitioner has not argued that application of the WPA to his parcel as a whole has deprived him of all economically beneficial use thereof. *Id.* To the contrary, the record establishes that petitioner will not be denied all economically viable use of his land. Accordingly, because the WPA unquestionably advances a legitimate state interest, we conclude that no compensable "taking" has occurred.

For these reasons, we affirm the circuit court's affirmance of the DNR's decision to deny petitioner's application for a permit to fill the entire wetland portion of his property.

Affirmed.

INTEGRAL INSURANCE COMPANY v MAERSK CONTAINER SERVICE COMPANY, INC

Docket Nos. 148914, 149038. Submitted January 12, 1994, at Detroit. Decided May 24, 1994; approved for publication July 25, 1994, at 9:30 A.M. Leave to appeal sought.

Integral Insurance Company brought an action in the Wayne Circuit Court against Maersk Container Service Company, Inc., and Ralph E. Scott, and a separate action against those defendants and Insurance Company of North America, seeking determinations regarding liability for no-fault insurance benefits for Scott. The actions were consolidated in the circuit court. Scott was injured when the semitrailer and tractor truck he was driving overturned. The semitrailer was loaded with cargo for Maersk. Scott, who owned the tractor, had leased it to Maersk, pursuant to a ninety-day lease, at the time of the accident. Pursuant to the lease, Maersk agreed to procure and maintain liability insurance covering bodily injury and property damage for the tractor, and Scott agreed to procure "bobtail" insurance and worker's compensation insurance. "Bobtail" insurance generally insures the tractor and driver when it is operated without cargo or a semitrailer. INA issued a no-fault policy to Maersk that covered the tractor, and Integral issued a "bobtail" policy to Scott that expressly excluded coverage while the tractor was being used to carry property for business and while the tractor was being used for the business of anyone who leased it. The trial court, Susan D. Borman, J., held that the exclusion clause contained in Integral's policy was contrary to public policy. The issues then focused on which insurer was primarily responsible for Scott's personal protection insurance (PIP) benefits. The court deferred the decision whether Scott was an employee of Maersk to the hearing referee who was deciding a separate worker's compensation claim filed against Maersk by Scott. The referee ruled that Scott was an employee of Maersk, and the trial court entered an order of summary

REFERENCES

Am Jur 2d, Automobile Insurance § 351; Workers' Compensation §§ 56, 143, 263.

See ALR Index under Automobile Insurance; Workers' Compensation.

disposition finding INA first in priority to pay Scott's PIP benefits, pursuant to MCL 500.3114(3); MSA 24.13114(3). The Worker's Compensation Appellate Commission, finding that Scott was not an employee, reversed the referee's decision. Maersk appealed from the trial court's order granting summary disposition for Integral (Docket No. 148914). INA appealed from the same order (Docket No. 149038). Integral cross appealed in both appeals. The appeals were consolidated.

The Court of Appeals *held:*

1. The trial court erred in refusing to determine whether Scott was an employee for purposes of no-fault coverage and deferring the decision to the hearing referee. The court had jurisdiction to determine the fundamental issue whether an employer-employee relationship existed and should have decided on its own whether Scott was an employee of Maersk for purposes of applying MCL 500.3114(3); MSA 24.13114(3).

2. The trial court erred in holding that the exclusionary clause in the policy issued by Integral was void because it was contrary to public policy. An exclusionary clause is not per se invalid simply because it is not specifically provided for in the no-fault act. Taken together, as allowed under MCL 257.520(j); MSA 9.2220(j), the policy issued by INA and the policy issued by Integral provided continuous insurance coverage of the tractor as required by the motor vehicle financial responsibility act, MCL 257.501 *et seq.*; MSA 9.2201 *et seq.* The policy issued by Integral is not void, and the exclusionary clause contained therein is applicable in this action.

3. Both Scott and Maersk were owners of the tractor under the no-fault act, MCL 500.3101(2)(g); MSA 24.13101(2)(g). Therefore, both were required to maintain security for the payment of benefits under personal protection insurance. Here, INA is responsible for the PIP benefits because Integral's policy did not provide coverage when Scott was hauling cargo on Maersk's behalf.

4. The trial court reached the correct result, but for the wrong reasons.

Order of summary disposition affirmed.

1. WORKER'S COMPENSATION — COURTS — DETERMINATION REGARDING EMPLOYMENT RELATIONSHIP — INJURY IN COURSE OF EMPLOYMENT.

Although the Bureau of Worker's Disability Compensation has exclusive jurisdiction to decide whether a worker's injury was suffered in the course of employment, the courts retain the jurisdiction to determine the fundamental issue whether an employee-employer relationship exists.

2. INSURANCE — NO-FAULT ACT.

Public policy prevents an automobile liability insurance policy from containing exclusions not specifically authorized by the Legislature; however, an exclusionary clause is not per se invalid simply because it is not specifically provided for in the no-fault act (MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*).

3. INSURANCE — MOTOR VEHICLE FINANCIAL RESPONSIBILITY ACT — SCOPE OF COVERAGE — FULFILLING REQUIREMENTS — MULTIPLE CARRIERS.

The scope of coverage regarding an automobile accident is determined by the motor vehicle financial responsibility act, which provides that the requirements for a motor vehicle liability policy may be fulfilled by combining the policies of one or more insurance carriers (MCL 257.520[j]; MSA 9.2220[j]).

Kohl, Secrest, Wardle, Lynch, Clark & Hampton, P.C. (by *Michael L. Updike*), for Integral Insurance Company.

Harvey, Kruse, Westen & Milan, P.C. (by *Thomas F. Kauza* and *William F. Rivard*), for Maersk Container Service Company, Inc.

Martin, Bacon & Martin, P.C. (by *John W. Crimando*), for Insurance Company of North America.

Before: HOOD, P.J., and R. J. DANHOF* and J. STEMPIEN,** JJ.

PER CURIAM. In Docket No. 148914, Maersk Container Service Company, Inc., appeals as of right from the circuit court's order granting the motion for summary disposition of plaintiff Integral Insurance Company pursuant to MCR 2.116(C)(10). Although it prevailed, Integral cross appeals as of right from certain conclusions of law reached by the circuit court. In Docket No. 149038, Insurance Company of North America (INA) also appeals

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1993-6.

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

as of right from the same order. Integral also cross appeals in Docket No. 149038. We consolidated the appeals and affirm.

This case involves a dispute between no-fault insurers regarding the primary liability to Ralph Scott for injuries he sustained on May 4, 1989, when the semitrailer and truck tractor he was driving overturned in Pennsylvania. Although the tractor was owned by Scott and registered in Michigan, Scott leased it to Maersk on April 4, 1989, for ninety days. Under the terms of the lease, Maersk agreed to procure and maintain liability insurance covering bodily injury and property damage for the tractor. Scott agreed to procure "bobtail" insurance and worker's compensation insurance.

INA issued a policy to Maersk covering personal injury protection for automobiles subject to no-fault. Scott's tractor was covered under the policy. Integral issued a "bobtail" policy to Scott that expressly excluded coverage (1) while the tractor was being used to carry property for business and (2) while the tractor was being used for the business of anyone who leased the tractor. Apparently, the lease and insurance arrangement between Scott and Maersk is very common in the trucking industry.

There is no dispute that at the time of the accident, Scott was hauling a trailer attached to the tractor and that the trailer was loaded with cargo for Maersk. Integral contended that INA's policy covered Scott and was primarily liable because Integral's policy excluded coverage when Scott was hauling cargo for a company to whom the tractor was leased. Integral and INA each agreed to contribute fifty percent of Scott's personal protection insurance (PIP) benefits during their dispute regarding priority. Integral filed sep-

arate lawsuits against Maersk and INA that were later consolidated. Initially, the trial court held that the exclusion clause contained in Integral's policy was contrary to public policy and therefore void. Thus, the issues focused on which policy was primarily responsible for Scott's PIP benefits.

The no-fault act provides that owners or registrants of motor vehicles shall maintain security for payment of benefits under personal protection insurance, as well as property and residual liability insurance. MCL 500.3101(1); MSA 24.13101(1). The act also requires insurers to pay PIP benefits to their policyholders for injuries resulting from automobile accidents regardless of fault. MCL 500.3105; MSA 24.13105. Because Scott was entitled to PIP benefits under MCL 500.3111; MSA 24.13111, it is necessary to determine which insurance company is liable for those benefits.

In determining their respective priorities, the parties argued at length in the trial court regarding the application of MCL 500.3114; MSA 24.13114, which provides in relevant part:

> (1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident.
>
> * * *
>
> (3) An employee . . . who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

The trial court deferred its decision whether Scott

was an employee of Maersk to the hearing referee who was deciding a worker's compensation claim filed against Maersk by Scott. The referee eventually ruled that Scott was an employee of Maersk. Afterward, the trial court entered an order finding that INA was first in priority to pay Scott's PIP benefits under MCL 500.3114(3); MSA 24.13114(3). However, the Worker's Compensation Appellate Commission subsequently reversed the referee's decision, finding that Scott was not an employee.[1] Thus, the basis for the circuit court's order no longer holds true.

This Court agrees with Maersk and INA that the trial court erred in refusing to determine whether Scott was an employee for purposes of no-fault and deferring its decision to the hearing referee. Although the bureau has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment, the courts have jurisdiction to determine the fundamental issue whether an employee-employer relationship exists. *Sewell v Clearing Machine Corp,* 419 Mich 56, 62; 347 NW2d 447 (1984); *Amerisure Ins Cos v Time Auto Transportation, Inc,* 196 Mich App 569, 572; 493 NW2d 482 (1992). The trial court should have decided on its own whether Scott was an employee of Maersk for purposes of applying MCL 500.3114(3); MSA 24.13114(3).

Regardless of the court's error, this Court finds that the court also erred in holding that the bobtail policy was void as contrary to public policy. The scope of coverage regarding an automobile accident is determined by the financial responsibility act, MCL 257.501 *et seq.*; MSA 9.2201 *et seq.*

[1] An application for leave to appeal the WCAC's decision was filed and was denied by this Court. *Scott v Maersk Container Service Co, Inc,* unpublished order of the Court of Appeals, issued March 18, 1994 (Docket No. 170422).

State Farm Mutual Automobile Ins Co v Snappy Car Rental, Inc, 196 Mich App 143, 146; 492 NW2d 500 (1992). Public policy prevents an automobile liability insurance policy from containing exclusions not specifically authorized by the Legislature. However, an exclusionary clause is not per se invalid simply because it is not specifically provided for in the no-fault act. *Id.,* p 147.

Generally, a "bobtail" policy is a policy that insures the tractor and driver of a rig when it is operated without cargo or a trailer. The policy issued by Integral to Scott contained the following exclusion:

> This insurance does not apply to:
> 1. A covered auto while used to carry property in any business.
> 2. A covered auto while used in the business of anyone to whom the auto is rented.

Integral's policy provided coverage only when Scott was not hauling cargo for a business or when Scott was not hauling cargo for a business to whom the tractor was rented. Admittedly, the policy itself does not provide full coverage. However, the tractor was fully covered under no-fault by the addition of INA's policy that provided coverage when Scott was hauling cargo on behalf of Maersk. This is allowed under MCL 257.520(j); MSA 9.2220(j), which provides:

> The requirements for a motor vehicle liability policy may be fulfilled by the policies of 1 or more insurance carriers which policies together meet such requirements.

Taken together, the policy issued by INA and the bobtail policy issued by Integral provided continuous insurance coverage to the tractor as required

by the motor vehicle financial responsibility act. See also *State Farm Mutual Automobile Ins Co v Auto-Owners Ins Co,* 173 Mich App 51, 54; 433 NW2d 323 (1988). Accordingly, we hold that the policy issued by Integral is not void, and therefore the trial court's ruling was erroneous.

Thus, the issues related to the trial court's decision that INA was first in priority for paying Scott's PIP benefits under MCL 500.3114(3); MSA 24.13114(3) because he was an employee of Maersk are irrelevant because Integral's exclusion is applicable. We further find that both Scott and Maersk were owners of the tractor under the no-fault act as defined under MCL 500.3101(2)(g); MSA 24.13101(2)(g):

> "Owner" means any of the following:
>
> (i) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (ii) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

Maersk leased the vehicle for ninety days and Scott held legal title to the tractor. Therefore, as owners of a motor vehicle, Scott and Maersk were required to maintain security for payment of benefits under personal protection insurance. MCL 500.3101(1); MSA 24.13101(1). However, as previously stated, INA is responsible for the PIP benefits because Integral's policy did not provide coverage when Scott was hauling cargo on Maersk's behalf.

Therefore, we affirm the summary disposition order despite the erroneous conclusions reached by the court. This Court will not reverse a trial

court's decision where it reached the correct result, but for the wrong reason. *Bonner v Chicago Title Ins Co,* 194 Mich App 462, 472; 487 NW2d 807 (1992). In light of our disposition, we decline to address the remaining issues raised by the parties.

Affirmed.

SOUTHFIELD WESTERN, INC v CITY OF SOUTHFIELD

Docket No. 144439. Submitted April 13, 1994, at Detroit. Decided August 1, 1994, at 9:00 A.M. Leave to appeal sought.

Southfield Western, Inc., petitioned the Michigan Tax Tribunal to review the 1981 assessment of property it owned in the City of Southfield, the County of Oakland, and the Oak Park School District. In 1988, the Tax Tribunal lowered the assessment. The school district appealed the decision, and the Court of Appeals, GRIBBS, P.J., and WEAVER and T. E. BRENNAN, JJ., affirmed. Unpublished opinion per curiam of the Court of Appeals, decided February 23, 1990 (Docket No. 111742). The Supreme Court denied leave to appeal. 437 Mich 915 (1991). The respondents then paid the petitioner the tax refund ordered by the judgment entered by the Tax Tribunal, including simple interest from the date the petitioner paid the tax to the date the respondents paid the refund. The petitioner moved in the Tax Tribunal for a determination of the interest due on the tax refund, arguing that MCL 205.737(4); MSA 7.650(37)(4) required that interest be calculated from the date of payment of the tax to the date the judgment is entered, that the amount so calculated be added to the judgment, and that interest then be paid on that combined amount from the date of the entry of the judgment to the date of the satisfaction of the judgment. The Tax Tribunal determined that the interest payment should be calculated as simple interest for the entire period from the date of the payment of the tax to the date of the satisfaction of the judgment. The petitioner appealed.

The Court of Appeals *held:*

The language of MCL 205.737(4); MSA 7.650(37)(4) evidences a clear legislative intent that prejudgment interest, i.e., interest for the period from the date of payment of the tax to the date of entry of the judgment by the Tax Tribunal, must be included in the judgment and that interest for the period from the date of entry of the judgment to the date of satisfaction of the

REFERENCES

Am Jur 2d, State and Local Taxation § 1069.

See ALR Index under Interest on Money; Prejudgment Interest; Taxpayers' Actions.

judgment be calculated using the entire amount of the judgment, including the prejudgment interest. Accordingly, the Tax Tribunal's determination with respect to the amount of interest payable to the petitioner was erroneous.

Reversed and remanded.

TAXATION — TAX TRIBUNAL — JUDGMENTS — INTEREST.

Interest on a refund of taxes paid as a result of a reduction by the Tax Tribunal of an assessment is calculated by computing the interest for the period from the date the tax was paid to the date of entry of the judgment of the Tax Tribunal, adding that amount to the amount of the judgment, and, then, computing the interest on the entire judgment, including the prejudgment interest, for the period from the date of entry of the judgment to the date of the satisfaction of the judgment (MCL 205.737[4]; MSA 7.650[37][4]).

Honigman Miller Schwartz & Cohn (by *Thomas J. Beale* and *Samina R. Hurst*), for the plaintiff.

Shifman & Carlson, P.C. (by *John A. Carlson*), for the defendant.

Before: SAWYER, P.J., and T. G. KAVANAGH* and L. L. HEATHSCOTT,** JJ.

SAWYER, P.J. Petitioner appeals from an order of the Tax Tribunal denying petitioner's motion for determination of interest on a tax refund. We reverse.

Petitioner owns property located within respondents' jurisdictions that is subject to the ad valorem property tax. Petitioner had challenged the 1981 assessment of the subject property and, in 1988, prevailed in the Tax Tribunal. The 1981 assessment was lowered from $6,794,200 to $4,620,450. Respondent school district appealed that decision, and this Court affirmed. Unpublished opinion

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

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

per curiam, decided February 23, 1990 (Docket No. 111742). Thereafter, the Supreme Court denied leave. 437 Mich 915 (1991). Respondents did not pay the tax refund due petitioner until after the final action in the Supreme Court. They then tendered the unlawfully charged property tax, but paid only simple interest from the date petitioner paid the tax until the date respondents paid the refund. Petitioner moved in the Tax Tribunal for a determination of the interest due on the refund, arguing that interest should have been calculated on the amount of the unlawfully charged tax from the date of the payment of the tax to the date of judgment in the Tax Tribunal (at simple interest), and then interest calculated on the entire amount of the judgment (including the prejudgment interest) from the date of judgment to the date of payment (again, at simple interest). Under petitioner's calculation of interest, the interest that is due would increase by approximately $24,000.

The sole question presented on appeal is what method of calculation of interest should be employed, and that question appears to be one of first impression. For the reasons expressed below, we agree with petitioner's interpretation of the statute.

MCL 205.737(4); MSA 7.650(37)(4) provides in pertinent part as follows:

> . . . A sum determined by the tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to date of its payment.

Petitioner's argument is one solely of statutory interpretation. Petitioner argues that the statute, by explicitly referring to two different interest

calculation periods, prejudgment and postjudgment, reflects an intent that prejudgment interest is to be included in the judgment and that the judgment will bear interest on the entire amount, including the prejudgment interest. Respondent school district[1] argues that interest must be calculated as purely simple interest unless there is statutory authorization for awarding compound interest.

Respondent is certainly correct that the general rule is that interest shall be simple interest unless there is specific authorization for compound interest. *Norman v Norman,* 201 Mich App 182, 184; 506 NW2d 254 (1993). That, however, does not resolve the question before us, because the question posited by petitioner is whether the above statute, in fact, does authorize the "compounding" of interest by including prejudgment interest in the sum upon which postjudgment interest is calculated.[2]

Respondent also relies upon the Supreme Court's decision in *Gage v Ford Motor Co,* 423 Mich 250; 377 NW2d 709 (1985). However, respondent's reliance on *Gage* is misplaced. *Gage* did not involve the interpretation of the statute at issue here, but rather involved the general judgment interest statute, MCL 600.6013; MSA 27A.6013. Moreover, the corresponding language in that statute interpreted by the *Gage* Court contains a significant difference from the language of the statute in the case at bar. Specifically, the statute interpreted by *Gage* provided that interest was to be calculated from the date of the filing of the complaint to the date of satisfaction of the judgment. *Gage, supra* at 253. There was no similar

[1] The remaining respondents have not filed briefs on appeal.

[2] We note that it is not truly accurate to refer to petitioner's method of calculating interest as providing for compound interest. We refer to it as such solely for ease of distinction between the two proposed methods of calculating interest.

temporal demarcation as that contained in the statute at issue here, which specifically directs that interest is to be calculated from the date of the payment of the unlawful tax until the date of judgment and then interest is also to be calculated from the date of judgment to the date of satisfaction. Finally, the *Gage* decision did not directly involve an issue of compound interest versus simple interest, but rather the application of an amendment of the general interest statute that provided for the compounding of interest and how that statute was to be applied to judgments rendered before the effective date of the amendment. At best, *Gage* stands for the proposition that interest shall be calculated as simple interest unless it is provided explicitly otherwise.

Accordingly, we must turn to the general principles of statutory construction in order to resolve the interpretation question now before us. The cardinal rule of statutory construction is to give effect to the Legislature's intent. *Gage, supra* at 260. Similarly, we must give meaning to all words in a statute, because we will not presume that the Legislature intended to do a useless thing. *Girard v Wagenmaker,* 437 Mich 231, 244; 470 NW2d 372 (1991).

This then raises the question why the Legislature in drafting MCL 205.737(4); MSA 7.650(37)(4) specifically would segregate the calculation of interest to two time periods, namely, interest before judgment and interest after judgment. Had the Legislature intended to provide for purely simple interest calculated from the date of the payment of the unlawful tax to the date of satisfaction of judgment, then it simply could have said so. That is, the Legislature could have employed language similar to that used in the Revised Judicature Act concerning interest on money judgments, MCL

600.6013; MSA 27A.6013, and merely said that interest shall be calculated from the date of the payment of the tax until the date of the payment of the refund, or words to that effect. Instead, the Legislature chose to employ additional words and to segregate the two different interest periods.

We must, consistent with the rules of statutory construction, interpret the statute so as to give meaning to those additional words and to give effect to the legislative intent. The only intent we can derive from the language employed by the Legislature is that it intended that prejudgment interest, that is to say interest from the date of the payment of the tax until the date of the Tax Tribunal's judgment, must be included in the judgment itself. Interest is then to be calculated from the date of judgment to the date of satisfaction on the basis of the entire amount of the judgment, including the prejudgment interest. This interpretation will give meaning to the demarcation created in the statute between prejudgment and postjudgment interest and, therefore, will give effect to the Legislature's intent. Furthermore, this principle is consistent with the principle that the general judgment interest statute, MCL 600.6013; MSA 27A.6013, is remedial in nature and is to be construed liberally in favor of a plaintiff. *McKelvie v Auto Club Ins Ass'n,* 203 Mich App 331, 339; 512 NW2d 74 (1994).

For the above reasons, we conclude that the Tax Tribunal erred in its interpretation of the interest provisions of the statute. On remand, the Tax Tribunal shall calculate the amount of additional interest owed by respondents in a manner consistent with this opinion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Petitioner may tax costs.

PEOPLE v PUBRAT

Docket No. 162555. Submitted July 8, 1994, at Detroit. Decided August 1, 1994, at 9:05 A.M. Leave to appeal sought.

Walter Pubrat pleaded nolo contendere in the Detroit Recorder's Court, John Patrick O'Brien, J., to charges of attempted larceny in a building and carrying a concealed weapon. He appealed, claiming that he should be permitted to withdraw his plea because, at the plea hearing and sentencing, he was represented by a person whose license to practice law had been suspended for disciplinary reasons.

The Court of Appeals *held:*

The defendant was denied his right to counsel under the circumstances of this case. Denial of the right to counsel is never harmless error.

Reversed and remanded.

CONSTITUTIONAL LAW — RIGHT TO COUNSEL — SUSPENDED ATTORNEYS.

A defendant who, upon a plea of nolo contendere, is convicted and sentenced while represented by a person whose license to practice law has been suspended for disciplinary reasons is denied the right to counsel; because denial of the right to counsel can never be considered harmless, the conviction of such a defendant must be reversed on appeal.

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 *Robert A. Radnick,* Assistant Prosecuting Attorney, for the people.

Peggy K. Madden, for the defendant on appeal.

REFERENCES

Am Jur 2d, Criminal Law § 732.

Criminal defendant's representation by person not licensed to practice law as violation of right to counsel. 19 ALR5th 351.

Accused's right to counsel under the Federal Constitution—Supreme Court cases. 18 L Ed 2d 1420.

Before: SAWYER, P.J., and WEAVER and S. A. TURNER,* JJ.

SAWYER, P.J. Defendant pleaded nolo contendere to attempted larceny in a building, MCL 750.92; MSA 28.287 and MCL 750.360; MSA 28.592, and carrying a concealed weapon, MCL 750.227; MSA 28.424. Defendant was placed on five years' probation. He now appeals and we reverse.

Defendant's only argument on appeal is that he should be permitted to withdraw his plea because he was not represented by an attorney licensed to practice law in the State of Michigan. We agree.

Defendant was represented in the trial court by James Cohen. Cohen was apparently licensed to practice law at the time he entered his initial appearance in this matter, but by the time of the taking of the plea and sentencing, Cohen had been suspended from the practice of law.[1] The question then is whether the validity of defendant's plea is vitiated by the fact that the individual serving as his attorney at those proceedings was not licensed to practice law. For the reasons to be discussed below, we believe that it does render the plea invalid.

The only other Michigan case of which we are aware that addressed a similar issue is *People v Brewer,* 88 Mich App 756; 279 NW2d 307 (1979). In *Brewer,* this Court addressed a case in which the defendant was represented by an attorney who

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

[1] Mr. Cohen's license to practice law was initially suspended because of a conviction of a high court misdemeanor. 69 Mich B J 432 (1990). Thereafter, his petition for reinstatement was granted. 71 Mich B J 210 (1992). However, the grievance administrator appealed that reinstatement to the Attorney Discipline Board, which reversed the hearing panel's order granting reinstatement. Accordingly, Cohen's license to practice law was suspended effective October 6, 1992, and has apparently remained suspended ever since. 72 Mich B J 90 (1993).

had been suspended from the practice of law because of a failure to pay bar dues. The Court declined to adopt a rule requiring reversal, but did remand the matter to the trial court to determine whether, in light of the suspension, the defendant had been deprived of the effective assistance of counsel. *Id.* at 762.

We need not determine whether *Brewer* was correctly decided because, in our view, there exists an important distinction between suspension for failure to pay dues and suspension for disciplinary reasons. In the situation where an attorney is suspended for the failure to pay dues, that failure does not necessarily reflect upon his ability. That is, as the *Brewer* Court noted, *id.* at 762, it could, but does not necessarily, reflect a lack of interest by the attorney in continuing to practice law. On the other hand, it could also reflect financial difficulties by the attorney or simple neglect in the failure to pay the bar dues. Indeed, the suspension from practice for the failure to pay dues reflects as much an enforcement mechanism for the collection of mandatory dues as it is a method of ensuring competent and ethical representation. On the other hand, suspension for disciplinary reasons reflects a lack of either competency or ethics by the attorney being disciplined.

Other states that have considered the question of the effect of representation by an individual not licensed to practice law have reached varying results. For example, in *People v Felder,* 61 AD2d 309; 402 NYS2d 411 (1978), a divided New York court affirmed the conviction of three defendants who had been represented by an individual who had not, and apparently had never, been licensed to practice law. On the other hand, in *People v Perez,* 147 Cal Rptr 34 (1978), the California Court of Appeals reversed the conviction of a defendant

who was represented at trial by a law student participating in a program that allowed law students to appear in court under the supervision of a licensed attorney. The court even went so far as to say that the evidence of the defendant's guilt was overwhelming and that, if they were free to do so, they would hold that the error was harmless beyond a reasonable doubt, but that they could not so hold because "the denial of the right to counsel at any critical stage is reversible per se." *Id.* at 43, citing *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

The question, then, is whether such an error may be deemed harmless. In this respect, the majority and dissenting opinions in *Felder, supra,* set forth the opposing views. The majority in *Felder, supra* at 311-312, opined as follows:

> Concededly, the fact that each of the defendants was represented in the County Court by a layman masquerading as a lawyer raises an issue of constitutional dimension. However, not all errors which violate the Constitution of the United States call for reversal (cf. *Harrington v California,* 395 US 250, 253-254 [89 S Ct 1726; 23 L Ed 2d 284 (1969)]). Constitutional errors insignificant in the setting of a particular case may, consistent with the Federal Constitution, be deemed harmless, not requiring an automatic reversal of the conviction (cf. *Chapman v California,* 386 US 18, 22 [87 S Ct 824; 17 L Ed 2d 705 (1967)]). Even constitutional error may be harmless where it is clear, beyond a reasonable doubt, that the error did not contribute to defendant's conviction (*People v Almestica,* 42 NY2d 222, 224 [397 NYS2d 709; 366 NE2d 799 (1977)]).
>
> . . . The test of due process in such an instance is not whether the defendant had an attorney, licensed or unlicensed, but whether under all of the circumstances his conviction was obtained in such a manner as to be offensive to the common and fundamental idea of what is fair and right (see

People v Cornwall, 3 Ill App 3d 943 [277 NE2d 766 (1971)]).

The dissent in *Felder, supra* at 318, replied as follows:

> I do not believe it is at all germane that this layman may have acted more or less capably than the most skilled lawyer. Surely, one need not expound upon the State's concern in licensing the profession of law. Whether he did so expertly or inexpertly is totally irrelevant. In licensing, the admitting court of State assures and certifies that the licensee has met minimal standards of education and character promulgated and adhered to by his peers over the centuries. I suggest that if we condone what here occurred, we are rendering a grievous disservice to the public and, also, denigrating our honorable and learned pursuit.

We believe that the dissent in *Felder* has the better view of the matter. The conclusion that denial of the right to counsel can be deemed harmless under the circumstances of a particular case overlooks the fact that denial of the right to counsel can never be deemed harmless. *Perez, supra* at 43; see also *Strickland v Washington,* 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Furthermore, the fact that defendant was denied his right to counsel is established by virtue of the fact that the person standing next to him at the time of the plea and sentencing, although having previously been an attorney in this state, was not at the relevant times an attorney.

The state has undertaken elaborate means to determine who can be an attorney. The Supreme Court has developed extensive procedures by which individuals who wish to become attorneys must meet certain stringent educational requirements, must undergo a background check to deter-

mine their character and fitness to be an attorney, and must submit to a bar examination to determine their competence to be an attorney. Furthermore, the Supreme Court has in place an elaborate mechanism to ensure that attorneys, once licensed, remain fit to practice law, suspending or revoking the licenses of those attorneys who prove themselves unfit.

In our view, the state cannot now disavow those procedures and restrictions on the practice of law merely because it is convenient to do so in order to avoid the repercussions of having allowed an unlicensed individual to play the role of an attorney in a criminal prosecution. The state has defined what an attorney is and, when defendant entered his plea and was sentenced, Mr. Cohen did not meet the definition of an attorney. Moreover, this does not involve a situation such as in *Brewer, supra,* where the state is using its licensing power to extract a few pieces of silver for the benefit of the bar association, but a situation where the disciplinary authorities have positively determined that an individual was not fit to continue the practice of law and, indeed, thereafter made a second determination that the individual was not fit to return to the practice of law upon his petition for reinstatement.

In short, the trial court should never have allowed Mr. Cohen to practice as an attorney in its courtroom after Mr. Cohen's suspension from the practice of law on October 6, 1992. The trial court's having dispensed with its obligation to ensure that only licensed attorneys practice law in front of it, we cannot now absolve the denial of defendant's right to counsel. The formulation is simple. Defendant had the right to be represented by counsel. *Gideon, supra.* The person who represented defendant was not, either at the time of the

plea or the sentencing, an attorney. Therefore, defendant was denied his right to counsel. Because the denial of the right to counsel can never be considered harmless, defendant's conviction must be set aside.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

S. A. TURNER, J., concurred.

WEAVER, J. *(concurring).* I concur in the result only.

SARASKI v DEXTER DAVISON KOSHER MEAT & POULTRY

Docket No. 153745. Submitted December 14, 1993, at Detroit. Decided August 1, 1994, at 9:10 A.M.

Henry Saraski received worker's compensation general disability benefits for a total, temporary disability that occurred while he was employed by Dexter Davison Kosher Meat & Poultry. Dexter Davison reduced the payments, pursuant to MCL 418.357; MSA 17.237(357), because Saraski was sixty-five years old. Following the decision in *Franks v White Pine Copper Division,* 422 Mich 636 (1985), Dexter Davison restored Saraski to his basic weekly rate before § 357 reductions and began coordinating fifty percent of his social security benefits pursuant to MCL 418.354; MSA 17.237(354). Saraski then sought and was granted an open award of total and permanent disability benefits under MCL 418.361(3); MSA 17.237(361)(3). Dexter Davison was no longer permitted to coordinate benefits under § 354 and, therefore, again began adjusting Saraski's weekly benefits under § 357. Saraski claimed that Dexter Davison was not entitled to the § 357 reduction because it had already elected to coordinate benefits under § 354. A hearing referee agreed. Dexter Davison appealed to the Worker's Compensation Appellate Commission, which held that an employer is not prohibited from serially selecting between reduction under §§ 354 or 357 at its discretion. The WCAC also concluded that its decision rendered moot Saraski's motion to dismiss that was based on Dexter Davison's failure to pay seventy percent of Saraski's weekly benefit while the appeal was pending, as required by MCL 418.862; MSA 17.237(862). Saraski appealed by leave granted.

The Court of Appeals *held:*

1. The WCAC's decision that the employer was not bound by its election to coordinate benefits under § 354 was not error under the facts of this case.

2. Once an employer makes an initial selection between

REFERENCES

Am Jur 2d, Workers' Compensation §§ 477, 652.

Tort liability of worker's compensation insurer for wrongful delay or refusal to make payments due. 8 ALR4th 902.

§§ 354 and 357, § 357(2) prohibits the employer from serially switching the selection unless the specific circumstances involved require a different result in order to prevent injustice. A change in a party's disability status may be viewed as a new event that may terminate prior elections by the employer and permit the employer to make a new election, if one is available.

3. The WCAC erred in failing to analyze Dexter Davison's failure to pay seventy percent of Saraski's benefits as a condition precedent to perfecting an appeal. It is error to refuse to assess penalties against the employer for its failure to pay regardless of whether the WCAC ultimately denies the benefits sought. The issue was not moot.

Affirmed in part, reversed in part, and remanded.

WHITE, J., concurring with the majority in all other regards, stated that the general rule that once an employer makes an initial selection between §§ 354 and 357, § 357(2) prohibits the employer from serially switching the selection should neither be adopted nor rejected.

1. WORKER'S COMPENSATION — COORDINATION OF BENEFITS — ELECTION BY EMPLOYER.

Once an employer makes an initial selection to reduce a disabled employee's worker's compensation benefits under either §§ 354 or 357 of the Worker's Disability Compensation Act, § 357(2) prohibits the employer from serially switching the selection; an exception to this general rule may be found where the specific circumstances involved require a different result in order to prevent injustice, e.g., a change in a party's disability status may be viewed as a new event that may terminate prior elections by the employer and permit a new election (MCL 418.354, 418.357; MSA 17.237[354], 17.237[357]).

2. WORKER'S COMPENSATION — FAILURE TO PAY BENEFITS — PENALTY.

It is error for the Worker's Compensation Appellate Commission to refuse to assess penalties against an employer for failure to pay seventy percent of a disabled employee's benefits pending an appeal to the commission; whether the commission ultimately denies the benefits sought is not relevant (MCL 418.862[1]; MSA 17.237[862][1]).

Kelman, Loria, Downing, Schneider & Simpson (by *Donald W. Loria*), for the plaintiff.

Plunkett & Cooney, P.C. (by *A. T. Iverson, Jr.*), for Dexter Davison Kosher Meat & Poultry and the Accident Fund of Michigan.

Before: MARILYN KELLY, P.J., and WHITE and D. F. BRECK,* JJ.

MARILYN KELLY, P.J. Henry Saraski appeals by leave granted from an order of the Worker's Compensation Appellate Commission (WCAC), permitting post-sixty-five age reductions in his weekly benefits pursuant to MCL 418.357; MSA 17.237(357). He appeals as well from a WCAC denial of his motion to dismiss defendants' appeal. He argues that dismissal is required, because Dexter Davison failed to pay seventy percent of his weekly benefits as required by MCL 418.862; MSA 17.237(862). We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

I

Henry Saraski fell and injured his knee while an employee of Dexter Davison on January 18, 1978. He was sixty-five years of age. Dexter Davison paid weekly benefits for general disability, with reductions pursuant to MCL 418.357; MSA 17.237(357). Payments with reductions pursuant to § 357 continued until shortly after the Supreme Court's decision in *Franks v White Pine Copper Division,* 422 Mich 636; 375 NW2d 715 (1985).[1] Then, apparently relying on *Franks,* Dexter Davison restored Saraski to his basic weekly rate before § 357 reductions and began coordinating fifty percent of his social security benefits pursuant to MCL 418.354; MSA 17.237(354). It also withheld fifty percent of the coordinated rate against what it viewed as a previous overpayment; the earlier reductions in weekly benefits had not equalled fifty

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

[1] Superseded by statute MCL 418.354(17); MSA 17.237(354)(17).

percent of the social security benefits Saraski received during the same period.

In January, 1986, Saraski filed a petition alleging total and permanent disability due to the loss of industrial use of both legs, under MCL 418.361(3); MSA 17.237(361)(3). He was granted an open award of total and permanent disability benefits. The Second Injury Fund successfully appealed the referee's failure to apply the two-year-back rule. Saraski successfully cross-appealed the determination of his average weekly wage. Dexter Davison took no appeal from the decision. When Saraski was awarded total and permanent disability under § 361(3), Dexter Davison was no longer permitted to coordinate benefits under § 354 because "benefits under section 361(2) and (3) are benefits which recognize human factors substantially in addition to the wage loss concept." MCL 418.354(16); MSA 17.237(354)(16).

Dexter Davison again began adjusting Saraski's weekly benefits under § 357. There is no prohibition against taking § 357 age reductions in a § 361(3) award.

Saraski moved for mediation or a hearing, claiming that Dexter Davison was not entitled to reduce his weekly benefit under § 357, since it had already elected to coordinate his benefits under § 354. Magistrate Godfrey relied primarily on § 357(2) which states:

> Subsection (1) shall not apply to a person 65 years of age or over otherwise eligible and receiving weekly payments who is not eligible for benefits under the social security act, 42 U.S.C. 301 to 1397f, or to a person whose payments under this act are coordinated under section 354. [MCL 418.357(2); MSA 17.237(357)(2).]

He held that Dexter Davison must abide by its

initial election between coordination under § 354 or reduction under § 357. Moreover, Dexter Davison could not change its selection absent a court order.

Dexter Davison appealed from Magistrate Godfrey's decision to the WCAC. Saraski moved to dismiss the appeal because Dexter Davison had failed to pay seventy percent of his weekly benefit while the appeal was pending as required by MCL 418.862; MSA 17.237(862).

The WCAC observed that § 357(2) prohibits an employer from reducing benefits under both § 354 and § 357 simultaneously. However, it held that an employer is not prohibited from serially selecting between benefit reduction under § 354 or § 357 at its discretion. The WCAC also concluded that its decision on the merits mooted Saraski's motion to dismiss pursuant to MCL 418.862; MSA 17.237(862).

We now decide if the WCAC's decision permitting defendant to reduce plaintiff's benefits under § 357, after defendant had earlier done so under § 354 and still earlier under § 357, was correct.

II

This Court may review questions of law involved in any final order of the WCAC. We will reverse a WCAC decision if the Commission operated within the wrong legal framework or if its decision was based on erroneous legal reasoning. *Corbett v Montgomery Ward & Co, Inc,* 194 Mich App 624, 631; 487 NW2d 825 (1992); *Abbey v Campbell, Wyant & Cannon Foundry (On Remand),* 194 Mich App 341, 351; 486 NW2d 131 (1992). Statutory interpretation is a question of law subject to de novo review on appeal. *Cardinal Mooney High*

School v Michigan High School Athletic Ass'n, 437 Mich 75; 467 NW2d 21 (1991).

Previously, our Court considered the employer's right to serially select between § 357 and § 354 to reduce a disabled employee's benefits. In *Krueger v Simplicity Pattern Co,*[2] we held that, once an employer elected to coordinate benefits, it could not reverse the coordination when the employee's pension benefits expired. *Krueger,* p 217. Our Supreme Court dismissed the appeal of *Krueger* on stipulation of the parties after plaintiff died. It also vacated the judgment of our Court, without instruction or comment. Consequently, we again address the questions presented as matters ungoverned by existing precedent.

We conclude, for the reasons set out below, that the WCAC's decision that Dexter Davison was not bound by its election to coordinate benefits under § 354 was not error. In doing so, we do not adopt the WCAC's rule that serial selection between § 354 and § 357 at the employer's discretion, with whatever frequency the employer chooses, is always permissible. Rather, we adopt the general rule of *Krueger* that once an employer makes an initial selection between § 354 and § 357, § 357(2) prohibits the employer from serially switching the selection. However, as with all general rules, specific circumstances may require a different result in order to prevent injustice. We find such circumstances here.

First, when Saraski was initially disabled, defendant elected to reduce benefits under § 357 not § 354. Defendant undertook coordination of benefits under § 354 only after our Supreme Court decided *Franks.* At the time, the question of whether serial selection was permissible had not

[2] 196 Mich App 212; 492 NW2d 790 (1992), vacated 442 Mich 912 (1993).

been decided. Applying the rule developed in *Krueger,* which we explicitly adopt here, it is clear that defendant originally selected to reduce benefits under § 357; defendant now seeks merely to return to the original selection, contrary to plaintiff's contention that defendant originally selected to coordinate benefits under § 354.

However, we also note that in 1986, plaintiff sought to alter his disability status from total, temporary disability to total, permanent disability. When Administrative Law Judge Canady found plaintiff to be totally and permanently disabled, his finding had several ramifications. First, by operation of law, defendant could no longer reduce benefits under § 354 under any circumstances. MCL 418.354(16); MSA 17.237(354)(16). Moreover, a change in a party's disability status may be viewed as a new event which may terminate prior elections by the employer. It permits the employer to make a new election, if one is available. Equity requires that an employer be permitted to make a new election when the employee seeks and obtains a change in his or her disability status.

We distinguish the facts here from those in *Krueger* primarily on this basis: In *Krueger,* defendant sought to serially select between § 354 and § 357 solely at its discretion. The disabled worker, without recourse or warning, was at the mercy of the employer's varying selection based merely on the economic self-interest of the employer. Here, plaintiff sought an altered disability status and was not merely the victim of defendant's economic and business decisions.

Thus, we again decide that an employer may not serially switch between § 354 and § 357. Having made an election, the employer must continue it. However, we also conclude that certain events, such as an employee's successful alteration of his

disability status, may create a narrow exception wherein the employer may alter its election. Consequently, we find no error in the WCAC's decision permitting defendant to make a new election under the circumstances existing here.

III

We conclude that the WCAC erred in failing to analyze Dexter Davison's failure to pay seventy percent of Saraski's benefits as a condition precedent to perfecting an appeal. MCL 418.862(1); MSA 17.237(862)(1). Saraski correctly notes that it is error for the WCAC to refuse to assess penalties against an employer for failure to pay seventy percent of benefits pending appeal. It was not relevant whether the WCAC ultimately denied the benefits sought. *Boden v Detroit Lions, Inc, (On Remand),* 193 Mich App 203, 208; 483 NW2d 673 (1992). It follows that Saraski's request for the sanction of dismissal does not become moot simply because the WCAC was persuaded that Dexter Davison should prevail on the merits.

We affirm the WCAC's decision that Dexter Davison was entitled to switch to age reduction of Saraski's benefits pursuant to § 357 for the reasons set out above. We reverse the WCAC's decision which declares Saraski's motion to dismiss moot. We remand for reconsideration of whether defendant's failure to comply with § 862(1) required dismissal of its appeal. We do not retain jurisdiction.

D. F. BRECK, J., concurred.

WHITE, J. *(concurring).* I agree, for the reasons stated by the majority, that in the present case,

the Worker's Compensation Appellate Commission did not err in concluding that defendant properly could reduce benefits under MCL 418.357; MSA 17.237(357). I would not, however, adopt or reject the "general rule of *Krueger* [v *Simplicity Pattern Co,* 196 Mich App 212; 492 NW2d 790 (1992).]" *Ante,* p 352.

I join in part III of the majority opinion.

LISTANSKI v CANTON CHARTER TOWNSHIP

Docket No. 154045. Submitted January 12, 1994, at Detroit. Decided August 1, 1994, at 9:15 A.M. Leave to appeal sought.

Ethel and Raymond Listanski brought an action in the Wayne Circuit Court against Canton Charter Township, alleging that the township was liable pursuant to the highway exception to governmental immunity for injuries sustained by Ethel Listanski when she slipped and fell on a public sidewalk adjacent to a county road in the township. The court, Marianne O. Battani, J., granted summary disposition for the township, ruling the highway exception inapplicable because the township lacked jurisdiction over the sidewalk. The plaintiffs appealed.

The Court of Appeals *held:*

The term "highway" has been defined for purposes of the highway exception to governmental immunity to include sidewalks. MCL 691.1401(e); MSA 3.996(101)(e). Although a township is statutorily authorized to install sidewalks along a highway that is under the jurisdiction of a board of county road commissioners and to enact ordinances relating to the maintenance and repair of such sidewalks if the township obtains the approval of the county road commissioners, MCL 41.288(1); MSA 9.585(3)(1) and MCL 41.288a; MSA 9.585(4), a township is under no duty to repair sidewalks that are adjacent to a county road.

Affirmed.

J. STEMPIEN, J., dissenting, stated that a township has jurisdiction over a sidewalk along a county road within the boundaries of the township where the sidewalk is placed there by authority granted by statute to the township, and the township is liable pursuant to MCL 691.1402; MSA 3.996(102) for damages arising out of the failure to keep the sidewalk in reasonable repair.

REFERENCES

Am Jur 2d, Highways, Streets, and Bridges §§ 5, 104; Municipal, County, School, and State Tort Liability §§ 90, 111, 326.

See ALR Index under Governmental Immunity or Privilege; Sidewalks.

GOVERNMENTAL IMMUNITY — HIGHWAYS — SIDEWALKS — COUNTIES — TOWNSHIPS.

A township needs the approval of the county in which it is located in order to maintain or repair a public sidewalk that is adjacent to a county road within the township; accordingly, for purposes of the highway exception to governmental immunity, the township lacks sufficient jurisdiction over such sidewalks to incur liability for personal injury sustained thereon (MCL 41.288(1), 41.288a, 691.1401[e], 691.1402; MSA 9.585[3][1], 9.585[4], 3.996[101][e], 3.996[102]).

Rattner, Steinberg & Associates (by *Ronald A. Steinberg*), for the plaintiffs.

Cummings, McClory, Davis & Acho, P.C. (by *Marcia L. Howe*), for the defendant.

Before: HOOD, P.J., and R. J. DANHOF* and J. STEMPIEN,** JJ.

R. J. DANHOF, J. Plaintiffs Ethel and Raymond Listanski appeal as of right from the circuit court's orders granting defendant Canton Township's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

On August 25, 1989, Ethel Listanski slipped and fell on a public sidewalk adjacent to a county road in front of a residence in Canton Township. The plaintiffs brought suit against the township and George Gornell, the owner of the residence, alleging that the sidewalk was not in reasonable repair. The trial court summarily dismissed the township, finding that the highway exception to governmental immunity did not apply because the township did not have jurisdiction over the sidewalk upon which Ethel fell.

On appeal, plaintiffs contend that the township

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1993-6.

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

has jurisdiction over the sidewalk and that the highway exception to governmental immunity therefore applied. We disagree.

The defective highway exception to governmental immunity applies where a governmental agency's failure to maintain in reasonable repair a highway under its jurisdiction causes bodily injury. MCL 691.1402; MSA 3.996(102). This exception applies to municipal corporations. MCL 691.1401(a) and (d); MSA 3.996(101)(a) and (d). The term "highway" includes sidewalks. MCL 691.1401(e); MSA 3.996(101)(e).

Defendant asserted that the county had jurisdiction over the road adjacent to the sidewalk and that it did not have jurisdiction to repair the sidewalk without the county's permission. In support of this allegation, defendant submitted the affidavit of Tom Casari, the engineer for Canton Township. Plaintiffs rely upon *Jones v Ypsilanti,* 26 Mich App 574; 182 NW2d 795 (1970), in asserting that the township and the county had concurrent jurisdiction over the sidewalk. *Jones* involved a plaintiff who fell on a sidewalk along a state trunk line highway in a city. This Court construed Const 1963, art 5, § 28 and art 7, § 29 in finding that the city retained reasonable control over state trunk line highways within its boundaries. Art 5, § 28 established a state highway commission to obtain jurisdiction and control over trunk line highways. Art 7, § 29 provides in relevant part:

> Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

There were no statutory provisions limiting the

city's control over the sidewalks within its boundaries. Thus, this Court rejected the city's claim that it did not have jurisdiction over the sidewalk.

This case is distinguishable because a township is involved. MCL 41.288(1); MSA 9.585(3)(1) authorizes a township, through its board, to install sidewalks along a highway, but contains the following limitation:

> A highway under the jurisdiction of the director of the state transportation department or the board of county road commissioners shall not be improved under this act without the written approval of the director of the state transportation department or the board of county road commissioners.

Further, MCL 41.288a; MSA 9.585(4) authorizes a township to enact ordinances relating to sidewalk maintenance and repairs along county roads, but further requires the approval of the county. Therefore, the Legislature has limited a township's jurisdiction over the sidewalks within its boundaries by requiring the county road commissioners' approval of repairs. There also is no provision imposing a duty upon the township to repair sidewalks adjacent to county or state roads. See *Court v Clark,* 19 Mich App 261, 263; 172 NW2d 545 (1969). Accordingly, this Court finds that Canton Township did not have jurisdiction to repair the sidewalk upon which plaintiff Ethel Listanski fell, and that the court did not err in summarily dismissing plaintiffs' claims.

Affirmed.

HOOD, P.J., concurred.

J. STEMPIEN, J. *(dissenting).*I respectfully dissent. The opinion of the majority would establish that

as a matter of public policy, the public highways for use by pedestrians may be left in such a state of disrepair so as to be hazardous to public health, safety, and welfare. The Legislature has carved out a statutory exception to governmental immunity for the public use of its highways. Therein the Legislature defined highways to include sidewalks, MCL 691.1401(e); MSA 3.996(101)(e). Obviously, in so doing, the Legislature considered the health, safety, and welfare of pedestrians as important as the health, safety, and welfare of motor vehicle occupants. Hence, the only question in this case is which governmental agency is responsible for the maintenance of the public sidewalks.

The ultimate issue to be decided in this case is whether a township can be liable for failure to maintain sidewalks within its boundaries. It is this writer's opinion that there are circumstances under which the sidewalks are under township jurisdiction and in which township liability does exist for failure to maintain the public sidewalks in a reasonably safe condition. The pertinent statutes and the Michigan Constitution, when viewed in historical perspective, indicate that the Legislature did not intend to absolve townships from all responsibilities for public travel.

On August 25, 1989, plaintiff Ethel Listanski fell on a public sidewalk along a residential street in the Charter Township of Canton. Plaintiffs sued, alleging that Canton failed to maintain the sidewalk in reasonable repair. Canton filed a motion for summary disposition accompanied by an affidavit of its engineer denying jurisdiction. The trial court granted summary disposition on the basis of lack of jurisdiction by Canton over the road to which the sidewalk is adjacent.

The Michigan Constitution, the county road law, the state trunk line highway act, and the township

law all refer to and supplement one another. A common thread through all of them is the inclusion of township authority and responsibility over sidewalks. Though not succinctly written in one statute, it is the Legislature's intent that townships have jurisdiction and responsibility for sidewalks within their boundaries.

All roads in a township are under the county road law, MCL 224.1 *et seq.*; MSA 9.101 *et seq.* whether they are major arterial roads or residential streets in a subdivision. They are designated either county primary or county local roads. The McNitt act, formerly 1948 CL 247.1 *et seq.*, provided for the takeover of all township roads over a period of time. All dedicated roads in recorded plats lying outside incorporated cities and villages were to be taken over by the counties. The passage of this legislation alone did not deprive townships of their power to install sidewalks or, in this writer's opinion, the duty to maintain sidewalks once installed.

Historically, counties were not given authority to construct and install sidewalks. MCL 224.19; MSA 9.119, MCL 224.21; MSA 9.121. Statutes dating back to 1893 have consistently restricted counties to the construction and maintenance of roads, bridges, and culverts. That limited obligation continues to the present. Const 1963, art 7, § 16 states that the Legislature "may provide the powers and duties of counties in relation to highways, bridges, culverts and airports." Admittedly, MCL 41.271; MSA 9.571 currently allows counties to establish sidewalks when petitioned by more than fifty-one percent of the abutting township landowners. It is important to note that this legislative action provides a means for the township residents to impose a sidewalk on the roadway. It is not inherent in the statute that the county, by

its ownership of a right of way, has independent authority to construct and maintain sidewalks within township boundaries.

Townships were historically charged with this duty. 1883 PA 60, § 1 stated:

> [P]ublic sidewalks may be established, opened improved and maintained . . . the townships and unincorporated villages of this state shall possess the authority herein prescribed for the building, repairing and preserving the same.

Current legislative authority for township construction and maintenance of sidewalks is found in several sources: 1. MCL 41.288; MSA 9.585(3) allows for ten-year contracts for installation of sidewalks and elevated structures for pedestrian traffic. 2. MCL 41.288a; MSA 9.585(4) grants authority for the construction, repair, and maintenance of sidewalks for the protection of the health, safety, and welfare of its residents. 3. MCL 42.10; MSA 5.46(10) allows charter townships, such as Canton, to give to their superintendents the functions and duties of the construction, repair, and maintenance of sidewalks. Not only do townships have authority to install and maintain sidewalks, townships are authorized by the Legislature to adopt ordinances regarding maintenance and repairs of sidewalks. MCL 41.181; MSA 5.45(1).

Concurrent with historical authority to construct and maintain sidewalks, townships have had historical liability for failure to reasonably discharge their duty to maintain the sidewalks. In *Ferguson v Muskegon Co,* 181 Mich 335; 148 NW 212 (1914), the Michigan Supreme Court addressed the issue of liability for an unrepaired sidewalk along a county road. There was a county road system at the time. It called for the same author-

ity as exists today: namely, the construction of roads, bridges, and culverts by counties and authority for townships, cities, villages, and corporations to build and maintain sidewalks, pursuant to 1909 PA 283, §§ 19 and 21.

The plaintiff in *Ferguson* was injured while walking on a sidewalk adjacent to a county road in a township and sought to impose liability for the defective sidewalk on the county. At the time, 1909 PA 283 imposed liability on the county for failure to maintain county roads, bridges, and culverts. Previously, townships had liability for public highways, streets, bridges, crosswalks, sidewalks, and culverts. The *Ferguson* Court held that county liability was fixed to the extent of the authority of the county for construction, that is, roads, bridges, and culverts, because the Legislature clearly used "special restrictive terms." Without authority for the county to build sidewalks, there was no liability for the county for their disrepair, even where a sidewalk was on the side of and along a portion of a county road. The Court found that the responsible party was the township. The Court stated:

> We find, then, from these sections of this act which have been quoted, that the county road commissioners have exclusive charge of roadways, bridges, and culverts on roads over which they have assumed control, and only townships and unincorporated villages have within their respective limits power and authority to build and repair sidewalks along same roads. *These powers and duties are specifically defined and distinguishable, and, although, exercised over the same highway, they are not conflicting and giving such separate and distinct powers and authority to two public bodies arises naturally from their relations to the public,* as has been recognized by this court. [181 Mich 339; emphasis added.]

The *Ferguson* Court distinguished the purposes of the installation of roads from that of sidewalks. The roadway designed for vehicular travel was for the entire population to have adequate highways for public travel. The sidewalk provided the population of the township "suitable sidewalks for the use of its inhabitants and others, who as foot passengers desire to pass along . . . ." *Id.* at 340. This distinction between road and sidewalks is as valid in our society as it was in 1914.

The *Ferguson* case was decided before the enactment of the McNitt act, but, nonetheless, is applicable to this case. Current legislative authority for construction of roads and sidewalks within townships remains in the counties and townships respectively. Liability for failure to maintain those installations is currently recognized in MCL 691.1402; MSA 3.996(102), which imposes the same duties as the law that governed the *Ferguson* case in 1914.[1] Counties are liable only for the portion of the highway designed for vehicular travel. Townships, cities, and villages are liable for sidewalks as defined in MCL 691.1401(e); MSA 3.996(101)(e).

The lack of authority of a county to install sidewalks deprives it of "jurisdiction" over the sidewalk. The specific legislative empowerment to a township to construct and repair sidewalks

[1] MCL 691.1402; MSA 3.996(102) states in part: "The liability, procedure and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in Section 21, chapter 4 of Act No. 283 of the Public Acts of 1909, as amended, being section 224.21 of the Compiled Laws of 1948." The prior law is mirrored in the current statutory provision imposing liability for sidewalks on townships, cities, and villages. States and counties are only liable for the improved portion of the road.

MCL 691.1404(a); MSA 3.996(101)(a) states: " 'Municipal corporation' means any city, village, township or charter township, or any combination thereof, when acting jointly."

MCL 691.1401(e); MSA 3.996(101)(e) states: " 'Highway' means every public highway, road, and street which is open for public travel and shall include bridges, crosswalks, and culverts on any highway. The term 'highway' does not include alleys, trees and utility poles."

would give it jurisdiction over the sidewalk, which is included in the definition of highway. This writer disagrees with defendant Canton when it urges that a sidewalk and its adjoining highway must be considered as one unit. Presumably, defendant township makes this argument on the basis that the sidewalk is installed within the county right of way. That conclusion is not the intent of the Legislature, nor is it practical to use such as a rule of law that courts should follow. The ownership in fee simple of the realty upon which an installation is placed does not make the installed fixture the responsibility or duty of the fee simple holder. For example, most private driveways are at least partly on the right of way of state, county, and city roads, yet the driveway is not "under the jurisdiction" of the governmental unit. This is the same for utilities, cables, and other installations permitted in the right of way under MCL 224.19b; MSA 9.119(2).[2]

Defendant's reasoning that no one is liable for failure to maintain the sidewalks within a township's boundary would require this Court to ignore and hold for naught the Legislature's use of the word "township" in MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.* The Legislature specifically defined "highway" to include sidewalks in the 1965 highway liability act and retained the definition in the 1986 amended version. Both of these statutes were enacted after the transfer of all township roads to the county road system under the McNitt act. Therefore, the intent of the Legislature to continue township liability is clear because of the consistent reference to townships in the history of the statutes.

[2] This statute allows the permissive installation of undefined facilities in the county right of way, but the statute does not absolve the utility owner from the responsibility of maintenance.

It was also the intent of the drafters of the Michigan Constitution to continue township control. After the transfer of township roads, the Michigan Constitution of 1963 was drafted. Art 7, § 29 states in part:

> [T]he right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Const 1908, art 8, § 28 referred to townships, but counties were excluded. The new constitution retained the same language but added counties to the list of governmental units that have control over their public ways and places. The drafters of the new constitution are presumed to have knowledge of exiting laws at the time of adoption. Const 1963, art 3, § 7 provides:

> The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

The mechanisms for the funding of roads and sidewalks are also enlightening and assist in determining legislative intent and explaining the addition and deletion of the words "county" and "township" in the statutes. The funding structure for roads helps explain why the transfer of roads to counties would not have included sidewalks. The state, counties, cities, and villages are recipients of state road funding primarily through Const 1963, art 9, § 9 fuel tax and other miscellaneous sources of revenue.[3] Townships do not have access

[3] The 1963 constitution provided that specific fuel taxes be set aside for transportation purposes. Not less than ninety percent of the fuel

to this source of revenue nor authority to raise such revenues.[4]

On the other hand, sidewalks are funded from one of two sources. The townships are authorized to assess the abutting property owners or to pay from their own general funds for repair and maintenance. The general fund can be subsidized by a levy of no more than one mill on all property owners of the township, subject to voter approval. The distinction between roadway and sidewalk funding thus exemplifies the need to treat sidewalk jurisdiction separate from jurisdiction over the improved portion of the road designed for vehicular travel. Therefore, defendant's argument that roadways and sidewalks should be treated as one unit for jurisdictional purposes is inconsistent with the funding of the installation and repair of county roads and the funding of the installation and repair of sidewalks.

The majority opinion in this case acknowledges *Jones v Ypsilanti,* 26 Mich App 574; 182 NW2d 795 (1970), as construing Const 1963, art 5, § 28 and art 7, § 29 to hold that the city retained reasonable control over state roads to the extent that liability for adjacent sidewalks fell upon the city.[5] The majority distinguishes the case at bar

taxes are exclusively reserved for "state, county, city and village roads, streets and bridges . . . ."

[4] Although amendments of the state trunk line highway act (MCL 247.651 *et seq.*; MSA 9.1097(1) *et seq.*) invite participation by the heavily populated townships, it is only through a property assessment over which counties retain control of the taxes levied and the process. (MCL 247.670; MSA 9.1097[20])

[5] Art 5, § 28 was amended in 1978. At the time of the *Jones* opinion, it referred to the state highway commission as having "jurisdiction over all state trunkline highways and appurtenant facilities." Presumably, the *Jones* panel was interpreting the language regarding the term "jurisdiction" in reference to highway and "appurtenances." This language was eliminated with the 1978 amendment. The term "jurisdiction" is now found only in the applicable statutes. Therefore, there are only legislative definitions subject to interpretation consis-

from *Jones* on the basis that cities had no statutory limitations on their control over sidewalks, while townships have limited control because of MCL 41.288; MSA 9.585(3) and MCL 41.288a; MSA 9.585(4). Those statutes require permission of the county before township sidewalk installation. Such a distinction is an illusory limitation in the law, as it applies to sidewalks. This writer suspects that it also is illusory in practice.

Permission is not the pivotal issue in determining jurisdiction for purposes of MCL 691.1401; MSA 3.996(101) and MCL 691.1402; MSA 3.996(102).[6] There are conflicting statutes regarding the issue of permission when dealing with the county right of way. MCL 41.288; MSA 9.585(3) authorizes sidewalks and elevated structures for pedestrians along and over county and state highways. The law provides for written approval by the state or the county for township construction of these items. This statute applies to main or arterial roads, not residential streets, *Damico v Shelby Twp,* 64 Mich App 271; 236 NW2d 69 (1975).[7] The cost of these improvements are paid from general funds, not special assessments to abutting property

tent with legislative intent and the present art 5, § 28 of the 1963 constitution, which is silent with regard to a definition of jurisdiction.

[6] In fact, in the driveway example *supra,* if permission were a pivotal factor in defining jurisdiction, the county and the state would have jurisdiction over the driveway because MCL 247.321; MSA 9.140(21) requires permission of the county for installation of driveways.

[7] The *Damico* Court made a significant point supportive of plaintiffs' position of jurisdiction. The *Damico* Court found that MCL 41.401; MSA 9.570(1) (predecessor of MCL 41.288; MSA 9.585[3]) allowed for the purchase of elevated structures and sidewalks on major roads without a public hearing and did not apply to sidewalks in residential areas. In so determining, the court reasoned that in contradistinction to private ways, all public ways are highways "without distinction." "*Such language can hardly be said to warrant an inference that the Legislature does not intend to make distinctions between bridges, highways, county roads and residential streets.*" *Id.* at 274 (emphasis added).

owners as in residential areas. Then MCL 41.288a; MSA 9.585(4) dilutes the permission requirement. It authorizes sidewalk construction and maintenance in any area of the township. It does require approval for sidewalks in the right of way. The approval sought is not specifically designated as written approval. The law certainly implies a lesser restriction on township authority for sidewalks as opposed to long-term debts on construction of major roads. MCL 224.19b; MSA 9.119(2) shows the decreasing role of county approval for sidewalk installation. In fact, it eliminates approval:

> (1) A person, partnership, association, corporation or governmental entity shall not construct . . . or perform any other work within the right of way of a county road *except sidewalk installation and repair* without first obtaining a permit from the county road commission having jurisdiction over the road *and from the township,* city or village in which the county road is located when a permit is required by ordinance of the township, city or village, *pursuant to authority conferred by article VII, section 29 of the Michigan constitution of 1963.* [Emphasis added.]

This statute demonstrates the Legislature's recognition that townships have constitutional authority over installations in the county's right of way without regard to the county's permission. Clearly, this statute empowers the township to deny a permit even if the county had issued a permit for the construction within the highway right of way. The defendant contends townships have no authority regarding the highway right of way. Yet, both this statute and the *Jones* case, which the majority in this opinion recognize, acknowledge the concurrent jurisdiction of the township.

The empowering statutes and Const 1963, art 7, § 29 are to be reviewed by a standard set by art 7, § 34, which states in part:

> . . . Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by the constitution.

Thus, the proposition that requirements of permission limit the power and jurisdiction of townships is an interpretation of law contrary to the standards of this section. Art 7, § 29 fairly implies township authority over sidewalks in the county right of way.

Further evidence that the analysis in *Jones* regarding legislative intent is applicable to townships is found in MCL 42.17; MSA 5.46(17). This statute provides that charter townships

> shall have and possess and may exercise the same powers and *shall be subject to the same liabilities as are possessed by cities* . . . to provide for the public peace and health and safety of persons and property.[8] [Emphasis added.]

The argument is made that *Jones* is an outmoded rationale and is replaced by numerous cases that hold that only one governmental unit can hold jurisdiction over a highway. However, each of these cases deals with allegations of defects over the improved portion of a highway

[8] It is significant that the authority to construct and repair sidewalks under MCL 41.288a; MSA 9.585(4) is given by the Legislature under the power to regulate for the health, safety, and welfare of residents and is repeated in this empowerment statute for charter townships. This is another example of the interplay of constitutional and statutory provisions granting powers to the townships. The exercise of this power in the area of public sidewalks is not immune from liability pursuant to MCL 691.1401, 691.1402; MSA 3.996(101), 3.996(102).

designated for vehicular travel. The issue of pedestrian walkways alongside the improved portion is not the subject of defendant's cited cases. The reasoning of *Jones* can be found in later cases such as *Pomeroy v Dep't of Transportation,* 175 Mich App 556; 438 NW2d 264 (1988); *Union Twp v Mt Pleasant,* 381 Mich 82; 158 NW2d 905 (1968); *Michonski v Detroit,* 162 Mich App 485; 413 NW2d 438 (1987); *Davis v Chrysler Corp,* 151 Mich App 463; 391 NW2d 376 (1986).[9]

The majority opinion relies on *Court v Clark,* 19 Mich App 261; 172 NW2d 545 (1969), for the proposition that there is no provision imposing a duty upon the township to repair sidewalks adjacent to county roads. The *Court* case was based on a cause of action that arose before the enactment of MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.* Although the *Court* panel did not find liability under the predecessors of MCL 691.1401; MSA 3.996(101), it focused solely on those statutes. The panel in the *Court* case did not address the Supreme Court decision of *Ferguson,* the constitutional issues of the *Jones* case, or other statutes regarding the authority of townships. The issue whether jurisdiction of sidewalks was transferred from township to county along with the roads was not fully explored by the *Court* panel. Thus, the dissent believes that the *Court* opinion is much more narrow, and after analysis, should not be the definitive answer for the issue of sidewalk liability.

The *Court* opinion cited 1948 CL 242.5 as controlling for liability. However, that statute does

[9] The dissent acknowledges that *Michonski, supra,* and *Davis, supra,* held light poles to be actionable and that utility poles are expressly exempted now from MCL 691.1401(e); MSA 3.996(101)(e). But the analysis of jurisdiction with regard to portions outside the traveled portion of the road remains valid. This analysis was not overruled in *Schuerman v Dep't of Transportation,* 434 Mich 619; 456 NW2d 66 (1990).

not stand alone. Section 5 of the 1948 act stated that townships had no liability for bridges, culverts, and sidewalks *except as provided by the act.* Section 5 further stated that common-law liability was abolished. Overlooked by the *Court* decision was § 3 of the same act, which stated, in part, that townships, villages, and cities had to keep public highways, streets, and bridges *within their jurisdiction reasonably safe.*

The 1959 amendment of 1938 CL 242 excluded township liability specifically for state highways. As the panel in *Jones* explained, this exclusion was regarding a specific statutory exemption for state trunk lines. The *Jones* Court stated that if any other source would impose liability on the city, then it was liable because the amendment applied only to state trunk lines. This comports with the maxim that the expression of one thing implies the exclusion of other similar things. Thus, the 1959 amendment was not applicable to county roads. The *Court* panel should have found liability on the basis of this maxim. If predecessor liability is determined not to be continuous, then one only needs to look to the *Jones* opinion, which stated the obvious—since the effective date of MCL 691.1401; MSA 3.996(101), the liability of government is determined by that act alone and prior exclusions of liability for sidewalks were repealed by that act.

The *Jones* Court found, after examining the constitution and the statutes, sidewalk liability existed for the city. On the basis of the foregoing analysis, the term "city" could just as correctly be read "township." No distinguishing features exist between the two in this context except the illusory permit provision. Case law from at least 1914 to the present has made distinctions concerning juris-

dictional issues involving highways. The laws of this state support a finding of jurisdictional distinction between improved portions of a highway and rights of way. It is not a matter of concurrent jurisdiction for liability purposes under MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.* For this statutory liability, jurisdiction between the road as designed for vehicular travel and the sidewalk is separate and independent for counties and townships.

In conclusion, I would find that the township has the jurisdiction over sidewalks along roads within township boundaries when they are placed there by authority of the township. Pursuant to MCL 691.1402; MSA 3.996(102) there is liability on the part of the township for its failure to keep those sidewalks in reasonable repair for public travel.

I would reverse the decision of the trial court and remand for further proceedings.[10]

[10] The affidavit submitted by Canton states only that Canton did not *install* the sidewalk that was present on the date of the injury. It is unclear whether the sidewalk was installed by a contractor under an ordinance, by direction of the township planning commission (or other township body), or by petition to the county by fifty-one percent of the property owners. Perhaps the defendant is suggesting that the sidewalk was installed without township knowledge or authority.

PEOPLE v ARCOS

Docket No. 153492. Submitted February 1, 1994, at Grand Rapids. Decided August 1, 1994, at 9:20 A.M.

Ignacio G. Arcos pleaded guilty in the Eaton Circuit Court, Thomas S. Eveland, J., of possession with intent to deliver 225 grams or more but less than 650 grams of heroin. The defendant was sentenced to a prison term of ten to thirty years, despite the argument of the defense counsel that the court should make a downward departure from the statutory minimum sentence of ten years because the defendant was subject to deportation. The defendant appealed.

The Court of Appeals *held:*

1. A sentencing court retains discretion to depart from the statutory minimum sentence for possession with intent to deliver heroin if it finds on the record that objective and verifiable factors exist that support a finding that there are substantial and compelling reasons for the departure. Because the Legislature gave courts discretion to depart from the presumptively mandatory sentences only in exceptional cases, a court's discretion is narrowed to considering only the mitigating reasons involved in the actual criminal act and the defendant's individual characteristics. The defendant's almost certain deportation for this criminal act fits neither of those factors; accordingly, the court did not abuse its discretion in refusing to make a downward departure in the statutory minimum sentence.

2. Because the defendant's sentence was within the statutory minimum term in effect at the time of his sentencing, it is presumptively valid and proportionate. The defendant has failed to rebut that presumption.

Affirmed.

J. T. HAMMOND, J., concurring in the result, stated that only

---

REFERENCES

Am Jur 2d, Aliens and Citizens §§ 1037, 1043, 1065; Criminal Law § 624.

Validity of state statute imposing mandatory sentence or prohibiting granting of probation or suspension of sentence for narcotics offenses. 81 ALR3d 1192.

in extreme cases should a court's refusal to depart from a sentencing guidelines range be error; however, the fact that a defendant will be deported as a result of a conviction should be a factor that a court may consider in imposing sentence.

CONTROLLED SUBSTANCES — SENTENCES — MANDATORY MINIMUM SENTENCES — DEPARTURE — DEPORTATION.

It is not an abuse of discretion for a court to refuse to depart from the mandatory minimum sentence set by statute for certain controlled substance convictions, even though it is almost certain that a defendant will be deported (MCL 333.7401[4]; MSA 14.15[7401][4]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Jeffrey L. Sauter,* Prosecuting Attorney, and *William M. Worden,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Penny R. Beardslee*), for the defendant on appeal.

Before: HOLBROOK, JR., P.J., and SAWYER and J. T. HAMMOND,* JJ.

HOLBROOK, JR., P.J. Defendant pleaded guilty of possession with intent to deliver 225 grams or more but less than 650 grams of heroin, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), in exchange for the prosecutor dismissing the charge of conspiracy to deliver more than 225 grams or more but less than 650 grams of heroin and agreeing to a minimum sentence of no more than ten years. Defendant was sentenced to the statutory mandatory minimum prison term of ten years, with a thirty-year maximum term. Defendant appeals as of right. We affirm.

On appeal, defendant argues that the trial court erred in failing to depart from the mandatory minimum term of imprisonment. Defense counsel

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

had argued at defendant's sentencing for a downward departure from the mandatory minimum term, because defendant was subject to deportation. The trial court determined that defendant's impending deportation did not constitute a substantial and compelling reason to depart from the mandatory minimum prison term. Defendant now argues that the fact that he, most assuredly, will be deported constitutes an objective and verifiable factor that provides a substantial and compelling reason for the trial court to depart from the mandatory minimum prison term.

Under MCL 333.7401(4); MSA 14.15(7401)(4), a sentencing court retains discretion to depart from the minimum term if the court finds on the record that there are substantial and compelling reasons to do so. *People v Poppa,* 193 Mich App 184, 188; 483 NW2d 667 (1992). The trial court may depart from the mandatory minimum sentences for factors that are objective and verifiable. *People v Hill,* 192 Mich App 102, 105; 480 NW2d 913 (1991). Objective and verifiable factors include "actions and occurrences which are external to the minds of the judge, defendant and others involved in making the decision and must be capable of being confirmed." *People v Krause,* 185 Mich App 353, 358; 460 NW2d 900 (1990).

Although the imminent deportation of a defendant is certainly an action that is external to the mind of a judge and is capable of being confirmed, we believe that it is not an objective and verifiable factor to consider in determining whether substantial and compelling reasons exist to depart from the mandatory minimum sentence. The Legislature intended to give trial courts discretion to depart from the presumptively mandatory sentences only in exceptional cases. *People v Downey,* 183 Mich App 405, 416; 454 NW2d 235 (1990). The

trial court's discretion thus is narrowed to considering only the mitigating reasons involved in the actual criminal act and the defendant's individual characteristics. We believe that the fact that defendant is subject to deportation as a result of his involvement in this criminal act fits neither of these factors. See *United States v Alvarez-Cardenas,* 902 F2d 734, 737 (CA 9, 1990).

In addition, we find that defendant's sentence does not violate the principle of proportionality as set forth in *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). Because defendant's sentence was within the statutory minimum term in effect at the time of his sentencing, his sentence is presumptively valid and proportionate. *People v Williams,* 189 Mich App 400, 403-404; 473 NW2d 727 (1991); *Poppa, supra,* p 189. Defendant has failed to rebut this presumption. We conclude, therefore, that the trial court did not abuse its sentencing discretion. *Poppa, supra,* p 187.

Affirmed.

SAWYER, J. concurred.

J. T. HAMMOND, J., *(concurring).* I concur in the result. Only in the most extreme circumstances could a refusal to exceed the guidelines range, or to refuse to sentence below the guidelines range, be error. This sentence does not violate the principle of proportionality as set forth in *People v Milbourn,* 435 Mich 630; 462 NW2d 1 (1990). I believe, however, that the fact that the defendant *will* be deported as a result of the instant conviction *may* (not must) be considered by the sentencing court. Why should our taxpayers be required to feed, house, clothe, and provide medical care for the defendant for an *extra* four or five years—in our overcrowded prison systems—when upon release he will be deported?

PEOPLE v LAWRENCE

Docket No. 152765. Submitted May 18, 1994, at Detroit. Decided August 1, 1994, at 9:25 A.M. Leave to appeal sought.

Victor A. Lawrence pleaded nolo contendere in the Recorder's Court for the City of Detroit, A. George Best, II, J., to a charge of unarmed robbery. The court, relying on a presentence investigation report that included a presentence investigation report from another case against the defendant in a different court that revealed that the defendant had agreed to plead guilty of armed robbery in exchange for the dismissal of three other theft-related offenses, sentenced the defendant to seven to fifteen years' imprisonment. The defendant appealed.

The Court of Appeals *held:*

1. The defendant failed to preserve for appellate review any challenge to the use of the information regarding the dismissed charges by failing to request an evidentiary hearing at the time of sentencing in the present case.

2. The sentence was proportionate, and the sentencing court gave a thorough explanation for its departure from the sentence recommended by the sentencing guidelines. The court did not err in considering the fact that the defendant pushed the victim.

Affirmed.

SENTENCES — APPEAL — PRESERVING QUESTION — PRIOR DISMISSAL OF CHARGES.

A defendant fails to preserve for appellate review a challenge to a sentencing court's use of information in a presentence investigation report regarding charges that were dismissed in a different court in exchange for the defendant's plea of guilty in that court where the defendant is given an opportunity to challenge the accuracy or relevance of the dismissed charges at the time of sentencing but fails to do so (MCL 771.14[5]; MSA 28.1144[5]).

Frank J. Kelley, Attorney General, *Thomas L.*

REFERENCES

Am Jur 2d, Appeal and Error §§ 545, 867; Criminal Law § 527.
See ALR Index under Sentence and Punishment.

Casey, Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Sherrie P. Guess*), for the defendant on appeal.

Before: MICHAEL J. KELLY, P.J., and CORRIGAN and C. D. CORWIN,* JJ.

MICHAEL J. KELLY, P.J. Defendant pleaded no contest to a charge of unarmed robbery, MCL 750.530; MSA 28.798, and received a prison sentence of seven to fifteen years. He now appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion in considering several previous, similar charges against defendant that were dismissed as a result of a plea bargaining agreement in a different court. While it is true that "[a] sentencing court may consider the facts underlying uncharged offenses, pending charges, and acquittals," *People v Parr,* 197 Mich App 41, 46; 494 NW2d 768 (1992), these facts must be supported by reliable evidence, *People v Ewing (After Remand),* 435 Mich 443, 455 (opinion by BRICKLEY, J.), 463 (opinion by BOYLE, J.); 458 NW2d 880 (1990). The trial court in this case relied solely on the presentencing investigation report (PSIR), which incorporated a PSIR from another case against defendant in a different court. That report revealed that defendant had agreed to plead guilty of armed robbery in exchange for the dismissal of three other theft-related charges. Although the factual allegations of the dismissed charges were not independently

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

supported by record evidence, the trial court concluded, in large part on the basis of the dismissed charges, that defendant had a "social history" of theft-related assaults and sentenced him accordingly.

Because the PSIR from the prior case was included in the PSIR for the present offense, which defendant received, defendant had the opportunity to challenge the accuracy or relevancy of the dismissed charges at the time of sentencing in the present case. See MCL 771.14(5); MSA 28.1144(5). Neither defendant nor his attorney alleged that the charges were inaccurate or that he was innocent of them. No evidentiary hearing was requested. Counsel simply urged that there be no assumption of guilt. She suggested, "I don't think that anyone can make any assumptions about untried cases that were dismissed. There is no finding of guilt, there can be no assumption of guilt." To challenge the charges, counsel should have requested an evidentiary hearing; that she did not do so we ascribe to defense strategy. In *People v Hernandez,* 443 Mich 1, 18-19; 503 NW2d 629 (1993), the Supreme Court held that the remand procedure for challenging an alleged scoring error in the sentencing guidelines "should not be utilized for presentence issues that can be raised contemporaneously with the event giving rise to the challenge." The same reasoning applies by analogy to the present case. Accordingly, we conclude that defendant has failed to preserve the issue for appellate review.

With respect to the remaining sentencing challenges, we see no abuse of discretion in the trial court's attempt to fashion a punishment proportionate to the offense and the offender. *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). The sentencing guidelines recommend a minimum sen-

tence of one to four years. The trial court gave a thorough explanation at sentencing for its departure from the guidelines. *People v Adams,* 195 Mich App 267; 489 NW2d 192 (1992), modified on other grounds 441 Mich 916 (1993). The court did not err in considering the fact that defendant pushed the victim. *People v Duprey,* 186 Mich App 313, 317; 463 NW2d 240 (1990).

Affirmed.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO v DEPARTMENT OF MENTAL HEALTH

Docket No. 140834. Submitted October 12, 1993, at Detroit. Decided August 1, 1994, at 9:30 A.M. Leave to appeal sought.

The American Federation of State, County and Municipal Employees, AFL-CIO, Lola DeBois, and Shirley Towns brought an action in the Ingham Circuit Court against the Department of Mental Health and the Civil Service Commission. The action against the Department of Mental Health sought declaratory and injunctive relief with respect to the implementation of an August 13, 1990, department guideline that included a standard-form contract that would have instituted in all future contracts different obligations than those then existing between the department and the private organizations that contracted to provide group-home mental health services for the department. The plaintiffs asserted that the guideline adopted by the department was a rule within the meaning of the Administrative Procedures Act and, accordingly, that the standard-form contract was unenforceable because the department had not followed the formal rule-making procedures of the APA. The trial court, James R. Giddings, J., granted summary disposition for the department on the basis that the guideline was not a rule within the meaning of the APA and that the department did not have to comply with the formal rule-making procedures. The plaintiffs appealed.

The Court of Appeals *held:*

1. Although the trial court did not decide whether the plaintiffs have standing to bring this action, that question was raised below and is a question of law for which all the facts necessary for its resolution have been presented. Accordingly, that question properly is raised in this appeal.

2. Because plaintiff union, which represents employees of various private group-home providers that would be affected by the new standard-form contract, and the individual plaintiffs, who work for a private group-home provider that contracts

REFERENCES

Am Jur 2d, Administrative Law §§ 154, 304; Parties § 33.

See ALR Index under Administrative Law; Parties.

with the department, have a substantial interest and personal stake in the outcome of this controversy because of the controversy's effect on the terms and working conditions of employees working for those providers, the plaintiffs have standing to bring this action.

3. Although the decision of the department to contract with private group-home providers is a permissive exercise of its statutory powers, the guideline, including the incorporated standard-form contract, is a rule within the meaning of the APA and should have been promulgated pursuant to the rule-making procedures of the APA. Because the department promulgated the guideline and the included standard-form contract without following the statutory procedures, they are without legal authority or effect. The trial court erred in granting summary disposition for the department and in refusing to grant summary disposition for the plaintiffs.

Reversed and remanded.

CONNOR, J., dissenting, stated that the decision of the trial court should be affirmed, because the guideline at issue clearly is a guideline, which is binding only on the agency, and not a rule, which is binding on outside parties and purports to have the force and effect of law, and, accordingly, is not subject to the rule-making procedures of the APA.

1. COURTS — STANDING — MENTAL HEALTH PROVIDERS — CONTRACTS.

A union representing employees of private group-home providers of services for the Department of Mental Health and the employees of those providers have standing to bring an action against the Department of Mental Health challenging a guideline adopted by the department that incorporates the standard-form contract used by the department to contract for group-home services.

2. ADMINISTRATIVE LAW — DEPARTMENT OF MENTAL HEALTH — MENTAL HEALTH PROVIDERS — CONTRACTS — ADMINISTRATIVE PROCEDURES ACT.

A guideline adopted by the Department of Mental Health that prescribes the provisions of the mandatory standard-form contract used by the department to contract for mental health services with private group-home providers is a rule within the meaning of the Administrative Procedures Act and is subject to the formal rule-making procedures of the APA (MCL 24.207; MSA 3.560[107]).

Webb, Hildebrandt & Paton, P.C. (by *L. Roger Webb* and *Alison L. Paton*), for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Gary P. Gordon* and *Richard P. Gartner,* Assistant Attorneys General, for the Department of Mental Health.

Before: JANSEN, P.J., and CONNOR and R. L. ZIOLKOWSKI,* JJ.

JANSEN, P.J. Plaintiffs appeal as of right from an order of the Ingham Circuit Court granting defendant Department of Mental Health partial summary disposition pursuant to MCR 2.116(C)(10) and 2.116(I)(2). We reverse.

The State of Michigan is responsible for providing mental health services. Const 1963, art 8, § 8. The Mental Health Code, MCL 330.1001 *et seq.*; MSA 14.800(1) *et seq.,* delineates the powers and duties of the Department of Mental Health (DMH) and requires the DMH to ensure that adequate and appropriate mental health services are available to all citizens in this state. The DMH is permitted to operate such facilities directly or may contract with a nonpublic entity to fulfill those duties or powers granted by statute to the DMH. MCL 330.1116(j); MSA 14.800(116)(j).

Pursuant to this statutory authority, the DMH has utilized a standard contract (the DMH-3800B contract) to contract with private group residential home providers in which developmentally disabled persons are placed. On August 13, 1990, the DMH issued a proposed guideline revision that would establish a new contract for the private group-home providers. The guideline included a new standard DMH-3800B contract, which is incorporated by reference as part of the guideline. The proposed contract contained a number of signifi-

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

cant changes. It is undisputed that private group-home providers must enter into the contract in order to do business with the DMH. Neither the private provider nor the DMH staff have the power to modify any terms of the new DMH-3800B contract.

Plaintiffs Lola DeBois and Shirley Towns are employed by Michigan Community Service, Inc., a nonprofit corporation that provides specialized residential services for developmentally disabled adults. Plaintiff American Federation of State, County and Municipal Employees, AFL-CIO, (AFSCME) is a voluntary, unincorporated association that represents public employees. The AFSCME has been seeking to represent direct-care workers, such as DeBois and Towns, and has received from the Michigan Employment Relations Commission, the Employment Relations Board, and this Court favorable rulings finding the DMH to be a joint employer. *Michigan Council 25, AFSCME v Louisiana Homes, Inc,* 192 Mich App 187; 480 NW2d 280 (1991), vacated 441 Mich 883 (1992), aff'd on remand *Michigan Council 25, AFSCME v Louisiana Homes, Inc (On Remand),* 203 Mich App 213; 511 NW2d 696 (1993). Correspondence issued by the director of the DMH states that the DMH's motive in attempting to change the provisions of the standard contract is to avoid the effect of the *Louisiana Homes* rulings.

Plaintiffs filed a two-count complaint on October 29, 1990. Count I concerned defendant Civil Service Commission and is not relevant to the instant appeal. Count II sought declaratory and injunctive relief against the DMH, requesting the trial court to enjoin the DMH from instituting revisions of departmental guidelines regarding standard contracts between the DMH and private organizations providing residential mental health services.

Plaintiffs contend that the contract was actually an administrative rule and that the DMH was required to follow the formal rule-making procedures of the Administrative Procedures Act, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*

On November 29, 1990, plaintiffs requested a preliminary injunction, which was granted by the trial court. The trial court subsequently denied the DMH's motion to vacate the preliminary injunction. Plaintiffs then filed a motion for summary disposition regarding count II of the complaint. The trial court denied plaintiffs' motion for summary disposition, but granted summary disposition for the DMH pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2).

As a preliminary matter, we must first determine whether plaintiffs have standing to bring this action. Although the DMH raised this issue below, the trial court did not decide it. Both parties have briefed thoroughly this issue before this Court. We, therefore, will review this issue, because it involves a question of law for which the facts necessary for its resolution have been presented. *Gillette Co v Dep't of Treasury,* 198 Mich App 303, 311; 497 NW2d 595 (1993).

Contrary to the DMH's argument, standing and subject-matter jurisdiction are not the same. *Dep't of Social Services v Carter,* 201 Mich App 643, 646; 506 NW2d 603 (1993); *Altman v Nelson,* 197 Mich App 467, 472; 495 NW2d 826 (1992). It is clear that plaintiffs have standing in this case, because they have shown a substantial interest and a personal stake in the outcome of the controversy. *Altman,* p 475. The AFSCME has a substantial interest and personal stake in the outcome of this case, because the DMH's director, in letters, has stated that the changes in the contract are designed to avoid the ruling that the DMH is a joint employer and that

the AFSCME, therefore, may organize and represent the direct-care workers. Plaintiffs Lola DeBois and Shirley Towns, as direct-care workers for one of the private group-home providers, have a substantial interest and personal stake in the outcome of this case, because the changes in the contract directly affect the terms and conditions of their employment. Accordingly, plaintiffs have standing to bring this suit.

Next, we must determine if the guideline and standard contract constitute a rule within the meaning of the APA and, if so, whether the DMH's attempt to change the standard contract violates the promulgation procedures set forth in the APA. Because the trial court granted summary disposition to the DMH pursuant to MCR 2.116(C)(10), our review of this issue is de novo, because we must review the record to determine whether the DMH was entitled to judgment as a matter of law. *Michigan Mutual Ins Co v Dowell,* 204 Mich App 81, 86; 514 NW2d 185 (1994).

Section 7 of the APA defines rule as:

> "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission thereof . . . . [MCL 24.207; MSA 3.560(107)].

The trial court found that the guideline and standard contract is not a rule on the basis of the provision excluding from the definition of a rule the following:

> A decision by an agency to exercise or not to exercise a permissive statutory power, although

> private rights or interests are affected. [MCL 24.207(j); MSA 3.560(107)(j)].

Our Supreme Court has noted that "rule" is defined broadly to defeat agencies' inclinations to label as bulletins, announcements, guides, and interpretive bulletins those directives that are actually rules. *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services,* 431 Mich 172, 183; 428 NW2d 335 (1988). Further, the situations in which § 7(j) exemptions have been found to apply are those in which explicit or implicit authorization for the action in question have been found. *Detroit Base Coalition,* pp 187-188.

The DMH claims that the above exemption applies pursuant to MCL 330.1116(j); MSA 14.800(116)(j), which states that the DMH "may enter into any agreement, contract, or arrangement with any public or nonpublic entity that is necessary or appropriate to fulfill those duties or exercise those powers that have by statute been given to the department." This provision allows the DMH to contract with private group-home providers; however, the issue here is whether the contract itself, which must be utilized by the private group-home providers and may not be modified, constitutes a rule within the meaning of the APA. Thus, while the act of contracting with a private group-home provider is permissive, the terms of the contract and the requirement that the private group-home provider abide by the contract are not. *Spear v Michigan Rehabilitative Services,* 202 Mich App 1, 4-5; 507 NW2d 761 (1993).

The standard contract is very specific. It is seventeen pages long and provides, inter alia, for funding of the group homes, discrimination poli-

cies; compliance with DMH rules, guidelines, and directives; submission of financial statements; requirements regarding direct-care worker training and staff levels; requirements regarding patient rights and reporting requirements, and personnel policies and procedures including bonuses and evaluations. The guideline, which incorporates the standard contract by reference, is specifically intended to rescind and replace the former standard contract. Therefore, the guideline and standard contract, which must be read together, are not merely an explanatory guideline that would not be subject to the promulgation procedures of the APA. *Jordan v Dep't of Corrections,* 165 Mich App 20, 25; 418 NW2d 914 (1987).

Accordingly, while the DMH's decision to contract with private group-home providers is a permissive exercise of its statutory power, the guideline and the standard contract, which is required to be entered into by a private group-home provider and may not be modified, are not exempt from the definition of a rule and must be promulgated as a rule pursuant to the APA. *Spear, supra,* p 5; *Palozolo v Dep't of Social Services,* 189 Mich App 530; 473 NW2d 765 (1991) (adopting Judge SHEPHERD's dissenting opinion in *Pyke v Dep't of Social Services,* 182 Mich App 619, 633-636; 453 NW2d 274 (1990). Because the DMH failed to promulgate the guideline and standard contract pursuant to the APA, its attempt to revise the standard contract is without legal authority or effect.

We reverse the trial court's grant of summary disposition in favor of the DMH and remand for the court to enter summary disposition in favor of plaintiffs. We do not retain jurisdiction.

R. L. ZIOLKOWSKI, J., concurred.

CONNOR, J. *(dissenting).* I dissent. I would hold

that the Department of Mental Health (DMH) did not violate the Administrative Procedures Act, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*, by revising the standard contract provisions at issue without treating the revision as the making of a rule within the meaning of the APA.

Generally, a "rule" is an agency policy of general applicability that prescribes the practice of the agency. MCL 24.207; MSA 3.560(107). However, the APA definition of rule specifically excludes "guidelines" that are promulgated by the agency. See MCL 24.207(h); MSA 3.560(107)(h). "Guidelines" are declarations of agency policy binding on the agency issuing them, but not on any other person, which do not have the force or effect of law. MCL 24.103(6); MSA 3.560(103)(6). Guidelines necessarily prescribe some agency practice.

I am satisfied that the guideline that accompanied the adoption of new standard contract language is actually a guideline and not a rule. It is binding only on the DMH and on no other person. Moreover, it does not purport to have the force or effect of law: it expressly allows for the director of the DMH to authorize departures from the standard contract language.

I am also satisfied that adopting standard contract language is not rulemaking. Standard contract language is binding on no one, neither the DMH nor anyone else, until someone agrees to be bound by the language. Even taking a position that no deviation from the language will be permitted is simply hard bargaining: parties seeking to contract with the DMH are free to counteroffer with any language they wish. The DMH has the statutory power to contract as is appropriate. MCL 330.1116(j); MSA 14.800(116)(j). The DMH's decision to contract with private group providers is a per-

missive exercise of its statutory power, and the department has discretion to determine what is necessary or appropriate language in the contract to fulfill the duties imposed on it. If an agency's decision whether to exercise such statutory power is not rulemaking, MCL 24.207(j); MSA 3.560(107)(j), then I agree with the trial court that the agency's decision regarding the terms under which it will exercise that power is not rulemaking.

I would affirm.

MICHIGAN SOFT DRINK ASSOCIATION v DEPARTMENT OF TREASURY

Docket Nos. 141168, 141586. Submitted December 20, 1993, at Detroit. Decided August 1, 1994, at 9:35 A.M. Leave to appeal sought.

The Michigan Soft Drink Association brought an action in the Ingham Circuit Court against the Department of Treasury, seeking a declaration that the unclaimed deposit amendments of the act regarding beverage containers (the Bottle Law), 1989 PA 148, MCL 445.573b; MSA 18.1206(13b) and MCL 445.573d; MSA 18.1206(13d), are unconstitutional as a taking without just compensation of private property belonging to the plaintiff's members. The plaintiff also sought a permanent injunction against enforcement of the amendments. Several retail merchants were allowed to intervene to challenge the plaintiff's standing to bring the action and to oppose the plaintiff's motion for partial summary disposition. The court, Thomas L. Brown, J., found that the plaintiffs had standing to bring the action and entered partial summary disposition for the plaintiffs, finding that the unclaimed deposit amendments were unconstitutional under US Const, Ams V and XIV, and Const 1963, art 10, § 2. The court therefore entered the permanent injunction requested by the plaintiffs. The defendant and the intervening defendants filed separate appeals. The appeals were consolidated.

The Court of Appeals *held:*

The trial court properly found that the plaintiffs had standing to bring the action, but erred in finding the unclaimed

REFERENCES

Am Jur 2d, Constitutional Law §§ 189, 219, 580-584, 590, 591, 600; Eminent Domain §§ 73, 80, 150, 157, 173; Parties §§ 31, 33.

Supreme Court's views as to what constitutes "taking," within meaning of Fifth Amendment's prohibition against taking of private property for public use without just compensation. 89 L Ed 2d 977.

Supreme Court's views as to what constitutes "private property" within meaning of prohibition, under Federal Constitution's Fifth Amendment, against taking of private property for public use without just compensation. 91 L Ed 2d 582.

deposit amendments to be unconstitutional and in entering the permanent injunction.

1. The plaintiff has standing pursuant to MCR 2.201(B)(4), because the purposes for which it exists qualify as protective or improvement purposes and because it seeks to test the constitutionality of a statute relating to an allegedly illegal expenditure of state funds. The plaintiff's interest in this matter differs from the interest of the citizenry at large.

2. When the Legislature amended the Bottle Law, the Initiated Law of 1976, MCL 445.571 *et seq.*, MSA 18.1206(11) *et seq.*, by enacting 1989 PA 148, which contained the unclaimed deposit amendments, the manufacturers and distributors no longer had a private property interest in the retention of prospective unredeemed bottle deposits. Therefore, the plaintiff cannot demonstrate a cognizable interest in affected private property and cannot prevail in its claims pertaining to the takings clauses. The amendments did not effect a taking because the plaintiff's members possessed no right to the deposits under the amended act. Any property rights of the plaintiff's members that arose from the original act were subject to amendment. The Legislature had the authority to settle the question of ownership of the unrefunded deposits by adopting 1989 PA 148.

3. In the alternative, even assuming that the plaintiff's members have some property interest in future unclaimed deposits, the regulatory action involved here is not a permanent physical occupation of property that amounts to a taking per se. The governmental regulation of property here did not constitute a taking. Because the prospective amendments are rationally related to the general welfare, an alteration of the plaintiff's expectations is appropriate. A state may exact costs from private business as a reasonable use of police powers.

Reversed and remanded.

1. CONSTITUTIONAL LAW — BOTTLE LAW — UNCLAIMED DEPOSITS.

The unclaimed deposit amendments of the bottle law do not offend the takings clauses of the federal or state constitutions (US Const, Ams V, XIV; Const 1963, art 10, § 2; 1989 PA 148, MCL 455.573b, 455.573d; MSA 18.1206[13b], 18.1206[13d]).

2. PARTIES — STANDING.

Standing denotes a party's interest in the outcome of litigation that ensures sincere and vigorous advocacy; standing requires a demonstration that a substantial interest of the plaintiff will be affected detrimentally in a manner different from the interests of the citizenry at large.

3. ACTIONS — PARTIES — STANDING.

A domestic nonprofit corporation organized for civic, protective, or improvement purposes has standing to bring an action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating to such an expenditure (MCR 2.201[B][4]).

4. CONSTITUTIONAL LAW — PRIVATE PROPERTY — TAKEN FOR PUBLIC USE.

The federal and state constitutions protect private property from being taken for public use without just compensation; to prevail on a takings claim, a claimant first must demonstrate a cognizable interest in the affected private property (US Const, Ams V, XIV; Const 1963, art 10, § 2).

5. CONSTITUTIONAL LAW — PRIVATE PROPERTY — STATUTES.

Property rights that arise from a statutory scheme are subject to amendment and may be taken away prospectively by amendment without violating the constitutional prohibition against taking private property without just compensation (US Const, Ams V, XIV; Const 1963, art 10, § 2).

6. CONSTITUTIONAL LAW — POLICE POWERS — PROPERTY — TAKEN FOR PUBLIC USE — MONEY.

Although both tangible and intangible property may be the subject of an impermissible taking for public use, there is no property right to potential or future profits; absent legal entitlement to specific profits, there can be no property interest and thus no taking without just compensation; an appropriation of money does not constitute a taking per se, as would a physical occupation of property or a denial of all its beneficial use.

7. CONSTITUTIONAL LAW — PRIVATE PROPERTY — TAKEN FOR PUBLIC USE.

Three factors should be considered in identifying a taking forbidden by the taking clause: the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action (US Const, Ams V and XIV).

Dykema Gossett (by *William J. Perrone, Richard D. McLellan,* and *Ronald J. Torbert*), and *Tom Downs,* for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L.*

Casey, Solicitor General, and *Clive D. Gemmill* and *Thomas R. Wheeker,* Assistant Attorneys General, for the Department of Treasury.

Bellanca, Beattie & De Lisle, P.C. (by *James C. Zeman* and *James V. Bellanca, Jr.*), for Associated Food Dealers of Michigan and others, intervening defendants.

Amici Curiae:

Michigan United Conservation Clubs, and others (by *M. Carol Bambery*).

Before: SAWYER, P.J., and CORRIGAN and HOOD, JJ.

CORRIGAN, J. In this case of first impression, we hold that the unclaimed deposit amendments of the act regarding beverage containers (hereafter referred to as the Bottle Law), 1989 PA 148, MCL 445.573b; MSA 18.1206(13b) and MCL 445.573d; MSA 18.1206(13d), do not offend the takings clauses of US Const, Ams V and XIV, and Const 1963, art 10, § 2. Because these amendments constitute a valid exercise of legislative power, we order dissolution of the trial court's permanent injunction against enforcement of 1989 PA 148.

Plaintiff Michigan Soft Drink Association (MSDA), whose members consist of Michigan manufacturers and distributors of carbonated beverages, challenged the constitutionality of 1989 PA 148 as a taking of MSDA members' private property without just compensation. By stipulation of the parties, several retail merchants intervened to challenge plaintiff's standing and to oppose plaintiff's motion for partial summary disposition.

The circuit court first ruled that plaintiff had standing. Regarding plaintiff's motion for partial

summary disposition, the court held that MCL 445.573b; MSA 18.1206(13b) and MCL 445.573d; MSA 18.1206(13d), which prospectively impose duties on manufacturers and distributors annually to report bottle deposits collected and refunds paid, and to pay unrefunded deposits to the Department of Treasury, effect an unlawful taking of private property for public use without just compensation, in violation of US Const, Ams V and XIV, and Const 1963, art 10, § 2. The court permanently enjoined enforcement of 1989 PA 148, MCL 445.573a; MSA 18.1206(13a) and MCL 445.573c; MSA 18.1206(13c). Defendants appealed, their appeals were consolidated, and we reverse.

I

STATUTORY SCHEME

The concerns of Michigan's citizens about environmental damage and financial burdens caused by discarded beverage containers led the people to approve the Initiated Law of 1976, MCL 445.571 *et seq.*; MSA 18.1206(11) *et seq.*, commonly known as the Bottle Law, which was effective December 3, 1978. The parties essentially agree on the mechanics of the Bottle Law's operation. The law prohibits dealers from selling to consumers beverages in nonreturnable containers for any off-premises consumption of beer and soft drinks,[1] MCL 445.572(1); MSA 18.1206(12)(1). A purchaser must pay at least a ten-cent deposit on a returnable container. MCL 445.571(d); MSA 18.1206(11)(d). In turn, a dealer must pay a refund value of at least ten cents to a

[1] MCL 445.571(g); MSA 18.1206(11)(g) defines a dealer as anyone who sells beverages in beverage containers to consumers. Subsection b of that section defines a beverage container as an airtight metal, glass, paper, or plastic container, or a container composed of a combination of these materials, which, at the time of sale, contains one gallon or less of a beverage.

purchaser who returns an empty container of the same size, kind, and brand of beverage that the dealer sells. *Id.*; MCL 445.572(4); MSA 18.1206(12)(4). The dealer may then present the empty container to any manufacturer or distributor who sells the same size, kind, and brand of container; a distributor or manufacturer must accept the empty container and pay its full refund value. MCL 445.572(6); MSA 18.1206(12)(6). A manufacturer or distributor may originate a deposit on any beverage container it sells. MCL 445.572(11); MSA 18.1206(12)(11).

After the voters approved the Initiated Law of 1976, manufacturers and dealers originated deposits on returnable beverage containers in anticipation of their duty to pay the refund value to dealers. Because consumers did not return all containers for their refund value, unredeemed deposits in an unknown amount began to accumulate.[2] The 1976 legislation was silent about the ownership of these unredeemed deposits. In the absence of any explicit legislative directive, manufacturers and distributors kept all the unredeemed deposits.

The Attorney General opined that unclaimed deposits were not subject to escheat under the Initiated Law of 1976, that the deposits belonged to the collectors of those deposits, and that the containers belonged to the purchasers. The Attorney General also concluded, however, that appropriate legislation could render unclaimed deposits subject to escheat. OAG 1989-1990, No 6578, pp 84-89 (April 25, 1989).

[2] The amount of unredeemed deposits is unknown on this record. Plaintiff did not disclose the actual amount. A recent study estimates that the annual income from unclaimed deposits is between $26 million and $121 million a year. Webster & Pratt, *Unclaimed Beverage Container Deposits: An Update,* Michigan Commentary (Public Sector Consultants, Inc, June 29, 1988).

In deciding this case, the circuit court acknowledged that the current deposit structure would not exist in the absence of state action and that the 1976 law imposed an artificial value on empty returnable containers. The court recognized that the advent of new product technology in the form of cheap nonreturnable containers had rendered obsolete the former practice of some beverage container manufacturers of charging deposits on returnable bottles. Were it not for the Bottle Law, manufacturers and distributors would not charge deposits on nonreturnable containers equal to their statutory refund value.

Because of public sentiment against windfall profits to distributors and manufacturers from the unredeemed deposits, the Legislature explicitly amended the Bottle Law to provide that unclaimed deposits on returnable containers are considered the property of the purchaser, not the manufacturer or distributor, 1989 PA 148, MCL 445.573d; MSA 18.1206(13d). Further, distributors or manufacturers are to report annually to the Department of Treasury the total dollar amounts of deposits collected and refunds paid. If a distributor's or manufacturer's total annual deposits exceed the total annual value of refunds, the excess must be remitted to the Department of Treasury for deposit in a revolving fund, MCL 445.573b; MSA 18.1206(13b). The Department of Treasury is to disburse annually seventy-five percent of the unredeemed bottle fund to the Unclaimed Bottle Fund. The remaining twenty-five percent is to be apportioned to dealers on the basis of the percentage of empty returnable containers each dealer handles. See MCL 445.573c; MSA 18.1206(13c).

1989 PA 148 was made contingent upon the enactment of what later became 1989 PA 157, which directed utilization of the Unclaimed Bottle

Fund for specified environmental and public purposes, MCL 299.609a *et seq.*; MSA 13.32(9a) *et seq.* For the first ten years, the unclaimed deposits will remain in the Unclaimed Bottle Fund. Thereafter, the Department of Treasury will disburse one-third of the proceeds to the Environmental Response Fund, one-third to the Long-Term Maintenance Trust Fund, and one-third to the Clean Michigan Fund, MCL 299.609; MSA 13.32(9), MCL 299.609c; MSA 13.32(9c), MCL 299.375; MSA 13.33(5).

II

PLAINTIFF'S STANDING TO SUE

Defendants first contend that plaintiff lacks standing to sue because it has failed to demonstrate any direct economic injury from the unclaimed deposits amendments. We affirm the circuit court's ruling that plaintiff has standing to bring this action. Standing denotes "a party's interest in the outcome of litigation that ensures sincere and vigorous advocacy." *House Speaker v Governor,* 443 Mich 560, 572; 506 NW2d 190 (1993); *Taylor v Blue Cross & Blue Shield of Michigan,* 205 Mich App 644; 517 NW2d 864 (1994). Evidence of a commitment to engage in litigation alone, however, is insufficient to confer standing. *House Speaker v State Administrative Bd,* 441 Mich 547, 554; 495 NW2d 539 (1993). "Standing requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." *Id.* Defendants contend that the lack of direct economic injury to plaintiff defeats standing, citing *California Bankers Ass'n v Shultz,* 416 US 21; 94 S Ct 1494; 39 L Ed 2d 812 (1974). Although this argument certainly has persuasive force under

relevant federal standards, Michigan does not always subscribe to federal authority on standing questions. *House Speaker v Governor, supra.* Instead, plaintiff has standing pursuant to MCR 2.201(B)(4), which provides in part:

> An action to prevent illegal expenditure of state funds *or to test the constitutionality of a statute relating to such an expenditure may be brought:*
> (a) in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes . . . . [Emphasis added.]

Plaintiff, a domestic nonprofit Michigan corporation, exists to promote the strength and well-being of the Michigan soft drink industry and to influence legislation and public policies affecting the soft drink industry. These purposes qualify as protective or improvement purposes. 1989 PA 148 not only directs the collection and retention of unredeemed deposits, it also directs expenditure of those deposits in subsequent years, MCL 445.573c; MSA 18.1206(13c); 1989 PA 157, MCL 299.609a; MSA 13.32(9a). Accepting, as we must, the truth of plaintiff's allegation in the complaint that the statutory scheme would effect an illegal taking, we conclude that plaintiff has standing to litigate this matter because it seeks to test the constitutionality of a statute relating to an allegedly illegal expenditure of state funds. *House Speaker v Governor, supra.*

Defendants rely principally on *Michigan License Beverage Ass'n v Behnan Hall, Inc,* 82 Mich App 319; 266 NW2d 808 (1978), to defeat plaintiff's standing to sue. In *License Beverage,* the association's stated purpose was to educate its members, licensees under the Liquor Control Act, regarding their moral, ethical, and civic responsibilities. *Id.* at 325, n 3. The organization sought injunctive

relief to enforce provisions of the Liquor Control Act. *Id.* at 323-324. This Court held that the association lacked standing because it was not constituted for representative purposes and its corporate purposes were unrelated to litigation purposes. *Id.* at 325-326. By contrast, the complaint in this case specifically alleges that plaintiff exists to represent the rights and interests of its members. Plaintiff's interest obviously differs from the interest of the citizenry at large. In light of MCR 2.201(B)(4) and *House Speaker v Governor, supra,* we conclude that the circuit court properly found that plaintiff has standing to pursue this litigation.

III

TAKINGS CLAUSE

Defendants contend that the circuit court erred in holding that the unclaimed deposits amendments of the Bottle Law, 1989 PA 148, MCL 445.573b; MSA 18.1206(13b) and MCL 445.573d; MSA 18.1206(13d), violate the takings clauses of the federal and state constitutions. They argue that, after the Legislature declared that unredeemed deposits belong to the purchasers, manufacturers and distributors have no private property interest in the retention of prospective unredeemed bottle deposits. We agree.

We begin from the premise that legislative enactments are presumed constitutional, absent a clear showing to the contrary. The party challenging the constitutionality of legislation bears the burden of proof. *Caterpillar, Inc v Dep't of Treasury,* 440 Mich 400; 488 NW2d 182 (1992). Both Const 1963, art 10, § 2 and the Fifth Amendment protect private property from being taken for public use without just compensation. US Const, Ams V and XIV; Const 1963, art 10, § 2; *Penn Central*

Transportation Co v New York City, 438 US 104, 122; 98 S Ct 2646; 57 L Ed 2d 631 (1978); *Lansing v Edward Rose Realty, Inc,* 442 Mich 626, 631; 502 NW2d 638 (1993). In order to prevail on a takings claim, a claimant first must demonstrate a cognizable interest in the affected private property. See *Charles Murphy, MD, PC v Detroit,* 201 Mich App 54; 506 NW2d 5 (1993); *Ohio Student Loan Comm v Cavazos,* 900 F2d 894, 898-899 (CA 6, 1990). Plaintiff has failed in this burden. It has not demonstrated a property interest in its members' retention of future unredeemed deposits.

After the circuit court had already rendered its opinion in this case, the supreme courts of Massachusetts and Maine upheld the constitutionality of similar amendments of their states' bottle laws against takings clause challenges brought by wholesalers' associations in their states. *Massachusetts Wholesalers of Malt Beverages, Inc v Commonwealth,* 414 Mass 411; 609 NE2d 67 (1993) (*Mass Wholesalers II*); *Maine Beer & Wine Wholesalers Ass'n v Maine,* 619 A2d 94 (Me, 1993). Massachusetts originally enacted a bottle law analogous to the Initiated Law of 1976, Mass Gen, L ch 94, §§ 321-327. Its law did not address the problem of unclaimed deposits. The supreme court ruled that unclaimed bottle deposits belonged to the manufacturers and distributors, in the absence of an explicit legislative directive. *Massachusetts Wholesalers of Malt Beverages, Inc v Attorney General,* 409 Mass 336; 567 NE2d 183 (1991) (*Mass Wholesalers I*). The Massachusetts legislature thereafter amended its bottle law to require the maintenance of separate accounts for the benefit of consumers and the commonwealth, providing specifically that "for no purposes are amounts in such fund to be regarded as income of said bottlers or distributors." Mass Gen, L ch 94, § 323(h).

Just as in this case, Massachusetts wholesalers again filed suit, asserting that Mass Gen, L ch 94, § 323(h) effected a taking without just compensation. *Mass Wholesalers II, supra.* The supreme court rejected this argument, holding that the amendment did not effect a taking because the plaintiffs possessed no right to the deposits under the amended bill. *Mass Wholesalers II, supra,* 609 NE2d 69. The court reasoned that any rights arose from the original statutory scheme, and those rights were subject to amendment. The court rejected the wholesalers' claims of a continuing common-law right to the deposits, and found any preexisting rights the wholesalers enjoyed derived from statute. Before the enactment of the bottle law, the wholesalers had not charged deposits on these containers. After enactment, the only deposits charged equaled the statutory refund value:

> The plaintiffs' right to the deposits created under the original bottle bill, as interpreted in *Mass Wholesalers, supra,* does not translate into a similar right to these deposits under the bottle bill, as now amended. "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Regents of State Colleges v Roth,* 408 US 564, 577; 92 S Ct 2701, 2709; 33 L Ed 2d 548 (1972). *German v Commonwealth* [410 Mass 445, 450; 574 NE2d 336 (1991)]. What the Legislature granted in the original bottle bill, the Legislature can take away by amendment. [609 NE2d 70.]

We find the analysis in *Mass Wholesaler II* persuasive. See, also, *Webb's Fabulous Pharmacies, Inc v Beckwith,* 449 US 155, 161; 101 S Ct 446; 66 L Ed 2d 358 (1980); *Verbison v Auto Club Ins Ass'n,* 201 Mich App 635, 639; 506 NW2d 920

(1993) (property interests are not created by the constitution, but are defined by rules or understandings from independent sources, such as state laws).

We reject plaintiff's argument that the common law of sale and return contracts establishes that the deposits are its property, in reliance on *Goebel Brewing Co v State Bd of Tax Administration,* 306 Mich 222; 10 NW2d 835 (1943). The deposit scheme reviewed in *Goebel* was not a creature of the Legislature. *Id.* Unlike *Goebel,* but like the transactions at issue in *Massachusetts Wholesalers, supra,* the deposit transactions in the instant case occur artificially, as a result of state mandate. Although the Bottle Law does not mandate that manufacturers and distributors originate deposits, the law makes such an event inevitable. MCL 445.572(6); MSA 18.1206(12)(6) and MCL 445.572(12); MSA 18.1206(12)(12). Plaintiff essentially concedes this point; its members charge a deposit in recognition of their obligation to pay the refund value. Absent the statutory refund scheme, the manufacturers and distributors would not charge deposits on containers.

Plaintiff does not contend that its members charged deposits before the approval of the Initiated Law of 1976. Because the deposit system is a creature of the Legislature, the Legislature may define its dimensions. Nor does plaintiff argue or provide authority that the Legislature is barred from altering the conceptions of property derived from the common law. The Legislature had authority to settle the question of ownership by its adoption of the 1989 amendments. As *Mass Wholesalers II, supra,* 609 NE2d 73 observed:

> "As a broad principle of jurisprudence rather than as a result of the evolution of legal rules, it is

> clear that a State, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, belonging to unknown persons." *Standard Oil Co v New Jersey,* 341 US 428, 435-436; 71 S Ct 822, 827; 95 L Ed 1078 (1951). The abandoned property scheme set up in the amendment is proper.

The Maine Supreme Court has also upheld amendments of its bottle law analogous to 1989 PA 148 against state and federal takings clause challenges. Employing a somewhat different analysis, that court concluded that amendments requiring sellers to remit fifty percent of unclaimed deposits to the state amounted to a valid environmental regulation falling squarely within the state's police powers. *Maine Beer & Wine Wholesalers v Maine, supra.* In the alternative, even assuming that plaintiff's members have some property interest in future unclaimed deposits, we adopt the analysis of the Maine Supreme Court:

> Although both tangible and intangible property may be the subject of an impermissible taking, there is no property right to potential or future profits. *York Hosp v Maine Health Care Fin Comm'n,* 719 F Supp 1111, 1121 (D Me, 1989) ("Absent legal entitlement to specific profits, there can be no property interest, and thus, no taking."); *Seven Islands Land Co v Maine Land Use Regulation Comm'n,* 450 A2d 475, 482, n 10 (ME, 1982) (citing *Andrus v Allard,* 444 US 51, 66; 100 S Ct 318, 327; 62 L Ed 2d 210 [1980]). Furthermore, an appropriation of money does not constitute a per se taking, as would a physical occupation of property or a denial of all its beneficial use. *United States v Sperry Corp,* 493 US 52, 62, n 9; 110 S Ct 387, 395, n 9; 107 L Ed 2d 290 (1989) ("It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money

> is fungible. . . . Such a rule would be an extravagant extension of the [definition of per se takings].") *Accord Wellman v Department of Human Servs,* 574 A2d 879, 885 (ME, 1990) ("In order for there to be a taking . . . there must be a physical invasion of private property or a substantial impairment of its use and enjoyment. The concept of a taking does not apply to an overpayment of money to the state by a citizen, . . . or a fine under a statute later declared to be unconstitutional." [citations omitted]). [619 A2d 97-98.]

The Maine court recognized that its bottle law fell squarely within the police powers. It observed that the amendments intended to place cost burdens posed by disposable containers on the industry, rather than the public. The court opined that the Maine legislature intended that the cost of unreturned containers must be borne by the industry that profits from their sale. The court rejected the bottlers' claim of a taking per se:

> The challenged amendment does not authorize a physical invasion or confiscation of the industry's property but merely regulates its sale of beverage containers by making it financially accountable for those containers not returned. *See Yee v City of Escondido,* 503 US —, —; 112 S Ct 1522, 1529; 118 L Ed 2d 153, 166 (1992) (The existence of a wealth transfer does not "convert regulation into physical invasion."); *Prudential Ins Co of Am v Insurance Comm'r,* 293 A2d 529, 537 (Me, 1972). [619 A2d 99].

The regulatory action involved here is not a permanent physical occupation of property that amounts to a taking per se. *Loretto v Teleprompter Manhattan CATV Corp,* 458 US 419; 102 S Ct 3164; 73 L Ed 2d 868 (1982); *Electro-Tech, Inc v Campbell Co,* 433 Mich 57, 69, n 13; 445 NW2d 61 (1989). Accordingly, a less stringent takings analy-

sis is appropriate. In evaluating whether governmental regulation of property constitutes a taking, we make an ad hoc factual inquiry into the circumstances of each case. *Connolly v Pension Benefit Guaranty Corp,* 475 US 211, 224-225; 106 S Ct 1018; 89 L Ed 2d 166 (1986):

> To aid in this determination, however, we have identified three factors which have "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation had interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transportation Co,* 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

Applying the *Penn Central* factors, the economic impact of the regulatory taking on plaintiff is nonexistent. The economic impact on plaintiff's members is unknown on this record. Plaintiff has not attempted to identify a legitimate, investment-backed expectation in future profits from unclaimed deposits.[3] Finally, the character of the governmental action is not a permanent, physical occupation of property by the government. The amended act is prospective; plaintiff has not identified a concrete taking of any particular deposit. Because the prospective amendments are rationally related to the general welfare, an alteration of plaintiff's expectations is appropriate. *Blue Cross & Blue Shield of Michigan v Baerwaldt,* 593 F Supp 39, 42 (WD Mich, 1984). A state may exact costs from private business as a reasonable use of police powers. We conclude that the amendments satisfy the *Penn Central* test, and plaintiff has

[3] In discovery, plaintiff responded that a question framed on this subject was vague, ambiguous, and irrelevant. It claimed it did not understand the question.

failed to satisfy its burden of proving the invalidity of the amendments under the takings clauses.

We need not decide defendants' remaining issues because our disposition renders those issues moot.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

ZARKA v BURGER KING

Docket No. 152167. Submitted July 12, 1994, at Lansing. Decided August 1, 1994, at 9:40 A.M. Leave to appeal sought.

Alan N. Zarka brought an action in the Ingham Circuit Court against Burger King and King Southern, Inc., seeking damages for injuries he allegedly suffered when he slipped and fell on the premises of a restaurant operated by the defendants. The plaintiff, an employee at the restaurant, had come on his day off to get his paycheck. After getting the paycheck, the plaintiff purchased food at retail prices, entered the public dining area, and ate the food while he was waiting for his girl friend, another employee, to get off work. As he was leaving the restaurant, the plaintiff allegedly slipped and fell on an accumulation of ice or water. The court, Thomas L. Brown, J., granted summary disposition for the defendants on the basis of the exclusive remedy provision of the Worker's Disability Compensation Act. The plaintiff appealed.

The Court of Appeals *held:*

Although the plaintiff may have been within the course of his employment when he entered the premises for the purpose of getting his paycheck, any employment relationship had ceased by the time he became a member of the public by purchasing food at retail prices, entering the public area of the restaurant, and eating the food in the restaurant. By the time of the alleged accident and injury, there was no longer a sufficient nexus between his employment and his injury to bring the matter within the scope of the exclusive remedy provision of the Worker's Disability Compensation Act. It was error for the trial court to grant summary disposition for the defendants on the basis of that provision.

Reversed and remanded.

WORKER'S COMPENSATION — EXCLUSIVE REMEDY PROVISION — COURSE OF EMPLOYMENT.

An employee may maintain an action for premises liability

REFERENCES

Am Jur 2d, Workers' Compensation §§ 65, 67.

Modern status: "dual capacity doctrine" as basis for employee's recovery from employer in tort. 23 ALR4th 1151.

against an employer that operates a retail food establishment where the employee, after having gone to the place of employment to secure a paycheck, thereby arguably having been engaged in the course of the employment relationship, ceases the employment relationship by purchasing food at retail price and eating the food in the public dining area of the establishment before being injured while on the premises; under such circumstances, the exclusive remedy provision of the Worker's Disability Compensation Act is not applicable (MCL 418.131; MSA 17.237[131]).

James C. Lucas, P.C. (by *James C. Lucas*), for the plaintiff.

Michael J. Milroy, for the defendants.

Before: DOCTOROFF, C.J., and SHEPHERD and J. R. KIRWAN,* JJ.

SHEPHERD, J. Plaintiff appeals as of right from an April 29, 1992, order of the trial court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(4). The trial court ruled that plaintiff's premises liability claim was precluded by the exclusive remedy provision of the Worker's Disability Compensation Act. We reverse.

The underlying facts of this case are not disputed. On December 11, 1989, plaintiff traveled to his place of employment, a Burger King restaurant located in Lansing, Michigan, to pick up his paycheck and give his girl friend, a coemployee, a ride home. Plaintiff had not worked that day, nor was he scheduled to work. Once inside the restaurant, plaintiff picked up his biweekly paycheck. After receiving his paycheck, plaintiff purchased some food at retail prices, entered the public dining room area, and ate his food. As he was leaving, plaintiff slipped and fell on an accumulation of

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

water or snow located in front of the exit. Plaintiff allegedly sustained an injury to his hand when he fell.

Plaintiff filed his complaint against defendants in the circuit court on a theory of premises liability. Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(4) on the ground that the exclusive remedy provision of the WDCA, MCL 418.131; MSA 17.237(131), precluded plaintiff's claim. The trial court agreed with defendants and granted the motion.

The essential question in this case is whether the circuit court or the Bureau of Worker's Disability Compensation has jurisdiction to hear this case. For the bureau to have exclusive jurisdiction, the injury must have arose out of and in the course of employment. MCL 418.131; MSA 17.237(131), MCL 418.301; MSA 17.237(301). Defendants are correct that as a general rule the question whether an injury arose out of and in the course of employment is a question to be resolved in the first instance by the bureau. *Buschbacher v Great Lakes Steel Corp,* 114 Mich App 833, 837; 319 NW2d 691 (1982). However, there is an exception "where it is obvious that the cause of action is not based on the employer/employee relationship." *Id.* at 838; see also *Genson v Bofors-Lakeway, Inc,* 122 Mich App 470, 477; 332 NW2d 507 (1983). The question whether plaintiff's injury arose out of and in the course of his employment may be a question of law or one primarily of fact, or a mixed question of law and fact. *Koschay v Barnett Pontiac, Inc,* 386 Mich 223, 225; 191 NW2d 334 (1971). Thus, where the facts are undisputed, the question is one of law for the courts to decide.

Here, the parties disagree concerning the application of two leading cases, *MacDonald v Michigan Bell Telephone Co,* 132 Mich App 688; 348 NW2d

12 (1984), and *Dunlap v Clinton Valley Center,* 169 Mich App 354; 425 NW2d 553 (1988).

In *MacDonald,* the plaintiff-employee had been gone from her place of employment for only thirty minutes when she realized that she had lost the key to the trunk of her car. She then drove back to her employer's parking lot and began searching for the lost key. While searching for the key, the plaintiff slipped on some loose gravel and fell, injuring her back. The panel of this Court in *MacDonald* reversed an award of benefits by the Worker's Compensation Appeal Board, finding that the plaintiff's injury did not occur "within the course, the flow, the path, route, or channel of plaintiff's employment." *Id.* at 692.

In *Dunlap,* the plaintiff-employee stopped at her place of employment to pick up her paycheck. The plaintiff had been scheduled to work that day, but had taken the day off. The plaintiff slipped and fell in a puddle of water and was injured. Reversing a decision of the WCAB, this Court in *Dunlap* concluded that the plaintiff's injury arose out of the course of her employment because the act of "[r]eceiving remuneration for one's work is a part of one's duties for his employer." *Id.* at 357. The Court further noted that the employer was obligated legally to give the plaintiff her paycheck. *Id.* at 357-358.

Herein, plaintiff argues that the present case is more similar to the situation in *MacDonald* and, thus, that the exclusive remedy provision of the WDCA should not apply. Conversely, defendants argue that the present case is more similar to the situation in *Dunlap* and, thus, that plaintiff's claim should be barred by the exclusive remedy provision of the WDCA.

This topic is discussed in 1A Larson, Workmen's Compensation Law, § 26.31, p 5-330 *et seq.* Larson

states the general rule to be that "an employee is in the course of employment while collecting his pay." *Id.* However, Larson, *supra,* § 26.33, pp 5-337 to 5-338, also recognizes an exception under the going and coming rule:

> Once collection of pay has been identified as a work-connected activity, it follows that the normal course of employment limitations applicable to any work activity should apply. Thus, an injury occurring off the premises while the claimant is on his way to the plant to collect his pay, or is on his way home, is outside the course of employment; for there is no reason to place the discharged worker about to collect pay in a stronger position than that afforded to the worker on his way to the actual performance of the duties of his employment. Similarly, under the rule in the preceding subsection, *a worker who has collected his pay may leave the course of employment by remaining on the premises for an unreasonable period,* as in the case of the claimant who had stayed on the premises for three hours after collecting his paycheck, playing cards, and drinking, before being shot in an argument.[41]

[41] *Blade v Mervis,* 226 So 2d 552 (La Ct App 1969).

We agree with the foregoing statement from Larson that an employee who has already received a paycheck may leave the course of employment at a subsequent time. However, rather than focusing upon the length of time (Larson speaks of an "unreasonable" delay) we believe that the controlling factor is the relationship between the parties. That is, the length of time following receipt of a paycheck may evince a change in relationship, but the key factor is the relationship itself.

This Court in *Howard v White,* 195 Mich App 590, 592-593; 491 NW2d 625 (1992), recognized the

importance of the relationship between the parties with its discussion of the dual capacity doctrine. Therein, the plaintiffs, city employees, were injured in an accident caused in part by a malfunctioning traffic signal. The plaintiffs were driving a city vehicle and returning to their work site from lunch. In addition to filing suit against the driver of the other vehicle, the plaintiffs also filed suit against the city for failure to maintain the traffic signal. The Court reasoned as follows in permitting the plaintiffs to maintain their cause of action outside the ambit of the worker's compensation exclusive remedy provision:

> [T]he employer-employee relationship in this case was a mere coincidence and was entirely unrelated to plaintiffs' cause of action. Plaintiffs' action is not based on the employer-employee relationship. [*Id.*, at 593.]

Cf. *Handley v Wyandotte Chemicals Corp,* 118 Mich App 423, 429; 325 NW2d 447 (1982); 2A Larson, Workmen's Compensation Law, § 72.81, p 14-229 *et seq.*]

In the present case, although plaintiff's singular act of picking up his paycheck may have been related sufficiently to the employment relationship to justify the application of the exclusive remedy provision in accord with *Dunlap,* the relationship between the parties changed when plaintiff purchased the food at retail prices and ate the food in the public section of the restaurant. At the time of plaintiff's injury, there was no longer a sufficient nexus between the injury and the employment relationship; in other words, it can not be said that the injury was a circumstance of the employment. *Collier v J A Fredman, Inc,* 183 Mich App 156, 161; 454 NW2d 183 (1990). Not only did plaintiff

modify the relationship by offering to purchase food at retail, but his employer also modified the relationship by making the retail sale. Although it appears that the lapse of time involved here between the receipt of the paycheck and the injury was not as lengthy as in *Blade, supra* (discussed in 1A Larson, § 26.33, *supra*), we are nevertheless convinced that plaintiff's injury did not arise out of or in the course of employment. This we conclude as a matter of law on the basis of the undisputed facts of record.

In response to the parties' arguments, we conclude that the present case is more similar to the situation in *MacDonald* than that in *Dunlap.* As in *MacDonald, supra* at 692, the injury here did not occur "within the flow, the path, route, or channel of plaintiff's employment." Thus, the exclusive remedy provision of the WDCA, MCL 418.131; MSA 17.237(131), does not preclude plaintiff from pursuing his claim in the circuit court.

Reversed and remanded for further proceedings consistent with this opinion.

PEOPLE v SWIRLES

Docket No. 168756. Submitted June 8, 1994, at Detroit. Decided August 2, 1994, at 9:00 A.M.

Thomas R. Swirles pleaded guilty in the Midland Circuit Court, Paul J. Clulo, J., of armed robbery and possession of a firearm during the commission of a felony pursuant to a plea bargain and sentencing agreement, and was sentenced to twenty-five to fifty years' imprisonment for the armed robbery conviction. The defendant appealed, claiming that the prosecution breached the sentencing agreement by recommending the longest minimum sentence under the sentencing guidelines instead of making a general recommendation that the minimum be within the five- to twenty-five-year range of the guidelines.

The Court of Appeals *held:*

The record in this case is unclear with respect to whether the prosecution agreed to make a general recommendation that the minimum sentence fall within the guidelines or whether the prosecution agreed to recommend a specific sentence that falls within the guidelines. The case must be remanded for a determination of the actual terms of the agreement and for specific performance of the agreement. If the trial court determines that the prosecution breached the sentencing agreement, the court must resentence the defendant in accordance with *People v Shuler,* 188 Mich App 548 (1991), and *People v Nixten,* 183 Mich App 95 (1990).

Remanded.

MICHAEL J. KELLY, P.J., concurring, stated that a prosecutor's promise to recommend sentencing within the guidelines can mean that the prosecutor intends to recommend a specific sentence that is within the guidelines. A defendant approves such a specific recommendation by not objecting at sentencing.

1. SENTENCES — SENTENCING AGREEMENTS.

A sentencing agreement that provides for a general recommendation by the prosecution that the minimum sentence of impris-

REFERENCES

Am Jur 2d, Criminal Law §§ 481, 485.
See ALR Index under Guilty Plea.

onment be within the range recommended by the sentencing guidelines is breached where the prosecution recommends a specific minimum sentence.

2. SENTENCES — SENTENCING AGREEMENTS.

The terms of a sentencing agreement must be fulfilled where a defendant's plea of guilty is induced by the agreement.

State Appellate Defender (by *Daryl D. Mack*), for the defendant on appeal.

Before: MICHAEL J. KELLY, P.J., and FITZGERALD and CORRIGAN, JJ.

PER CURIAM. Defendant appeals as of right his plea of guilty of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and his sentence of twenty-five to fifty years of imprisonment for the armed robbery conviction. Defendant pleaded guilty pursuant to the prosecutor's promise to dismiss a charge of conspiracy to commit armed robbery and a charge of being an habitual offender in this case and to dismiss charges in another case of unlawfully driving away an automobile, conspiracy, and of being an habitual offender. The prosecutor and defendant also negotiated a sentencing agreement. We affirm defendant's plea-based conviction but remand for further proceedings regarding the scope of the prosecutor's promise relating to the sentencing recommendation.

Defendant claims that the prosecutor breached the sentencing agreement by recommending a sentence of twenty-five years, a specific top end of the guidelines' sentence, instead of honoring his promise to make a general recommendation of a sentence of five to twenty-five years. Whether the prosecutor breached the agreement depends on the

exact terms of the agreement. At the rearraignment, the prosecutor stated:

> [T]he People are making a Briggs-Killebrew sentence recommendation that the defendant receive an initial sentence within that recommended by the sentencing guidelines as determined by the court at the time of sentencing.
>
> [W]e believe the minimum range is going to fall between 5 to 25, but I think that's something that ultimately will have to be determined by the court.

At sentencing, the prosecutor argued:

> I think that this court should give him the 25 years, the maximum in the guideline range, as the minimum and I have no problem with the 50 years as maximum on the maximum part of the sentence.

Defense counsel never objected to the prosecutor's specific sentence recommendation at sentencing. The record contains no copy of a written plea agreement, and the parties' intent appears somewhat ambiguous. From the record before us, the true nature of the prosecutor's promise is not adequately developed.

A prosecutor who agrees to make a general sentence recommendation pursuant to a sentencing agreement breaches the agreement by recommending a specific number of years. *People v Shuler,* 188 Mich App 548; 470 NW2d 492 (1991). A sentencing court is, of course, not bound by any sentencing agreement negotiated between a defendant and the prosecution. *People v Killebrew,* 416 Mich 189, 207; 330 NW2d 834 (1982). Where a defendant's plea of guilty is induced by the prosecutor's promise relating to sentencing, the terms of

that agreement must be fulfilled. *People v Nixten,* 183 Mich App 95; 454 NW2d 160 (1990).

It is not apparent from the record before us whether the prosecutor agreed to recommend, generally, that defendant's minimum sentence fall within the guidelines or whether he agreed to recommend to the court a specific sentence that would fall within the guidelines.

We, therefore, remand to the trial court for a determination of the actual terms of the agreement regarding the prosecutor's intent. If the court on remand concludes that the promise was breached, the court should resentence defendant in accordance with *Shuler* and *Nixten, supra,* so that defendant may obtain specific performance of the bargain.

Remanded. We do not retain jurisdiction.

MICHAEL J. KELLY, P.J. *(concurring).* Because this is not a case involving a clear conflict but does involve interpretations and nuances, I write only to say that I do not think that *People v Shuler,* 188 Mich App 548; 470 NW2d 492 (1991), necessarily controls the outcome, and if it does not, I agree with Judge SAWYER's dissent in *People v Nixten,* 183 Mich App 95, 99-100; 454 NW2d 160 (1990). It seems to me that there is room to infer in any prosecutorial recommendation of "within the guidelines" that the defendant should expect a maximum/minimum recommendation. Why trial counsel avoid more precision probably depends upon counsel's reading of the sentencing judge. Some sentencing judges pay more attention to recommendations than others.

Why plea bargainers leave for appellate determination the parameters of their agreement may be the result of shoddy craftsmanship or a tacit understanding that the maximum/minimum is al-

ways the prosecutor's option. Because the recommendation is nonbinding, I would lean heavily toward requiring defense objection at the time of sentencing in order to preserve the issue for appellate review. I would presume that trial counsel know what a recommendation to a trial court of "sentencing within the guidelines" or "a minimum sentence within the guidelines" meant at the time there was a meeting of the minds during negotiations. If defense counsel makes no objection at the time of sentencing it seems to me counsel has stamped approval on the prosecutor's recommendation if it is *anywhere* within the guidelines.

PEOPLE v KRAUSE

Docket No. 151315. Submitted May 5, 1994, at Grand Rapids. Decided August 2, 1994, at 9:05 A.M. Leave to appeal sought.

Thomas E. Krause, II, was convicted by a jury in the Calhoun Circuit Court, Conrad J. Sindt, J., of first-degree murder. The defendant was seventeen years old when he was arrested in California and confessed to the murder committed in Michigan. He appealed.

The Court of Appeals *held:*

1. In determining whether the defendant's April 7, 1991, confession was voluntary, the trial court did not err in applying Michigan law, instead of California law, to conclude that the defendant could be considered an adult pursuant to MCL 712A.3; MSA 27.3178(598.3) and that the confession was voluntary. Where two states have sufficient contact with the subject matter of litigation, the forum state constitutionally may apply the law of either state having an interest in the subject activity.

2. The trial court did not clearly err in finding that the defendant's April 16, 1991, confession was voluntary.

3. The defendant waived his right to counsel with respect to the questioning that resulted in the April 7, 1991, confession by initiating communication with the police officers after they had stopped questioning the defendant on April 6, 1991, when he invoked the right to counsel.

Affirmed.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Jon Sahli,* Prosecuting Attorney, and *Ronald S. Pichlik,* Assistant Prosecuting Attorney, for the people.

John B. Payne, Jr., for the defendant on appeal.

Before: FITZGERALD, P.J., and WEAVER and W. M. BAXTER,* JJ.

PER CURIAM. Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and was sentenced to life imprisonment without parole. Defendant appeals as of right. We affirm.

Defendant first contends that, as a minor who was arrested in California for a crime that occurred in Michigan, the statements he gave to the police are subject to scrutiny under California law. We review questions regarding conflicts of law de novo. See *Severine v Ford Aerospace & Communications Corp,* 118 Mich App 769; 325 NW2d 572 (1982).

Although there is no law specifically on point regarding which state's law should be applied when a defendant is determined to be a minor in the state where he was arrested but is considered to be an adult in the state where the crime occurred, we are convinced that the trial court correctly applied Michigan law in determining whether defendant's April 7, 1991, confession was voluntarily made.

States have jurisdiction over criminal matters that occur within their respective territories. See LaFave, Criminal Law, 2d, § 2.9. Further, where two states have sufficient contact with the subject matter of litigation, the forum state may constitutionally apply the law of either state having an interest in the subject activity. *Severine, supra* at 772. Michigan clearly had sufficient contact with the subject matter of the litigation because the crime occurred in Michigan. Thus, defendant's argument that his confession should have been

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

suppressed under California law because he was not allowed to contact his mother concerning the waiver of his rights is without merit. Under Michigan law, defendant was an adult when the interview occurred. MCL 712A.3; MSA 27.3178(598.3).

Defendant also maintains that the trial court abused its discretion in denying his motion to suppress an April 16, 1991, statement that was made in Michigan. Specifically, he claims that the trial court failed to consider that the police officers questioned him before his arraignment and failed to consider his age and lack of counsel. The arguments are without merit.

In evaluating the voluntariness of a confession, this Court is guided by the factors articulated by our Supreme Court in *People v Cipriano,* 431 Mich 315; 429 NW2d 781 (1988). In reviewing a trial court's determination regarding voluntariness, this Court examines the entire record and makes an independent determination. Nonetheless, we defer to the trial court's superior ability to view the evidence and the witnesses, and we will not disturb the court's findings unless they are clearly erroneous. *People v Marshall,* 204 Mich App 584; 517 NW2d 554 (1994).

In this case, the trial court's finding that defendant's statement was voluntary is not clearly erroneous. The totality of the circumstances indicates that it was freely and voluntarily made. *Cipriano, supra.* Although defendant was questioned before the arraignment, there is nothing in the record to indicate that the questioning was for the purpose of obtaining a confession. Defendant, who was seventeen at the time of the incident, had an eleventh grade education, had several juvenile criminal convictions, had been informed that he had a right to an attorney, and had signed a written consent form. *Cipriano, supra.* The evi-

dence showed that defendant's statements were voluntary, and the trial court's findings are not clearly erroneous. *People v Etheridge,* 196 Mich App 43; 492 NW2d 490 (1992).

Next, defendant argues that his April 7 statement should have been suppressed because insufficient evidence was produced to establish that he initiated further contact with the police after invoking his right to counsel. Defendant did not raise this issue below and we need not address it on appeal. *People v Hamacher,* 432 Mich 157, 168; 438 NW2d 43 (1989). Appellate review is appropriate, however, because a constitutional issue is raised. *People v Harris,* 95 Mich App 507, 509; 291 NW2d 97 (1980).

There is no dispute that defendant requested counsel on April 6 and that questioning ceased at that time. Thus, the determinative question is whether defendant initiated further communication with the police and thereby waived his previously invoked right to counsel. See *People v Myers,* 158 Mich App 1, 9; 404 NW2d 677 (1987).

The record indicates that defendant asked to talk to detectives on April 7. Defendant testified that he chose to talk to the officers, that no one suggested that he talk to them, and that he chose to talk to them even though he knew he had the right to speak with an attorney. Under these circumstances, we conclude that the evidence clearly established that defendant waived his right to counsel by initiating further contact with the police. *Id.*

Lastly, defendant's argument that in the absence of the two confessions there was no probative evidence introduced to show that the crime was committed in Michigan is without merit in light of our conclusion that the confessions were voluntary.

Affirmed.

PEOPLE v McKENZIE

Docket No. 147416. Submitted May 5, 1994, at Lansing. Decided August 2, 1994, at 9:10 A.M. Leave to appeal sought.

Marcy McKenzie was convicted by a jury in the Ingham Circuit Court, Carolyn Stell, J., of felony murder relating to an arson fire in an apartment complex inhabited mostly by senior citizens and the death of an elderly resident from a heart attack brought on by the excitement generated by the fire. The defendant appealed.

The Court of Appeals *held:*

1. The trial court did not err in denying the defendant's motion for a directed verdict. A rational trier of fact could have concluded that, in starting a fire in a senior citizens complex, the defendant acted with wanton and wilful disregard of the likelihood that the natural tendency of her behavior was to cause death or great bodily harm.

2. The defendant's conviction was supported by sufficient evidence, including evidence concerning the foreseeability and the proximate cause of the death of the victim, who had a preexisting heart ailment and had been susceptible to stress.

3. The trial court correctly refused to instruct the jury regarding the defense of accidental death, CJI2d 7.2. Such an instruction would not have been supported by the evidence or consistent with the defendant's theory of the case.

4. The trial court did not err in refusing to give the addict-informer jury instruction, CJI2d 5.7. That instruction applies where the uncorroborated testimony of an addict-informer is the only evidence linking an accused to the alleged offense. In this case, the testimony of the addict-informer against the defendant was corroborated by other evidence.

5. The trial court did not err in refusing to specifically instruct the jury with regard to how it could consider evidence presented by the defendant concerning the addict-informer's reputation for untruthfulness. No such standard jury instruction exists, and the defendant failed to cite a rule of law requiring such a special instruction.

Affirmed.

Frank J. Kelley, Attorney General, *Thomas L.*

Casey, Solicitor General, *Donald E. Martin,* Prosecuting Attorney, and *Samuel R. Smith,* Chief Appellate Attorney, for the people.

State Appellate Defender (by *Richard B. Ginsberg*), for the defendant on appeal.

Before: HOOD, P.J., and CAVANAGH and D. A. TEEPLE,* JJ.

PER CURIAM. Defendant was convicted by a jury on a charge of first-degree felony murder, MCL 750.316; MSA 28.548. Defendant, who was sentenced to life in prison, appeals her conviction as of right. We affirm.

The present case stems from a fire that originated in defendant's apartment in a complex inhabited almost exclusively by senior citizens. Defendant, who is not a senior citizen, was permitted to reside in the complex because she had a medical condition (epilepsy). On September 8, 1989, the resident manager made several trips to defendant's apartment to inform her that she would have to move out within thirty days because she had caused a number of disruptions. On the final trip, the manager observed a cigarette smoldering on defendant's bed sheet; the manager removed the sheet and left the apartment after defendant indicated that she intended to kill herself.

Four days later, on the evening of September 12, 1989, an alarm sounded and smoke was seen coming from defendant's door. The fire department was summoned and several residents began to assist others out of the building. Before the fire department's arrival, one of the residents, Mr. Gannon, forced defendant's door open and confirmed that her apartment was on fire. According

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

to Gannon, defendant was not in her apartment. All the residents were evacuated from the complex, including defendant's next-door neighbor, Emma Merritt. The fire department arrived and the blaze, which did not spread to other units, was extinguished after approximately one hour. Merritt, who was neither burned during the fire nor inhaled any smoke, collapsed on the sidewalk and died of a heart attack. The medical examiner who performed the autopsy opined that Merritt's heart attack was brought on by the excitement generated by the fire.

An examination of defendant's apartment led the authorities to conclude that the fire had been intentionally set. Defendant initially claimed that someone had thrown a Molotov cocktail through her window. Later, defendant stated that one of her multiple personalities may have started the fire by placing a lit cigarette on the bed. A trial was conducted and defendant presented the multiple personality/insanity defense. The jury found defendant guilty of first-degree felony murder. However, defendant was granted a new trial on the basis that both the prosecutor and defense counsel had misinterpreted the results of a blood alcohol test performed on defendant the evening of the fire. Defendant's blood alcohol level was much higher than thought to be by defense counsel and the prosecutor.

At the retrial, defendant abandoned the multiple personality/insanity defense. Instead, defendant focused on the cause of death and whether she was capable of forming the requisite intent for felony murder given her level of intoxication. The prosecutor offered the testimony of a resident from the complex who claimed that defendant approached her on the sidewalk after the evacuation and said, "I did a good job, didn't I." Additionally,

an inmate from the Ingham County Jail testified that, while awaiting retrial, defendant told her that she intentionally set the fire in response to the eviction notice. According to the inmate, defendant said that she did not intend to hurt anyone by starting the fire. The jury found defendant guilty as charged.

Defendant first argues that the trial court erred in denying her motion for a directed verdict. We disagree.

> When reviewing a denial of a motion for a directed verdict, this Court must consider the evidence presented by the prosecution up to the time the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove the elements of a crime. [*People v Morris,* 202 Mich App 620, 622; 509 NW2d 865 (1993). Citations omitted.]

To establish the crime of felony murder, the prosecution must present proofs from which the jury could rationally find that, while committing the underlying offense, the defendant acted with the intent to kill, with the intent to do great bodily harm, or with wanton and wilful disregard of the likelihood that the natural tendency of the defendant's behavior was to cause death or great bodily harm. *People v Aslin,* 179 Mich App 456, 458; 446 NW2d 832 (1989).

In the present case, a resident of the complex testified that while the fire was still ablaze, defendant remarked, "I did a good job, didn't I." Additionally, an inmate at the jail where defendant was housed stated that defendant admitted inten-

tionally setting the fire by placing a lit cigarette and a pair of electric curlers on the bed. This statement was corroborated by the evidence found at the scene by investigators. More specifically, investigators concluded that defendant's bed had been intentionally set on fire.

This evidence indicates that the fire that originated in defendant's bedroom had been intentionally set. Moreover, the resident who forcibly entered defendant's apartment to investigate the fire stated that no windows were broken before his entry and, further, that defendant's apartment seemed secure in all other respects. From this evidence a rational trier of fact could conclude that the underlying crime of arson had been committed. Additionally, the physician who performed the autopsy on Merritt's body testified that she died as a result of a heart attack brought on by the excitement surrounding the fire. Accordingly, because the corpus delicti of the crime of felony murder had been established, the prosecutor was free to introduce the testimony of the inmate who claimed that defendant admitted setting the fire.

On the basis of the foregoing, we believe that a rational trier of fact could have concluded that, by starting a fire in a senior citizens complex, defendant acted in such a manner as to exhibit a wanton and wilful disregard of the likelihood that the natural tendency of her behavior was to cause death or great bodily harm. *Aslin, supra.* Therefore, the trial court properly denied defendant's motion for a directed verdict. *Morris, supra.*

For the same reasons, we find unavailing defendant's argument that there was insufficient evidence to support her conviction of first-degree felony murder. Defendant argues that Merritt died as a result of a preexisting condition, and that the manner of her demise was not a foreseeable conse-

quence under the circumstances. To support this argument, defendant points to the testimony of the medical examiner, who stated that Merritt had a serious heart condition. The medical examiner opined that, given the severity of Merritt's condition, there was no guarantee that she would have lived another day notwithstanding the fire. Nonetheless, it was determined that Merritt's heart attack and subsequent death were brought on by the excitement generated by the fire.

As stated in *People v Flenon,* 42 Mich App 457, 462; 202 NW2d 471 (1972), a criminal defendant takes the victim as found. Nonetheless, defendant insists that she did not cause Merritt's death because Merritt was neither burned nor asphyxiated. *Aslin, supra,* is instructive. In *Aslin,* the defendant broke into the home of an elderly woman (that he knew) in the middle of the night and robbed her. The victim, Mrs. Stephens, had a severe heart condition but did not die while the robbery was in progress. In fact, after the defendant departed, she went outside and informed neighbors of the incident. Mrs. Stephens died of a heart attack at a neighbor's residence before the paramedics arrived. The *Aslin* panel held:

> We find the evidence produced at trial could lead a rational trier of fact to conclude that defendant knew about the victim's vulnerable state of health, and that defendant's actions were such as to evince a wilful or wanton disregard for the likelihood that serious consequences to his victim amounting to great bodily harm or death would result. Confronting an older woman in her own home at night, and twice knocking her down, was likely to cause her injury. Knowledge of her heart condition increased the predictability of serious harm from these actions. At a minimum another heart attack was likely and death possible. [179 Mich App 459.]

Defendant does not contest the fact that she resided in a complex inhabited primarily by senior citizens. By starting the fire, defendant deliberately set in motion a series of events that adversely affected the residents of her complex. Having been forced to flee their residences in desperation, the tenants became the victims of defendant's intentional act. In this case, defendant "found" one victim who had a severe heart ailment and a low tolerance for stressful events. It does not matter that, unlike the especially vulnerable Merritt, others would have been able to withstand the consequences of defendant's actions. Defendant took her victim as she found her. *Flenon, supra.*

Given these circumstances, the questions of foreseeability and proximate cause were properly left to the jury. *People v Clark,* 171 Mich App 656, 659; 431 NW2d 88 (1988); *People v Webb,* 163 Mich App 462, 464-465; 415 NW2d 9 (1987); *People v Moss,* 70 Mich App 18, 22; 245 NW2d 389 (1976). In short, sufficient evidence was presented from which a rational trier of fact could conclude that defendant committed the crime of first-degree felony murder with the predicate offense being arson.

Finally, defendant argues that the trial court failed to properly instruct the jury. Again, we disagree. We first note that defendant failed to object to the instructions that were actually given at trial. Therefore, the arguments raised concerning these instructions will not be reviewed because defendant failed to preserve this portion of her argument. No manifest injustice will result from our failure to review this portion of defendant's argument because the instructions that were given fairly presented the issues to the jury and sufficiently protected defendant's rights. *People v Curry,* 175 Mich App 33, 39; 437 NW2d 310 (1989).

Defendant additionally claims that the trial

court erroneously failed to instruct the jury regarding the defense of accidental death, CJI2d 7.2. We disagree. Failure to give this instruction was not erroneous because it was not supported by the evidence. Defendant claimed at trial that the fire was accidentally set. CJI2d 7.2 deals with a situation in which a defendant admits to having intentionally started a fire but lacked the intent to kill or cause great bodily harm to anyone. Therefore, the trial court did not err in failing to provide this instruction to the jury because it was not consistent with defendant's theory of the case.

Defendant also argues that the court erred in refusing to give CJI2d 5.7, the addict-informer instruction. Again, we find that the trial court did not err. Defendant claims that the instruction should have been given because the inmate who testified against her, Deloris Curry, was an admitted drug addict. First, although Curry volunteered damaging information to the authorities concerning defendant, this Court is satisfied from the record that Curry was not an "informant" as contemplated by CJI2d 5.7. Moreover, Curry's testimony was not uncorroborated but, instead, was supported by other evidence. The use note to CJI2d 5.7 provides that the instruction is to be used where the *uncorroborated* testimony of an addict informant is the only evidence linking the accused with the alleged offense. This is not the case here. Therefore, the trial court did not err in failing to give this instruction.

Defendant's final argument pertains to her request below that the trial court specially instruct the jury with regard to how it could consider the evidence presented by defense counsel regarding Curry's reputation for untruthfulness. No such standard jury instruction existed, and the trial court opted not to fashion a special instruction.

Defendant points to no rule of law mandating the trial court to fashion a special instruction under circumstances similar to these. We find no error in the trial court's refusal to do so.

Affirmed.

NEWSOME v LABBY

Docket No. 169731. Submitted May 4, 1994, at Grand Rapids. Decided August 2, 1994, at 9:15 A.M. Leave to appeal denied, 447 Mich —.

Rita and Oliver Newsome brought an action in the Calhoun Circuit Court against Michelle and Roderick Labby pursuant to the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.*, seeking custody of Katelyn H. Labby, the defendants' minor daughter and the plaintiffs' granddaughter. Before the action for custody, proceedings in the probate court had resulted in the suspension of the defendants' parental rights with respect to the child, the appointment of the plaintiffs as the child's guardians, and the adoption of a plan for the reintegration of the defendants and the child. The circuit court, Allen L. Barbrecht, J., dismissed the action for custody, ruling that the plaintiffs lacked standing pursuant to MCL 722.26b; MSA 25.312(6b) because the defendants had substantially complied with the reintegration plan. The plaintiffs appealed.

The Court of Appeals *held:*

The circuit court erred in determining that the plaintiffs lacked standing. Pursuant to MCL 722.26b; MSA 25.312(6b), a limited guardian of a child does not have standing to bring an action for custody of the child if the parent or parents of the child have complied substantially with a reintegration plan. The standing of a full guardian to bring an action for custody is not affected by the substantial compliance of the parent or parents with a reintegration plan. The plaintiffs, being full guardians, had standing to bring their action for custody.

Reversed and remanded.

PARENT AND CHILD — CHILD CUSTODY ACT — GUARDIANS — CUSTODY ACTIONS — STANDING.

A limited guardian, but not a full guardian, of a child over whom parental rights have been suspended loses standing to bring an

---

REFERENCES

Am Jur 2d, Parent and Child §§ 28, 34.

Award of custody of child where contest is between child's parents and grandparents. 31 ALR3d 1187.

action for custody of the child when the child's parent or parents substantially comply with the terms of a reintegration plan (MCL 722.26b; MSA 25.312[6b]).

Kenneth R. Struble, for the plaintiffs.

Michael W. King and *Brenda M. Koppe,* for the defendants.

Before: FITZGERALD, P.J., and WEAVER and W. M. BAXTER,* JJ.

PER CURIAM. Plaintiffs Rita and Oliver Newsome appeal as of right from a Calhoun Circuit Court order dismissing their complaint for custody of Katelyn Helen Labby on the basis of lack of standing. We reverse.

Plaintiffs, who are Katelyn's maternal grandparents, were appointed Katelyn's guardians on May 21, 1990, after the probate court suspended defendants' parental rights by reason of their disappearance. In October 1992, defendants petitioned the probate court for termination of the guardianship, and an "order for reunification" was signed by both parties and entered on December 28, 1992. The order established a plan for reintegration and provided that the guardianship would terminate on June 1, 1993.

In May 1993, plaintiffs filed a complaint for custody pursuant to the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.,* in the Calhoun Circuit Court. On May 7, 1993, the circuit court entered an ex parte interim order staying the guardianship proceedings in the probate court pursuant to MCL 722.26b(4); MSA 25.312(6b)(4). Defendants moved for summary disposition on the ground that plaintiffs were limited guardians who

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

lacked standing to initiate the circuit court action. Following a hearing, the circuit court granted defendants' motion after concluding that the plaintiffs had become limited guardians by virtue of the reintegration plan and that defendants had substantially complied with the plan.[1] Plaintiffs objected to the entry of the order granting defendants' motion. On September 3, 1993, the probate court issued a declaratory ruling that plaintiffs had remained full guardians throughout the court proceedings.

On September 13, 1993, a hearing on plaintiffs' objections was held in circuit court. Recognizing that the probate court had determined plaintiffs' guardianship to be a full guardianship, defendants argued that the circuit court should not take jurisdiction because plaintiffs had entered into the reintegration plan and essentially waived their right to petition the circuit court for jurisdiction. On October 7, 1993, the circuit court dismissed the action, finding that plaintiffs lacked standing to bring the custody action because the existence of the reintegration plan created an exception to standing conferred upon full guardians. An order dismissing plaintiffs' action was entered on October 21, 1993. Upon the lifting of the circuit court's stay of the probate court proceedings, the guardianship was terminated and Katelyn was apparently returned to defendants' custody.

We are presented with the question whether the circuit court erred in determining that the existence of a reintegration plan presented an exception to the standing granted to full guardians in MCL 722.26b(1); MSA 25.312(6b)(1). We conclude that the trial court did err, and therefore we reverse and remand for reinstatement of plaintiffs' suit for custody.

[1] See MCL 722.26b(2); MSA 25.312(6b)(2).

As a preliminary matter, we note that the circuit court had jurisdiction to determine whether the plaintiffs had standing under MCL 722.26b; MSA 25.312(6b). See *Solomon v Lewis,* 184 Mich App 819; 459 NW2d 505 (1990), vacated 437 Mich 983 (1991) (the Supreme Court remanded the matter to the circuit court to determine whether the plaintiffs had standing to bring an action for custody of the child pursuant to MCL 722.26b; MSA 25.312[6b]).

MCL 722.26b; MSA 25.312(6b) provides in relevant part:

> (1) Except as otherwise provided in subsection (2), a guardian or limited guardian of a child has standing to bring an action for custody of the child pursuant to this act.
>
> (2) A limited guardian of a child does not have standing to bring an action for custody if the parent or parents of the child have substantially complied with a limited guardianship placement plan regarding the child entered into pursuant to section 424a of the revised probate code, Act No. 642 of the Public Acts of 1978, being section 700.424a of the Michigan Compiled Laws.

By its plain language, § 6b of the Child Custody Act has given a guardian, and a limited guardian in certain circumstances, standing to bring an action for custody of a child for whom the petitioner is guardian. MCL 722.26b; MSA 25.312(6b); *Bowie v Arder,* 441 Mich 23, 43-44; 490 NW2d 568 (1992). No exception to standing for full guardians is made, despite the fact that reintegration plans in full guardianships are expressly contemplated. See MCL 700.424c; MSA 27.5424(3). Because the statute is clear, judicial construction is precluded. *Dep't of Transportation v Robinson,* 193 Mich App 638, 644; 484 NW2d 777 (1992). The circuit court

erred in judicially creating an exception to standing conferred upon full guardians and in dismissing plaintiffs' complaint for lack of standing.

Reversed and remanded to the circuit court for reinstatement of plaintiffs' action for custody. We do not retain jurisdiction.

PEOPLE v HEIM

Docket No. 149093. Submitted April 19, 1994, at Lansing. Decided August 15, 1994, at 9:00 A.M. Leave to appeal sought.

John W. Heim was convicted by a jury in the Jackson Circuit Court, Chad C. Schmucker, J., of two counts of child sexually abusive activity and pleaded guilty of being an habitual offender, second conviction. The defendant was sentenced to two concurrent sentences of 24 to 360 months' imprisonment with credit for 195 days for time spent in jail before sentencing. The defendant appealed, and the prosecution cross appealed.

The Court of Appeals *held:*

1. The defendant's claim that the statute making child sexually abusive activities criminal, MCL 750.145c(2); MSA 28.342a(2), is vague in the constitutional sense because a person of ordinary intelligence could not know what activity is criminal under the statute is without merit. The statute expressly prohibits persuading a child to engage in erotic nudity, including the display of the female breast, for the purpose of making photographs that appeal to prurient interests. No person of common intelligence could not recognize that the taking of photographs of a sixteen-year-old girl's exposed breasts for the purpose of making pornographic materials is a prohibited act under the statute.

2. The trial court erred in granting credit as time served toward the sentences in this case the time served by the defendant for an unrelated offense.

Conviction affirmed. Case remanded for recomputation of the sentence credit.

CRIMINAL LAW — CHILD SEXUALLY ABUSIVE ACTIVITY — CONSTITUTIONAL LAW — VAGUENESS — NOTICE OF PROHIBITED CONDUCT.

The statute prohibiting child sexually abusive activity provides adequate notice of the acts prohibited so as to avoid being

REFERENCES

Am Jur 2d, Criminal Law §§ 15-17; Statutes § 346.

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime—Supreme Court cases. 16 L Ed 2d 1231.

vague in the constitutional sense; the statute clearly provides fair notice that the taking of photographs of a sixteen-year-old girl's exposed breasts for the purpose of making pornographic materials is a prohibited act (MCL 750.145c[2]; MSA 28.342a[2]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Joseph S. Filip,* Prosecuting Attorney, and *Jerrold Schrotenboer,* Chief Appellate Attorney, for the people.

Richard D. Hitt, and John W. Heim, in propria persona.

Before: MCDONALD, P.J., and MURPHY and G. A. DRAIN,* JJ.

MURPHY, J. A jury convicted defendant of two counts of child sexually abusive activity, MCL 750.145c(2); MSA 28.342a(2). Defendant pleaded guilty of being an habitual offender, second conviction, under MCL 769.10; MSA 28.1082. The trial court imposed two concurrent sentences of 24 to 360 months' imprisonment with credit for 195 days. Defendant appeals as of right from his conviction and sentence. The prosecutor cross appeals from the trial court's granting 195 days of credit for time served in jail before sentencing.

This case arose from the allegations of defendant's sixteen-year-old niece that on two occasions defendant had taken photographs of her with her exposed breasts for the purpose of making pornographic material. Defendant testified at trial and denied the accusations, specifically denying taking photographs of his niece. The jury apparently found the niece's testimony more credible.

Defendant argues on appeal that the child sexually abusive activity statute, MCL 750.145c(2);

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

MSA 28.342a(2), is unconstitutionally vague because a person of common intelligence could not possibly know what activity is criminal under the statute. Appellate review of this issue normally would be precluded because defendant failed to challenge the constitutionality of this statute before the trial court. *People v Gezelman (On Rehearing),* 202 Mich App 172, 174; 507 NW2d 744 (1993). However, we will review this issue because it involves an important constitutional question. *Id.*

A statute may be challenged for vagueness on three grounds: (1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed; or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. E.g., *People v Hayes,* 421 Mich 271, 283; 364 NW2d 635 (1984). In this case, defendant challenges MCL 750.145c(2); MSA 28.342a(2) on the ground that it does not provide fair notice of the conduct proscribed.

At one point in his brief, defendant characterizes the statute as being "overbroad" as well as being vague. The reference to the statute being overbroad is inappropriate in this case because defendant does not argue that the statute impinges on his First Amendment freedoms. See *Hayes, supra.* Moreover, this Court has rejected the argument that MCL 750.145c(2); MSA 28.342a(2) is unconstitutional because it is overbroad. *Gezelman, supra.*

We disagree with defendant's argument that MCL 750.145c(2); MSA 28.342a(2) is unconstitutionally vague. MCL 750.145c(2); MSA 28.342a(2) provides in relevant part:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony . . . .

Subsection one of this statute, MCL 750.145c(1); MSA 28.342a(1), defines "child sexually abusive activity" and "child sexually abusive material," as well as the relevant terms that are a part of these two definitions. In light of these definitions, the statute expressly prohibits persuading a child to engage in erotic nudity, which may mean the display of a female breast, in order to make a developed or undeveloped photograph that appeals to prurient interests. The language used to prohibit the act is not so vague that a person of common intelligence must necessarily guess at its meaning. See *People v Munn,* 198 Mich App 726, 727; 499 NW2d 459 (1993). Certainly, the language provides fair notice that taking photographs of a sixteen-year-old girl's exposed breasts for the purpose of making pornographic materials is a prohibited act.

Defendant raises several other issues in his brief and supplemental brief that challenge the validity of his conviction and sentence. After reviewing the record, we conclude that these claimed errors do not warrant a new trial or resentencing.

The prosecutor argues on cross appeal that the 195 days of credit defendant received against his current sentences erroneously included twenty-six days that he had served for an unrelated offense. We agree. See MCL 769.11b; MSA 28.1083(2); *Peo-*

ple v Prieskorn, 424 Mich 327, 341; 381 NW2d 646 (1985). Accordingly, we remand this case to the trial court for a recomputation of sentence credit.

Affirmed in part and remanded for a recomputation of sentence credit. We do not retain jurisdiction.

STOLARUK CORPORATION v CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA

Docket No. 147168. Submitted March 8, 1994, at Lansing. Decided August 15, 1994, at 9:05 A.M. Leave to appeal sought.

Stolaruk Corporation brought an action in the Macomb Circuit Court against Central National Insurance Company of Omaha, Strada Asphalt Paving Company, and others, seeking to recover costs incurred by Stolaruk in complying with a directive of the Department of Natural Resources to remediate diesel fuel contamination at a Groveland Township parcel of property that, along with parcels in Rochester Hills and Southfield, Stolaruk had sold to Strada. A prior action between Stolaruk and Strada concerning the sale of the parcels had concluded in the entry of a consent judgment by which Stolaruk and Strada agreed to release one another from liability relating to then known or future causes of action involving the parcels, and by which Strada agreed to indemnify Stolaruk for liability relating to governmental claims of toxic pollution. Central National had been Stolaruk's liability insurer. The court, Robert J. Chrzanowski, J., granted summary disposition for Central National and Strada. Stolaruk appealed.

The Court of Appeals *held:*

1. Stolaruk is barred from pursuing a claim against Central National because Stolaruk, which was under an obligation to preserve Central National's rights of subrogation under the contract of insurance, destroyed Central National's right of subrogation as against Strada when Stolaruk released Strada from liability for known or unknown causes of action pertaining to the parcels.

2. The indemnification agreement and other provisions in the consent judgment clearly indicate that Strada agreed to indemnify Stolaruk for liability from government claims of toxic

REFERENCES

Am Jur 2d, Contribution §§ 22, 53, 69; Insurance §§ 1794, 1795, 1810, 1813.

Tortfeasor's general release of cotortfeasor as affecting former's right to contribution against cotortfeasor. 34 ALR3d 1374.

pollution only with respect to the Rochester Hills parcel. The Groveland Township parcel is not covered by the indemnification agreement.

3. The mutual release is not rendered invalid by § 12d of the Environmental Response Act. Parties potentially responsible for environmental contamination under the ERA may be jointly and severally liable to the government for cleanup or closure costs, notwithstanding any agreement by the parties to the contrary. However, the parties may agree to apportion the costs of any such cleanup between themselves in any manner they see fit.

Affirmed.

1. INSURANCE — RELEASE BY INSURED — SUBROGATION — INSURER'S LIABILITY.

A release of liability given by an insured to a tortfeasor destroys the insurer's right of subrogation against the tortfeasor and bars an action on the policy by the insured.

2. ENVIRONMENT — ENVIRONMENTAL RESPONSE ACT — APPORTIONMENT OF LIABILITY FOR CLEANUP COSTS.

Private parties jointly and severally liable under the Environmental Response Act to the government for the cleanup or closure costs of environmental contamination may apportion the costs of such cleanup between themselves in any manner they see fit, including the release by one party of the other party's liability (MCL 299.612d; MSA 13.32[12d]).

D'Agostini, Sable & Ruggeri, P.C. (by *William K. Cashen*), for Stolaruk Corporation.

Sullivan, Ward, Bone, Tyler & Asher, P.C. (by *Thomas M. Slavin*), and *Provizer, Lichtenstein & Phillips, P.C.* (by *Randall Phillips* and *William Selinsky*), for Central National Insurance Company of Omaha.

Frank & Stefani (by *Sidney L. Frank* and *David S. Hankus*), for Strada Asphalt Paving Company, Angelo's Crushed Concrete, Inc., and Dominic Iafrate.

Before: HOOD, P.J., and NEFF and T. E. JACKSON,* JJ.

HOOD, P.J. Plaintiff, Stolaruk Corporation, sought to recover from defendants Strada Asphalt Paving Company, Angelo's Crushed Concrete, Inc., and Dominic Iafrate (hereafter defendants Strada) costs that it incurred during the cleanup of certain contaminated real property. Stolaruk also claimed that defendant Central National Insurance Company was obligated under a contract of insurance to honor its claim for coverage regarding the same cleanup. The trial court granted summary disposition in favor of defendants Strada and Central National pursuant to MCR 2.116(C)(10), and subsequently denied Stolaruk's motion for rehearing or reconsideration. Stolaruk appeals as of right. We affirm.

In 1986, Stolaruk, which owned various parcels of Michigan real property, agreed to sell Strada certain real property situated in Rochester Hills and Southfield. Additionally, Stolaruk sold Strada the asphalt plants located on these properties, as well as an asphalt plant located in Groveland Township. Strada removed the asphalt plant from the Groveland Township property in the spring of 1986.

Litigation concerning these transactions ensued between Stolaruk and Strada, and a consent judgment was eventually entered on September 28, 1988, in the Macomb Circuit Court. The consent judgment set forth the terms and conditions of the transfer from Stolaruk to Strada of a four-acre parcel of property in Rochester Hills. The consent judgment included a merger and general release whereby each party agreed to release the other from liability relating to then known or future

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

causes of action. Finally, an indemnification provision was included in the consent judgment whereby Strada agreed to indemnify Stolaruk for liability relating to any claim made by a governmental agency concerning the existence of substances exceeding acceptable toxicity levels on certain specified property.

In November of 1989, the Michigan Department of Natural Resources issued a directive to Stolaruk requiring it to investigate and remediate diesel fuel contamination at the Groveland Township property. Stolaruk sought insurance coverage from its provider, Central National, to cover the costs of this endeavor; Central National denied coverage; Stolaruk incurred out-of-pocket expenses in excess of $100,000 in its effort to comply with the DNR directive.

Stolaruk then initiated the present action against Central National[1] and sought to have the court declare the rights and liabilities of the parties under the contract of general liability insurance covering the Groveland Township property. Central National moved for summary disposition, claiming that it was not obligated under the insurance contract because Stolaruk had prejudiced its (Central National's) right to subrogation by executing the comprehensive release contained in the 1988 consent judgment. Stolaruk then filed an amended complaint naming Strada as defendant. Stolaruk claimed that Strada caused the contami-

[1] Central National insured Stolaruk under two separate policies—a primary policy and an umbrella policy. Therefore, because Stolaruk sought to collect on both policies, Central National was treated as two defendants. It is not disputed that Central National would not be obligated under the umbrella policy upon a determination that it was not liable under the primary policy. Indeed, Central National was found not liable on the primary policy. Therefore, for purposes of this appeal, when referring to Central National, we are addressing its obligations under the primary policy, unless the umbrella policy is specifically mentioned.

nation of the Groveland Township property by removing the asphalt plant in 1986 and, further, that the indemnity provision contained in the consent judgment obligated Strada to compensate it for the expenses incurred as a result of the DNR directive. Strada also moved for summary disposition.

The trial court granted summary disposition for defendants Central National and Strada pursuant to MCR 2.116(C)(10), concluding that the indemnification provision contained in the consent judgment applied solely to the Rochester Hills property, and not to the Groveland Township property. Therefore, according to the trial court, Strada was not required to indemnify Stolaruk for expenses incurred during the process of remediating the contamination found to exist at the Groveland Township property. Additionally, the trial court found that Central National was not obligated under the insurance policy because Stolaruk had prejudiced its right to subrogation by executing the general release found in the consent judgment.

First, Stolaruk argues that the trial court erred in concluding that its claim for insurance coverage was barred. Stolaruk contends that the trial court's grant of Central National's motion for summary disposition pursuant to MCR 2.116(C)(10) was improper because important questions of fact existed. We disagree.

Regarding the Groveland Township property, the contract of insurance between Stolaruk and Central National contains a subrogation clause that provides:

> 8. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization *and the in-*

> *sured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights.* The insured shall do nothing after loss to prejudice such rights. [Emphasis added.]

Further, the contract of insurance expressly provides that no action shall lie against Central National if Stolaruk fails to satisfy all of the conditions set forth therein. Clearly, as a condition precedent to Central National's performance under the contract, Stolaruk was required to take those measures necessary to protect Central National's subrogation rights.

Stolaruk contends that it had no knowledge of the contamination at the Groveland Township property when it executed the general release and, therefore, that it did nothing "after loss" to prejudice Central National's subrogation rights. We find myopic plaintiff's focus on the "after loss" language contained in the subrogation clause. By urging such a narrow interpretation of the subrogation provision, plaintiff seeks to obfuscate the clear import of the clause—namely, that the insured would do nothing to negatively affect the subrogation rights of the insurer.

Moreover, the release contained in the consent judgment provides as follows:

> IV. IT IS FURTHER ORDERED AND ADJUDGED that this Consent Judgment shall merge any and all claims, past, present or future, *known or unknown,* accrued or not accrued, contingent or otherwise, relating to these parties arising out of or relating to the transactions between the Plaintiffs and the Defendants which are the subject matter of the instant litigation.
>
> V. IT IS FURTHER ORDERED AND ADJUDGED that the Consent Judgment shall also constitute a complete release between the Plaintiffs and Defendants *as to all actions, suits, proceedings, claims*

> *and demands whatsoever, known or unknown,* contingent or otherwise, either of them at any time had or has in respect to any act, cause, matter, or thing except those obligations provided for in this Consent Judgment. [Emphasis supplied.]

The foregoing language makes it clear that Stolaruk and Strada executed a release covering all known, *unknown,* then existing, or future causes of action. Hence, we find meritless Stolaruk's argument that it did not know of the Groveland Township contamination when it executed the release, because it is clear that the release encompassed all present or future causes of action whether known or unknown. Therefore, having breached a condition precedent by absolutely releasing a potential tortfeasor from liability, Stolaruk destroyed Central National's right of subrogation as against Strada and, thus, Stolaruk is barred from pursuing a cause of action on the insurance policy. *Poynter v Aetna Casualty & Surety Co,* 13 Mich App 125, 128-130; 163 NW2d 716 (1968).

Stolaruk also argues that a question of fact existed regarding whether Strada was indeed responsible for contaminating the Groveland Township property. According to Stolaruk, absent a showing of causation on Strada's part, it cannot be fairly said that Central National even had a right of subrogation against Strada. Thus, Stolaruk contends that it was improper for the trial court to grant summary disposition in favor of Central National on the basis that Stolaruk had destroyed Central National's right of subrogation by entering into the mutual release with Strada. We find this argument unpersuasive.

It is axiomatic that a motion for summary disposition based upon the failure to state a claim tests the legal sufficiency of a claim by the pleadings

alone. MCR 2.116(C)(8). However where matters outside the pleadings are considered, summary disposition is proper only where reasonable minds could not differ. MCR 2.116(C)(10); *Burger v Midland Cogeneration Venture,* 202 Mich App 310, 315-316; 507 NW2d 827 (1993). Below, through its pleadings, Stolaruk maintained that Strada caused the contamination at issue. Central National produced the consent judgment and argued that Stolaruk's action was barred as a result of the release contained in the judgment. The trial court found, and we agree, that Strada and Stolaruk agreed to a complete release concerning *all* present and future causes of action. Accordingly, because it is clear that Stolaruk had executed a general release in favor of the party that it identified in its pleadings as having caused the contamination at the Groveland Township site (Strada), we conclude as did the trial court that Central National was entitled to summary disposition as a matter of law because the release destroyed its right of subrogation against Strada. MCR 2.116(C)(10); *Burger, supra; Poynter, supra.*

It does not matter that Strada denied causing the contamination. Below, Central National and Strada opposed Stolaruk's claims through two separate motions for summary disposition. Paying particular attention to the factual allegations contained in Stolaruk's claim against Central National, and Central National's motion for summary disposition, we find that no record could be developed that would leave open an issue upon which reasonable minds could differ regarding Stolaruk's claim against Central National. Accordingly, notwithstanding Strada's denial, the trial court properly granted Central National's motion for summary disposition. *Amorello v Monsanto Corp,* 186 Mich App 324, 329-330; 463 NW2d 487 (1990).

Next, Stolaruk argues that Strada was required to indemnify it pursuant to the language of the consent judgment. Again, we disagree. The following indemnification provision was included in the consent judgment at Section III(C)(2)(k):

> That, *upon the Closing,* the Defendants herein (Strada) shall forever indemnify and hold harmless Plaintiffs, their successors, assigns, heirs and personal representatives from any and all liability relating to any claim by any governmental agency, State or Federal, person, corporation or any other entity as to the existence of substances which exceeds acceptable toxicity levels, as provided by the Michigan Department of Natural Resources and/or U.S. Environmental Protection Agency, including, but not limited to, fines, penalties, actual attorneys fees or any other monies or obligations expended or incurred and Defendants shall have the absolute duty to defend including retention of legal counsel. [Emphasis supplied.]

We agree with plaintiff that the foregoing constitutes a promise by Strada to indemnify it for costs associated with the remediation of toxic substances. However, contrary to plaintiff's argument, this indemnification agreement is not broad, but rather applies specifically to certain property located in Rochester Hills.

Other language in the consent judgment makes it clear that the parties did not intend the indemnification agreement to be comprehensive. Instead, it is clear from the language of the consent judgment that the parties intended the indemnification provision to apply only to specific parcels of land in Rochester Hills. Indeed, the above-emphasized "Closing" language found in the indemnification clause concerns the Rochester Hills property. Additionally, remarks made by plaintiff's counsel on the record concerning the indemnification agree-

ment further satisfies us that the provision was only intended to apply to the Rochester Hills property. Accordingly, because Stolaruk has failed to establish that Strada agreed to indemnify it for remediation costs concerning the Groveland Township property, it is clear that the above-discussed mutual release precludes Stolaruk from now attempting to seek indemnification from Strada.

Finally, Stolaruk argues that the Environmental Response Act (ERA) renders the release invalid. We disagree. The relevant provision of the ERA, MCL 299.612d; MSA 13.32(12d), provides:

> (1) An indemnification, hold harmless, or similar agreement or conveyance is not effective to transfer from a person that may be liable under section 12 to the state for evaluation or response activity costs or damages for a release or threat of release to any other person the liability imposed under this act. This section shall not bar an agreement to insure, hold harmless, or indemnify a party to the agreement for liability under this act.
>
> (2) This act does not bar a cause of action that a person subject to liability under this act, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

This section has not been interpreted by either this Court or the Michigan Supreme Court, and unfortunately the language employed by the Legislature lacks clarity. Further, the House Legislative Analysis report concerning this provision does not shed more light on the subject. However, federal courts have addressed similar provisions in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601-9657, and the Leaking Underground Storage Tank Act (LUSTA), MCL 299.831-299.850; MSA 14.528(261)-14.528(280). Of these decisions, we are

inclined to follow *Niecko v Emro Marketing Co,* 973 F2d 1296 (CA 6, 1992).

In *Niecko,* the Sixth Circuit Court of Appeals affirmed a decision of the federal district court for the eastern district of Michigan. *Niecko* involved an interpretation of § 12(6) of the LUSTA, which, for purposes of this discussion, is analogous to the ERA provision at issue here. Because there was no case law interpreting the subsection of the LUSTA, the Sixth Circuit Court of Appeals, as did the district court, looked at cases that interpreted the relevant CERCLA provision.

The *Niecko* court concluded that the relevant LUSTA provision allows a party to release another from financial responsibility arising out of environmental contamination liability. *Id.* In so doing, the *Niecko* court reasoned as follows at 1300-1301:

> However, the better interpretation, and the one used by the district court in the instant case, is that the first sentence provides that *all parties involved are to be jointly and severally liable to the claimant under the statute. Where the claimant is the government, liability may not be transferred. However, as between the parties allegedly responsible, the district court held that liability may indeed be transferred. In other words, the first sentence ensures the clean up is performed and those responsible cannot escape their liability for cleaning the property. However, in terms of financial liability, the parties may allocate the costs of the clean up between them.* Such an interpretation is consistent with the legislative history of CERCLA. [Emphasis supplied.]

Put another way, the *Niecko* interpretation prevents a party from contracting away its liability as against the government, but allows private parties to allocate the financial responsibility for the costs

of the cleanup as between themselves. See also *Mardan Corp v CGC Music, Ltd,* 804 F2d 1454 (CA 9, 1986); *AM Int'l, Inc v Int'l Forging Equipment Corp,* 982 F2d 989 (CA 6, 1993).

We adopt the *Niecko* view as applicable to the present case and hold that private parties potentially responsible for environmental contamination under the ERA may be jointly and severally liable to the government for cleanup or closure costs, notwithstanding any agreement by the parties to the contrary. However, private parties may agree with one another to apportion the costs of any such cleanup between themselves in any manner that they see fit. Accordingly, the release entered into by Stolaruk and Strada is not precluded by § 12d of the ERA. Accordingly, the trial court properly concluded that Stolaruk, having executed the general release, was prohibited from attempting to recoup from Strada the monies expended during its effort to remediate the contamination found at the Groveland Township property. Summary disposition was therefore proper. MCR 2.116(C)(10); *Niecko, supra.*

Affirmed.

ROSSOW v ARANDA

Docket No. 164420. Submitted May 17, 1994, at Grand Rapids. Decided August 15, 1994, at 9:10 A.M.

Suzanne N. Rossow brought an action in the Cass Circuit Court against Pedro Aranda, Jr., seeking physical custody of the parties' oldest daughter pursuant to the provisions of the Child Custody Act. An order granting the defendant physical custody of the child previously had been entered pursuant to a stipulation by the plaintiff in a paternity action that had been brought by the plaintiff against the defendant. The court, Michael E. Dodge, J., denied the plaintiff's request for physical custody of the child and ordered that physical custody remain with the defendant. The plaintiff appealed.

The Court of Appeals *held:*

1. The plaintiff failed to establish that the stipulation she had executed in the paternity action upon which the order placing physical custody of the child with the defendant had been based was the result of duress or coercion.

2. A party seeking a change in custody of a child that is already the subject of a prior custody order has the burden of showing first that either there is proper cause for the change or there has been a change in circumstances warranting the change in custody. Until a proper basis for a change in custody is shown, a court is without authority to consider the prior decision regarding custody or to reconsider the best interests of the child or the existence of an established custodial environment. Because the plaintiff failed to show a sufficient change in circumstances, the trial court properly declined to consider the questions of the best interest of the child or the existence of an established custodial environment.

Affirmed.

PARENT AND CHILD — CHILD CUSTODY — CHANGE OF CIRCUMSTANCES — BEST INTEREST OF CHILD — CUSTODIAL ENVIRONMENT.

A party seeking a change of custody of a child where there is a

REFERENCES

Am Jur 2d, Parent and Child § 27.

See ALR Index under Custody and Support of Children.

prior court order regarding custody has the burden of showing first that there is proper cause for the change of custody or that there has been a change in circumstances warranting a change in custody; until such cause or change in circumstances has been established, a court is without authority to consider the prior decision or to reconsider the best interest of the child or the existence of an established custodial environment (MCL 722.27[1][c]; MSA 25.312[7][1][c]).

Peter J. Johnson and *Jay L. Schultz,* for the plaintiff.

Before: DOCTOROFF, C.J., and TAYLOR and M. G. HARRISON,* JJ.

TAYLOR, J. Plaintiff appeals as of right from a circuit court order that denied her request for physical custody of the parties' eldest daughter and that continued physical custody of the daughter with defendant. We affirm.

Plaintiff sought to set aside a stipulation pursuant to which she agreed to transfer physical custody of the parties' eldest daughter from herself to defendant. Plaintiff failed to establish that she had entered into the stipulation as a result of duress or coercion. Accordingly, plaintiff failed to demonstrate proper cause for a change of custody. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Mann v Mann,* 190 Mich App 526, 536; 476 NW2d 439 (1991).

Further, we reject plaintiff's claim that the trier of fact erred as a matter of law in refusing to consider and make findings with regard to the statutory best interest factors, MCL 722.23; MSA 25.312(3). A trial court may amend or modify its previous custody judgment or order only "for proper cause shown or because of change of circumstances . . . ." MCL 722.27(1)(c); MSA 25.312(7)(1)(c).

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

The plain and ordinary language used in MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. It therefore follows as a corollary that where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors.

In the instant case, plaintiff failed to establish either proper cause or a change of circumstances warranting a change of custody. Accordingly, the trier of fact was not required by MCL 722.27(1)(c); MSA 25.312(7)(1)(c) to address the statutory best interest factors. Plaintiff's failure to present sufficient proof of changed circumstances precludes further consideration of her motion to change custody.

Finally, we reject plaintiff's challenge to the trier of fact's determination that an established custodial environment existed with defendant. Because plaintiff has failed to establish proper cause or a change of circumstances necessitating consideration of a change in custody, the trier of fact was not required to make a determination with regard to the existence of an established custodial environment. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). Accordingly, any such finding by the trier of fact was harmless in the instant case.

Affirmed.

WHITE v HUMBERT

Docket No. 144445. Submitted April 13, 1994, at Detroit. Decided August 15, 1994, at 9:15 A.M. Leave to appeal sought.

Sheila White, as personal representative of the estate of Phoebe Obelton, brought an action in the Wayne Circuit Court against Hope Humbert, a police dispatcher, and Keith D. Beasley and Ronald Johnson, police officers, claiming that the failure of the defendants to discharge properly their official duties contributed to the death of Obelton. The court, Kay Tertzag, J., denied motions for summary disposition for defendants Humbert and Beasley, holding that each owed a duty of care to the plaintiff's decedent and was not entitled to summary disposition pursuant to the public duty doctrine. Humbert and Beasley appealed.

The Court of Appeals *held:*

1. The trial court erred in holding that Humbert owed a duty of care to the decedent other than that owed to the public in general. A duty of care with respect to a specific individual arises out of a special relationship with the person. No such special relationship existed between Humbert and the decedent where the only connection between the two was that Humbert was the dispatcher who answered a call made by one of the decedent's neighbors informing authorities that the decedent was being attacked and was screaming for help. Because no special relationship existed between Humbert and the decedent, Humbert owed no duty of care to the decedent different than that owed to the public in general and was entitled to summary disposition on the basis of the public duty doctrine.

2. Because Beasley was at the scene, was informed of the plight of the decedent, and was in a position to render specific assistance to the decedent in particular, there existed a sufficient basis to give rise to a special relationship between him and the decedent such that he owed a specific duty of care toward the decedent in particular to assist her or protect her from further injury. Accordingly, the public duty doctrine does

---

REFERENCES

Am Jur 2d, Negligence § 108.

See ALR Index under Degree and Standard of Care.

not apply, and the trial court properly denied summary disposition for Beasley on that basis.

Affirmed in part, reversed in part, and remanded.

1. PUBLIC OFFICERS — POLICE DISPATCHERS — PUBLIC DUTY DOCTRINE — DUTY OF CARE.

A police dispatcher owes no special duty of care toward the victims of crimes that are reported to the police by third parties, because under those circumstances there exists no special relationship between the dispatcher and the victim; in such circumstances, the public duty doctrine applies.

2. PUBLIC OFFICERS — POLICE OFFICERS — PUBLIC DUTY DOCTRINE — DUTY OF CARE.

A police officer who is at the scene of a reported crime, is informed of the danger to a specific victim, and is in a position to render possible assistance to that particular victim owes a duty of care to that specific victim such that the public duty doctrine does not apply.

Lopatin, Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick (by *Richard E. Shaw*), for the plaintiff.

Donald Pailen, Corporation Counsel, and *Sharon D. Blackman,* Assistant Corporation Counsel, for the defendants.

Before: SAWYER, P.J., and T. G. KAVANAGH* and L. L. HEATHSCOTT,** JJ.

SAWYER, P.J. Defendants appeal by leave granted from an order of the circuit court denying their motion for summary disposition. We affirm in part and reverse in part.

Because this case involves a question whether summary disposition is appropriate, we will accept as true the facts pleaded by plaintiff. According to plaintiff's complaint, on October 9, 1990, calls for

* Former Supreme Court justice, sitting on the Court of Appeals pursuant to Administrative Order No. 1993-6.

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

emergency assistance were placed by two neighbors of plaintiff's decedent. The first call was received by defendant Hope Humbert, a 911 dispatch operator, at 12:30 A.M. Because of the priority rating given to the call, a police unit was not dispatched for approximately forty minutes after receiving the first call. According to plaintiff, while waiting for police to arrive, other calls were placed directly to the precinct. In any event, the first scout car did not arrive at the scene until approximately 1:30 A.M.

The original call itself was prompted by neighbors who saw and heard plaintiff's decedent being attacked and screaming for help. The two officers who responded to the scene are defendants Keith D. Beasley and Ronald Johnson.[1] When officers Johnson and Beasley arrived, they were met by decedent's neighbors, who explained that decedent had been screaming for help and that, through the decedent's bathroom window, they had witnessed her being attacked. They informed the officers concerning which apartment decedent lived in. The officers then took down the witnesses' names, circled the building, and left without knocking on decedent's door or otherwise attempting to make contact with decedent to determine if she, in fact, was being or had been attacked.

Thereafter, at approximately 4:15 A.M., a call was received by the 911 operator from decedent's husband, who stated he had just stabbed his wife to death. In fact, the time of decedent's death was placed at 4:50 A.M. Indeed, according to plaintiff, although decedent suffered numerous stab wounds, the actual cause of death was due to bleeding from those wounds.

[1] Although Johnson is named as a defendant in plaintiff's complaint, he is not a party to this appeal, apparently because the motions for summary disposition in the lower court only affected defendants Humbert and Beasley.

On appeal, defendants argue that they were entitled to summary disposition on the basis of the "public duty" doctrine. Under the public duty doctrine, a public official, such as a police officer, is regarded as owing his duty to the public in general and not to a specific individual unless a special relationship exists between the official and the individual such that the performance by the public official would affect the individual in a manner different in kind from the way performance would affect the public. *Harrison v Director of Dep't of Corrections,* 194 Mich App 446, 456-457; 487 NW2d 799 (1992).

Turning first to the issue of the 911 dispatch operator, defendant Humbert, we conclude that no special relationship can be said to exist between defendant Humbert and decedent. Decedent did not place the call to 911, thus, there were no assurances by Humbert to decedent that help was on the way. In essence, the connection between decedent and Humbert is simply too attenuated to conclude that any relationship or duty would arise between the two beyond the general duty owed by Humbert to the public at large. Accordingly, we conclude that the trial court erred in denying Humbert's motion for summary disposition.

However, with respect to the police officers, and specifically defendant Beasley, we are persuaded that a police officer's response at a crime scene is individualized sufficiently to allow for the creation of a duty to a potential victim at that crime scene above and beyond the general duty owed by the police to the public at large. In this respect, we think it important to consider the context in which the public duty doctrine normally is applied. Specifically, the cases in which claims were dismissed on the basis of the public duty doctrine have the common thread of involving the specula-

tive possibility of a tortfeasor's injuring an unidentifiable member of the general public.

For example, in *Harrison,* a parolee broke into the plaintiff's house, murdered two thirteen-year-old boys, attempted to murder one other, and placed three other individuals in fear of their lives. The plaintiffs brought an action against the director of the Department of Corrections, members of the parole board, and various other officials of the Department of Corrections. In essence, their claim was based upon a theory that the granting of the parolee's parole and his release from prison had been improper. This Court applied the public duty doctrine and rejected the argument that a special relationship existed. This Court noted that, at a minimum, the existence of a special relationship would seem to require some contact between the governmental agency or official involved and the victim and reliance by the victim upon the promises or actions of the governmental agency or official. *Harrison, supra* at 457.

The point made by *Harrison,* and other cases cited by defendants, is that while the defendants in those cases might have had some reason to believe that members of the general public might be endangered by the actions of a third party, there was no identifiable person who was being endangered. That is, the potential for injury and the identification of the victim remain hypothetical until such time as the crime has occurred.

Similarly, in *Chivas v Koehler,* 182 Mich App 467, 475-476; 453 NW2d 264 (1990), the Court concluded that prison guards owed no duty to members of the public killed by escaped prisoners. Again, however, in that case the danger to the public and the identity of the victims remained speculative until the crimes actually occurred.

In the case at bar, on the other hand, the police

were responding to a police call in which they had been informed specifically that a crime was in progress and that a particular, identifiable victim was in danger. This does not involve a matter where some unidentifiable member of the general public might be injured, but where the police were informed that a specific member of the public was, in fact, in the process of being injured.

The closest case to defendants' situation is that which was presented in *Zavala v Zinser,* 123 Mich App 352; 333 NW2d 278 (1983), aff'd sub nom *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567; 363 NW2d 641 (1984). In *Zavala,* the plaintiff was shot outside a Detroit bar, which shooting was observed by police officers sitting in a nearby, marked police vehicle. The plaintiff's theory was that the defendant officers were negligent in failing to prevent the shooting. This Court upheld a grant of summary judgment, concluding both that there was no duty owed the plaintiff under the public duty doctrine and that the doctrine of governmental immunity applied.[2] However, on further appeal, the Supreme Court specifically did not decide the issue of the public duty doctrine, concluding instead that summary judgment was appropriate on the basis of governmental immunity.[3] As Judge KAUFMAN noted in his dissent in *Zavala,* there is a duty imposed by statute and by the Detroit City Charter for the police to preserve the peace and protect the public. *Zavala, supra* at 358-

[2] Judge KAUFMAN did file a vigorous dissent, rejecting the conclusion that the public duty doctrine precluded liability by the officers.

[3] Specifically, the Court noted that the officers did not, in fact, do nothing before the shooting. Rather, they determined the need for backup assistance before dealing with the altercation and had radioed for that assistance. It was while waiting for backup to arrive that the shooting occurred. The Court concluded that the officers' decision concerning how to handle the situation was a discretionary-decisional act that came within the governmental immunity doctrine as enunciated in *Ross, supra* at 659-660.

359. The question, of course, becomes: When does a special relationship between the police and a specific member of the public arise that is sufficient to shift that duty from being owed to the public at large to a specific individual?

We believe that where an officer is responding to a call that a specific crime is occurring or has occurred, the specific nature of that police activity is sufficient to give rise to the special relationship between the officer and the victim so as to impose a duty upon the officer to render assistance to the victim or to protect that specific victim from further injury, dependent upon the circumstances.

We do wish to stress, however, that this does not make the police the guarantor of the safety of every crime victim. First, the officer is immune unless his conduct rises to the level of gross negligence. MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). Second, the fact that a police officer is unable to render assistance to the victim does not necessarily mean that the officer handled the call improperly. That is, the officer must handle each situation in accordance with the legal restrictions on the officer and with the proper considerations for the officer's own safety, on the basis of the facts available to the officer at the time. The appropriate response to a particular case may, on the basis of the information available to the officer at the time, be to do nothing. Or, as was the case in *Zavala,* it may be appropriate for the officer to wait for backup.

Turning to the case at bar, whether the officers acted appropriately would have to be determined in light of the information received by the officers from the 911 dispatch operator and from the witnesses at the scene. The officers would have to evaluate that information to determine whether there was, in fact, a likelihood that there was a

victim in need of assistance, whether the apartment should be approached, and whether the facts would justify their entry into the apartment to determine whether the victim was in need of assistance. Whether defendant Beasley and his partner breached their duty to the victim in the manner in which they handled the call or were grossly negligent, so as not to be entitled to immunity, in their handling of the call is not the question before us. Rather, we merely hold that once they were called to a crime scene in which they were informed that plaintiff's decedent was being attacked, that created a sufficient special relationship between them and the victim to create a duty to that victim to handle the call appropriately. Whether they handled the call appropriately and whether, even if negligent in handling the call, their negligence rises to the level of gross negligence necessary under the governmental immunity statute are questions of fact separate and apart from the duty question. We merely hold that a duty of care existed; the questions whether that duty was breached and whether defendants are entitled to governmental immunity are not before us.

For the above reasons, we conclude that the trial court correctly determined that defendant Beasley owed a duty to plaintiff's decedent, but erred in concluding that a duty was owed by defendant Humbert. Accordingly, we affirm the trial court's denial of summary disposition with respect to Beasley, but reverse that denial with respect to Humbert. On remand, the trial court shall enter the appropriate order granting summary disposition in favor of Humbert.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings

consistent with this opinion. We do not retain jurisdiction. Defendant Humbert only may tax costs, the remaining parties not having prevailed in full.

PEOPLE v CHESEBRO

Docket No. 158915. Submitted February 2, 1994, at Grand Rapids. Decided August 15, 1994, at 9:20 A.M.

Michael J. Chesebro pleaded nolo contendere in the Allegan Circuit Court, George R. Corsiglia, J., to a charge of criminal sexual conduct in the second degree involving one victim. The court departed from the sentencing guidelines when it imposed a sentence of ten to fifteen years in prison. The defendant appealed his sentence.

The Court of Appeals *held:*

1. The trial court erred in scoring points under the sentencing guidelines for Offense Variable 6, two or more victims. Offense variables should be scored only with respect to the specific criminal transaction that gave rise to the conviction for which sentence is imposed, unless the instructions for a variable specifically direct otherwise. Because the defendant's conviction related to only one victim, no points should have been scored for OV 6 notwithstanding the fact that the defendant admitted to having engaged in similar conduct with various victims over several years. Remand is necessary for a grant or denial of resentencing depending on whether the trial court decides to impose a different sentence or the same sentence in light of the corrected scoring of the sentencing guidelines.

2. The claim that the sentence imposed violates the principle of proportionality need not be addressed now in view of a possible resentencing. The defendant may renew the claim in a subsequent appeal following remand.

3. The trial court did not interject the defendant's religion into the sentencing proceeding. The trial court's remarks were in response to comments made by the defendant at allocution.

4. Resentencing before a different judge is not required in the absence of any indication that the original judge is biased against the defendant or incapable of complying with the directions of the Court of Appeals on remand.

Remanded for further proceedings.

REFERENCES

Am Jur 2d, Criminal Law § 527.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES.

Offense variables under the sentencing guidelines should be scored only with respect to the specific criminal transaction that gave rise to the conviction for which sentence is imposed unless the instructions for a variable specifically direct otherwise.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Frederick Anderson,* Prosecuting Attorney, and *Roberts A. Kengis,* Assistant Prosecuting Attorney, for the people.

Krause & Zambon, P.C. (by *Richard E. Zambon*), for the defendant.

Before: HOLBROOK, JR., P.J., and SAWYER and J. T. HAMMOND,* JJ.

SAWYER, J. Defendant pleaded nolo contendere to criminal sexual conduct in the second degree. MCL 750.520c; MSA 28.788(3). He was thereafter sentenced to serve ten to fifteen years in prison. He now appeals, raising only issues regarding sentencing, not the conviction. We remand for consideration by the sentencing judge of a motion for resentencing.

Defendant raises a number of issues with respect to his sentence, one of which has merit. Defendant argues that the trial court erred in assessing ten points in the scoring of Offense Variable 6 under the sentencing guidelines. We agree.

Offense Variable 6 deals with multiple victims, and ten points are appropriate where there are two or more victims. In the case at bar, the offense for which defendant was convicted involved only one victim, but, according to the presentence investigation report, defendant has admitted to engaging in similar conduct with various victims

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

over the course of a number of years. It was on the basis of these other instances that the trial court assessed ten points for Offense Variable 6. Thus, the question before us is whether, as defendant argues, Offense Variable 6 refers only to the victims in the charged offense, or to any victim in any offense, as the prosecution argues. We agree with defendant.

We begin by looking at the definition of "offense variable" contained in the sentencing guidelines. The definitions section defines "offense variable" as being the factors "that are used to evaluate the seriousness of the offense." Thus, the primary focus of the offense variables is not to measure the offender, but to measure the offense.[1] Indeed, in looking at the various offense variables, both for criminal sexual conduct and other crimes, it can be readily observed that the offense variables by and large speak to the circumstances of the particular offense for which the defendant is to be sentenced. For example, Offense Variable 1 addresses the use of a weapon in the course of the crime, Offense Variable 2 addresses a physical attack on the victim, Offense Variable 3 addresses the intent to kill or injure, Offense Variable 4 addresses aggravated physical abuse involved in an offense, and so on.

In fact, the only offense variables that by their specific terms direct attention to crimes other than the one for which the defendant is being sentenced are Offense Variable 8 (continuing pattern of criminal behavior), Offense Variable 16 to a limited extent (aggravated controlled substance offense), and Offense Variable 25 in certain circumstances

[1] The nature of the offender is primarily measured by use of the prior record variables. This is not to say, of course, that the offense variables completely ignore the nature of the offender, only that their primary focus is on the nature of the offense.

(contemporaneous criminal acts, which can include similar acts committed within the last six months). However, to the extent those variables require consideration of offenses other than the one for which the defendant is being sentenced, the instructions specifically direct the court to consider other offenses.

If, on the other hand, we were to accept the prosecutor's invitation to read into the offense variables the idea that prior conduct may be considered in scoring the variable even absent explicit instructions to do so, absurd results could occur. For example, Offense Variable 1 involves the aggravated use of a weapon and fifteen points is appropriate if a firearm is pointed toward the victim. Under the prosecutor's rationale, fifteen points could be scored if the defendant has ever pointed a weapon at someone, during any offense, and even where no weapon was involved in the current offense. Similarly, under Offense Variable 2 (physical attack or injury), one hundred points is scored if the victim is killed. Under the prosecutor's theory, once a defendant has committed a crime in which a victim is killed and the scoring of one hundred points for Offense Variable 2 is appropriate, the defendant would always receive a score of one hundred points for Offense Variable 2 for any offense committed thereafter even though there may have been no killing in those offenses.

We think the rule that more accurately applies the sentencing guidelines is that the offense variables are to be scored only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise. In this respect, the scoring of Offense Variable 6 is more akin to the scoring of Offense

Variable 12, as discussed in *People v Polus,* 197 Mich App 197; 495 NW2d 402 (1992).

In *Polus,* this Court considered the proper scoring of Offense Variable 12, which deals with the number of criminal sexual penetrations. The trial court in *Polus* had scored fifty points, which is appropriate where there are two or more penetrations in addition to the penetration that forms the basis of the conviction. However, to conclude that there had been multiple penetrations, the trial court in *Polus* had relied upon penetrations that had occurred over the course of months or years, not just penetrations during the specific criminal transaction for which the defendant was convicted. *Id.* at 199. We reversed, concluding that only those sexual penetrations occurring during the course of the same criminal transaction were to be scored. If the prosecutor is correct in theorizing that offense variables are not specific to the crime for which the defendant is being sentenced, then *Polus* would have had to have been decided otherwise. We do not believe that *Polus* was incorrectly decided, but that the prosecutor's reasoning is flawed.

Finally, the prosecutor suggests that if Offense Variable 6 is limited to the number of victims during the same criminal transaction, then Offense Variable 25 becomes meaningless because it would cover contemporaneous criminal acts. We disagree. First, by its terms, Offense Variable 25 is not limited to the same criminal transaction. Rather, it considers all criminal acts occurring within twenty-four hours of the offense for which the offender is being sentenced or up to six months for crimes that are the same or similar in nature to the crime for which the defendant is being sentenced. Thus, the crimes that are eligible for scoring under Offense Variable 25, by the specific

instructions for the scoring of that offense variable, do not need to be part of the same criminal transaction. Moreover, Offense Variable 25 does not require the presence of multiple *victims.* Rather, Offense Variable 25 focuses on multiple criminal *acts,* regardless of the number of victims.

Furthermore, Offense Variable 6 does not necessarily require a contemporaneous criminal act. The instructions for Offense Variable 6 provide that a victim is each person who is placed in danger of injury or loss of life. It does not necessarily require that a separate criminal offense have occurred with respect to that victim. For example, in a robbery, the defendant may rob only one victim, but scoring Offense Variable 6 for multiple victims is nevertheless appropriate because there are other individuals present at the scene of the robbery who were, therefore, endangered. See *People v Day,* 169 Mich App 516; 426 NW2d 415 (1988). Thus, while there may be some overlap between Offense Variable 6 and Offense Variable 25, they are by no means duplicative in that the scoring of points under one offense variable necessarily requires the scoring of additional points under the other.

Accordingly, for the above reasons, we conclude that the trial court erred in scoring ten points for Offense Variable 6. Because there was only one victim involved in the criminal transaction for which defendant was convicted, Offense Variable 6 should be scored as zero.

There remains, however, the question of the appropriate remedy. In *Polus, supra,* we held that the appropriate remedy where there is a scoring error is to remand the matter to the trial court to determine whether resentencing is required in light of the corrected scoring. As the Court did in *Polus,* we wish to emphasize here that we are not

saying that the trial court must ignore defendant's prior conduct in determining the appropriate sentence to impose. As the *Polus* Court pointed out, just because prior conduct is not scored under the offense variable does not mean that it cannot be considered in determining where within the guidelines recommendation to sentence the defendant or be considered in deciding to depart from the guidelines recommendation. *Polus, supra* at 200. Rather, that conduct cannot be used to score the offense variable to determine the base guidelines recommendation. *Id.*

Accordingly, it is entirely possible that, even with the changed guidelines recommendation, the trial court might choose to impose the same sentence. Thus, it is premature to order a resentencing because it is not entirely clear that a resentencing will be required. Rather, consistent with the decision in *Polus,* the matter should be remanded to the trial court for the court to determine whether it would impose a different sentence in light of the changed guidelines scoring. If the court determines that it would impose a different sentence, then it may enter the appropriate order granting resentencing and bring defendant before it to be resentenced. On the other hand, if the trial court determines that its sentence would not change even in light of the correct scoring of the guidelines, then it may enter an appropriate order denying resentencing. The trial court should make its determination and enter the appropriate order within fifty-six days of the clerk's certification of this opinion.

Defendant next argues that the sentence imposed violates the principle of proportionality set forth in *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). However, in light of the remand ordered on the previous issue, we believe it would

be premature to decide the proportionality question. Rather, if the trial court affirms its original sentence on remand, or imposes a shorter sentence but one which defendant believes is still disproportionate, then defendant may raise that challenge in an appeal following the remand.

Next, defendant argues that the trial court improperly interjected defendant's religion into the sentencing proceeding. We disagree. It was defendant who brought up the issue of his religion during his allocution at sentencing. The trial court's comments were merely in response to those stated by the defendant. Accordingly, we are not persuaded that the trial court improperly injected religious values into the sentencing proceeding.

Finally, defendant argues that he should be resentenced before a different judge. We see no need to assign this matter to a different judge. As explained above, the trial court did not consider improperly defendant's religious values in fashioning the sentence, nor has defendant shown that the trial court has exhibited a bias toward defendant. Defendant suggests that the trial court would have a difficult time setting aside its previously expressed views concerning the scoring of Offense Variable 6. We, however, see no reason to believe that the trial court cannot reconsider this issue in light of properly scored sentencing guidelines and determine whether resentencing is required. As noted above, the mere fact that defendant's prior conduct is not properly scored under Offense Variable 6 does not mean that it cannot be considered by the trial court in fashioning defendant's sentence. It only means that the trial court must consider the appropriate sentence to impose in light of a somewhat reduced recommendation under the sentencing guidelines. That reduced recommendation may or may not translate into

the trial court deciding that a shorter sentence is appropriate.

We suspect that the trial court will again depart from the sentencing guidelines and may even reaffirm its original sentence in light of the comments made at sentencing. However, that does not translate into an automatic conclusion that such a sentence would be disproportionate under *Milbourn*. Because there is no reason to believe that the trial court cannot properly comply with our directions on remand, we see no need to direct assignment to a different judge. If defendant has objections to the manner in which the remand is handled or to the sentence that he ultimately receives following remand, be it affirmation of the original sentence or the imposition of a new sentence, he may pursue the appropriate remedies in an appeal following remand.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

PEOPLE v KINCADE (ON REMAND)

Docket No. 153264. Submitted May 5, 1994, at Detroit. Decided August 16, 1994, at 9:00 A.M. Leave to appeal sought.

Dennis J. Kincade was convicted by a jury in the Recorder's Court of Detroit of first-degree murder and possession of a firearm during the commission of a felony. The defendant appealed, and the Court of Appeals, MAHER, P.J., and SHEPHERD and G. S. ALLEN, JR., JJ., affirmed. 162 Mich App 80 (1987). The defendant thereafter filed in the Recorder's Court a motion for a new trial, which was denied. The Court of Appeals denied leave to appeal from the denial of the order (Docket No. 104129). The Supreme Court also denied leave. 432 Mich 909 (1989). The defendant again moved for a new trial in the Recorder's Court, which was denied, and the Court of Appeals denied the defendant's application for leave to appeal (Docket No. 121864). The Supreme Court remanded the matter to the Recorder's Court with instructions that it was to hold a hearing on the defendant's claim of a new trial based on the denial of effective assistance of counsel and that it was to appoint an attorney for the defendant if he was indigent. 436 Mich 883 (1990). An attorney was appointed, hearings were held, and the Recorder's Court, Michael J. Talbot, J., denied the motion for a new trial, ruling that the defendant had failed to sustain his claim of ineffective assistance of trial and appellate counsel. The defendant filed in the Court of Appeals a complaint for superintending control, challenging the failure of the Recorder's Court to appoint appellate counsel or provide him with transcripts of the hearings. The Court of Appeals directed that the Recorder's Court provide the defendant with a copy of its decision and the transcripts of the hearings, but denied the complaint for superintending control for lack of merit. *In re Kincade,* unpublished order of the Court of Appeals, decided October 16, 1991 (Docket No. 141703). Contemporaneously with the filing of the complaint for superintending control, the defendant filed a claim of appeal, contending that the decision of the Recorder's Court was a final judgment that was appealable as of right (Docket No. 140764). When the defendant failed to respond to the Court's request for copies of the trial court's order and opinion, the Court of Appeals dismissed the appeal.

The Supreme Court remanded the matter to the Court of Appeals for consideration as on leave granted. 439 Mich 1022 (1992).

The Court of Appeals *held:*

1. Because the Court of Appeals affirmed the defendant's convictions and sentences in the original appeal, the right to appointment of counsel in the subsequent proceedings relative to the motions for a new trial is governed by the court rules. When the Supreme Court remanded for the hearing on the motion for a new trial, the defendant's right to appointment of counsel arose as a result of the contested nature of the proceedings, which required appointment of counsel pursuant to MCR 6.505.

2. Because the proceedings on remand were not a continuation of the defendant's original appeal as of right, no further appeal as of right would lie, and any further appeals from decisions relative to the defendant's attempts to seek relief from judgment would be by leave to appeal only. MCR 6.509(A). However, where, as here, counsel is appointed in the trial court, the appointed counsel is authorized to represent the defendant in connection with an application for leave to appeal to the Court of Appeals the trial court's decision of the matter for which the appointment was made. MCR 6.509(B). It is for the appointed attorney to decide in the exercise of professional discretion whether to seek leave to appeal on behalf of the defendant. No such decision has been made in this case.

3. Although no claim of appeal exists, the defendant or his previously appointed counsel may file a delayed application for leave to appeal, providing that the application for leave to appeal is filed within the time limit of MCR 7.205(F) as extended by the period during which that time limit was tolled by the various appellate proceedings.

Appeal dismissed.

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.

Dennis J. Kincade, in propria persona.

ON REMAND

Before: GRIFFIN, P.J., and SAWYER and P. H. CHAMBERLAIN,* JJ.

PER CURIAM. Pursuant to the Michigan Supreme Court's order of June 1, 1992, this case comes to this Court for plenary consideration "as on leave granted." 439 Mich 1022 (1992).

The procedural history of this case is lengthy, but not complex. In 1985, after a jury trial in the Recorder's Court, defendant was convicted of first-degree murder and possession of a firearm during the commission of a felony. On August 20, 1985, he received the statutory sentence for each offense.

A claim of appeal was filed, and defendant's convictions were affirmed. *People v Kincade,* 162 Mich App 80; 412 NW2d 252 (1987). No further appeal was sought.

On September 9, 1987, defendant, proceeding in propria persona, filed a motion in the lower court that he styled as one for a new trial. That motion was denied by an order dated September 14, 1987. A delayed application for leave to appeal from that order was filed in the Court of Appeals, which denied leave. Unpublished order of the Court of Appeals, decided November 22, 1988 (Docket No. 104129). The Supreme Court denied leave on May 31, 1989. 432 Mich 909 (1989).

Subsequently, defendant again moved for a new trial in the Recorder's Court. From denial of that motion, defendant filed an application for leave to appeal in the Court of Appeals, which was denied. Unpublished order of the Court of Appeals, decided March 15, 1990 (Docket No. 121864).

However, our Supreme Court, in *People v Kin-*

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

cade, 436 Mich 883 (1990), remanded the matter to the Recorder's Court with instructions "to provide a hearing on the defendant's claim that he should receive a new trial because he was denied effective assistance of counsel. MCR 7.302(F)(1)." Furthermore, the Court provided that "[o]n remand, if the defendant is indigent, the court is to appoint an attorney who has not previously represented the defendant."

Hearings were held on January 23 and 24 and April 26, 1991, for which attorney Kimberly Reed was appointed to represent defendant. On April 26, 1991, the trial court denied the motion for a new trial, ruling that defendant's claim of ineffective assistance of trial and appellate counsel had not been sustained.

Defendant filed a claim of appeal in the Court of Appeals, contending that the Recorder's Court decision was a "final judgment" appealable as of right. When defendant failed to respond to correspondence from the clerk's office of this Court, requesting a copy of the trial court's order and opinion as required by MCR 7.204(C)(1), this Court dismissed the appeal. Unpublished order of the Court of Appeals, decided on October 17, 1991 (Docket No. 140764).

Contemporaneously with defendant's filing of a claim of appeal in Docket No. 140764, defendant filed a complaint for superintending control. That complaint challenged the Recorder's Court's failure or refusal to provide defendant with appointed appellate counsel following the hearings and the alleged refusal of the Recorder's Court to provide defendant with transcripts of those hearings. This Court issued a peremptory order pursuant to MCR 7.206(D)(3), directing the Recorder's Court forthwith to provide defendant with a copy of its decision of April 26, 1991, and with a transcript of the

proceedings on remand. The order further provided that, in all other respects, "the complaint for superintending control is denied for lack of merit in the grounds presented. MCR 7.205; *Ross v Moffitt,* 417 US 600; 94 S Ct 2437; 41 L Ed 2d 341 (1974)." *In re Kincade,* unpublished order of the Court of Appeals, decided October 16, 1991 (Docket No. 141703). The citation of *Ross* and MCR 7.205 was an effort to suggest that an appeal as of right would not lie from such an order and, thus, that there would be no right to appointed counsel on appeal therefrom. *Ross* holds that the Sixth Amendment right to appointment of counsel for indigent criminal defendants on appeal applies only to first appeals or appeals as of right and not to subsequent, discretionary appeals.

It is the decision in Docket No. 140764 that has been returned to this Court "for consideration as on leave granted." Defendant contends he is entitled to the appointment of counsel and to an appeal as of right in these circumstances. We disagree.

In *People v Jones,* 394 Mich 434; 231 NW2d 649 (1975), our Supreme Court reaffirmed its holding in *People v Pickett,* 391 Mich 305; 215 NW2d 695 (1974), that where an appellate court remands for some limited purpose following an appeal as of right in a criminal case, a second appeal as of right, limited to the scope of the remand, lies from the decision on remand. From the second appeal under those circumstances, a defendant is entitled to the full panoply of ancillary rights, such as the right to the assistance of appointed counsel if indigent. Const 1963, art 1, § 20.

Granting that proposition, it has no application here. In resolving defendant's appeal as of right by published opinion, this Court did not remand or otherwise leave open any issue raised for further

resolution on remand. Defendant's postappeal motions for a new trial, all of which were filed more than eighteen months after the original sentencing date, MCR 7.205(F), were reviewable only as motions for relief from judgment pursuant to MCR 6.501 *et seq.* When the Supreme Court remanded for an evidentiary hearing, the invocation of defendant's right to the appointment of counsel in conjunction with the motion for relief from judgment was the result of the fact that an evidentiary hearing had been ordered. MCR 6.505.

Because the proceedings on remand were not a continuation of defendant's appeal as of right, no further appeal as of right could lie therefrom; appeals from decisions under the relief from judgment chapter are by leave to appeal only. MCR 6.509(A). However, in any such appeal, where the trial court, as here, has appointed counsel for the defendant during the proceeding, that appointment "authorizes the attorney to represent the defendant in connection with an application for leave to appeal to the Court of Appeals." MCR 6.509(B).

The rule in that respect is not mandatory in terms of the lawyer's obligation; rather, the matter is left to the lawyer's professional discretion, as this Court recently recognized in a peremptory order in *People v Baber,* unpublished order of the Court of Appeals, decided February 18, 1994 (Docket No. 169488):

> Once the circuit court determined that oral argument was necessary to resolve one or more aspects of the motion for relief from judgment, it became mandatory to appoint counsel for defendant, MCR 6.505(A), assuming defendant's indigence. When counsel is once appointed pursuant to that rule, and the trial court ultimately concludes that the motion for relief from judgment should be

> denied, counsel has authority to appeal, but not a mandate, and therefore must exercise professional discretion in determining whether to seek leave to appeal that decision to this Court. MCR 6.509(B).

Here, defendant's appeal is discretionary. Thus, the extent of defendant's right to the assistance of counsel is provided by court rule, MCR 6.509(B), rather than the requirements of the Sixth and Fourteenth Amendments as delineated in *Ross, supra.* It is for attorney Kimberly Reed, in the exercise of her professional discretion, to decide whether a substantive challenge to the order denying the motion for relief from judgment should be sought in this Court by a delayed application for leave to appeal, a decision that it appears defendant has not yet requested her to make. That decision can still be made, because the eighteen-month time limitation of MCR 7.205(F) was tolled during the time the various appellate proceedings connected with the order denying relief from judgment have been pending in this Court or the Supreme Court. *Riza v Niagara Machine & Tool Works, Inc,* 411 Mich 915 (1980).

Accordingly, defendant's appeal is dismissed without prejudice to the filing of a delayed application for leave to appeal from the order denying relief from judgment, whether by counsel previously appointed or by defendant in propria persona, if brought within the time otherwise allowed by MCR 7.205(F).

This Court retains no further jurisdiction.

PEOPLE v SLOAN

Docket No. 168967. Submitted July 7, 1994, at Detroit. Decided August 16, 1994, at 9:05 A.M. Leave to appeal sought.

Robert L. Sloan was charged in the Recorder's Court for the City of Detroit with manslaughter, operating a motor vehicle while under the influence of intoxicating liquor causing a death, and felonious driving, after he was involved in an automobile accident that resulted in a fatality. The court, Bruce U. Morrow, J., denied the defendant's motion to suppress blood test results obtained from a blood sample drawn pursuant to a search warrant issued by a magistrate. The defendant appealed by leave granted from that order.

The Court of Appeals *held:*

The affidavit for the search warrant was insufficient because it contained no facts on which the conclusion that the defendant was under the influence of intoxicating liquor was based. The affidavit does not support the trial court's conclusion that there was a substantial basis for the determination that probable cause existed. The trial court erred in relying on the magistrate's after-the-fact testimony regarding off-the-record statements the magistrate relied on in issuing the warrant.

Reversed.

SEARCHES AND SEIZURES — SEARCH WARRANTS — PROBABLE CAUSE.

Probable cause for the issuance of a search warrant must be based on facts presented to the magistrate by oath or affirmation; the affidavit must contain facts within the knowledge of the affiant, rather than conclusions or beliefs, and must state facts that justify inferences; the affiant is not free to draw inferences, but must state matters that justify the drawing of them.

Frank J. Kelley, Attorney General, *Thomas L.*

REFERENCES

Am Jur 2d, Searches and Seizures §§ 117, 123.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant. 10 ALR3d 359.

Casey, Solicitor General, *John D. O'Hair,* Prosecuting Attorney, and *Timothy A. Baughman,* Chief of Research, Training, and Appeals, for the people.

Thomas V. Wilhelm, for the defendant.

Before: GRIBBS, P.J., and REILLY and T. L. BROWN,* JJ.

PER CURIAM. This is an interlocutory appeal. Defendant appeals by leave granted a Recorder's Court order denying his motion to suppress blood test results. We reverse.

On March 13, 1993, defendant was involved in an automobile accident that resulted in a fatality. Defendant and his passenger were injured and taken to the hospital. While at the hospital, a blood sample was drawn from defendant pursuant to a search warrant. The affidavit on which the warrant was based stated in pertinent part:

> On 3-13-93 on or about 11:40 P.M. (2340 hrs) Robert Leonard Sloan operating a vehicle in the City of Southgate in area of Pennsylvania & Walter. Collision occurred & appears Robert Leonard Sloan under influence of intoxicating liquor, transported to Wyandotte Hospital & Medical Center. Request blood sample be taken. Robert Leonard Sloan involved in accident causing death.

Defendant was subsequently arrested and bound over on charges of manslaughter with a motor vehicle, MCL 750.321; MSA 28.553, operating a motor vehicle while under the influence of intoxicating liquor causing a death, MCL 257.625(4); MSA 9.2325(4), and felonious driving, MCL 752.191; MSA 28.661. In the trial court, defendant moved to suppress the results of the blood test,

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

arguing that the affidavit was insufficient because it did not allege facts on which probable cause could be based. The trial court allowed the parties to take the testimony of the magistrate who issued the warrant to determine what facts the magistrate had relied upon in issuing the warrant. The magistrate testified that he had questioned the officer about defendant's condition. The trial court noted that the procedure used in this case, where the warrant was issued after the magistrate read the affidavit and questioned the officer, under oath, followed by the trial court's taking testimony of the magistrate, was not ideal. However, the trial court denied defendant's motion to suppress the blood test results.

A search warrant may not be issued unless justified by probable cause. *People v Cooper,* 166 Mich App 638, 652; 421 NW2d 177 (1987). Probable cause must be based on facts presented to the magistrate by oath or affirmation. *People v Mitchell,* 428 Mich 364, 367; 408 NW2d 798 (1987). The affidavit must contain facts within the knowledge of the affiant rather than mere conclusions or beliefs, and must state facts that justify inferences. *People v Rosborough,* 387 Mich 183, 199; 195 NW2d 255 (1972); *Cooper, supra* at 652. On appeal from a finding of probable cause, the reviewing court must look at the affidavit and determine whether the information contained in the documents could have caused a reasonably cautious person to conclude that there was a substantial basis for the determination that probable cause existed to conclude that the evidence sought might be found in a specific location. *People v Russo,* 439 Mich 584, 603-604; 487 NW2d 698 (1992). The search warrant and the underlying affidavit are to be read in a common-sense and realistic manner,

and the reviewing court should give deference to the magistrate's decision. *Id.*

In this case, the affidavit contained no facts on which the conclusion, that defendant was under the influence of intoxicating liquor, was based. The affiant is not free to "draw his own inferences. He must state matters which justify the drawing of them." *Rosborough, supra* at 199. The affidavit itself would not allow a reviewing court to conclude that there was a substantial basis for the determination that probable cause existed. While the trial court was required to give deference to the magistrate's decision, it was not justified in relying on the magistrate's after-the-fact testimony regarding off-the-record statements in reaching the conclusion that the factual basis for the warrant was sufficient.[1] *People v White,* 167 Mich App 461, 463; 423 NW2d 225 (1988); MCL 780.653; MSA 28.1259(3). Because the affidavit here was insufficient, the warrant was invalid and the blood test results should have been suppressed.

Reversed.

---

[1] We need not decide here whether a reviewing court may consider information given under oath to the issuing magistrate if a verbatim record of the proceeding is made.

PEOPLE v SPINKS

Docket No. 150024. Submitted February 8, 1994, at Detroit. Decided August 16, 1994, at 9:10 A.M.

Charles Spinks was convicted by a jury in the Detroit Recorder's Court, George W. Crockett, III, J., of second-degree murder and possession of a firearm during the commission of a felony. He was sentenced to eight to twenty years for the murder conviction and two years for the felony-firearm conviction. The defendant appealed.

The Court of Appeals *held:*

1. The trial court erred in admitting the confession of the defendant's accomplice as evidence in the defendant's trial. Those portions of the statement that implicated the defendant were inadmissible against the defendant. The statement did not contain adequate indicia of reliability and violated the defendant's constitutional right of confrontation. The error was harmless beyond a reasonable doubt, however, because the defendant's confession was sufficient to prove beyond a reasonable doubt the defendant's commission of the crimes.

2. The trial court did not err in instructing the jury as requested by the defendant.

3. The defendant's confession was voluntary and was not the fruit of his arrest, which he alleged was illegal. The defendant's confession was admitted properly.

Affirmed.

1. CRIMINAL LAW — HEARSAY EVIDENCE — CONFESSIONS OF ACCOMPLICES.

The portions of a nontestifying accomplice's hearsay statement

REFERENCES

Am Jur 2d, Criminal Law §§ 721, 729, 731, 957; Evidence §§ 589, 633, 785, 789-791.

Admissibility, as against interest, in criminal case of declaration of commission of criminal act. 92 ALR3d 1164.

Federal constitutional right to confront witnesses—Supreme Court cases. 98 L Ed 2d 1115.

When is evidence which is obtained after unconstitutional search or seizure sufficiently remote from such search or seizure so as not to be tainted by, and not to be inadmissible as fruit of, such search or seizure—Supreme Court cases. 109 L Ed 2d 787.

that are against the declarant's own penal interest are admissible in a defendant's trial; however, those portions that inculpate the defendant are admissible only if the circumstances under which the statement was made vouch for its reliability; a statement may be found to be unreliable where it is made to the police while the declarant is under custodial interrogation and is motivated by a desire to win favorable treatment (MRE 804[b][3]).

2. CRIMINAL LAW — HEARSAY EVIDENCE — RIGHT OF CONFRONTATION — CONFESSIONS OF ACCOMPLICES.

Where there is adequate indicia of reliability, the admission in a defendant's trial of a nontestifying accomplice's hearsay statement does not violate the defendant's constitutional right of confrontation; a statement generally will be found to be reliable where the statement was voluntarily given, made contemporaneously with the events referenced, made to family, friends, colleagues, or confederates, and uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener; a statement generally will be unreliable where it was made to law enforcement officers or at the prompting or inquiry of the listener, it minimizes the role or responsibility of the declarant or shifts blame to the accomplices, it was made to avenge the declarant or to curry favor, and the declarant had a motive to lie or distort the truth (US Const, Am VI; Const 1963, art 1, § 20).

3. CRIMINAL LAW — EVIDENCE — APPEAL — HARMLESS ERROR.

A violation of the Confrontation Clause or the erroneous admission of evidence may be found to be harmless error where the appellate court can confidently conclude, beyond any reasonable doubt, that the error did not affect the jury's verdict; an error is not harmless if an average jury would have found the prosecution's case significantly less persuasive had the error not occurred (US Const, Am VI; Const 1963, art 1, § 20).

4. CRIMINAL LAW — EVIDENCE — UNLAWFUL DETENTION.

Where an unlawful detention has been employed as a tool to directly procure a confession from a detainee, the resulting evidence generally should be excluded as the fruit of the poisonous tree; however, suppression is not required where there is no causal nexus between the illegal arrest and the confession; a causal nexus is determined by examining the time elapsed between the illegal arrest and the confession, the flagrancy of official misconduct, any intervening circumstances, and any circumstances that occurred after the arrest.

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 A. Napp,* Assistant Prosecuting Attorney, for the people.

Mark R. Hall, for the defendant.

Before: GRIBBS, P.J., and HOOD and H. E. BROWN,* JJ.

PER CURIAM. Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to a term of eight to twenty years for the murder conviction plus the mandatory two years for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant originally was charged with first-degree murder, MCL 750.316; MSA 28.548, conspiracy to commit first-degree murder, MCL 750.157a MSA 28.354(1), and possession of a firearm during the commission of a felony. Following a preliminary examination, the conspiracy charge was dismissed because of insufficient evidence. Defendant then successfully moved to suppress statements that he and his codefendant made to the police, and the remaining charges were dismissed.

The prosecutor appealed, and this Court reversed, holding that both statements were admissible against defendant. *People v Spinks,* 184 Mich App 559; 458 NW2d 899 (1990). Defendant's application for leave to appeal to the Supreme Court was denied. 437 Mich 875 (1990). Defendant was

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

then tried and convicted. We note that he was tried alone. His original codefendant had already been convicted.

Defendant first argues that the accomplice's statement was improperly admitted against him. We agree.

We note, first, that this issue was decided in defendant's prior appeal and that consideration is therefore technically precluded by the law of the case doctrine. *CAF Investment Co v Saginaw Twp,* 410 Mich 428, 454; 302 NW2d 164 (1981). However, the case upon which this Court relied during defendant's first appeal was reversed by the Supreme Court in *People v Watkins,* 438 Mich 627; 475 NW2d 727 (1991). Because defendant's constitutional rights are at risk, we choose to address this issue on the merits. *Locricchio v Evening News Ass'n,* 438 Mich 84, 109-110; 476 NW2d 112 (1991); *Bennett v Bennett,* 197 Mich App 497, 500; 496 NW2d 353 (1992).

For a nontestifying codefendant's statement to be admissible against a defendant, it must be admissible under the Michigan Rules of Evidence and it must not violate the defendant's constitutional right to confront his accuser. *People v Poole,* 444 Mich 151, 157; 506 NW2d 505 (1993). We first acknowledge that the statement is indeed an unsworn out-of-court statement offered for its truth and, therefore, it is clearly hearsay. See *id.* at 158-159. Under MRE 804(b)(3), those portions that are against the declarant's own penal interest are admissible. *Poole, supra* at 159. However, those portions that inculpate defendant are admissible only if the circumstances under which the statement was made vouch for its reliability. *Id.* at 161-162. A narrative description freely made to an acquaintance while not in custody probably would be admissible. *Id.* at 162. However, statements

made to the police while under custodial interrogation may be motivated by a desire to win favorable treatment and, therefore, would not be admissible. *Id.* at 158, 162; see also *Watkins, supra* at 646-650.

In this case, the statement made by defendant's accomplice inculpated the declarant and several other people, including defendant. Defendant's role in the crime was to purchase the murder weapon. He was not alleged to have been present during the shooting. The victim was the declarant's brother, and the killing was the result of a dispute involving drugs.

After carefully reviewing the accomplice's statement, we conclude that those portions implicating defendant were inadmissible against him. We note that, overall, the statement tended to shift blame by inculpating others more than it inculpated the declarant, although defendant's role was described as being relatively minor. Also, the statement was made in response to custodial interrogation and, therefore, may have been motivated by a desire to curry favor with the authorities. The trial court abused its discretion in admitting it.

Whether the admission of the nontestifying accomplice's statement also violated defendant's constitutional right of confrontation, US Const, Am VI, and Const 1963, art 1, § 20, depends on whether it bears "adequate indicia of reliability." *Poole, supra* at 162. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* However, reliability may not be inferred from the blanket categorization of a statement as being against penal interest. *Watkins, supra* at 653-655. In fact, accusatory statements in a codefendant's custodial confession are "properly presumed at the outset to be *uniquely* and *especially* suspect and unreliable, much *more* so than typical, run-of-the-

mill hearsay." *Id.* at 656 (emphasis in original). We note that the lack of indicia of trustworthiness may not be overcome with corroborating evidence. *Id.* at 665. In *Poole,* on the other hand, no violation of the Confrontation Clause was found where the statement was: "(1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates —that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener." *Poole, supra* at 165.

Here, there are no indicia of reliability. To the contrary, the accomplice's statement in this case presents all the factors that favor a finding of unreliability because it: "(1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice[s], (3) was made to avenge the declarant or to curry favor, and (4) . . . the declarant had a motive to lie or distort the truth." *Poole, supra* at 165. Thus, admitting the accomplice's statement in this case also violated defendant's right of confrontation.

However, a violation of the Confrontation Clause —like the erroneous admission of evidence—may be harmless if the appellate court can "confidently conclude, beyond any reasonable doubt, that the error did not affect the jury's verdict." *Watkins, supra* at 667; see also *People v Banks,* 438 Mich 408, 427; 475 NW2d 769 (1991). An error is not harmless if "the 'minds of an average jury' would have found the prosecution's case 'significantly less persuasive' had the statements of the [accomplice] been excluded." *Id.* at 430, quoting *Schneble v Florida,* 405 US 427, 432; 92 S Ct 1056; 31 L Ed 2d

340 (1972). Thus, even where "the properly admitted evidence . . . was substantial" an error is not harmless if the improperly admitted statements "provided a uniquely devastating and detailed account of the alleged crime. Any doubt on this score is dispelled by the fact that the jury specifically asked and was permitted to reexamine copies of the two confessions during deliberation. It would be virtually impossible to find the error harmless in light of such a direct indication that the jury was specifically concerned with the erroneously admitted evidence." *Watkins, supra* at 667.

In this case, the people introduced a receipt from a gun shop showing that defendant purchased the murder weapon. There was also forensic evidence to the same effect. Further, defendant's confession was introduced—which he challenges on appeal—in which he admitted not only purchasing the murder weapon but also knowing what his accomplice was considering doing with it.

We acknowledge that the jury deliberated for two days before reaching a verdict and that they twice asked for and examined the accomplice's inadmissible statement. However, defendant's own confession was just as detailed and devastating as his accomplice's statement and it was, by itself, sufficient to prove beyond a reasonable doubt that defendant aided and abetted the commission of second-degree murder when he purchased the murder weapon with knowledge that the principal intended to use it to kill the victim. See *People v Genoa,* 188 Mich App 461, 463; 470 NW2d 447 (1991); see also MCL 767.39; MSA 28.979. Thus, assuming for a moment that defendant's own confession was properly admitted—which we will decide later—we find that the error nevertheless was harmless beyond a reasonable doubt.

Defendant next argues that the trial court erred

in allowing defendant's accomplice, who had already been convicted, to refuse to testify after the accomplice asserted his Fifth Amendment privilege regarding self-incrimination. Defendant further argues that the trial court erred in allowing the prosecutor to refuse to request a court order granting immunity to the accomplice and thereby force the accomplice to testify. These errors, defendant alleges, violated his right of confrontation by making the accomplice unavailable for cross-examination and allowing his statement to be introduced.

Because we have already concluded that defendant's right of confrontation was violated by introducing his accomplice's statement, we do not address the merits of these arguments. We note, however, that the violation of defendant's right of confrontation was, as discussed above, harmless beyond a reasonable doubt.

Next, defendant complains that the trial court improperly instructed the jury regarding the elements of aiding and abetting. We disagree.

Defendant opposed the prosecutor's request to instruct the jury using the first edition of the criminal jury instructions. Counsel did this even after a discussion was held on the record regarding a possible error in the second edition's version of the aiding and abetting instruction, CJI2d 8.1. The jury was given the instruction defendant insisted on. He may not now complain. *People v Buck,* 197 Mich App 404, 423; 496 NW2d 321 (1992), modified on other grounds sub nom *People v Holcomb,* 444 Mich 853; 508 NW2d 502 (1993). As discussed above, the error—if any—was harmless because the evidence properly admitted at trial was sufficient to find beyond a reasonable doubt all the statutory elements of aiding and abetting.

Lastly, defendant challenges the admissibility of

his confession on the ground that it was the fruit of an illegal arrest without a warrant. We disagree.

Generally, if an "unlawful detention has been employed as a tool to directly procure any type of evidence from a detainee," the resulting evidence should be excluded as the fruit of the poisonous tree. *People v Mallory,* 421 Mich 229, 240-241, 243, n 8; 365 NW2d 673 (1984). However, a defendant's illegal arrest does not require suppression of his confession unless there is a causal nexus between the illegal arrest and the confession. *Id.* at 243, n 8. This is determined by examining: (1) the time elapsed between the illegal arrest and the confession, (2) the flagrancy of official misconduct, (3) any intervening circumstances, and (4) any circumstances antecedent to the arrest. *Id.* see also *People v Malach,* 202 Mich App 266, 274; 507 NW2d 834 (1993).

According to the evidence presented at the hearing regarding defendant's motion to suppress, defendant was arrested at about midnight and was not interrogated until about noon the next morning. The parties stipulated that the delay was the result of the arresting officers' busy schedule. The arresting officers testified that defendant's brother allowed them inside the house after they knocked and identified themselves. The officers entered the house with their weapons drawn. However, none of the witnesses testified that they saw the weapons before opening the door.

During defendant's prior appeal, this Court overturned the trial court's decision to suppress defendant's confession on the basis of prearraignment delay. *Spinks, supra* at 561-565. The panel examined the totality of the circumstances and found that the confession was voluntary. *Id.* at 564-565. The panel did not consider defendant's argument

that the confession should be suppressed as the fruit of an illegal arrest.

We acknowledge that the trial court did not rule on this issue below. However, we find—as did the prior panel—that the factual record below is sufficient for us to decide this issue as a matter of law. See *id.*

Our review of the record discloses only a moderate preinterrogation delay of about twelve hours. The officers' conduct was not flagrant; in fact, defendant's brother may have consented to their entry. See MCL 764.15; MSA 28.874; see also *City of Troy v Ohlinger,* 438 Mich 477, 485-486; 475 NW2d 54 (1991). There are no antecedent or intervening circumstances that are relevant to the causal nexus between the alleged illegal arrest and defendant's confession. Thus, in light of all the circumstances, including those discussed in this Court's prior opinion, we find that defendant's confession was made voluntarily and was not the fruit of the alleged illegal arrest. Therefore, it was admitted properly into evidence.

Affirmed.

H. E. BROWN, J., concurred in the result only.

CANADA CREEK RANCH ASSOCIATION, INC v MONTMORENCY TOWNSHIP

Docket No. 150099. Submitted April 13, 1994, at Grand Rapids. Decided August 16, 1994, at 9:15 A.M. Leave to appeal sought.

Canada Creek Ranch Association, Inc., filed in the Tax Tribunal a petition challenging a multimillion dollar assessment imposed for tax purposes by Montmorency Township on an undeveloped tract of approximately 11,700 acres used by members of the association for hunting, fishing, and other recreational pursuits. Hillman Community Schools intervened as a respondent. Membership in the association required the purchase of one or more of three thousand lots or cabin sites on approximately eight hundred acres adjoining the tract. The association came into possession of the tract through conveyances of portions of the tract by Monteith Land Company, Black River Ranch, and the Vernor estate. The Tax Tribunal determined that the disputed tract had a nominal value of less than $100 because restrictions on its sale and use, as imposed in the deeds through which the tract was conveyed to the association, rendered the tract unmarketable. Montmorency Township and Hillman Community Schools appealed.

The Court of Appeals *held:*

1. The Tax Tribunal erred in determining that the portions conveyed by Black River Ranch and the Vernor estate were unmarketable by virtue of the improbability of 12.51 percent of the association members approving a sale of the tract, as required by the articles and bylaws of the association for the sale of the tract. A landowner may not rely on self-imposed restrictions on the sale of the property as a means of avoiding taxes on the property. Restrictions on the use of the Black River Ranch portions, as imposed in the deeds through which those portions were conveyed to the association, do not necessarily render the tract unmarketable or its value nominal. On remand, the Tax Tribunal is to redetermine the value of the property acquired from Black River Ranch and the Vernor estate.

2. Competent, material, and substantial evidence supports the Tax Tribunal's determination that the portions acquired from Monteith Land Company were subject to restrictions

imbedded in the chain of title that rendered those portions unmarketable and valuable only to the members of the association.

3. Contrary to the respondents' assertion, the Tax Tribunal did not make a determination that the assessed values of the lots adjoining the tract reflect the value of the tract.

Affirmed in part, reversed in part, and remanded.

Clark, Klein & Beaumont (by *Thomas S. Nowinski* and *Robert J. McClory*), for Canada Creek Ranch Association, Inc.

Thrun, Maatsch & Nordberg, P.C. (by *Michael A. Eschelbach*), for Montmorency Township and Hillman Community Schools.

Before: MICHAEL J. KELLY, P.J., and HOOD and S. B. MILLER,* JJ.

PER CURIAM. Respondents appeal as of right a Tax Tribunal ruling that petitioner's common amenity property had only nominal value for the tax years 1986 through 1990. We affirm in part, reverse in part, and remand.

I

Petitioner Canada Creek Ranch Association, Inc., is a recreational club in which individuals hold certificates of membership in the association and are required to purchase platted lots on the corporate premises of Canada Creek in Montmorency Township, Montmorency County. Members are permitted to use approximately 11,700 acres (hereinafter "common amenity property") of largely undeveloped property contiguous to approximately eight hundred acres of three thousand subdivided, individually owned lots. There is no

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

market for petitioner's stock apart from lot ownership. The stock may only be acquired in conjunction with the transfer of a lot.

Petitioner acquired the common amenity property from three separate sources. The largest portion was obtained from the Monteith Land Company. In 1934, Monteith began to develop the ranch property. Monteith divided approximately eight hundred acres into three thousand platted lots to put up for sale. That same year, petitioner was incorporated. Monteith agreed to convey the remainder of its property to petitioner without monetary consideration in two transactions. The first conveyance was to occur when one-half of the platted lots were sold, and the second when the rest of the lots were sold. Only the property conveyed in these two transactions—not the individual platted lots—is at issue here.

The agreement between Monteith and petitioner provided that the common amenity property "shall be held exclusively and continuously for the use, benefit and pleasure of the members of the Canada Creek Ranch Association," and that "all members of the Association duly enrolled and in good standing . . . shall be permitted to use, occupy and enjoy for hunting, fishing and other recreational purposes, any and all parts of said land and premises except the 'cabin sites' [lots] as aforesaid."

Pursuant to the agreement, the southern half of the common amenity property was conveyed to petitioner in 1942, when one-half of the platted lots had been sold.

In 1943, five lot owners brought suit in the Montmorency Circuit Court against petitioner, Monteith, and certain individuals associated with the development of Canada Creek. In a decree dated May 5, 1944, the court determined the rights of the parties, including the rights of petitioner's

members "as a class." The decree governed both the conveyed and unconveyed portions of the property. It incorporated the 1934 agreement between Monteith and petitioner and declared their rights and obligations as those "necessarily incident to the mutual interest of each corporation in the success of the club project . . . as more particularly set forth in the certain contract of September 5, 1934 . . . ." In 1953, the decree was recorded with the register of deeds in Montmorency County.

In 1954, petitioner purchased the remaining unsold lots from Monteith and, pursuant to the agreement, Monteith conveyed the other half of the property at issue.

In 1955, the Montmorency Circuit Court issued another decree in a suit brought by petitioner against individuals claiming mineral rights in the Monteith property. The decree declared petitioner the "absolute owner in fee" of the property except for certain mineral rights.

The second source of the common amenity property is Black River Ranch. That portion of the property comprises approximately five hundred acres along the western boundary of the common amenity property. Black River Ranch conveyed this property in three separate deeds dated 1951, 1953, and 1963. The deed for the first conveyance restricts the use of the property as follows:

> Said conveyed lands shall never[,] either in whole or in part, be used, occupied or enjoyed in any manner or for any purpose whatever except as wild lands, and shall not be partitioned[,] divided, or in any manner apportioned into any parcel or parcels, subdivisions or lots, nor shall any buildings or structures of any character be erected, constructed, or moved or placed anywhere thereon, unless with the express written consent of Black [River Ranch].

The deed also contains a reversion clause, providing for reversion of the property to Black River Ranch in the event that the deed restriction is violated. The deed for the 1953 conveyance from Black River incorporates the same restrictions. Apparently, the 1961 deed also contains these restrictions.

The final portion of the common amenity property was acquired from the Vernor estate in 1970. In a single, related transaction, petitioner subdivided a portion of the Vernor property upon which a cabin was located and sold that lot to heirs of the Vernor estate. The remaining property comprised approximately forty acres. Although the deed to the cabin lot requires any purchaser of the lot to be a member of petitioner, the remainder of the Vernor estate property is not subject to any restrictions.

Petitioner's articles of incorporation provide additional restrictions on the sale of the common amenity property. Article III, § 9, of petitioner's bylaws provides:

> The Board of Directors shall control the policy, funds, and property of the Association, authorizing all contracts, sales and purchases and declaring and paying dividends. The Board of Directors, except as otherwise provided herein, shall not have authority to convey, sell, lease or mortgage, any of the land owned by the Association unless authorized to do so by the holders of a majority of the shares of the Association voting in person or by proxy at an Annual or Special Meeting.

Under Article VIII, twenty-five percent of petitioner's shares would be needed to vote on the sale of common amenity property, and a majority of those, or 12.51 percent of all shares, could authorize a sale.

In 1986, respondent Montmorency Township assessed the value of the common amenity property at $2,247,754. Petitioner challenged the assessment before the Michigan Tax Tribunal, claiming the property had no value because the land was subject to severe sale and use restrictions. Respondent Hillman Community Schools intervened because it had a financial interest in assessments made on the property. The tribunal ruled that the common amenity property had only nominal value represented by a sum not to exceed $100.

II

Respondents believe that the Tax Tribunal erred in ruling that the common amenity property had only nominal value. Where, as here, fraud is not alleged, this Court must determine whether the tribunal committed an error of law or adopted a wrong principle. *Jones & Laughlin Steel Corp v City of Warren,* 193 Mich App 348, 352; 483 NW2d 416 (1992). The tribunal's findings of fact must be supported by competent, material, and substantial evidence on the whole record. *Id.* Substantial evidence must be more than a scintilla of evidence, but it may also be less than a preponderance of the evidence. *Id.* at 352-353.

With respect to the property acquired from the Vernor estate and Black River Ranch, we agree with respondents that the tribunal erred. It found that the practical restrictions placed on the sale of the Vernor property by petitioner's articles and bylaws made the sale of the property highly improbable. The tribunal considered these same restrictions when it determined that the Black River Ranch property was unmarketable. Although petitioner showed it is highly improbable that even 12.51 percent of its members would approve a sale

of common amenity property, such self-imposed restrictions on marketability are not proper considerations in assessing property value. In *NeBo-Shone Ass'n, Inc v State Tax Comm,* 58 Mich App 324, 334-335; 227 NW2d 358 (1975), this Court held that restrictions on the sale of corporate property arising out of a corporation's bylaws may not be considered in assessing the tax value of the corporate property. Neither a private individual nor a corporation may rely on self-imposed restrictions on the sale of property as a means of avoiding taxes. *Id.*

The tribunal also took into consideration the use restrictions contained in the deeds for the Black River Ranch property. These restrictions prohibit development, subdivision, or any use of the property other than as wild lands. Although the restrictions undoubtedly have an effect on the value of the property for assessment purposes, they do not necessarily render the property unmarketable or the value nominal.

Accordingly, we remand to the Tax Tribunal for reassessment of the value of those portions of the common amenity property acquired from the Vernor estate and Black River Ranch.

III

With respect to the property acquired from Monteith, the Tax Tribunal's findings were supported by competent, material, and substantial evidence. The tribunal properly considered the effect of the 1944 court decree on the marketability of the property.

Respondents argue that the decree was effective only as between petitioner and Monteith. Because Monteith is now a dissolved corporation, respondents assert that the decree is no longer enforce-

able. We disagree. The decree stated that its findings and orders were for the benefit of all Canada Creek members "as a class" and were determinative of the rights of all members "as a class." Petitioner was the only party who introduced evidence concerning the meaning of the phrase "as a class." Two witnesses testified that the language referred to petitioner's members as property owners rather than as shareholders. This interpretation is supported by the decree itself because, as noted by the tribunal, the subject of the decree was property rights.

Unlike the deed restrictions on the Black River Ranch property, the restrictions on the Monteith property go beyond merely limiting use of the property to recreational purposes. The rights to use and enjoy the property belong exclusively to petitioner's members. Thus, the property is without value to anyone but petitioner's members. See *Muskegon Conservation Club v City of North Muskegon,* 5 MTTR 161 (Docket No. 89028, March 6, 1987).

IV

Respondents contend that the restrictions in the 1944 decree are ineffective because the 1955 decree declared petitioner the "absolute owner in fee" of the common amenity property except for certain mineral rights. We disagree. Petitioner maintains, and respondents do not dispute, that the issue in the 1955 proceedings was not land title but rather ownership of mineral rights. The 1955 decree did not address the use restrictions incorporated into the 1944 decree. To the extent that the court characterized petitioner as the "absolute owner in fee," it may not be deemed to have exercised authority over matters beyond the scope of those proceedings.

Respondents also point out that the deed restrictions on the Monteith property can be waived under the provisions of petitioner's articles and bylaws, specifically, by a vote of only 12.51 percent of the members. However, the restrictions are imbedded in the chain of title. The articles and bylaws do not address the removal of deed restrictions. In order to remove a restriction in the chain of title, unanimous consent of those interested in the restriction is required. 2 Cameron, Michigan Real Property Law (2d ed), § 22.25, p 1031; 5 Powell, Real Property, ¶ 677, pp 60-118 — 60-122. Even assuming that a vote by as few as 12.51 percent of the members could remove the restrictions, the relevant inquiry regarding provisions for waiving existing restrictions is not whether the restrictions *could* be lifted, but rather whether they *would* be lifted. See *Presque Isle Harbor Ass'n v Presque Isle Twp,* 3 MTTR 397 (Docket No. 66598, February 4, 1985), citing *Moran v Grosse Pointe Twp,* 317 Mich 248, 255; 26 NW2d 763 (1947), and *Consumers Power Co v Big Prairie Twp,* 81 Mich App 120, 148; 265 NW2d 182 (1978). The evidence before the Tax Tribunal showed that, from the petitioner's perspective, the chances of approving a sale of the common amenity property are remote given the voting practices of past and current members. From a potential buyer's perspective, the chances of approving the purchase of the property are equally remote because the mere existence of the deed restrictions in the chain of title, whether they are enforceable or could be waived, would necessitate an expensive lawsuit against petitioner's members to quiet title.

V

Respondents further dispute the tribunal's find-

ing that the assessed value of the platted lots already reflects the value of the common amenity property. However, the tribunal did not make such a finding. Although it found evidence that the market prices of the lots often incorporate a premium for the benefit of using the common amenity property, the tribunal was

> less than wholly convinced that the full measure of the value of the pro rata "membership rights", encompassing the rights to use of the miles of pristine common amenity property, is recognized in the [tax value] assessments of the individually owned, platted lots for the years in question.

Accordingly, and we believe appropriately, the tribunal encouraged the parties to seek a resolution of how to attribute the value of "membership rights" to the value of the platted lots for future assessments.

Affirmed in part, reversed in part, and remanded.

TUSCOLA COUNTY ABSTRACT COMPANY, INC v TUSCOLA COUNTY REGISTER OF DEEDS

Docket No. 145006. Submitted April 7, 1994, at Lansing. Decided August 16, 1994, at 9:20 A.M.

Tuscola County Abstract Company, Inc., brought an action in the Tuscola Circuit Court against the Tuscola County Register of Deeds, Virginia McLaren, seeking a writ of mandamus requiring the defendant to provide it with sufficient space to maintain a photocopy machine in the defendant's office. Following an evidentiary hearing, the court, M. Richard Knoblock, J., ruled that the defendant's practice of providing copies of documents for a fee of $1 a page had not fulfilled her statutory obligation to provide reasonable access to her office, that the plaintiff should be allowed to maintain a copy machine at the defendant's office for which it would pay the defendant a fee of $25 a week, and that the defendant should reimburse the plaintiff for past copy costs. The defendant appealed.

The Court of Appeals *held:*

1. Mandamus is an extraordinary remedy that is appropriate only where a public official has a clear legal duty to perform an act that is ministerial and involves no exercise of discretion or judgment. By statute, MCL 565.551; MSA 26.791, a register of deeds is required to furnish proper and reasonable facilities for the inspection and examination of records and files to all persons having an occasion to make examination for a lawful purpose. However, the statute vests in a register of deeds the discretion either to permit individuals to produce their own photocopies on equipment supplied by the register of deeds or by the individual seeking copies or to produce photocopies for such individuals at a fee as provided by law or, if no fees is provided by law, for a fee that does not exceed the reasonable costs to the register of deeds. Because the manner in which photocopies will be made available to the public is at the discretion of the register of deeds, the defendant had no clear

REFERENCES

Am Jur 2d, Mandamus §§ 204, 205; Records and Recording Laws §§ 13, 14.

See ALR Index under Records and Recording.

legal duty to permit the plaintiff to place its photocopier in the defendant's office. Thus, the order of mandamus was not appropriate.

2. The Revised Judicature Act clearly provides that a register of deeds is entitled to charge $1 a page for copies that are supplied. Because the Legislature has authorized the fee that may be charged by the defendant, the trial court was without authority to determine that a fee in the statutory amount was unreasonable because of the volume of copies requested by the plaintiff.

Reversed and remanded.

1. REGISTERS OF DEEDS — RECORDS — PHOTOCOPIES — MANDAMUS.

Registers of deeds have the discretion to permit parties seeking copies of records maintained in the office of the register of deeds to make their own copies of the records or, in the alternative, to supply those copies for those parties for a fee; because the choice of the manner in which the copies are supplied is left to the discretion of the register of deeds, mandamus does not lie to require a register of deeds to permit a party to make its own copies (MCL 565.551; MSA 26.791).

2. REGISTERS OF DEEDS — RECORDS — PHOTOCOPIES — FEES.

Registers of deeds may charge a fee of $1 a page for copies of documents produced for parties requesting such copies; a court lacks authority to create an exception to that legislatively authorized fee (MCL 565.551, 600.2567[1][b]; MSA 26.791, 27A.2567[1][b]).

Ransford & Crews, P.C. (by *Gary J. Crews*), for the plaintiff.

Cohl, Stoker & Toskey, P.C. (by *Bonnie G. Toskey* and *David M. Foy*), for the defendant.

Before: WAHLS, P.J., and MACKENZIE and K. B. GLASER,* JJ.

PER CURIAM. Defendant, the Tuscola County Register of Deeds, Virginia McLaren, appeals as of right from the order of mandamus requiring her to provide plaintiff with sufficient space to maintain a photocopy machine in her office. We reverse.

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

Plaintiff placed a copy machine in a back room of defendant's office in 1974. In 1985, defendant obtained a copy machine and subsequently moved plaintiff's machine to another area. The machine was then placed in the lobby to avoid congestion. In 1990, plaintiff refused defendant's requests to pay $600 a month, and a few months later $300 a month, for the space its machine was occupying. After defendant unplugged the machine, plaintiff began purchasing copies of documents for a fee of $1 a page.

Plaintiff filed a complaint for mandamus, seeking an order to maintain its copy machine in defendant's office. An evidentiary hearing was held at which representatives from other abstract or title insurance companies and from other registers of deeds testified regarding the fees and practice throughout the state. The court ruled that defendant had not fulfilled her statutory obligation to provide reasonable access to her office. The court subsequently ordered that plaintiff's copy machine would remain at defendant's office and that plaintiff would pay $25 a week. The court also ordered defendant to reimburse plaintiff for past copy costs.

Defendant first contends that the court abused its discretion in granting plaintiff's request for mandamus and ordering it to provide sufficient space for plaintiff's copy machine. We agree.

Mandamus is an extraordinary remedy and is appropriate only when there is no other remedy, legal or equitable, that might achieve the same result. *Delly v Bureau of State Lottery,* 183 Mich App 258, 260; 454 NW2d 141 (1990). 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. *Id.* Mandamus will not lie to review or control the exercise of discretion vested in a public official or administrative body. *Teasel v Dep't of Mental Health,* 419 Mich 390, 410; 355 NW2d 75 (1984).

MCL 565.551; MSA 26.791 requires registers of deeds to furnish proper and reasonable facilities for the inspection and examination of the records and files in the registers' offices to all persons having occasion to make examination of them for any lawful purpose. The registers of deeds may establish reasonable rules and regulations regarding the inspection and examination of the records as shall be necessary to protect the records and files and to prevent interference with the regular discharge of duties. The Legislature has recently amended MCL 565.551; MSA 26.791 by the enactment of 1994 PA 51 to provide, in relevant part:

> (2) If an individual requests a reproduction of a record or file of a register of deeds, the register of deeds shall do 1 of the following, *at the register of deeds' option*:
>
> (a) Reproduce the record or file for the individual . . . using a medium selected by the register of deeds. *Unless a different fee is provided for by law,* the fee for a reproduction under this subdivision other than a paper copy shall not exceed the reasonable costs to the register of deeds.
>
> (b) Provide equipment for the individual to reproduce the record or file . . . using a medium selected by the register of deeds. *Unless a different fee is provided for by law,* the fee for a reproduction under this subdivision other than a paper copy shall not exceed the reasonable costs to the register of deeds.
>
> (c) Authorize the individual to reproduce the record or file on the premises using equipment provided by that individual. This subdivision does

> not apply unless the individual requests authorization to reproduce the record or file using equipment provided by that individual. [Emphasis added.]

We find that the trial court abused its discretion in granting a writ of mandamus. Under MCL 565.551; MSA 26.791, both before and after its recent amendment, the registers of deeds in this state have considerable discretion in providing reasonable access and facilities for inspection and examination of records. The Supreme Court clearly recognized this discretion in *Washtenaw Abstract Co v Mayer,* 347 Mich 228, 233; 79 NW2d 480 (1956), in which it held that the county board of commissioners could not remove a photocopy machine that had been placed in the office of the register of deeds by an abstracter with the register's permission. Further, the amendment clearly provides that a register of deeds, at the register's option, may allow a copy machine to be placed at the office or may charge a fee for copies of documents that are produced for the party requesting copies. Therefore, mandamus was inappropriate, because defendant's actions involved the exercise of discretion vested in a public official.

Additionally, mandamus was improper because plaintiff does not have a clear legal right to maintain the copy machine at defendant's office, nor does defendant have a clear legal duty to provide the space. In *Washtenaw Abstract Co, id.* at 233, the Supreme Court pointedly asserted:

> [W]e in nowise hold that abstracters do or may acquire a vested or other right to permanently or exclusively occupy portions of the offices of the registers of deeds, even with the consent of the latter, for the purpose of copying records.

See also *Burton Abstract & Title Co v Martin,* 38 Mich App 178, 180-181; 196 NW2d 23 (1972). Accordingly, we reverse the order of mandamus.

Next, defendant argues that the trial court erred in finding that the fee of $1 a page for copies of documents was unreasonable. We agree. The Legislature has provided that a register of deeds is entitled to charge $1 a page for copies of any records or papers:

> A register of deeds is entitled to the following fees, which are not taxable as costs except as indicated:
>
> * * *
>
> (b) For copies of any records or papers, if required, $1.00 per page, taxable as costs if otherwise allowed. [MCL 600.2567(1)(b); MSA 27A.2567(1)(b).]

No exception is made for any member of the public, including abstract companies. MCL 600.2567(4); MSA 27A.2567(4) further provides that a county board of commissioners may reduce or eliminate the fees specified in subsection 1(b).

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, 216; 501 NW2d 76 (1993). If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted. *Lorencz v Ford Motor Co,* 439 Mich 370, 376; 483 NW2d 844 (1992). In finding the statutory fee of $1 a page unreasonable, the trial court stated:

> Now, I realize that for making hard copies, the statute clearly says that the rate shall be a dollar a copy and that can only be reduced by the County Board of Commissioners. But we're talking about

> an arrangement for—an ongoing arrangement here for an abstract company who has a demand for a lot of copies, and I think that that's something over and above and different than what this statute provides for. I think the purpose of that statute is to set a ceiling so that a Register of Deeds can't take the arbitrary position that they want $10 a copy for a copy, for example, which they could possibly do if there wasn't this legislation to put the one dollar ceiling on it, and I think that's the purpose of the legislation.

The trial court's analysis and ultimate conclusion were made without the benefit of the 1994 amendment of MCL 565.551; MSA 26.791, which provides clarification. The Legislature has authorized the register of deeds to charge any fee provided by law, in this case $1 a page pursuant to § 2567(1)(b) of the Revised Judicature Act, and the register of deeds, in turn, may select the fee to charge all members of the public. By empowering the county board of commissioners with discretion to reduce or eliminate the fee, the Legislature made clear its intention that the board of commissioners should decide whether an exception should be made. Accordingly, we find the trial court was without authority to create exceptions simply on the basis of the volume of copies requested by an abstract company and to impose lease arrangements upon the register of deeds. Therefore, we reverse the court's finding that the fee is unreasonable.

In light of our holdings that mandamus was not properly issued and that the fee was not unreasonable, we reverse the award of damages ordered by the trial court.

Reversed and remanded. We do not retain jurisdiction.

K & K WOODWORKING, INC v MICHIGAN EMPLOYMENT SECURITY COMMISSION

Docket No. 159037. Submitted April 6, 1994, at Grand Rapids. Decided August 16, 1994, at 9:25 A.M.

K & K Woodworking, Inc., was determined by the Michigan Employment Security Commission to have succeeded Timmer & Brummel, Inc., as employer and to be liable for Timmer's unpaid contributions due under the Michigan Employment Security Act. Timmer had surrendered its assets to NBD Bank as payment of a secured loan extended by NBD to Timmer. K & K purchased those assets from NBD. The MESC also determined that K & K could not reduce its liability for Timmer's unpaid contributions by the amount of the security interest in the Timmer assets because that interest had been held by NBD, and not by K & K. The Ottawa Circuit Court, Calvin L. Bosman, J., reversed the MESC decision, holding that K & K was not a successor employer because it acquired Timmer's assets not from Timmer but from NBD. The MESC appealed.

The Court of Appeals *held:*

1. The lack of a direct transfer of the Timmer assets from Timmer to K & K does not preclude the MESC from determining pursuant to MCL 421.15(g); MSA 17.515(g) and MCL 421.41(2)(a); MSA 17.543(2)(a) that K & K succeeded Timmer as employer and is liable for the contributions Timmer left unpaid at the time of K & K's acquisition of the Timmer assets.

2. The MESC erred in construing MCL 421.15(g); MSA 17.515(g) as allowing a reduction for the amount of the secured interest in the assets of a predecessor only when that secured interest is owned by the transferee. The proper inquiry under § 15(g) is not who held the secured interest, but rather whether the secured interest was superior to the lien or interest of the MESC.

Circuit court decision vacated, MESC decision regarding K &

REFERENCES

Am Jur 2d, Unemployment Compensation § 29.

Constitutionality, construction, and application of provision of Unemployment Compensation Act subjecting to its provisions an employer purchasing or succeeding to the business of another employer. 4 ALR2d 721.

K's liability reversed, and case remanded to the MESC for further proceedings.

UNEMPLOYMENT COMPENSATION — SUCCESSOR EMPLOYERS — CONTRIBUTIONS — SECURITY INTERESTS.

A person who purchases seventy-five percent or more of the assets of an employer from a lender to whom a security interest in the assets had been given by the employer and the assets surrendered in payment of the employer's debt to the lender may be deemed to be the successor of the employer and liable for the contributions left unpaid by the employer to the Michigan Employment Security Commission at the time the assets were acquired from the lender; the liability of the purchaser for unpaid contributions is to be reduced by the amount of any security interest in the assets that is superior to the lien or interest of the commission (MCL 421.15[g], 421.41[2][a]; MSA 17.515[g], 17.543[2][a]).

Varnum, Riddering, Schmidt & Howlett (by *Joan Schleef*), for K & K Woodworking, Inc.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Duane R. Johnson,* Assistant Attorney General, for the Michigan Employment Security Commission.

Before: MARILYN KELLY, P.J., and R. B. BURNS* and W. E. COLLETTE,** JJ.

PER CURIAM. The Michigan Employment Security Commission appeals as of right from a circuit court order reversing an MESC referee's decision that K & K Woodworking, Inc., is a successor employer to Timmer & Brummel, Inc. We vacate the circuit court's ruling, reverse the MESC's decision regarding K & K's liability, and remand for further proceedings.

On August 28, 1989, Timmer executed an agreement with NBD Bank, agreeing to voluntarily

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1993-6.

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

surrender ownership of its corporate assets and cash to NBD to pay a business loan. Timmer's assets were subject to NBD's first-priority security interest.

On September 6, 1989, K & K purchased Timmer's assets from NBD. The MESC subsequently issued a determination and a redetermination that K & K succeeded Timmer as employer and was liable for Timmer's unpaid contributions and interest.

Following a hearing, an MESC referee on March 13, 1991, affirmed the redetermination, ruling that K & K was not entitled to a reduction in its MESC obligation because it did not hold a security interest in the assets it acquired from Timmer. On appeal, the circuit court reversed the MESC's determination of successorship, holding that K & K was not a successor employer because it had acquired Timmer's assets from NBD. The present appeal followed.

The primary issue presented on appeal is whether K & K can be held liable for Timmer's unpaid contributions and interest pursuant to § 15(g) of the Michigan Employment Security Act, MCL 421.15(g); MSA 17.515(g). At the time of the events in question in this case, § 15(g) provided in pertinent part:

> A person or employing unit, which acquires the organization, trade, business, or 75% or more of the assets from an employing unit, as a successor defined in section 41(2), shall be liable for contributions and interest due to the commission from the transferor at the time of the acquisition in an amount not to exceed the reasonable value of the organization, trade, business, or assets acquired, less the amount of a secured interest in the assets owned by the transferee which are entitled to priority.

Resolution of this issue requires an interpretation of the acquisition requirements in the MESA for an individual, legal entity, or employing unit to become a successor employer. We find that the following definition of "employer" in § 41(2)(a), MCL 421.41(2)(a); MSA 17.543(2)(a), does not require any particular form of acquisition:

> Any individual, legal entity, or employing unit which acquired the organization, trade, or business, or 75% or more of the assets thereof, of another which at the time of the acquisition was an employer subject to this act.

Liberally construing § 41(2)(a), *Grand Rapids Public Schools v Falkenstern,* 168 Mich App 529, 536; 425 NW2d 128 (1988), we hold that the Legislature intended to permit a factual inquiry into the substance of the transaction rather than require any technical form of acquisition. Cf. *Warehouse Indemnity Corp v Arizona Dep't of Economic Security,* 128 Ariz App 504; 627 P2d 235 (1981); *Mason v City Cartage Co,* 124 Ind App 314; 117 NE2d 387 (1954).

This result dovetails harmoniously with other sections of the MESA pertaining to successor employers, such as MCL 421.22(a); MSA 17.524(a), which specifically recognizes that business transfers may occur other than in the ordinary course of trade. See *Nelligan v Gibson Insulation Co,* 193 Mich App 274, 280-281; 483 NW2d 460 (1992). We disagree with the circuit court's view that the phrase "from an employing unit" in § 15(g) requires a direct transfer between the predecessor and successor employer. Nowhere in § 15(g) or § 41(2)(a) is a transfer through an intermediary prohibited. Hence, the lack of direct privity of contract between K & K and Timmer did not

preclude the MESC from finding that K & K was liable under § 15(g) for Timmer's unpaid contributions and interest.

Because it could reasonably be found that the bank acted as a conduit to facilitate the transfer of assets between K & K and Timmer in order to safeguard its own secured interest, we affirm the referee's finding that K & K was the successor employer to Timmer. See *McArthur v Borman's Inc,* 200 Mich App 686, 689; 505 NW2d 32 (1993). In light of this holding, we need not consider the circuit court's ruling that the bank did not fall within the definition of an "employing unit."

Next, although the MESC's interpretation of the formula in § 15(g) for determining plaintiff's maximum liability is entitled to respectful consideration, we are not bound by it and we decline to follow it here. *Ha-Marque Fabricators, Inc v Michigan Employment Security Comm,* 178 Mich App 470, 478; 444 NW2d 190 (1989). We must presume that the Legislature was aware of other laws governing secured transactions, such as Article 9 of the Uniform Commercial Code, MCL 440.9101 *et seq.*; MSA 19.9101 *et seq.*, when it amended the formula in § 15(g) in 1971 PA 231 to add the reduction for "a secured interest in the assets owned by the transferee which are entitled to priority." See *In re Recorder's Court Bar Ass'n v Wayne Circuit Court,* 443 Mich 110, 126; 503 NW2d 885 (1993). We agree with K & K that the phrase "owned by the transferee" modifies the word "assets" because neither the subject matter nor dominant purpose of § 15(g) requires a different interpretation. *People v Pigula,* 202 Mich App 87, 90; 507 NW2d 810 (1993). However, we are not persuaded that this interpretation clarifies how "assets owned by the transferee" should relate to the additional limitations for "a secured interest"

and "which are entitled to priority." Nor are we persuaded that issues of fairness should affect how § 15(g) is interpreted. See *Mercy Hosp v Crippled Children Comm,* 340 Mich 404, 408; 65 NW2d 838 (1954).

We believe it is appropriate to construe § 15(g) in conjunction with the lien rules for the MESC in § 15(e), MCL 421.15(e); MSA 17.515(e), which were in effect at the time K & K acquired Timmer's assets. In so doing, it is apparent that the only secured interests the Legislature intended to be subtracted from the reasonable value of the business or assets that establish the successor employer's maximum liability in § 15(g) are secured interests superior to the MESC's own lien to collect unpaid contributions and interest. Stated otherwise, the Legislature's intent in § 15(g) was to adjust for those assets that the MESC could not reach because of the existence of superior secured interests. In this regard, the transferee (K & K) stands in the same shoes as the transferor (Timmer) in relation to the MESC because the "priority" language in § 15(g) effectively limits the MESC's ability to reach assets to pay for contributions and interest to those assets that it could have reached had there been no sale of the business or assets.

We therefore hold that the referee erred in construing § 15(g) as allowing a reduction for the amount of the secured interest in the assets of a predecessor only when that secured interest is owned by the transferee. The question under § 15(g) is not who held the secured interest, but rather whether the secured interest was superior to the MESC's own lien or interest. Because the referee's interpretation of § 15(g) was contrary to law, we reverse this part of the MESC decision. MCL 421.38(1); MSA 17.540(1); *Schultz v Oakland Co,* 187 Mich App 96, 102; 466 NW2d 374 (1991).

We vacate the circuit court decision, reverse the MESC decision regarding K & K's liability, and remand to the MESC for further proceedings consistent with this opinion. We do not retain jurisdiction.

BELL v FOX

Docket No. 145414. Submitted January 12, 1994, at Detroit. Decided June 8, 1994; approved for publication September 1, 1994, at 9:00 A.M.

Gloria Patricia Leigh Bell brought an action in the Wayne Circuit Court against Detroit Police Officers Claude Fox, Tedre Kerr, two supervisory officers, and the City of Detroit, seeking damages resulting from the defendants' mistaken arrest of the plaintiff. The court, William L. Cahalan, J., granted summary disposition for Fox, Kerr, and the city, dismissing the plaintiff's federal law claims on the basis of res judicata. The court, James Chylinsky, J., then dismissed the plaintiff's state law claims, granting summary disposition for Fox, Kerr, and the city. The plaintiff appealed.

The Court of Appeals *held:*

1. The trial court did not err in granting the defendants summary disposition of the plaintiff's state law claims after finding no questions of material fact for trial.

2. The police officers had probable cause to arrest the plaintiff. Therefore, the arresting officers and the city were protected from the plaintiff's suit by governmental immunity. There is no intentional tort exception to the doctrine of governmental immunity.

3. The trial court did not err in dismissing on the basis of res judicata the plaintiff's federal claims, which had been dismissed with prejudice by a federal district court after the federal court considered and decided the merits of the claims.

Affirmed.

1. JUDGMENTS — DISMISSALS — FEDERAL COURTS — PREJUDICE.

A federal court's dismissal of a plaintiff's federal claims that does not state whether the dismissal is with or without prejudice is presumed to be with prejudice (FR Civ P 41[b]).

REFERENCES

Am Jur 2d, Judgments, §§ 415, 448, 481, 922.

See ALR Index under Dismissal, Discontinuance, and Nonsuit; Res Judicata.

2. JUDGMENTS — RES JUDICATA.

Res judicata bars the relitigation in a state court of a plaintiff's federal claims that have been considered and decided in a final binding decision by a federal court.

Law Offices of Eddie D. Smith (by *Eddie D. Smith*), for the plaintiff.

City of Detroit Law Department (by *Donald Pailen,* Corporation Counsel, and *Sharon D. Blackmon,* Assistant Corporation Counsel), for Claude Fox, Tedre Kerr, and the City of Detroit.

Before: HOOD, P.J., and R. J. DANHOF* and J. STEMPIEN,** JJ.

PER CURIAM. This case arises out of defendants' mistaken arrest of plaintiff on charges pending against a woman who apparently had stolen plaintiff's identification. Plaintiff appeals as of right from the dismissal of her complaint against the city and the arresting officers.[1] We affirm.

Plaintiff was a passenger in a vehicle parked in an area known to have a lot of drug and prostitution activity. Undercover officers suspected that a drug transaction was underway and asked the three occupants for identification. Plaintiff did not produce identification but gave her name and date of birth to the officers.

A check of the Law Enforcement Information Network (LEIN) computer disclosed that plaintiff's name was an alias for a woman who had an outstanding misdemeanor warrant for prostitution. The date of birth listed on the computer was about

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1993-6.

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

[1] Plaintiff's claims against the supervisory officers involved are not part of this appeal. Therefore, "defendants" in this opinion will refer only to defendants-appellees.

two years earlier than the date of birth plaintiff gave the officers. She was nevertheless arrested.

For reasons that are unclear, plaintiff spent about three days in jail before she was released. She was tried and eventually acquitted. She later sued, claiming to have suffered various damages, including loss of employment.

Plaintiff attacks on many grounds the trial court's decision to grant defendants' motion for summary disposition. We have reorganized her arguments and address them below.

In her first two issues, plaintiff claims that the trial court erred in granting defendants' motion for summary disposition under MCR 2.116(C)(10). She argues that her arrest was without probable cause and also that the officers' affidavits below were inaccurate. We disagree.

We note that, in opposing a motion for summary disposition, a "party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4); see also *Stanton v Dachille,* 186 Mich App 247, 262; 463 NW2d 479 (1990). Plaintiff completely failed to do that. In fact, she did not even submit her own affidavit in support of her allegations. Under these circumstances, the trial court was justified in finding that there were no questions of material fact for trial.

Just before the hearing regarding plaintiff's motion for rehearing or reconsideration, defendants admitted in writing that there was an error in their affidavits. Specifically, defendants admitted that, contrary to what was stated in their affidavits, the LEIN report did not list the date of birth plaintiff gave the officers but rather listed a different date of birth. The trial court made this letter

part of the record as an amendment of defendants' affidavits.

After considering this admission, the trial court declined to change its ruling with regard to defendants' motion for summary disposition. The court agreed with defendants that, because plaintiff had no identification or other confirmation of her asserted date of birth in her possession, because the two dates were only about two years apart and therefore there was no obvious difference in age, and because plaintiff could not be fingerprinted on the street, the officers had acted properly in arresting her. We agree with the trial court that, given these unrebutted facts, there was probable cause to arrest plaintiff.

On the merits, we also agree with the trial court that, because defendants had probable cause to arrest plaintiff, they were protected from suit by governmental immunity. See MCL 691.1407(2); MSA 3.996(107)(2).

According to defendants' uncontroverted affidavits, they clearly were acting within the scope of their authority and discharging a governmental function when they arrested plaintiff. See MCL 691.1407(2)(a) and (b); MSA 3.996(107)(2)(a) and (b); see also *Harrison v Director of Dep't of Corrections,* 194 Mich App 446, 450; 487 NW2d 799 (1992). As discussed above, their conduct in arresting plaintiff was reasonable and not grossly negligent within the meaning of the statute. That is, their conduct was not "so reckless as to demonstrate a substantial lack of concern for whether an injury results." See MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). Thus, they were immune from suit. See *id.* We note that, contrary to plaintiff's argument, there is no intentional tort exception to the doctrine of governmental immunity. *Smith v Dep't of Public Health,* 428 Mich 540, 544; 410 NW2d

749 (1987), aff'd on other grounds sub nom *Will v Michigan Dep't of State Police,* 491 US 58 (1989); see also *Harrison, supra* at 450. The trial court properly granted defendants' motion for summary disposition regarding all plaintiff's state claims.[2]

Plaintiff also argues that the trial court erred in dismissing her federal claims on the basis of res judicata. We again disagree.

For the sake of clarification, we note that, before suing in state court, plaintiff sued in federal court, alleging the same state and federal claims she asserted below. The federal court, in considering defendants' motion for summary disposition, considered plaintiff's federal claims on the merits and dismissed them. The federal court also dismissed plaintiff's pendent state claims, but explicitly did so without prejudice. Plaintiff's motion for reconsideration was denied and she did not appeal.

First, because the federal court's order did not state whether the dismissal of plaintiff's federal claims was with or without prejudice, the dismissal is presumed to be with prejudice. See FR Civ P 41(b); see also MCR 2.504(B)(3). Additionally, because the federal court considered and decided the merits of plaintiff's federal claims, its decision is final and binding. *Roberts v City of Troy,* 170 Mich App 567, 577; 429 NW2d 206 (1988). That decision is therefore res judicata and bars relitigation of plaintiff's federal claims. *Id.* Plaintiff's argument to the contrary is clearly meritless. The trial court did not err in dismissing plaintiff's federal claims.

We sympathize with plaintiff's anger at being mistakenly arrested. However,

[2] In her first amended complaint, plaintiff alleged the following state claims: assault and battery, false arrest, false imprisonment, intentional infliction of emotional distress, malicious prosecution, negligence, and gross negligence.

> [t]he Constitution does not guarantee that only the guilty will be arrested. If it did [42 USC 1983], would provide a cause of action for every defendant acquitted—indeed, for every suspect released. . . .
>
> . . . Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. [*Baker v McCollan,* 443 US 137, 145-146; 99 S Ct 2689; 61 L Ed 2d 433 (1979).]

Like plaintiff, we question why it took three days for her to be released when a simple fingerprint check would have disclosed that she was the wrong person. However, there is no evidence on this record that would indicate that these defendants were responsible for that delay.

Affirmed.

LINGLE v BERRIEN COUNTY

Docket No. 158277. Submitted April 20, 1994, at Grand Rapids. Decided June 14, 1994; approved for publication September 1, 1994, at 9:05 A.M.

Larry J. Lingle, Lauretta Lingle, Jesse C. Lingle, and Patricia A. Kleynenberg brought an action in the Berrien Circuit Court against Berrien County, as operator of the Riverwood Community Mental Health Center, and others, seeking damages allegedly arising as a result of Larry Lingle fatally shooting Robert Tollaksen as a result of improper treatment of Lingle by the defendants. The court, Ronald J. Taylor, J., granted summary disposition for the defendants. The plaintiffs appealed.

The Court of Appeals *held:*

1. A plaintiff cannot benefit from a cause of action founded upon an immoral or illegal act. Accordingly, although Larry Lingle was found not guilty by reason of insanity in the shooting of Tollaksen, the trial court properly granted summary disposition for the defendants with respect to Larry Lingle's negligence claim arising out of his treatment as an outpatient at the Riverwood Community Mental Health Center.

2. The trial court properly granted summary disposition for the defendants with respect to the bystander liability claims of the other plaintiffs, the parents and the sister of Larry Lingle, because bystander recovery is limited to members of the immediate family of an injured third party.

Affirmed.

Conybeare Law Office, P.C. (by *John C. Johnson*), for the plaintiffs.

Cummings, McClorey, Davis & Acho, P.C. (by *Gail P. Massad*), for Berrien County and others.

Kerr, Russell & Weber (by *Patrick McLain* and *Joanne G. Swanson*), for S. Prasad Sajja.

Before: CORRIGAN, P.J., and GRIFFIN and M. W. DRAKE,* JJ.

PER CURIAM. Plaintiffs appeal as of right from an order of the circuit court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm.

Although plaintiff Larry J. Lingle was found not guilty by reason of insanity in the shooting death of Robert Tollaksen, the trial court did not err in granting defendants' motion for summary disposition. A plaintiff cannot benefit from a cause of action founded upon an immoral or illegal act. *Glazier v Lee,* 171 Mich App 216, 220; 429 NW2d 857 (1988); 1A CJS, Actions, § 29, pp 386-387. Accordingly, Larry Lingle's negligence claim arising out of his treatment as an outpatient at Riverwood Community Mental Health Center was barred.

Further, the bystander liability claims of Larry Lingle's parents and sister were properly dismissed. Bystander recovery is limited to immediate family members of the injured third party. *Nugent v Bauermeister,* 195 Mich App 158, 160-161; 489 NW2d 148 (1992); *DAIIE v McMillan (On Remand),* 159 Mich App 48; 406 NW2d 232 (1987).

Affirmed.

---

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

LUCAS v PETERS

Docket No. 157036. Submitted April 19, 1994, at Grand Rapids. Decided June 29, 1994; approved for publication September 1, 1994, at 9:10 A.M. Leave to appeal sought.

Leroy C. Lucas brought an action in the Kent Circuit Court against Leo Peters, alleging tortious interference with an existing contractual relationship. The defendant brought a motion to compel arbitration, alleging that the plaintiff, an account executive who handled the defendant's brokerage account at Shearson Lehman Brothers, Inc., was required to submit to arbitration his claim that the defendant directed Shearson's manager to pay all the commissions from the defendant's account to another account executive who handled the account, despite knowing that the plaintiff and the other account executive had agreed to split the commissions. The court, Dennis C. Kolenda, J., denied the motion. The defendant appealed by leave granted.

The Court of Appeals *held:*

Pursuant to New York Stock Exchange Rule 600(a), the plaintiff was an "associated person" at the time of the present action, and, as such, was required to arbitrate controversies involving alleged misconduct attributed to a customer or nonmember that arises out of the associated person's exchange-related activities. The controversy with the defendant, a customer, arose out of the plaintiff's exchange-related activities. The trial court erred in denying the defendant's motion to compel arbitration.

Reversed.

1. SECURITIES REGULATION — ARBITRATION — FEDERAL ARBITRATION ACT — NEW YORK STOCK EXCHANGE RULES.

The federal arbitration act controls actions in both state and

REFERENCES

Am Jur 2d, Arbitration and Award, § 6; Securities Regulation—Federal, §§ 316, 327, 329, 1101-1103; Securities Regulation—State, §§ 14, 223.

Pre-emption by Federal Arbitration Act (9 USCS § 1 *et seq.*) of state laws prohibiting or restricting formation or enforcement of arbitration agreements. 108 ALR Fed 179.

federal courts; state courts are bound under the Supremacy Clause to enforce the substantive provisions of the act; the arbitration provisions in the constitution and rules of the New York Stock Exchange are sufficient to compel arbitration of disputes covered under the act irrespective of whether they are incorporated into a separate agreement (US Const, art VI, § 2; 9 USC 1-15).

2. SECURITIES REGULATION — ARBITRATION — WORDS AND PHRASES — "ASSOCIATED PERSON" — NEW YORK STOCK EXCHANGE RULES.

New York Stock Exchange Rule 600(a) requires "associated persons" to submit to arbitration any claims or disputes with a customer or nonmember arising out of the business of the associated person in connection with activities as an associated person; an associated person is a person associated with a member as, inter alia, an officer, director, branch manager, or employee of a broker or dealer that is a member (15 USC 78c[a][18], 78c[a][21]).

Cholette, Perkins & Buchanan (by *Bruce M. Bieneman* and *Robert E. Attmore*), for the plaintiff.

Hertz, Schram & Saretsky, P.C. (by *Bradley J. Schram, Steve J. Weiss,* and *Karen A. Gould*), for the defendant.

Before: CORRIGAN, P.J., and GRIFFIN and M. W. DRAKE,* JJ.

PER CURIAM. Defendant appeals by leave granted from an order of the circuit court denying defendant's motion to compel arbitration in this action arising out of defendant's brokerage account at Shearson Lehman Brothers, Inc. We reverse.

On June 9, 1992, plaintiff commenced the present action against defendant, alleging tortious interference with an existing contractual relationship. Plaintiff was hired as an account executive at Shearson Lehman Brothers, Inc., in 1984. From

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

1984 until June 1989, plaintiff executed defendant Leo Peters' stock and commodity trading through defendant's brokerage account at Shearson. Plaintiff alleged that in June 1989, he entered into an oral agreement with Chester Lautenbach, Jr., another account executive at Shearson, allowing Lautenbach to handle defendant's account. Under the agreement, both parties would split the commissions generated from the account. Plaintiff further alleged that defendant knew of the parties' agreement but, nevertheless, directed Shearson's manager to pay all the commissions from his account to Lautenbach.

On July 9, 1992, defendant moved to compel arbitration of plaintiff's claim. Defendant argued that plaintiff's employment contract with Shearson as well as the rules of the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD), where plaintiff was registered, required the submission of the claim to arbitration. In denying defendant's motion, the trial court ruled that the arbitration clause contained in the employment agreement was limited to disputes within the expertise of the securities industry. Additionally, the trial court concluded that arbitration was not compelled by the NASD and NYSE rules because such arbitration was limited to disputes arising from the conduct of the broker rather than the customer. Defendant now appeals as of right. We reverse.

Defendant first argues, inter alia, that NYSE Rule 600(a) requires that plaintiff, as an associated person, arbitrate his dispute with defendant.[1] It is

[1] The federal arbitration act, 9 USC 1-15, controls actions in both state and federal courts and "[s]tate courts are bound under the Supremacy Clause, US Const, art VI, § 2, to enforce the substantive provisions of the federal act." *Kauffman v Chicago Corp*, 187 Mich App 284, 286; 466 NW2d 726 (1991). The arbitration provisions of the

undisputed by both parties that plaintiff, as an employee of Shearson, was an "associated person"[2] at the time of the present action. Rule 600(a) of the NYSE requires associated persons to submit to arbitration any claims or disputes with a customer or nonmember "arising in connection with the business of such . . . associated person in connection with his activities as an associated person."

The duty to arbitrate assumed by an associated person under Rule 600(a), where the alleged misconduct is attributed to a customer or nonmember, is limited to only those controversies that arise out of the associated person's exchange-related activities. *Haviland v Goldman Sachs & Co,* 947 F2d 601, 605-606 (CA 2, 1991); *Fleck v E F Hutton Group, Inc,* 891 F2d 1047 (CA 2, 1989); *Paine, Webber, Jackson & Curtis, Inc v Chase Manhattan Bank, NA,* 728 F2d 577 (CA 2, 1984).

Because it is clear that defendant is a customer, arbitration under Rule 600(a) applies only to exchange-related controversies. In the present case, the controversy does arise out of plaintiff's exchange-related activities. The instant dispute is grounded upon an alleged agreement between plaintiff and another account executive at Shearson to split commissions from defendant's brokerage account. Under these circumstances, the trial court erred in denying defendant's motion to compel arbitration.

Our resolution of this issue renders it unneces-

NYSE Constitution and Rules are sufficient to compel arbitration of covered disputes under the act irrespective of whether they are incorporated into a separate agreement. *Paine, Webber, Jackson & Curtis, Inc v Chase Manhattan Bank, NA,* 728 F2d 577, 579 (CA 2, 1984).

[2] The Securities Exchange Act of 1934 defines an "associated person" as "a person associated with a member as, inter alia, an officer, director, branch manager, or employee of a broker or dealer that is a member." *Fleck v E F Hutton Group, Inc,* 891 F2d 1047, 1054 (CA 2, 1989), citing 15 USC 78c(a)(18), 78c(a)(21).

sary to address defendant's remaining claims on appeal.

Reversed.

PEOPLE v BROWN

Docket No. 139411. Submitted November 2, 1993, at Detroit. Decided September 6, 1994, at 9:00 A.M. Leave to appeal sought.

Kevin A. Brown was convicted following a joint bench trial in the Detroit Recorder's Court, M. John Shamo, J., of two counts of second-degree murder, one count of assault with intent to commit armed robbery, and possession of a firearm during the commission of a felony. The defendant was sentenced to concurrent prison terms of twenty to forty years for the murder and assault convictions, and to a consecutive term of two years for the felony-firearm conviction. The defendant appealed.

The Court of Appeals *held:*

The defendant's convictions and sentences are affirmed.

P. E. DEEGAN, J., in an opinion with which GRIBBS, P.J., concurred in the result only, stated:

1. The defendant's privilege against compelled self-incrimination, as guaranteed by Const 1963, art 1, § 17 and protected by the procedural safeguards in *Miranda v Arizona,* 348 US 436; 86 S Ct 1602; 76 L Ed 2d 694 (1966), and the defendant's right to counsel, as secured by Const 1963, art 1, § 20, were not violated during the defendant's second interrogation while in police custody when the police officer conducting the interrogation failed to inform the defendant that an attorney retained by his mother was available and waiting to confer with him. The trial court correctly refused to suppress evidence of the defendant's voluntary statement at the second interrogation session.

2. The trial court did not err in denying the defendant's request for a separate trial or in admitting evidence of the statements of the codefendants.

3. The defendant's sentences do not violate the principle of proportionality.

SHEPHERD, J., dissenting, stated that the right to counsel under Const 1963, art 1, § 20 and the right against compelled self-incrimination under Const 1963, art 1, § 17 encompass the right to be informed about retained counsel's attempts to contact the suspect. The case should be reversed and remanded for a new trial at which evidence of the defendant's statement at the second interrogation session would be excluded.

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 *Nancy A. Neff,* Assistant Prosecuting Attorney, for the people.

Cyril C. Pessina, for the defendant on appeal.

Before: GRIBBS, P.J., and SHEPHERD and P. E. DEEGAN,* JJ.

P. E. DEEGAN, J. I agree with Judge SHEPHERD's recitation of the facts.

I also agree with Judge SHEPHERD that we should defer to the trial court with respect to its findings of fact regarding the police activity during the questioning of the defendant. Defendant alleged that the police engaged in a variety of improper behavior, including the misrepresentation of the defendant's whereabouts to an attorney. Judge SHEPHERD concluded, and I agree, that "there is no evidence that they deliberately tried to conceal [the] defendant's location." *Post* at 547.

I further agree that the most important issue regarding the defendant's second statement is "whether the officers' [failure] to inform defendant of [an] attorney's attempts to contact him," *post* at 547, violated the privilege against compelled self-incrimination as guaranteed by Const 1963, art 1, § 17 and protected by the procedural safeguards in *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 76 L Ed 2d 694 (1966), or the right to counsel as secured by Const 1963, art 1, § 20, or both.

However, I do not agree with Judge SHEPHERD that the facts of this case justify extending the privilege against compelled self-incrimination. I do

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

not believe the police in this case were required to interrupt their interrogation of the defendant in order to inform him that an attorney, hired by a third party, was asking to talk with him. I find it significant that the defendant made a knowing and voluntary waiver of his privilege against self-incrimination, and that he never indicated to the police that he wanted an attorney.

The facts of this case differ in several important respects from those in *People v Wright,* 441 Mich 140; 490 NW2d 351 (1992). In *Wright,* the police did not advise the defendant of his constitutional rights until he had been in custody for over five hours. In the instant case, the police read the defendant his rights shortly after he voluntarily walked into the police station. The police in this case, in contrast to the police in *Wright,* reread to the defendant his rights before questioning him a second time. The defendant here, unlike the defendant in *Wright,* signed a standard constitutional rights notification form each time before he was questioned. The police stated that when they advised the defendant of his constitutional rights he declared that he understood those rights; he did not appear to be under the influence of any chemical substance, and he was cooperative. The defendant never asked to telephone a family member or a lawyer.

In *Wright,* the police engaged in coercive behavior. They deprived the defendant of food, and only gave him some water after nine hours in custody. They placed the defendant in a small room, four feet by five feet, in order to get him to confess. In addition, they threatened to charge the defendant with first-degree murder unless he confessed. Indeed, Justice BRICKLEY, in his concurring opinion in *Wright,* makes it clear that Wright's statement should have been suppressed because "he was

deprived of food, sleep, and contact with friendly outsiders, combined with the fact that he was not informed of available retained counsel." *Id.* at 172. Justice BRICKLEY expressly relied on "[t]he sum of these circumstances" in his decision to concur in the result in *Wright. Id.*

The police in the present case provided breakfast for the defendant, and did not engage in any coercive behavior similar to that in *Wright.* The police treated the defendant justly. That is evidenced by the defendant's second statement, in which he wrote the word "fair" in response to how he had been treated.

Because the facts in this case are not egregious and are dissimilar to those in *Wright,* I adopt the rationale of Justice RILEY, dissenting in *Wright, supra* at 172-180 (BOYLE and GRIFFIN JJ., concurring).

In her dissenting opinion, Justice RILEY relied on the United States Supreme Court's opinion in *Moran v Burbine,* 475 US 412; 106 S Ct 1135; 89 L Ed 2d 410 (1986), which was written by Justice O'Connor for the six-member majority. *Id.* at 415-434. Judge SHEPHERD suggests that we adopt Justice MALLETT's analysis in *Wright, supra* at 142-155. I am convinced that such a decision would establish a "rule that focuses on how the police treat an attorney—conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation—[and] would ignore both *Miranda*'s mission and its only source of legitimacy." *Moran, supra* at 425.

Moreover, I believe that Judge SHEPHERD's suggestion would create a multiplicity of needless and confusing legal questions for Michigan courts when applying *Miranda,* for example:

> To what extent should the police be held ac-

> countable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter? [*Moran, supra* at 425.]

In short, Judge SHEPHERD's suggestion would create in Michigan a Gordian knot concerning *Miranda* rights.

Because the facts of this case are distinguishable from those in *Wright* and I am convinced that the reasoning in Justice O'Connor's majority opinion in *Moran* is superior, I find the decision of the police not to inform the defendant, while interrogating him, of an attorney's attempts to contact him did not violate the privilege against compelled self-incrimination as guaranteed by Const 1963, art 1, § 17 and protected by the procedural safeguards in *Miranda.* Accordingly, I find no error in the trial court's decision not to suppress the defendant's second statement.

I am also convinced that the right to counsel as secured by Const 1963, art 1, § 20 does not include the right to be informed that counsel, retained by a third party, is attempting to contact the suspect.

> The general rule [is] that a defendant has no right to counsel until the right attaches automatically after the initiation of adversarial judicial criminal proceedings. . . . [An] exception [exists] for pretrial identification procedures . . . because of the unique elements of confrontation that these procedures present. . . . Normal custody interrogations have never been analyzed under the right to counsel simply because that right has not yet attached at this investigative stage. [*Wright, supra*

at 173, n 4 (Justice RILEY dissenting in an opinion joined by Justices BOYLE and GRIFFIN).]

Therefore, I do not find that the defendant's second statement was obtained in violation of the right to counsel as guaranteed by Const 1963, art 1, § 20. Accordingly, I find no error in the trial court's refusal to suppress the defendant's second statement.

Notwithstanding established Michigan case law to the contrary, Judge SHEPHERD would extend the right to counsel to encompass a suspect's "right to be informed about [a] retained counsel's attempts to contact [him]." *Post* at 548. In support of his view, Judge SHEPHERD relies on the decisions of three foreign jurisdictions: *People v West,* 81 NY2d 370, 372-374; 599 NYS2d 484; 615 NE2d 968 (1993); *State v Hattaway,* 621 So 2d 796, 801 (La, 1993); and *State v Lefthand,* 488 NW2d 799, 801-802 (Minn, 1992). I believe that all of those cases are inapposite. In *West,* the defendant had an existing attorney-client relationship, and both *Hattaway* and *Lefthand* involved defendants who had court-appointed attorneys. In the present case, on the other hand, the defendant did not have an attorney, did not ask for an attorney, and did not retain an attorney on his own. Counsel was retained by a third party, not by the defendant. I find no reason to turn to foreign jurisdictions in light of our own established case law. The creation of such a novel extension would not advance the development of a sound Michigan constitutional right to counsel.

In summary, I conclude that defendant's second incriminating statement to the police, made while an attorney retained by a third party attempted to contact him, did not violate the privilege against compelled self-incrimination as guaranteed by

Const 1963, art 1, § 17 and protected by the procedural safeguards in *Miranda* or the right to counsel as guaranteed by Const 1963, art 1, § 20. Accordingly, the trial court's refusal to suppress the defendant's second statement should be affirmed.

Finally, I find that the trial court did not err in denying the defendant's request for a separate trial or in admitting the codefendant's statements in a joint bench trial. *People v Etheridge,* 196 Mich App 43, 52-53; 492 NW2d 490 (1992); *People v Butler,* 193 Mich App 63, 66; 483 NW2d 430 (1992). I also conclude that the defendant's concurrent sentences of twenty to forty years' imprisonment for the murder and assault convictions do not violate the principle of proportionality. *People v Milbourn,* 435 Mich 630, 659-660; 461 NW2d 1 (1990).

Affirmed.

GRIBBS, P.J. I concur in the result only.

SHEPHERD, J. *(dissenting).* Defendant appeals from his conviction at a joint bench trial[1] of two counts of second-degree murder, MCL 750.317; MSA 28.549, one count of assault with intent to commit armed robbery, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). I would reverse, and thus I respectfully dissent from Judge DEEGAN's opinion.

I

The charges against defendant arose out of the deaths of Lorenzo Bundy and Lindsay Jackson. On

[1] Two codefendants, Darrell Stubbs and Dwayne Stubbs, were also charged and convicted in connection with this matter at the joint bench trial. Their appeals have been pursued under Docket Nos. 139412 and 139413.

the afternoon before their deaths, Bundy and Jackson left home in their mother's Mustang. Police later found Bundy's body in an alley with his hands tied behind his back and a gunshot wound to the head. Bundy's shirt was pulled up to the shoulders in the back, and his coat was hanging from one arm. Jackson's body was also found in the alley near a dumpster, with two gunshot wounds to the head. Neither Bundy nor Jackson had a wallet or any money when their bodies were found. The Mustang was found in the alley, but no keys were ever recovered.

After defendant was arrested in connection with the matter, he gave two statements to the police. Those statements formed the primary basis for his convictions. The first statement was given to Sergeant James Bivins, while the second statement was given to Lieutenant William Presley.

During the *Walker*[2] hearing, Bivens testified that defendant voluntarily came into the police station, where he was arrested. Bivens testified that defendant was able to read and write, that he did not appear to be under the influence of any chemical substance, and that he conversed coherently. Bivens also testified that defendant was advised of his constitutional rights and signed the standard notification-of-rights form. Further, Bivens testified that no threats or promises were directed toward defendant.

Initially, defendant was only questioned about Bundy's death.[3] In defendant's first statement to the police, he said that he shot Bundy in self-defense after Bundy attempted to rob him. Defen-

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] Bivens was only concerned with investigating Bundy's death because Bundy's body was found the day before Jackson's body. Apparently, defendant was not yet a suspect in Jackson's murder.

dant refused to sign this statement. According to Bivens, at no time did defendant indicate that he did not want to talk to the police, or that he wanted to talk to an attorney. Although uncertain about precisely when, Bivens acknowledged that at some point he spoke with defendant's mother, who indicated that she was going to retain an attorney for defendant. It should be emphasized that defendant was eighteen years old when he was arrested and interrogated.

The second officer to speak with defendant was Presley. Presley spoke with defendant the following day. At that point, defendant was questioned in connection with both deaths. According to Presley, defendant had been given breakfast that morning, and he was cooperative. Presley testified that defendant was not threatened or given any promises; and Presley ascertained that defendant was able to read. Presley testified that he advised defendant of his constitutional rights before questioning defendant in the matter, and defendant again signed a notification-of-rights form.

Defendant then gave a statement acknowledging his participation in the crimes; however, defendant said that he only participated because he was coerced by one of the other codefendants to do so. In the initial version of events given by defendant to Presley, defendant stated that he was attacked by one of the decedents, "the tall guy." Then, another individual—"D"—came along and shot defendant's attacker despite defendant's pleas not to shoot him. D then demanded that defendant help him dispose of the body. Meanwhile, the tall guy's brother came along and was grabbed by D. D then told defendant to watch the brother or D would kill defendant. Defendant told the man to lie on the ground while D was away. When D returned, D bound the man's hands. Then, a short

time later, while D forced defendant to help him move the tall guy, the tall guy's brother attempted to run. D demanded that defendant shoot the brother or be shot himself, handing defendant the gun. Defendant shot the tall guy's brother twice.

After making this initial statement, defendant told Presley that he wanted to change the beginning of the story. In the revised version, defendant said that two men—the tall guy and his brother—had approached defendant while they were looking for somebody. Defendant told them that the person was not there, and so they started to leave. However, as they were leaving D approached with a gun and said "this is a stick-up." D took defendant's coat, and ordered defendant to find something with which to tie up the others. D took the keys to the Mustang, and demanded that defendant move the car. At one point, the tall guy attacked defendant with a broom—and that was when D shot the tall guy. D took money and drugs from the tall guy. Defendant stated that the remainder of the events occurred the same way as he had recounted earlier.

Presley testified at the *Walker* hearing that after giving his second statement, defendant initialed all of his answers, and signed each page of the statement. However, defendant later crossed out his signatures. Presley testified that defendant said that he was crossing out his signatures because his mother had told him not to sign anything if she was not there.

Presley then testified that he was in the middle of taking defendant's statement when he was informed by another officer that an attorney for defendant was present at the police station. Presley did not allow the attorney access to defendant, nor did Presley tell defendant that an attorney was immediately available. Rather, Presley contin-

ued to take defendant's statement. Then, shortly after learning of the attorney's presence, Presley asked defendant if he had requested an attorney. According to Presley, defendant wrote down "no" in his own handwriting in response to that question. While it appears that the attorney sought judicial intervention in an attempt to gain access to defendant, that was not until after defendant's statement was completed.

When defendant took the stand at the *Walker* hearing, his version of the events surrounding the interrogation was different from that of the officers. Defendant testified that he crossed out his signatures from the second statement because, after reading it more carefully in Presley's absence, he discovered that Presley had not typed everything that defendant had said. Defendant testified that he was threatened and given promises of leniency in exchange for his statements by officers other than Bivens and Presley. Although defendant acknowledged writing the word "fair" in response to how he had been treated during the second interrogation, he stated that his response only pertained to his treatment by Presley, and not the other officers. Further, defendant testified that he had asked for an attorney during both interrogations. Defendant denied writing "no" in his second statement in response to whether he had requested an attorney. Defendant testified that when he placed his initials on the margin next to the question concerning his request for an attorney, the response line was blank at the time. Further, defendant testified that before he gave his second statement he had been told by his mother that she had called an attorney for him. Defendant testified that he kept asking the police about an attorney because he knew that his mother had called one.

The trial court denied defendant's motion to suppress his statements, finding that the officers were not required to inform defendant that his attorney was present. Following a joint bench trial, defendant was convicted as noted above. Herein defendant appeals as of right.

II

On appeal, defendant argues that the prosecution did not meet its burden of proving that his statements were given voluntarily and without coercion. Further, defendant argues that the police should not be allowed to benefit from their improper tactics. In addition to the fact that the police did not tell defendant that his attorney was present at the time of interrogation, defendant also alleges that the police deliberately misrepresented to defense counsel the defendant's location when counsel arrived at police headquarters.

On appeal, this Court must review the trial court's determination of voluntariness after examining the entire record, and must make an independent determination under the totality of the circumstances. *People v Brannon,* 194 Mich App 121, 131; 486 NW2d 83 (1992); *People v Wright,* 441 Mich 140, 147; 490 NW2d 351 (1992). However, this Court gives great deference to the trial court's assessment of the credibility of the witnesses, and its findings of fact will not be reversed unless clearly erroneous. *Brannon, supra* at 131.

III

Turning to the facts of this case, it is readily apparent that the trial court viewed defendant's testimony concerning the interrogation with more skepticism than that of the police officers. The

police officers testified that no threats or promises were made in obtaining the statements. They also testified that defendant received breakfast in the morning before giving his second statement, and he appeared cooperative. Both officers testified that defendant seemed competent to understand his rights, and that he signed a written form notifying him of his rights to remain silent, against self-incrimination, and to the assistance of counsel, among others. Further, both officers testified that at no point did defendant request the assistance of counsel. Thus, in these respects, we must defer to the trial court in its assessment of credibility. *Id.* I do not believe that the trial court clearly erred in these findings of fact, which are strongly corroborated by the testimony of the police officers. *Id.*

Defendant also argues that the police employed improper tactics by misrepresenting defendant's whereabouts to defense counsel. However, this allegation is simply not supported by the record. While the officers may have refused defense counsel access to defendant, there is no evidence that they deliberately tried to conceal defendant's location. Thus, I would conclude that the police officers did not do anything to misrepresent defendant's location to his attorney. *Id.*

However, most importantly, there remains the question whether the officers' refusal to inform defendant of his attorney's attempts to contact him was in some respect improper. On this question, I find compelling the analyses of Chief Justice CAVANAGH and Justice MALLETT in *Wright, supra* at 155 and 142, respectively. While four justices concurred in reversing this Court's previous decision in *Wright,*[4] those favoring reversal gave three separate legal bases for doing so.

[4] The Supreme Court's decision reversed this Court's previous opinion, *People v Wright,* 186 Mich App 566; 465 NW2d 339 (1990).

IV

First, on an independent basis, I would suppress defendant's second statement and reverse his convictions under the analysis set forth in Chief Justice CAVANAGH's concurring opinion in *Wright, supra* at 155. That is, I agree that a suspect's right to counsel under Const 1963, art 1, § 20 encompasses the right to be informed about retained counsel's attempts to contact the suspect. *Wright, supra* at 160-161 (CAVANAGH, C.J., concurring).

The facts in *Wright* and the case at bar are strikingly similar. In both cases the defendant was not aware that retained counsel was attempting to contact him during a custodial interrogation. In both cases the police refused the attorney access to the defendant, and refused to inform the defendant that his attorney was attempting to contact him. In both cases the defense attorney sought judicial intervention, but it was to no avail because the defendant's statement was completed in the interim.

I agree with Chief Justice CAVANAGH that "custodial interrogation of an accused who is represented by counsel" is a "critical" prearraignment stage of prosecution triggering our state's constitutional right to counsel. *Wright, supra* at 160 (CAVANAGH, C.J., concurring). The fact that retained counsel has attempted to contact a suspect may influence the suspect's decision whether to consult the advice of counsel. Refusing a suspect access to the information about counsel's attempted contact "render[s] subsequent statements by the suspect inadmissible as taken in derogation of the right to counsel." *Wright, supra* at 164 (CAVANAGH, C.J., concurring).

While this expanded scope of the right to counsel under Const 1963, art 1, § 20 is fairly novel to

Michigan jurisprudence, a number of other jurisdictions also have recently commented on the scope of their state's constitutional right to counsel.[5] Of particular relevance to the case at bar, in *People v West,* 81 NY2d 370, 373-374; 599 NYS2d 484; 615 NE2d 968 (1993), the Court of Appeals of New York concluded that New York's right to counsel attached when the accused retained counsel:

> [T]he right to counsel attaches indelibly where an uncharged individual has actually retained a lawyer in the matter at issue or, while in custody, has requested a lawyer in that matter.

The Court of Appeals of New York in *West* further expounded on the right to counsel as follows:

> The right to counsel helps to equalize the balance and assure that any waiver is knowing and intelligent. . . . Additionally, the right protects against undue interference with any existing attorney-client relationship. [*Id.* at 374.]

In *West,* retained counsel previously had been present at the defendant's lineup, and counsel instructed the police not to question the defendant. Thus, while there is some distinction between the case at bar where counsel had not yet had any contact with defendant, I would also emphasize that the defendant in the case at bar was only eighteen years old. It would not be unreasonable to conclude that defendant had an expectation that his family would make arrangements for retained counsel. The record is unclear regarding whether defendant actually knew that his mother had secured counsel for him. However, regardless

[5] See, e.g., *State v Hattaway,* 621 So 2d 796, 801 (La, 1993); *State v Lefthand,* 488 NW2d 799, 801-802 (Minn, 1992).

of precisely who arranged for counsel, the most compelling fact remains that the very police officers who were interrogating the defendant knew that defendant's retained counsel was immediately available at the station and wanted to speak with defendant—and the police continued the interrogation without informing defendant of retained counsel's availability.

At this juncture, I would make the observation that Judge DEEGAN's analysis seems dependent upon his statement that "[c]ounsel was retained by a third party, not by the defendant." *Ante* at 540. I believe that this is a distinction without meaning. In response, I would emphasize that the "third party" in this case was defendant's mother, and that defendant was only eighteen years old at the time of interrogation. Notably, although uncertain about the precise timing, Sgt. Bivens acknowledged that at some point he had spoken with defendant's mother, who indicated that she was going to retain an attorney for defendant. As it turns out, defendant's mother did in fact hire the attorney. This theme of defendant's dependency upon his family for guidance in this matter was repeated in other testimony. Lt. Presley testified that defendant said that he was crossing out his signature from the second statement because his mother had told him not to sign anything if she was not there. Under these circumstances, I would conclude that defendant was unfairly denied knowledge of *his* retained counsel's attempts to contact him.

I would concur with Chief Justice CAVANAGH's reasoning in *Wright, supra* at 155. On this basis alone I would suppress defendant's second statement to police and reverse his convictions.

V

I would also suppress defendant's second state-

ment to the police and reverse his convictions under the analysis set forth by Justice MALLETT in *Wright, supra* at 142. That is, while a suspect's Fifth Amendment right against self-incrimination does not require police to disclose counsel's attempts to contact the suspect, *Moran v Burbine,* 475 US 412; 106 S Ct 1135; 89 L Ed 2d 410 (1986), the Michigan counterpart, Const 1963, art 1, § 17, may and should be extended to so require it. *Wright, supra* at 154. As noted by Justice MALLETT, a number of other jurisdictions have recognized that "it is necessary for a suspect to be informed of an attorney's attempted contacts." *Wright, supra* at 148. To update the list of cases from other jurisdictions, I would cite one additional, recent case from the Supreme Court of New Jersey, *State v Reed,* 133 NJ 237; 627 A2d 630 (1993).

Reed involved facts similar to those in the case at bar. Therein, a defendant was denied access to information that counsel retained by his family was immediately available at the time of interrogation. *Id.* at 243. The Supreme Court of New Jersey made the following enlightening comments, *id.* at 253, 255-256, 257:

> Our decisional law on the state right against self-incrimination is based on the understanding that the privilege is defined by the ancillary rights, like the right to counsel during custodial interrogation. Moreover, the protections afforded by those ancillary rights provide a metric by which to measure the strength of the privilege. . . .
>
> * * *
>
> [W]hile courts may differ on the rationale for imposing the duty to inform a suspect that an

attorney is waiting to confer, they agree on one supervening principle: the atmosphere of custodial interrogation is inherently coercive and protecting the right against self-incrimination entails counteracting that coercion. Thus, although "knowledge" is always a relevant factor in assessing the validity of a waiver of the right against self-incrimination, because the right is against *compelled* self-incrimination, "knowledge" can be best understood as a condition of "voluntariness," which itself denotes the absence of "compulsion." Consequently, standards ostensibly imposed to enhance a suspect's "knowledge" of the *Miranda* rights also counteract coercion and assure "voluntariness." Some courts have recognized that connection. . . .

* * *

Accordingly, the most practical means to overcome coercion will be through normative rules that apply reasonable, specific, and objective standards. Although we cannot conclude with confidence that a suspect's knowledge that an attorney is ready, able, and willing to represent him or her will enhance the suspect's knowledge of the right to counsel, that knowledge will surely play an important role in "dissipat[ing] the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's" right against self-incrimination. . . .

[W]e believe that requiring the police to inform the suspect of an attorney's presence will greatly reduce the temptation, on law enforcement authorities, to pressure the suspect into a confession before the attorney gains access to the suspect. [Emphasis in original.]

I find the principles enunciated in *Reed* compelling, and in accord with Justice MALLETT's opinion in *Wright.* As in *Wright,* it cannot be said here that defendant knowingly and voluntarily waived his right against self-incrimination under Const 1963, art 1, § 17 without access to the information that retained counsel was available and was at-

tempting to contact him. I find the majority's analysis particularly troublesome given defendant's young age, and his dependency upon his family for assistance. Thus, I would also suppress defendant's second statement and reverse his convictions on this basis.

VI

Finally, in light of the split of opinion over the applicable legal principles discussed in *Wright, supra,* a brief discussion of Justice BRICKLEY's concurring opinion also seems appropriate. Justice BRICKLEY seems to focus on the question whether the defendant's waiver of the right to remain silent was truly voluntary under the totality of the circumstances. *Wright, supra* at 172 (BRICKLEY, J., concurring). Apparently, Justice BRICKLEY would analyze the police conduct here for its overall coercive nature, and would regard the denial of information about an attorney's attempted contacts as only one factor in that analysis. Because the present case does not involve any "coercive" activity by the police other than the denial of information about defendant's retained counsel, it is unclear how Justice BRICKLEY would rule in this case. *Wright* certainly seemed to involve greater overall coercion, with the deprivation "of food, sleep, and contact with friendly outsiders." *Wright, supra* at 172 (BRICKLEY, J., concurring).

I disagree with the implication in Justice BRICKLEY's opinion in *Wright* that suppression is only warranted in cases of extreme coercion. I believe that the right to counsel—either under Const 1963, art 1, § 20 or as an element of the right against self-incrimination under Const 1963, art 1, § 17—is so fundamental that a finding of extreme coercion is not necessary where a defendant is

deprived of information about retained counsel's availability and attempted contacts during a custodial interrogation.

In summary, I would reverse defendant's convictions for the reasons discussed in parts IV and V, *supra*. I respectfully dissent from Judge DEEGAN's opinion and would remand for a new trial at which the second statement would be excluded.

BELLOWS v DELAWARE McDONALD'S CORPORATION

Docket No. 145145. Submitted January 13, 1994, at Grand Rapids. Decided September 6, 1994, at 9:05 A.M.

Thelma Bellows brought an action in the Bay Circuit Court against Delaware McDonald's Corporation, National Broadcasting Company, Inc., Rymac, Inc., and Arthur Andersen & Company, alleging breach of contract and other theories of recovery arising out of the refusal to award her a $10 million prize as a holder of a winning game ticket in a promotional game. The plaintiff, although holding a winning ticket, was denied the prize on the basis of a contest rule that rendered ineligible "persons who are immediate family members of or who reside in the same household" as an employee of a McDonald's franchisee and the fact that the plaintiff's married daughter, who did not live with the plaintiff, was an employee of the McDonald's franchise, Rymac, Inc., at which the plaintiff obtained the winning ticket. The court, Eugene C. Penzien, J., dismissed all of the plaintiff's claims except the breach of contract claim against McDonald's and NBC. The plaintiff filed an amended complaint, alleging breach of contract and equitable estoppel. The court granted summary disposition for McDonald's and NBC, holding that the plaintiff was ineligible under the contest rules because she was a member of her daughter's immediate family within the meaning of the contest rules. The plaintiff appealed.

The Court of Appeals *held:*

1. The relationship between a sponsor of a prize contest and an entrant in a contest is governed by contract law. The rights of an entrant who has performed the act required by a sponsor's offer are limited by the terms of the offer, i.e., by the conditions and rules of the contest. Because the rules of this contest clearly made members of the immediate family of an employee of a McDonald's franchisee ineligible for a prize, the plaintiff would be ineligible if she is a member of the immedi-

REFERENCES

Am Jur 2d, Gambling, §§ 266, 267, 270.

Private contests and lotteries: entrants' rights and remedies. 64 ALR4th 1021.

ate family of her daughter within the meaning of the contest rules.

2. The construction suggested by the plaintiff, that "immediate family members" should be given the restrictive meaning of only those family members residing in the same household, is too restrictive, because it would render the remaining language of the contest rule concerning members of the same household surplusage. Accordingly, it is clear that the contest rule was intended to exclude persons such as the plaintiff.

3. Because there was no disputed issue of fact before the court, summary disposition on the basis of the interpretation of the language of the contest rules was not premature.

4. Because the doctrine of equitable estoppel does not give rise to a separate affirmative cause of action, the trial court properly granted summary disposition for the defendants with respect to plaintiff's equitable estoppel claim.

Affirmed.

CONTRACTS — PRIZE CONTESTS.

The relationship between a sponsor of a prize contest and an entrant in a contest is governed by contract law; the rights of an entrant who has performed the act required by a sponsor's offer are limited by the conditions and rules of the contest.

Currie & Kendall, P.C. (by *Thomas L. Ludington*), and *Smith & Brooker, P.C.* (by *A. T. Lippert, Jr.*), for the plaintiff.

Sonnenschein Nath & Rosenthal (by *Frederic S. Lane, Elpidio Villarreal,* and *Deborah M. Neyens*), and *Seward, Tally & Piggott, P.C.* (by *John M. Morosi* and *Kenneth K. Wright*), for the defendants.

Before: MURPHY, P.J., and GRIFFIN and S. J. LATREILLE,* JJ.

GRIFFIN, J. Plaintiff appeals as of right from an order of the circuit court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) in this breach of contract action. We affirm.

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

I

On October 11, 1990, plaintiff received a number of "McMillion$" game tickets while visiting a McDonald's franchise restaurant owned by defendant Rymac, Inc. The lottery-style promotional game, "McMillion$ on NBC," promised millions of dollars in prize money to the holder of a winning game ticket. While watching television that night, plaintiff discovered that the number on one of her tickets matched the winning prize number. After calling a telephone number printed on the ticket, plaintiff was told to report to the Detroit advertising office of defendant Arthur Andersen & Company to verify that she had won the $10 million prize.

The following morning, plaintiff, her husband, and one of her daughters met with an employee of Andersen, who confirmed that plaintiff possessed the winning ticket. Shortly thereafter, a representative of McDonald's arrived and congratulated plaintiff on winning the prize. Plaintiff spent the remainder of the day engaging in promotional activities that included television appearances and radio interviews. Later that evening, plaintiff was informed that she was "disqualified" from winning the contest because her daughter, Charlene Saunders, worked at the McDonald's franchise where plaintiff obtained the winning ticket. Under the contest rules, "persons who are immediate family members of or who reside in the same household" as an employee of a McDonald's franchisee were ineligible to participate in the contest. Saunders was married and resided approximately thirty miles from her mother.

On October 30, 1990, plaintiff brought the instant action, alleging breach of contract, intentional infliction of emotional distress, defamation,

portrayal in a false public light, and violation of the Michigan Consumer Protection Act. Following defendants' motion for summary disposition, the trial court dismissed all of plaintiff's claims except for her breach of contract count against defendants Delaware McDonald's Corporation and National Broadcasting Company, Inc. Thereafter, plaintiff amended her complaint to allege estoppel and breach of contract against both remaining defendants. Following defendants' motion for summary disposition under both MCR 2.116(C)(8) and (10), the trial court dismissed the amended complaint. The trial court ruled that plaintiff was ineligible to participate in the contest under the contest rules because she was a member of her daughter's "immediate family." Plaintiff now appeals as of right.

II

Although the parties agree that there is no prior Michigan case on point, other jurisdictions have recognized that contract law governs the relationship between the sponsor of a prize contest and an entrant in the contest. See, e.g., *Johnson v BP Oil Co,* 602 So 2d 885, 888 (Ala, 1992); *First Texas Savings Ass'n v Jergins,* 705 SW2d 390 (Tex App, 1986); *Chenard v Marcel Motors,* 387 A2d 596 (Me, 1978). In order to establish the formation of an enforceable contract, an entrant must show (1) the offer of a prize by the sponsor for the performance of a specified act, (2) competition in the contest, and (3) the performance of the specified act required for winning the contest. *Nat'l Amateur Bowlers, Inc v Tassos,* 715 F Supp 323, 325 (D Kansas, 1989); *Las Vegas Hacienda, Inc v Gibson,* 77 Nev 25, 27; 359 P2d 85 (1961).

However, the rights of an entrant who has

performed the act required in the sponsor's offer are limited "by the terms of the offer, i.e., by the conditions and rules in the contest." *Nat'l Amateur Bowlers, Inc, supra* at 325. Here, rule 8 of the contest rules provided that "persons in any of the following categories are not eligible to participate or win prizes: . . . (c) persons who are immediate family of or who reside in the same household as any person in the preceding categories." The categories listed included employees of McDonald's Corporation, its subsidiaries, franchisees, or affiliates, or employees, or agents, or independent contractors of any of the listed McDonald's organizations

Relying on *Bryant v Deseret News Publishing Co,* 120 Utah 241; 233 P2d 355 (1951), plaintiff asserts that she was eligible to participate in the contest under the contest rules because she is not a member of her daughter's "immediate family." In *Bryant,* the plaintiff sued the defendant sponsor to invalidate a prize won by a contestant who was the father of one of the sponsor's employees. *Id.* at 242. The son was twenty-one years old and resided with his wife and children in their own home. *Id.* The contest rules precluded "employees of the Deseret News and their immediate families." *Id.* In upholding the award of the contest prize, the Utah Supreme Court construed the word "immediate" as having a restrictive effect upon the word "family," thus limiting this class to only those family members residing in the son's household. *Id.* at 244-245.

More recently, the Illinois Court of Appeals, in *Harlem-Irving Realty, Inc v Alesi,* 99 Ill App 3d 932; 425 NE2d 1354 (1981), expressly rejected the rationale in *Bryant.* In *Harlem-Irving Realty,* the winner of a promotional contest run by a group of business tenants was sued after it was learned

that he was the father and grandfather of two employees of the tenants. *Id.* at 933-934. The rules precluded employees and their "immediate families" from contest participation. *Id.* at 934. However, the defendant did not reside in the same household as either relative. *Id.* at 934. In upholding the grant of the plaintiff's motion for summary judgment, the panel in *Harlem-Irving Realty* criticized the narrow construction of the term "immediate family" advanced in *Bryant.* Instead, the Illinois Court of Appeals concluded that it should be liberally construed to "effectuat[e] the purpose of the contest rules." *Id.* at 938. Under this construction, the panel concluded that the plaintiffs clearly intended to exclude the defendant and members of his class. *Id.* We agree with *Harlem-Irving Realty* and adopt its analysis.

III

In the present case, rule 8(c) excludes from eligibility those who are immediate family members of *or* who reside in the same household as any employee of a McDonald's franchisee. In light of the additional exclusionary class included in the contest rules, the narrow construction of the term "immediate family" advanced by plaintiff would render the term surplusage.

Furthermore, we construe the term "immediate family" in light of the apparent purpose of the contest rules. Rule 8(c) and other exclusionary rules are designed to encourage public participation in the contest by creating an appearance of fair play and impartiality, while at the same time bolstering public confidence. Applying this principle, we conclude that defendants intended to exclude members of plaintiff's class.

We also reject plaintiff's claim that summary disposition was premature because discovery was incomplete. This Court has held that a grant of summary disposition is premature if granted before discovery on a disputed issue is complete. *Mackey v Dep't of Corrections,* 205 Mich App 330, 333; 517 NW2d 303 (1994). However, a disputed issue must be before the court. *Pauley v Hall,* 124 Mich App 255, 263; 335 NW2d 197 (1983). If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence. *Michigan Nat'l Bank v Metro Institutional Food Service, Inc,* 198 Mich App 236, 241; 497 NW2d 225 (1993); *Pauley, supra.* Here, plaintiff failed to do so.

Finally, we agree that the trial court did not err in granting summary disposition with respect to plaintiff's equitable estoppel claim. The doctrine of equitable estoppel is not available to a plaintiff as a cause of action. *Hoye v Westfield Ins Co,* 194 Mich App 696, 707; 487 NW2d 838 (1992); *Harrison Twp v Calisi,* 121 Mich App 777, 787; 329 NW2d 488 (1982).

Affirmed.[1]

---

[1] In view of our resolution, we find it is unnecessary to address defendants' alternative argument that the contest rules restrict the scope of judicial review. We recognize, however, that a split of authority exists regarding whether a contest rule that makes the decision of the promoter or sponsor final precludes judicial review of the decision. See, e.g., *Johnson, supra; Bridges v Georgiana,* 211 NJ Super 427; 511 A2d 1255 (1985); *Carlini v United States Rubber Co,* 8 Mich App 501; 154 NW2d 595 (1967); anno: *Private contests and lotteries: entrants' rights and remedies,* 64 ALR4th 1021, §§ 12-13b, pp 1065-1068.

FAULKNER v FLOWERS

Docket No. 169088. Submitted May 11, 1994, at Marquette. Decided September 6, 1994, at 9:10 A.M.

Deborah Faulkner and Debra Holbrook brought an action in the Luce Circuit Court against Gerald and Helen Flowers, alleging that the defendants violated the Whistleblowers' Protection Act, MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, when they discharged the plaintiffs from employment after the plaintiffs indicated that they were going to report certain business practices of the defendants to the Internal Revenue Service. The court, Charles Stark, J., granted summary disposition for the defendants, finding it lacked subject-matter jurisdiction because the plaintiffs had filed a complaint with the Department of Labor, pursuant to the wage and fringe benefits act, MCL 408.471 *et seq.*; MSA 17.277(1) *et seq.*, shortly after being fired, and the administrative proceeding was still being pursued. The plaintiffs appealed.

The Court of Appeals *held:*

A plaintiff may initiate a cause of action in the circuit court under the Whistleblowers' Protection Act while at the same time pursuing administrative rights under the wage and fringe benefits act. The two acts provide differing remedies and encompass differing, but not conflicting, goals. The plaintiffs' complaint satisfies the requirements of both acts. The Legislature provided overlapping remedies for an employee whose employment is terminated for reporting wage and fringe benefits violations.

Reversed and remanded.

ACTIONS — EMPLOYMENT — RETALIATORY DISCHARGE — WHISTLEBLOWERS' PROTECTION ACT — WAGE AND FRINGE BENEFITS ACT.

The Legislature has provided overlapping remedies for an em-

REFERENCES

Am Jur 2d, Labor and Labor Relations, § 4451; Wrongful Discharge, §§ 55-57, 216, 241.

Liability for discharging at-will employee for refusing to participate in, or for disclosing, unlawful or unethical acts of employer or coemployees. 9 ALR4th 329.

Employee's protection under § 15 (a) (3) of Fair Labor Standards Act (29 USCS § 215 (a) (3)). 101 ALR Fed 220.

ployee whose employment is terminated for reporting wage and fringe benefits violations by an employer; the employee may initiate a cause of action in the circuit court alleging a violation of the Whistleblowers' Protection Act while at the same time pursuing administrative rights under the wage and fringe benefits act (MCL 15.361 *et seq.*, 408.471 *et seq.*; MSA 17.428[1] *et seq.*, 17.277[1] *et seq.*).

John H. Underhill, P.C. (by *John H. Underhill*), for the plaintiffs.

Moher & Cannello, P.C. (by *Timothy S. Moher*), for the defendants.

Before: MACKENZIE, P.J., and NEFF and R. L. OLZARK,* JJ.

NEFF, J. Plaintiffs appeal as of right from an order of the circuit court granting summary disposition to defendants. The circuit court determined it was without subject-matter jurisdiction to hear plaintiffs' case, which was based on the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, because plaintiffs had already initiated an administrative action with the Department of Labor pursuant to the wage and fringe benefits act, MCL 408.471 *et seq.*; MSA 17.277(1) *et seq.* We reverse the order granting summary disposition to defendants and remand this case to the circuit court for further proceedings.

I

Plaintiffs worked at defendants' establishment as waitresses, cooks, and bartenders. Plaintiffs were allegedly required to put all of the tips they received into a jar, so that defendants could take

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

half of the tips for themselves. When plaintiffs allegedly challenged this practice by claiming they would report defendants to the Internal Revenue Service, they were discharged by defendants. Shortly after being fired, plaintiffs filed a complaint with the Department of Labor pursuant to the wage and fringe benefits act. Shortly thereafter, and while the administrative proceeding was continuing, plaintiffs filed the instant suit in the circuit court.

II

A

When reviewing a motion for summary disposition under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to a judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. MCR 2.116(G)(2) and 2.116(I)(1); *Sargent v Browning-Ferris Industries,* 167 Mich App 29, 33; 421 NW2d 563 (1988).

B

The relevant portion of the WPA, MCL 15.362; MSA 17.428(2), provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a

> public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

The wage and fringe benefits act provides for the time and manner in which employees receive compensation. The provision relevant to this case, MCL 408.483(2); MSA 17.277(13)(2), provides:

> An employee who believes that he or she is discharged or otherwise discriminated against by an employer in violation of this section may file a complaint with the department alleging the discrimination within 30 days after the violation occurs. Upon receipt of the complaint, the department shall cause an investigation to be made. If, upon the investigation, the department determines that this section was violated, the department shall order the rehiring or reinstatement of an employee to his or her former position with back pay.

Defendants argued below that the trial court was without subject-matter jurisdiction to hear plaintiffs' claim because, once plaintiffs initiated the administrative proceeding with the Department of Labor, exclusive jurisdiction vested with that administrative agency.

C

The court below relied primarily on this Court's opinions in *Cockels v Int'l Business Expositions, Inc,* 159 Mich App 30; 406 NW2d 465 (1987), and *Murphy v Sears, Roebuck & Co,* 190 Mich App 384; 476 NW2d 639 (1991), in support of its determination.

In *Cockels,* this Court dealt with whether the

provision of the wage and fringe benefits act regarding retaliatory dismissals provided an exclusive or cumulative remedy with respect to the common law. See *Murphy, supra* at 387. It did not deal with whether that remedy provision is exclusive when a separate statutory provision is involved.

In *Murphy,* the question before this Court was whether a plaintiff must proceed with administrative remedies pursuant to the wage and fringe benefits act where that plaintiff also had an independent common-law remedy. This Court determined that the plaintiff may follow either course, but then, in dicta, went on to state that

> once an employee chooses to pursue the administrative remedy, that remedy must be utilized exclusively, including an appeal to the circuit court. [*Id.* at 388.]

Plaintiffs here, rather than basing their civil complaint on a common-law remedy, seek their remedy pursuant to the WPA, a separate statutory scheme, which itself creates new rights and imposes new duties. See *Tyrna v Adamo, Inc,* 159 Mich App 592, 599-600; 407 NW2d 47 (1987). Accordingly, both *Cockels, supra,* and *Murphy, supra,* are distinguishable from this case. See, e.g., *Tyrna, supra* at 598-599.

D

On appeal, both parties rely on *Shuttleworth v Riverside Osteopathic Hosp,* 191 Mich App 25, 27; 477 NW2d 453 (1991), wherein this Court determined that no common-law cause of action predated the WPA, and that the statute's remedy provision was exclusive. Accordingly, this Court

upheld the dismissal of the plaintiff's complaint that purported to be based on a common-law whistleblowers' theory. *Id.*

After this dispositive ruling was made, this Court, in dicta, also addressed whether a separate remedy was available to the plaintiff under the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq.*; MSA 17.50(1) *et seq. Shuttleworth, supra* at 28. This Court determined that the plaintiff had a separate remedy under the MIOSHA, and then stated that "before resorting to a civil action, [the plaintiff] first must have pursued the administrative remedies contained in the MIOSHA." *Id.* Because this language is dicta, we decline to follow it.

E

We find this Court's opinion in *Tyrna, supra,* to be most applicable here. In *Tyrna,* this Court determined that a plaintiff could initiate a cause of action in a civil court under the WPA, while at the same time pursuing administrative rights under the MIOSHA. *Id.* at 600-601. The plaintiff in *Tyrna* was fired after reporting a safety violation to various local officials. *Id.* at 596. The plaintiff filed her MIOSHA complaint after she was fired. *Id.* at 596-597.

This Court began its analysis by examining the purposes behind the two statutes, noting that they overlapped, and determining that the plaintiff's reporting of the violation satisfied the requirements of both statutes. *Id.* at 599. This Court then held

> that the Legislature has provided overlapping remedies for an employee whose employment is terminated in retaliation for such reporting. The Legis-

> lature has not provided that the employee must pursue only one statutory remedy. [*Id.*]

This Court also determined that the scope of the remedies provided by the WPA differed somewhat from those offered by the MIOSHA. *Id.* at 600. Accordingly, this Court stated that "we see no reason, without further legislative direction, that plaintiff should not be able to pursue a cause of action under both statutes." *Id.* at 600-601.

Similarly, here, the wage and fringe benefits act and the WPA provide differing remedies and encompass differing, but not conflicting, goals. The preamble to the wage and fringe benefits act provides:

> AN ACT to regulate the time and manner of payment of wages and fringe benefits to employees; to prescribe rights and responsibilities of employers and employees, and the powers and duties of the department of labor . . . to provide for settlement of disputes regarding wages and fringe benefits; to prohibit certain practices by employers; to prescribe penalties and remedies.

Thus, the goals of that act relate to wage and fringe benefits issues between an employee and an employer. These goals are narrower than those of the WPA.

The goals of the WPA, according to this Court's opinion in *Hopkins v Midland,* 158 Mich App 361, 374; 404 NW2d 744 (1987), are "to protect the integrity of the law by removing barriers to employee efforts to report violations of the law," and "to protect the public by protecting employees who report violations of laws and regulations." This applies broadly to "reporting to any public body a violation of any law or regulation of this state, a political subdivision, or the United States. MCL 15.362; MSA 17.428(2)." *Tyrna, supra* at 599.

Plaintiffs' complaint in this case, like that in *Tyrna, supra,* satisfies the requirements of both statutes.

III

We hold that the Legislature has provided overlapping remedies for an employee whose employment is terminated for reporting wage and fringe benefits violations. We find it within the legislative intent for a plaintiff to pursue a WPA cause of action even though that plaintiff has already initiated a wage and fringe benefits act administrative proceeding. The WPA provides remedies not available in the wage and fringe benefits act, cf. MCL 408.483(2); MSA 17.277(13)(2) with MCL 15.364; MSA 17.428(4); see also *Tyrna, supra* at 600. There are no conflicts between the remedies provided, and the goals of the two statutes are complementary.

In addition, if plaintiffs were to be relegated to their wage and fringe benefits act remedy, they could lose their WPA remedies if the resolution of the wage and fringe benefits act claims took longer than ninety days from the occurrence of the alleged violations. See MCL 15.363(1); MSA 17.428(3)(1). Thus, our holding here serves the beneficial purpose of allowing an harmonious reading of both statutes. See *House Speaker v State Administrative Bd,* 441 Mich 547, 568-569; 495 NW2d 539 (1993).

Accordingly, we reverse the lower court's determination that it lacked subject-matter jurisdiction to hear plaintiffs' case and remand this case for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

BPS CLINICAL LABORATORIES v BLUE CROSS AND BLUE SHIELD OF MICHIGAN

AMERICAN HEALTH RESOURCES, INC v BLUE CROSS AND BLUE SHIELD OF MICHIGAN

Docket Nos. 145988, 146035, 151162, 151163, 152010, 153383. Submitted March 8, 1994, at Detroit. Decided September 6, 1994, at 9:15 A.M. Leave to appeal sought.

BPS Clinical Laboratories and other independent clinical laboratories and two physicians brought an action in the Wayne Circuit Court against Blue Cross and Blue Shield of Michigan, alleging they wrongfully were denied the opportunity to participate as panel providers in the defendant's new health care program, Premier PLUS, part of a General Motors Corporation self-funded employee benefit plan managed by Blue Cross under an administrative services only contract. The plaintiffs alleged a violation of the Nonprofit Health Care Corporation Reform Act, MCL 500.1101 *et seq.*; MSA 24.660(101) *et seq.*, and tortious interference in business relationships. The plaintiff doctors also alleged breach of contract.

American Health Resources, Inc., brought an action for mandamus in the Wayne Circuit Court against Blue Cross and Blue Shield of Michigan, seeking an order requiring Blue Cross to comply with the Prudent Purchaser Act, MCL 550.51 *et seq.*, MSA 24.650(51) *et seq.*, by allowing it to apply for membership as a panel provider in Premier PLUS. American Health also alleged that Blue Cross violated the Antitrust Reform Act, MCL 445.771 *et seq.*; MSA 28.70(1) *et seq.*

The two cases were consolidated and assigned to Judge Richard C. Kaufman. Blue Cross had the cases removed to the federal

REFERENCES

Am Jur 2d, Injunctions, §§ 308, 310, 311; Insurance, § 18; Pensions and Retirement Funds, §§ 115, 117, 118, 120, 122, 124.

Furnishing of bond as prerequisite to issuance of temporary restraining order. 73 ALR2d 854.

Construction and application of pre-emption exemption, under Employee Retirement Income Security Act (29 USCS § 1001 *et seq.*), for state laws regulating insurance, banking, or securities (29 USCS § 1144 (b) (2)). 87 ALR Fed 797.

district court, alleging that the claims were subject to complete preemption under federal law by the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.* The federal court found that it did not have subject-matter jurisdiction under the ERISA and, while expressly leaving open the question whether the ERISA preempted the plaintiffs' state law claims, remanded the case to the Wayne Circuit Court. The circuit court entered an order on October 9, 1991, granting the defendant's motion for summary disposition, except with regard to the plaintiffs' claim under the Prudent Purchaser Act, which the court found the defendant had violated. The parties each appealed from the part of the order adverse to it. Blue Cross also appealed from an order entered on March 18, 1992, that enjoined operation of Premier PLUS until the defendant filed with the Insurance Commissioner the criteria for participating in the program and reconsidered the plaintiffs' applications to participate, and an order entered on April 9, 1992, that denied defendant's motion for security pending appeal. The appeals were consolidated.

The Court of Appeals *held:*

The order entered on April 9, 1992, and that part of the order entered on October 9, 1991, dismissing all the plaintiffs' claims except the Prudent Purchaser Act claim are affirmed. The order entered on March 18, 1992, is reversed. The part of the order entered on October 9, 1991, finding the defendant in violation of the Prudent Purchaser Act is reversed and amended to reflect a grant of summary disposition for the defendant in light of the defendant's preemption defense under the ERISA.

1. The ERISA provides that a state law that relates to employee benefit plans is preempted by the ERISA. 29 USC 1144(a). However, even if a state law claim relates to the ERISA, it may be exempt from preemption under the savings clause that exempts from preemption state laws that regulate the business of insurance, banking, or securities. 29 USC 1144(b)(2)(A). The savings clause is limited by a deemer clause that provides that states may not treat self-insured ERISA plans as insurers in order to subject them to state insurance regulation. 29 USC 1144(b)(2)(B).

2. The ERISA preemption clause prohibits the plaintiffs' claims because the specific state law provisions that form the basis for those claims relate to a self-funded employee health benefit plan and do not constitute regulation of the business of insurance.

3. The state law provisions that form the basis of the plain-

tiffs' claims do not regulate the business of insurance because Premier PLUS at this point is solely a program for self-funded employee benefit plans. The plaintiffs' claims for breach of contract, tortious interference, and antitrust violations clearly are not based on laws aimed at insurance regulation. The claims under the Prudent Purchaser Act and the Nonprofit Health Care Corporation Reform Act do not constitute efforts to regulate an insurance plan and, therefore, do not invoke the savings clause. 29 USC 1144(b)(2)(A).

4. The fact that Blue Cross, the administrator of the Premier PLUS program, is also an insurance company does not automatically trigger the savings clause. Preemption should not depend on the arbitrary distinction between programs with administrators that happen to engage in the business of insurance and those with administrators that do nothing but manage self-funded benefit plans.

5. The trial court did not err in modifying its October 9, 1991, order by entering an order on December 20, 1991, that enforced the terms of the earlier order and did not err in finding the defendant in violation of the latter order when it issued the March 18, 1992, order.

6. The trial court did not abuse its discretion in denying the defendant's motion for security under MCR 3.310(D)(1).

Affirmed in part and reversed in part.

WHITE, P.J., concurring in part and dissenting in part, stated that the antitrust statute did not apply, that the circuit court did not err in entering its December 20, 1991, and March 18, 1992, orders, that the motion for security pending appeal was properly denied, and that the remaining claims were not preempted by the ERISA.

1. CONFLICT OF LAWS — PREEMPTION — EMPLOYEE BENEFIT PLANS — INSURANCE — EMPLOYEE RETIREMENT INCOME SECURITY ACT.

A state law that relates to employee benefit plans is preempted by the Employee Retirement Income Security Act unless the state law regulates the business of insurance, banking, or securities; states may not treat self-insured ERISA plans as insurers in order to subject them to state insurance regulation; a state law relates to an employee benefit plan and would be preempted by the ERISA if it alters the level of benefits that would be paid out under a given plan from state to state, alters the terms of the plan such as requirements for eligibility, or subjects the fiduciaries of a plan to claims other than those provided in the ERISA itself (29 USC 1001 *et seq.*).

2. COSTS — DAMAGES — SECURITY — PRELIMINARY INJUNCTIONS — TEMPORARY RESTRAINING ORDERS — COURT RULES.

The court rule providing that, before granting a preliminary injunction or temporary restraining order, a court may require the applicant to give security for the payment of costs and damages that may be incurred or suffered by a party who is found to have been wrongfully enjoined or restrained is limited to security for a preliminary injunction or a temporary restraining order only; the rationale for requiring security is not applicable where a full hearing on the merits is held before an injunction is issued (MCR 3.310[D][1]).

Feikens, Foster, Vander Male, Bellamy & Gilchrist, P.C. (by *Alan G. Gilchrist, Keith J. Soltis,* and *Gail F. McIntyre*), for BPS Clinical Laboratories and other plaintiffs.

Frimet & Michalsen, P.C. (by *Gilbert M. Frimet* and *John A. Michalsen*), for American Health Resources, Inc.

Richard John Mathews and *Joseph W. Murray,* for Blue Cross and Blue Shield of Michigan.

Before: WHITE, P.J., and MICHAEL J. KELLY and W. J. CAPRATHE,* JJ.

MICHAEL J. KELLY, J. Plaintiffs, independent clinical laboratories and two physicians, alleged that they wrongfully were denied the opportunity to participate as panel providers in defendant's new health care program, Premier PLUS. On October 9, 1991, the circuit court granted defendant's motion for summary disposition with regard to all issues except plaintiffs' claim under the Prudent Purchaser Act (PPA), MCL 550.51 *et seq.*; MSA 24.650(51) *et seq.*, which the court found defendant had violated. The parties each appeal the court's summary disposition decision adverse to it. Defen-

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

dant also appeals an order of March 18, 1992, enjoining operation of Premier PLUS until defendant filed the criteria for participating in the program with the Insurance Commissioner and reconsidered plaintiffs' applications, and an order of April 9, 1992, denying defendant's motion for security pending appeal. The appeals were consolidated. We affirm the order of April 9, 1992, reverse the order of March 18, 1992, and affirm that part of the October 9, 1991, order dismissing all of plaintiffs' claims except the PPA claim. We reverse the part of the October 9, 1991, order finding defendant in violation of the PPA and order it amended to reflect a grant of summary disposition for defendant in light of defendant's preemption defense under the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.*

I

Defendant is a nonprofit health care corporation. It administers General Motors Corporation's traditional option coverage program under an "administrative services only" contract, which requires General Motors to pay defendant a fee for administering the program and reimburse defendant for all covered health care charges paid by defendant on behalf of program enrollees. Defendant is not an insurer for General Motors' employees. The Premier Prudent Laboratory Use Program (Premier PLUS) is a diagnostic laboratory network pilot program developed, marketed, and implemented by defendant. Employees under General Motors' self-funded, traditional option coverage plan were the first group to enroll in the program when, in 1990 and 1991, the Corporation-Union Committee on Health Care Benefits at General Motors evaluated potential pilot programs for laboratory ser-

vices and approved Premier PLUS. Although defendant developed Premier PLUS in part out of a desire to negotiate contracts with the employee health benefit plans for Ford, Chrysler, AT&T, and Ameritech and planned to use Premier PLUS in its own employee benefit plan, General Motors is apparently the only entity enrolled in the program at this time. The General Motors traditional option coverage program is an "employee benefit plan" for purposes of the ERISA.

Before implementation of the Premier PLUS program, defendant paid all diagnostic laboratories according to a maximum-fee schedule. Health care providers who drew blood and sent the samples to the laboratories for analysis received a $3 blood-handling fee from defendant.

Under the Premier PLUS program, defendant established a panel of six provider laboratories, which agreed to discount the rate charged to defendant for services rendered. Physicians who referred blood specimens to nonpanel laboratories would not receive the $3 blood-handling fee. Nonpanel laboratories themselves would be reimbursed only fifty percent of the maximum payment scheduled. In addition, the new program differentiated between standard and nonstandard laboratory procedures. Physicians who performed nonstandard procedures would be reimbursed fifty percent of the maximum fee scheduled. The range of services eligible for reimbursement under the program, whether in whole or in part, remained the same.

II

Plaintiffs are health care providers excluded from full reimbursement under Premier PLUS. On March 27, 1991, plaintiffs sued defendant, alleging

that Premier PLUS violated the Nonprofit Health Care Corporation Reform Act (Act 350), MCL 550.1101 *et seq.*; MSA 24.660(101) *et seq.*, and resulted in a tortious interference in the established business relationship between plaintiffs and referring physicians. Plaintiff doctors also alleged that Premier PLUS constituted a breach of contract with defendant.

Plaintiff American Health Resources, Inc., filed a complaint for mandamus on April 25, 1991, requesting that defendant be ordered to comply with the PPA by allowing it to apply for membership as a panel provider in Premier PLUS. The complaint also alleged an unlawful attempt to establish a monopoly in violation of the Antitrust Reform Act, MCL 445.771 *et seq.*; MSA 28.70(1) *et seq.* The two cases were consolidated and assigned to the same circuit judge.

Defendant removed the cases to the federal district court, arguing that plaintiffs' claims were subject to complete preemption under federal law by the ERISA. The federal court, on the basis of the face of the complaints, found that it did not have subject-matter jurisdiction under the ERISA and remanded the case to the circuit court on August 7, 1991. It expressly left open the question whether the ERISA preempted plaintiffs' state law claims.

On August 27, 1991, defendant moved for summary disposition. The circuit court granted the motion on October 9, 1991, except with regard to plaintiffs' claim under the PPA, which the court found defendant had violated. With regard to that claim, the court issued a final order requiring defendant to accept applications from plaintiffs for participation in Premier PLUS. In addition, the court permitted plaintiffs to reinstate their claim for money damages if defendant refused to accept

their applications. It also continued a temporary restraining order issued on August 14, 1991, which permitted plaintiffs to be treated as panel providers in Premier PLUS.

On October 31, 1991, defendant rejected all of plaintiffs' applications. On November 13, 1991, the circuit court continued the temporary restraining order with regard to BPS Clinical Laboratories, Michigan Clinical Laboratory, and Universal Standard Medical Laboratories, Inc.

On December 20, 1991, the circuit court found that defendant had continued to violate the PPA and also had violated the October 9, 1991, order. It issued an additional final order requiring defendant to submit its standards for panel membership to the Insurance Bureau within sixty days and added that it would enjoin operation of Premier PLUS if defendant did not comply. The court once again extended the temporary restraining order.

Subsequently, defendant moved for relief from this order and to stay any further proceedings, arguing that the order was void as an improper modification of the October 9, 1991, order and that, nonetheless, it had complied with the December 20, 1991, order. The court denied the motion on March 18, 1992, finding that defendant had not filed its standards with the Insurance Commissioner before reviewing plaintiffs' applications. The court enjoined operation of Premier PLUS until defendant filed its standards and considered plaintiffs' applications in light of those standards.

Defendant moved for security to protect its interests pending appeal. The circuit court denied the motion in an order dated April 9, 1992.

Concurrent with the circuit court proceedings, the Insurance Commissioner also reviewed allegations that defendant had not complied with statutory regulations in implementing Premier PLUS.

Although initially having found that defendant had not violated the law and having noted that the law, as applied to Premier PLUS, was probably preempted under the ERISA, the Insurance Commissioner later issued a notice of opportunity to show compliance, requiring defendant to address claims that it had violated the PPA. On March 19, 1992, the Insurance Commissioner issued a notice of dismissal, finding that defendant had complied with the Insurance Code.

III

Defendant contends that plaintiffs' claims are preempted under federal law by the ERISA. The circuit court refused to consider defendant's argument regarding this issue, apparently under the misconception that it had been resolved against defendant by the federal district court.[1] By not addressing the issue, the trial court effectively decided it against defendant. The issue has been thoroughly briefed on a complete record and presents a question of law. We believe that the public interest will best be served by resolving it. See *Detroit v Dep't of Social Services,* 197 Mich App 146, 158; 494 NW2d 805 (1992).

Under § 514(a) of the ERISA, a state law that "relates to" employee benefit plans is preempted by the ERISA, 29 USC 1144(a), unless it falls under the "savings clause" of § 514(b)(2)(A), 29 USC 144(b)(2)(A). The phrase "relates to" is broadly defined to preempt state laws that have a connection with or reference to an employee benefit plan, even if the law is not specifically designed to affect such plans or the effect is only indirect. *Ingersoll-*

[1] Although the federal district court concluded that "complete preemption" did not apply as a basis for subject-matter jurisdiction, it expressly declined to rule on the separate issue whether the ERISA preempted plaintiffs' state law claims.

Rand Co v McClendon, 498 US 133, 138-139; 111 S Ct 478; 112 L Ed 2d 474 (1990). "It is not the label placed on a state law claim that determines whether it is preempted, but whether in essence such a claim is for the recovery of an ERISA plan benefit." *Cromwell v Equicor-Equitable HCA Corp,* 944 F2d 1272, 1276 (CA 6, 1991), cert dis — US —; 120 L Ed 2d 931 (1992). If applicable, the ERISA preempts state common law in addition to statutory law. *Pilot Life Ins Co v Dedeaux,* 481 US 41; 107 S Ct 1549; 95 L Ed 2d 39 (1987).

In *Teper v Park West Galleries, Inc,* 431 Mich 202, 221; 427 NW2d 535 (1988), our Supreme Court held that a state law "relates to" an employee benefit plan and would be preempted by the ERISA if it had the effect of

> (1) altering the level of benefits which would be paid out under a given plan from state to state, (2) altering the terms of the plan such as requirements for eligibility, or (3) subjecting the fiduciaries of a plan to claims other than those provided in the ERISA itself.

In *United Wire, Metal & Machine Health & Welfare Fund v Morristown Memorial Hosp,* 995 F2d 1179, 1193 (CA 3, 1993), the court held that a state law may relate to ERISA plans if its effect, even if indirect, "is to dictate or restrict the choices of ERISA plans with regard to their benefits, structure, reporting and administration, or if allowing states to have such rules would impair the ability of a plan to function simultaneously in a number of states."

Even if a state law claim "relates to" the ERISA, it may nonetheless be exempt from preemption under the "savings clause" in § 514(b)(2)(A). 29 USC 1144(b)(2)(A). This provision exempts from preemption state laws that regulate the business

of insurance, banking, or securities. The savings clause is itself limited by the "deemer clause," which provides that states may not treat self-insured ERISA plans as insurers in order to subject them to state insurance regulation. 29 USC 1144(b)(2)(B).

Thus, states may regulate companies that insure ERISA plans, but they may not regulate ERISA plans. *Lincoln Mutual Casualty Co v Lectron Products, Inc,* 970 F2d 206, 210 (CA 6, 1992). A self-funded employee benefit plan is not subject to direct regulation by insurance laws pursuant to the language of the deemer clause. *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand),* 443 Mich 358, 382; 505 NW2d 820 (1993), quoting *FMC Corp v Holliday,* 498 US 52, 61; 111 S Ct 403; 112 L Ed 2d 356 (1990).

In this case, plaintiffs allege that defendant's implementation of Premier PLUS resulted in: (1) a violation of Act 350, because defendant failed to file the plan with the Insurance Commissioner and thereby indicate the criteria for becoming a panel member; (2) a violation of the PPA, because defendant failed to offer plaintiffs an application for participation in Premier PLUS; (3) a violation of the Antitrust Reform Act, because Premier PLUS was designed to exclude competition among independent laboratories and did not fall under the antitrust exception for health maintenance organizations; (4) a breach of contract with referring doctors, because Premier PLUS unilaterally changed the terms of reimbursement for services and blood-handling fees; and (5) a tortious interference with the business relationship between laboratories and referring physicians.

We believe the ERISA preemption clause prohibits plaintiffs' claims because the specific state law provisions that form the basis for those claims

"relate to" a self-funded employee health benefit plan and do not constitute regulation of the business of insurance. In *Adnan Varol, MD, PC v Blue Cross & Blue Shield of Michigan,* 708 F Supp 826 (ED Mich, 1989), several health care providers alleged that the defendant's participation agreement for a pilot health care program violated Act 350 and other state laws. The court held the plaintiffs' state law claims related to an ERISA employee benefit plan and were preempted by the ERISA. There, the plaintiffs challenged the authorization and concurrent review procedures in the program that the defendant administered for General Motors. The court found particularly relevant the fact that the defendant merely was acting as an administrator for a self-funded employee benefit plan agreed to between General Motors and its employees. *Id.* at 832.

Plaintiffs' claims "relate to" an employee health benefit plan under the ERISA. The state insurance regulations that plaintiffs seek to impose on defendant would, if applied, force defendant to alter the way it administers an employee health benefit plan adopted and funded by General Motors. Any finding by a court that changes plaintiffs' standing with Premier PLUS will affect General Motors' distributions under the plan. If defendant is ultimately required to consider and accept plaintiffs as panel providers for Premier PLUS, General Motors' benefit plan will be required to reimburse more providers than it had anticipated. Opening the program to other providers will also weaken the leverage needed to negotiate lower fees with a select group of providers, which is undoubtedly a key reason to adopt such a program in a self-funded plan. See *Stuart Circle Hosp Corp v Aetna Health Management,* 995 F2d 500 (CA 4, 1993) (holding that a Virginia statute, which prohibited

insurance companies from unreasonably discriminating against providers in establishing preferred provider organizations, related to an employee benefit plan). In addition, because insurance laws vary widely from state to state, applying Michigan law in this case would impair the ability of Premier PLUS to function simultaneously in a number of states for multijurisdictional employers such as General Motors. See *United Wire, supra* at 1193.

The next step in the ERISA preemption analysis is to determine the effect of the savings clause. We believe the state law provisions that form the basis of plaintiffs' claims do not regulate the business of insurance under the facts of this case because Premier PLUS is at this point solely a program for self-funded employee benefit plans. Plaintiffs' claims for breach of contract, tortious interference, and antitrust violations are clearly not based on laws aimed at insurance regulation. See *Pilot Life, supra* at 50. The claims under Act 350 and the PPA also do not constitute efforts to regulate an insurance plan. Defendant administers General Motors' traditional option health care program, which would incorporate Premier PLUS, under an "administrative services only" contract. This contract requires General Motors to reimburse defendant for all the covered health care charges paid by defendant on behalf of program enrollees and to pay defendant a fee for administering the program. The health plan is self-funded; defendant does not function as an insurer. If plaintiffs were to succeed in this suit, the state laws they invoke would be used essentially to regulate a self-funded ERISA plan, not an insurance plan. Thus, plaintiffs may not invoke the savings clause in § 514(b)(2)(A).

Plaintiffs argue that, despite its role as administrator in this case, defendant is an insurance company subject to regulation. It cannot wear two

hats. According to plaintiffs, when General Motors or any similarly situated entity sought an administrator for its self-funded health benefit plan, it chose a regulated entity and subsequently took the good with the bad in making that choice. We consider such reasoning circuitous and unacceptable. The fact that the administrator of the program is also an insurance company does not automatically trigger the savings clause. Plaintiffs' argument would create a situation analogous to the one that the deemer clause was created to prevent. Preemption should not depend on the arbitrary distinction between programs with administrators that happen to engage in the business of insurance and those with administrators that do nothing but manage self-funded benefit plans. If there is any arbitrary distinction to be identified, it is whether a plan is self-funded or insured. As the United States Supreme Court stated in *Metropolitan Life Ins Co v Massachusetts,* 471 US 724, 747; 105 S Ct 2380; 85 L Ed 2d 728 (1985):

> We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the "deemer clause," a distinction Congress is aware of and one it has chosen not to alter.

See also *Stuart Circle, supra* at 504 (quoting the same Supreme Court case though ultimately holding that preemption applied where the sponsor of a preferred provider plan served as an insurer and the state law applied only to insurers).

On this note, plaintiffs also contend that Premier PLUS is subject to state insurance laws because it is not strictly a program for self-funded employee benefit plans. Rather, defendant devel-

oped Premier PLUS in an effort not only to satisfy General Motors' desire to cut costs with a preferred provider program but also to attract business from other major corporate employee benefit plans. However, General Motors' self-funded plan is apparently the only one enrolled in Premier PLUS at this time. Because this record closed while Premier PLUS was purely a program for self-funded employee benefit plans managed by defendant under an administrative services only contract, we find plaintiffs' claims are preempted under the ERISA.

IV

Defendant's final two claims of error are arguably rendered moot by our decision regarding preemption. We have reviewed the claims because we anticipate the parties will seek further appellate review in the Supreme Court.

The trial court did not err in modifying its October 9, 1991, order by entering its December 20, 1991, order. The latter order enforced the terms of the former and did not improperly modify it under MCR 2.614(C). Nor did the trial court err in finding defendant in violation of the December 20, 1991, order when it issued the March 18, 1992, order.

The trial court did not err in denying defendant's motion for security under MCR 3.310(D).[2] Our review of this issue is limited to determining whether the trial court abused its discretion. *Zapalski v Benton,* 178 Mich App 398, 404; 444 NW2d 171 (1989). MCR 3.310(D)(1) provides:

Before granting a preliminary injunction or tem-

[2] Defendant concedes that it was not allowed security under MCR 2.109 because it was seeking such security to protect it from damages rather than to cover its costs and expenses.

> porary restraining order, the court may require the applicant to give security, in the amount the court deems proper, for the payment of costs and damages that may be incurred or suffered by a party who is found to have been wrongfully enjoined or restrained.

MCR 3.310(D)(1) is limited to security for a preliminary injunction or a temporary restraining order. *In re Prichard Estate,* 169 Mich App 140, 149; 425 NW2d 744 (1988). Neither of these is at issue in this case. Although the orders of October 9, November 13, and December 20, 1991, provided for a continuation of an earlier temporary restraining order, the March 18, 1992, order granted a permanent injunction regarding Premier PLUS as long as defendant refused to comply with the PPA. Moreover, where, as here, a full hearing on the merits was held before the issuance of an injunction, the rationale for requiring security is not applicable. See *Felton v Wedthoff,* 185 Mich 72, 80; 151 NW 727 (1915). Thus, neither the language nor the purpose of MCR 3.310(D)(1) supports defendant's argument. The trial court did not abuse its discretion in refusing defendant's request for security.

Affirmed in part and reversed in part.

W. J. CAPRATHE, J., concurred.

WHITE, P.J. *(concurring in part and dissenting in part).* I respectfully dissent from the majority's conclusion that plaintiffs' claims are preempted by the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.* While the words "relates to" have been given a broad meaning, the preemption clause does not preempt laws that have only a "tenuous, remote, or peripheral" effect on an ERISA plan. *Shaw v Delta Air Lines, Inc,* 463

US 85, 97; 103 S Ct 2890; 77 L Ed 2d 490 (1983). It has been observed:

> A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction. [*Rebaldo v Cuomo,* 749 F2d 133, 138 (CA 2, 1984).]

Plaintiffs' breach of contract claim is not preempted. Plaintiffs have not sued General Motors or the ERISA plan for breach of contract. Rather, they assert that the action of Blue Cross and Blue Shield of Michigan (BCBSM) in unilaterally changing the provider reimbursement level for certain covered services constitutes a breach of the existing contract. This claim only tangentially relates to the ERISA plan. It does not address the relationship between the plan and its subscribers, but, rather, the prior contractual relationship between BCBSM and the providers. Congress did not intend to preempt a state court's application of general contract law merely because one of the contracting parties also contracts with an ERISA plan that might be affected by the first contract.

Furthermore, although the circuit court granted BCBSM summary disposition with regard to this claim, I believe there were genuine issues of material fact regarding whether BCBSM changed the reimbursement level in violation of the existing agreement, or, as claimed by BCBSM, simply changed the covered services.

Nor are plaintiffs' claims of tortious interference with business relationships preempted. Again, plaintiffs have not sued General Motors or the plan, but, rather, BCBSM. The common law regarding tortious interference, like the law of contracts,

is a law of general application that only tangentially affects the ERISA plan. While it is true that at least one of the actions claimed by plaintiffs to be illegal involves an element of the plan—the plan provision providing that physicians are paid $3 to draw blood if they send the blood to a panel laboratory, but not otherwise—the law that the plan allegedly violates, MCL 445.162; MSA 14.375(22),[1] is a law of general application. Congress did not intend that ERISA plans be exempted from general regulatory laws, addressing traditional areas of state authority, that do not affect relations between the principal ERISA entities—the employer, the plan, the fiduciary, and the beneficiaries. *Firestone Tire & Rubber Co v Neusser,* 810 F2d 550, 553-556 (CA 6, 1987).

With respect to the tortious interference claim, I conclude that plaintiffs' claim should not have been dismissed. To establish a prima facie case of tortious interference with a business relationship, plaintiffs must show: (1) the existence of a valid business relationship (not necessarily evidenced by an enforceable contract) or expectancy; (2) knowledge of the relationship or expectancy on the part of the defendant; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage. *Bonelli v Volkswagen of America, Inc,* 166 Mich App 483, 496; 421 NW2d 213 (1988). There must be the intentional doing of an act that is wrongful per se or the intentional doing of a lawful act with malice and without legal justification for the purpose of invading the plaintiffs' contractual rights or business relationship. *Id.*

[1] While the circuit court determined that this statute was not violated, I believe there was a genuine issue whether BCBSM devised and acted as an intermediary in a plan in which doctors received compensation for sending patient specimens to specified laboratories.

Plaintiffs adequately pleaded a prima facie case, including reference to statutory violations constituting wrongful acts per se, and there was a genuine issue whether BCBSM tortiously interfered with plaintiffs' business relationships.

Additionally, I conclude that plaintiffs' claims under the Prudent Purchaser Act (PPA), MCL 550.51 *et seq.*; MSA 24.650(51) *et seq.*, are not preempted. Assuming for the moment that the PPA "relates to" an employee health benefit plan under the ERISA, the savings clause excepts from the preemption clause laws that regulate insurance. Section 514(b)(2)(A), 29 USC 1144(b)(2)(A). The majority concludes that the state law provisions that form the basis of plaintiffs' claims do not regulate the business of insurance "because Premier PLUS is at this point solely a program for self-funded employee benefit plans." *Ante,* p 582. The majority explains "[t]he health plan is self-funded; defendant does not function as an insurer. If plaintiffs were to succeed in this suit, the state laws they invoke would be used essentially to regulate a self-funded ERISA plan, not an insurance plan. Thus, plaintiffs may not invoke the savings clause in § 514(b)(2)(A)." *Ante,* p 582. In response to plaintiffs' argument that, notwithstanding BCBSM's role as administrator of the GM program, BCBSM is an insurance company subject to regulation, the majority states "[p]reemption should not depend on the arbitrary distinction between programs with administrators that happen to engage in the business of insurance and those with administrators that do nothing but manage self-funded benefit plans." *Ante,* p 583.

I conclude that plaintiffs' claims alleging a violation of the PPA seek to enforce laws that regulate insurance, notwithstanding that in the instant case Premier PLUS was implemented as part of a

self-funded ERISA plan. BCBSM is regulated under a statute that regulates insurance, MCL 550.1101 *et seq.*; MSA 24.660(101) *et seq.* (Act 350), and is regulated under that statute even when it acts only as a plan administrator. Act 350 permits BCBSM to promulgate plans in accordance with the PPA, and the PPA specifically applies to BCBSM as a "health care corporation" incorporated under Act 350. The PPA also specifically regulates third-party administrators the same as insurers. Under these circumstances, I would hold that the PPA is a law "that regulates insurance."

Nor is the insurance savings clause rendered ineffective by the "deemer clause."[2] Plaintiffs do not seek to have General Motors or the plan deemed to be an insurance company. Rather, plaintiffs challenge the process employed by BCBSM in formulating and implementing the Premier PLUS plan. The distinction between "programs with administrators that happen to engage in the business of insurance and those with administrators that do nothing but manage self-funded benefits plans" is not arbitrary. The Legislature has chosen to regulate BCBSM and, recognizing the economic power wielded by BCBSM and other similar organizations, has determined that it is necessary to regulate the manner in which such organizations, including third-party administrators, formulate prudent purchaser agreements and offer participation in such agreements to health care providers. Congress did not intend that BCBSM's activities, comprehensively regulated under state statute, must go unregulated and unchecked when the activity involved is the formulation, implementation, and administration of an ERISA plan, when these activities would otherwise be regulated if the underlying plan was not an ERISA plan. Rather,

[2] Section 514(b)(2)(B), 29 USC 1144(b)(2)(B).

Congress intended to defer to the state's regulation of companies, such as BCBSM, that are in the insurance business.

Turning to the question whether plaintiffs have a private cause of action under Act 350 or the PPA, I agree with the circuit court that plaintiffs' remedy under Act 350 was to file a complaint with the Insurance Commissioner to compel enforcement of the act. MCL 550.1619; MSA 24.660 (619). The PPA does not contain a similar restriction, and I conclude that plaintiffs could properly invoke the equity jurisdiction of the circuit court to seek to enjoin implementation of a plan that was not implemented according to the PPA or to obtain other appropriate relief. See *Michigan State Employees Ass'n v Dep't of Mental Health,* 120 Mich App 39; 328 NW2d 11 (1982).

With regard to the antitrust claim, while not approved, the plan was apparently "permitted" by the Insurance Commissioner, and accordingly the circuit court did not err in concluding that the antitrust statute[3] did not apply. Should it ultimately be determined that the Insurance Commissioner will not permit the plan, I would allow plaintiffs to reinstate their claim.

Lastly, I agree with the majority's discussion in part IV and its conclusion that the circuit court did not err in entering its December 20, 1991, and March 18, 1992, orders, or in denying BCBSM's motion for security pending appeal.

[3] MCL 445.774; MSA 28.70(4).

DLAIKAN v ROODBEEN

Docket No. 155595. Submitted April 12, 1994, at Detroit. Decided September 6, 1994, at 9:20 A.M.

Nadeem H. and Jacqueline C. Dlaikan, individually and as next friends of their daughters, Nicole M. and Jennifer L. Dlaikan, and other similarly situated parents of former pupils of St. Pius School, brought an action in the Wayne Circuit Court against Henry W. Roodbeen, Clara Seeley, St. Pius School, and others, alleging intentional misrepresentation, negligence, and breach of contract as a result of the refusal of defendant Roodbeen, pastor of the Parish of St. Pius X, to readmit the plaintiffs' children as pupils at St. Pius School for the 1991-92 school year. Roodbeen, Seeley, and the school moved for summary disposition, arguing that the court did not have subject-matter jurisdiction to hear the contract action. The court, Michael L. Stacey, J., denied the motion. Roodbeen, Seeley, and the school appealed by leave granted.

The Court of Appeals *held:*

Whether a court has subject-matter jurisdiction is a question of law. Although civil courts have jurisdiction to determine property rights involving ecclesiastical organizations, the plaintiffs' claims relating to the right of their children to attend St. Pius School are so entangled in questions of religious doctrine or ecclesiastical polity that they are beyond the jurisdiction of civil courts to hear. Accordingly, the trial court should have granted the motion for summary disposition. The plaintiffs' claims must be dismissed for lack of jurisdiction.

Reversed.

TAYLOR, J., dissenting, stated that the plaintiffs' claims involved questions of the existence of a contractual obligation that would not require the trial court to consider questions of religious doctrine or ecclesiastical polity and, accordingly, the ecclesiastical exemption is not applicable under the facts presented here.

REFERENCES

Am Jur 2d, Religious Societies, §§ 31, 32.

See ALR Index under Religion and Religious Societies.

RELIGIOUS CORPORATIONS AND ASSOCIATIONS — COURTS — JURISDICTION — ECCLESIASTIC QUESTIONS — SCHOOLS.

The issue of admission to an ecclesiastical organization's liturgical or eduational functions would entangle civil courts in matters of doctrine or ecclesiastical polity; a civil court should decline to hear such questions on the basis of lack of subject-matter jurisdiction.

N. Dawn Nasser, for the plaintiffs.

Bodman, Longley & Dahling (by *Joseph A. Sullivan* and *Diane L. Akers*), for the defendants.

Before: SHEPHERD, P.J., and TAYLOR and R. D. GOTHAM,* JJ.

R. D. GOTHAM, J. Defendants Henry Roodbeen, Clara Seeley, and St. Pius School appeal by leave granted from the circuit order that denied their motion for summary disposition, which had asserted that the court lacked subject-matter jurisdiction over the action. We reverse and order the dismissal of plaintiffs' claims against defendants.

This is an action by three families against various representatives of the St. Pius School and the school itself. Plaintiffs brought their action to challenge the decision of Father Henry Roodbeen, pastor of the Parish of St. Pius X, not to accept plaintiffs' children as students at the parish school for the 1991-92 school year. At the time the circuit court denied defendants' motion, three counts remained in the action, which were labeled intentional misrepresentation, negligence, and breach of contract.

Defendants' sole claim on appeal is that the circuit court lacked subject-matter jurisdiction. Whether the trial court had proper subject-matter jurisdiction is a question of law for this Court to

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

decide. *Dep't of Natural Resources v Holloway Construction Co,* 191 Mich App 704, 705; 478 NW2d 677 (1991). The trial court ultimately held that it had subject-matter jurisdiction on the basis that this was a contract action.

It is claimed that plaintiffs' admission to the St. Pius School is a contract right, that contract rights are property rights, and that civil courts have jurisdiction to determine property rights involving ecclesiastical organizations. But jurisdiction is limited to property rights that can be resolved by application of civil law. *Berry v Bruce,* 317 Mich 490; 27 NW2d 67 (1947); *Maciejewski v Breitenbeck,* 162 Mich App 410, 414; 413 NW2d 65 (1987).

Reference to the form of the claim may oversimplify the issue. We must "look to the substance and effect of [the] complaint, not its emblemata." *Natal v Christian & Missionary Alliance,* 878 F2d 1575, 1577 (CA 1, 1989).

When the claim involves the provision of the very services (or as here refusal to provide these services) for which the organization enjoys First Amendment protection, then any claimed contract for such services likely involves its ecclesiastical policies, outside the purview of civil law. In this regard there can be no distinction between a church providing a liturgical service in its sanctuary and providing education imbued with its religious doctrine in its parochial school. A civil court should avoid foray into a "property dispute" regarding admission to a church's religious or educational activities, the essence of its constitutionally protected function. *Borgman v Bultema,* 213 Mich 684, 703; 182 NW 91 (1921) (expulsion of clergy or members). To do so is to set foot on the proverbial slippery slope toward entanglement in matters of doctrine or ecclesiastical polity.

In obvious contrast, when an ecclesiastical orga-

nization enters into a contract to buy or sell property, to fix the church roof, or to interact in some other way with the secular world, its activity is governed by civil law alone. Similarly, a dispute over title to property between factions of such an organization may well be determined without reference to doctrine or ecclesiastical polity. *Bennison v Sharp,* 121 Mich App 705; 329 NW2d 466 (1982).

Here the pleadings demonstrate that plaintiffs' claims are so entangled in questions of religious doctrine or ecclesiastical polity that the civil courts lack jurisdiction to hear them. *Maciejewski, supra.* Even the claim that plaintiffs' children were denied "due process" by the failure of the parochial school to follow its own rules engages the issue of ecclesiastical polity. *Natal, supra* at 1577.

Moreover in this case plaintiffs allege no express written contract manifesting application of civil law alone. Under their theory of implied contract, an inquiry into the parties' relationship again necessarily entails an excursion into ecclesiastical polity. The same is true for the claims of intentional misrepresentation and professional negligence. Furthermore, we are aware of no precedent in this state for a claim of clergy malpractice where the only allegations relate to the performance of ecclesiastical functions such as the operation of a church school.

We reverse and dismiss plaintiffs' claims against defendants for lack of jurisdiction. MCR 2.116(C)(4).

SHEPHERD, P.J., concurred.

TAYLOR, J. *(dissenting).* I dissent from the majority opinion because I believe that it mistakenly creates an irrebuttable presumption in favor of

religious institutions. Adjudication of plaintiffs' contract claim will not result in "[setting] foot on the proverbial slippery slope toward entanglement in matters of doctrine or ecclesiastical polity." *Ante* at 593. To the contrary, by its unwarranted and unwise expansion of the ecclesiastical exception provided by the Free Exercise Clause, the majority has created a jurisprudential black hole in which the exception swallows the rule of law.

This is an action by three families pleading, in relevant part, a breach of contract claim against various representatives of the St. Pius School and the school itself. Plaintiffs brought their action to challenge the decision of Henry Roodbeen, the pastor of the parish, not to readmit their children as students in the parish school for the 1991-92 school year. Plaintiffs' contract claim is based on consideration given by them and their reliance on the established pattern of readmitting the children. The pleadings indicate that the dispute between defendants and plaintiffs had to do with teachers' lesson plans, allegations of improperly calculated grades, violation of the hair-length provision of the student dress code, and plaintiffs' complaints about the "people skills" of defendant Seeley. Defendants' pleadings do not set forth any provision of canon law granting Father Roodbeen permission to make such decisions, nor do they assert instances of conduct violative of Catholic doctrine on the part of plaintiffs' children.

Procedurally, when the circuit court order under review was issued, three counts remained in this action: intentional misrepresentation, negligence, and breach of contract. The trial court's denial of defendants' motion was based solely on its ruling that a viable contract claim was presented, a question not requiring determination of Roman Catholic doctrine or policy. Therefore, the majori-

ty's opinion regarding the other two claims—intentional misrepresentation and negligence—is untimely because those claims have not been decided by the trial court. In any event, neither of these claims requires an excursion into ecclesiastical polity, a trait they share with the contract claim properly at issue here.

Defendants argue that the trial court concluded that there should be a trial of the issue whether the pastor "made a wise or 'objectively' reasonable decision" and that this is erroneous because "[u]nder Roman Catholic ecclesiastical law, a parish pastor has absolute discretion over which parishioners participate in which parish activities." In other words, defendants argue that any decisions related to the parish school are ecclesiastical in nature and therefore subject to the unbridled discretion of the pastor. Aside from their mischaracterization of the trial court's decision, which held only that plaintiffs presented a viable contract action, defendants' argument is based on a misapprehension of the proper scope of the Free Exercise Clause of the First Amendment, a misapprehension equally apparent in the majority's analysis. Because plaintiffs' claim does not involve a purely ecclesiastical concern, I would hold that the trial court's denial of defendants' motion for summary disposition was correct as a matter of law.

As the trial court correctly determined, plaintiffs' contract claim is not the type of dispute between a church and its members that is exempt from the jurisdiction of civil courts. "In matters of church polity purely ecclesiastical civil courts do not interfere, but when property rights are involved they are to be tested in the civil courts by the civil laws." *Komarynski v Popovich,* 232 Mich 88, 99; 205 NW 184 (1925). "With the doctrinal disputes between the parties, whether they be with

respect to 'fundamentalism' or any other ecclesiastical matters, the courts have no concern." *Calvary Baptist Church of Port Huron, Michigan v Shay,* 292 Mich 517, 520; 290 NW 890 (1940). "This Court in prior decisions has repeatedly recognized the rule that judicial interference in the purely ecclesiastical affairs of religious organizations is improper." *Berry v Bruce,* 317 Mich 490, 499; 27 NW2d 67 (1947). The salient point in this doctrinal area is that religious organizations are immune from the jurisdiction of civil courts only in matters that are purely ecclesiastical, i.e., pertaining to religious doctrine or church polity. More specifically, the unreviewable discretion afforded to religious authorities does not encompass all decisions regarding all activities—secular and religious—undertaken by the religious organization; rather, it insulates only those decisions directly affecting the propagation of religious doctrine. *Assemany v Archdiocese of Detroit,* 173 Mich App 752, 763; 434 NW2d 233 (1988). Religious doctrine refers to "the ritual and liturgy of worship or the tenets of faith." *Jones v Wolf,* 443 US 595, 602; 99 S Ct 3020; 61 L Ed 2d 775 (1979). Polity is defined as the organization and form of government of the church. *Maciejewski v Breitenbeck,* 162 Mich App 410, 414; 413 NW2d 65 (1987). Resolution of plaintiffs' contract claim does not require judicial interference in a purely ecclesiastical matter.

That defendants' argument is not based on a matter of religious doctrine or liturgy is readily apparent by analogy to *Maciejewski.* In that case, this Court affirmed the trial court's decision that the issues of a bishop's power to assign a certain priest to a parish and parishioners' rights to receive communion and to assist the priest at Mass are beyond the jurisdiction of civil courts. It is, of course, indisputable that adjudication of these is-

sues would require the court to "stray into questions of religious doctrine or ecclesiastical polity," *id.* at 414, an inquiry that is prohibited by the Free Exercise Clause. Civil courts properly assert jurisdiction only over disputes involving "property rights which can be resolved by application of civil law." *Id.* "A contract right is a right in property." *Wiethoff v St Veronica School,* 48 Mich App 163, 166; 210 NW2d 108 (1973). Plaintiffs' argument is that their payment of the $50 preregistration fee and the usual practice of the school in readmitting students gave rise to a contract implied in fact. This contract claim is the basis on which the trial court denied defendants' motion for summary disposition, a fact that cannot be overemphasized.

It has long been established that religious organizations are equally subject to the principles of contract law and property law as all other associations, and disputes over such subject matters are justiciable by civil courts, providing an inquiry into religious doctrine is not required. *Watson v Jones,* 80 US (13 Wall) 679, 714, 725; 20 L Ed 666 (1872). Furthermore, an archbishop (and therefore, by analogy to the instant case, defendant Roodbeen) "is a juristic person, amenable to the [civil] courts for the enforcement of any legal right." *Gonzalez v Roman Catholic Archbishop of Manila,* 280 US 1, 16; 50 S Ct 5; 74 L Ed 131 (1929). Because plaintiffs' "claim is, in substance, that [they are] entitled to the [legal] relief sought," the trial court properly asserted jurisdiction over the subject matter. *Id.*

Whether a dispute is properly before a civil court depends on "the substance and effect of [the] complaint, not its emblemata." *Natal v Christian & Missionary Alliance,* 878 F2d 1575, 1577 (CA 1, 1989). It is not important how this suit is labeled by the parties; rather, a court must determine

precisely what it is being called upon to decide. It is on this particular point that the majority loses sight of the actual substance of the issue before us.

Unsupported by the factual record below or the relevant case law, the majority proclaims that the issue presented here "involves the provision of the very services . . . for which the organization enjoys First Amendment protection." *Ante* at 593. This judicial fiat flouts the established principles in this area of the law. The Free Exercise Clause of the First Amendment does not shield inviolably from civil legal authority all activities conducted by religious groups. Rather, it prevents civil authorities from getting involved in disputes concerning religious doctrines and liturgical services essential to the observance of the purely ecclesiastical mission of religious groups.

The majority seems to believe that a parish school is identical to a seminary (or other purely religious educational institution) in which the sole educational mission is to prepare students for clerical roles intimately involved in the propagation of religious doctrine. The difference between such a theological school and the parish-run elementary school involved here is, of course, sufficiently unmistakable to allow for taking judicial notice of it. The salient fact in this regard is that membership in the Catholic faith is not even required of students in the parish school. In the face of this fact alone, the majority's declaration that "there can be no distinction between a church providing a liturgical service in its sanctuary and providing education imbued with its religious doctrine in its parochial school" *ante* at 593, is wholly irrelevant. Furthermore, the majority's bald assertion that the parish school is "imbued with its religious doctrine" and that its "educational activities [are] the essence of its constitutionally pro-

tected function," *ante* at 593, is inaccurate. The actual substance of plaintiffs' complaint deals with educational and pedagogical matters common to all elementary schools, secular and parochial. Moreover, there is no evidence in the record that purely ecclesiastical or liturgical considerations entered into the challenged decision. Thoughtful attention to the actual substance of the dispute leads ineluctably to the realization that adjudication of plaintiffs' contract claim is not precluded by the Free Exercise Clause of the First Amendment.

In *Maciejewski, supra,* the plaintiffs argued that they were seeking injunctive relief and damages for the tort of intentional infliction of emotional distress. *Maciejewski, supra* at 411-412. However, as discussed above, what the plaintiffs actually sought was civil adjudication of the qualifications of a parish priest and of the parishioners' rights regarding sacraments of the Roman Catholic faith. *Id.* at 414, 416. In the case before us, plaintiffs have stated a valid contract claim that does not depend on any underlying doctrinal or liturgical issue. Defendants are merely attempting to evade any potential contractual obligation by asserting that all decisions regarding all aspects of any activities carried on by the church are purely ecclesiastical and, therefore, beyond the jurisdiction of civil courts. This is not—and, by any reasonable view of the intended accommodation of religious freedom, cannot be—an accurate statement of free exercise jurisprudence.

In effect, defendants' claim is that invocation of this ecclesiastical exemption trumps the application of secular law in all contexts and with respect to all persons standing in opposition to a religious organization. This is an inaccurate statement of the unreviewable discretion afforded by the Free

Exercise Clause. There are only two situations in which religious bodies exercise unbridled discretion: where an issue involves a purely ecclesiastical matter (which, as already discussed, is not the case here), and where the challenged decision pertains to a person whose function is integral to the doctrinal mission of the religious organization.

This Court previously has explained, in the context of claims based on Title VII of the Civil Rights Act of 1964,[1] that the proper initial inquiry is "the function of the position" of the party challenging the decision of a religious body. *Assemany, supra* at 761. If a person occupies "a pastoral-liturgical leadership role in the parish" or is "intimately involved in the propagation of [religious] doctrine," then the religious organization's decision is unreviewable if it is based on a tenet of the organization's religious beliefs. *Id.* at 763. Judicial review of Title VII claims concerning "employment decisions by religious bodies regarding lay teachers in church-run schools whose duties include teaching religion directly or indirectly . . ." [is also prohibited.] *Id.* at 761. However, "[i]n cases involving church employees who are not involved in the propagation of religious faith or religious doctrine, . . . Title VII actions against religious employers are not barred by the Free Exercise Clause notwithstanding the employers' arguments that their employment decisions were founded on religious beliefs." *Id.* at 762. This Court ultimately held that the plaintiff's claim was barred by the Free Exercise Clause because the function of his position was such that he had "assumed a pastoral-liturgical leadership role in the parish" and "was intimately involved in the propagation of Catholic doctrine . . . ." *Id.* at 763.

Logically, in the general context of free exercise

[1] 42 USC 2000e *et seq.*

jurisprudence, the rationale explicated in *Assemany* is not limited solely to Title VII claims; rather, it applies to all valid legal claims (statutory or common law) brought against a religious organization.

Plaintiffs' contract claim is sufficient as a matter of law to withstand summary disposition. Plaintiffs are not ministers, or even employees, of St. Pius X Parish, and defendants do not assert any issue regarding the propagation of religious doctrine as the basis of the decision challenged by plaintiffs. I would also note again defendants' concession that membership in St. Pius X Parish, or even in the Catholic faith, is not required of students in the parish school. Therefore, this analytical framework, which depends on the status of the party in opposition to the religious organization, also supports the trial court's decision.

I wish to emphasize that I am not advocating the creation of any path-breaking precedent: that secular laws are generally applicable to religious organizations, except for the narrow ecclesiastical exemption discussed above, is unremarkable. See, e.g., *Dep't of Social Services v Emmanuel Baptist Preschool,* 434 Mich 380; 455 NW2d 1 (1990) (church school subject to state licensing requirements).[2] Furthermore, even when advancing legitimate free exercise claims, "[r]eligious organizations are not absolutely free from governmental interference where there is a state interest of sufficient magnitude to override the interest claim-

[2] The presumption of the validity of secular laws to matters concerning religious organizations extends to criminal, as well as civil, laws. See, e.g., *Kedroff v St Nicholas Cathedral,* 344 US 94, 109; 73 S Ct 143; 97 L Ed 120 (1952) ("If [subversive or, under the relevant statute, otherwise illegal] action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense.").

ing protection under the Free Exercise Clause." *Assemany, supra* at 759.[3]

In the instant case, the parties challenging defendant Roodbeen's decision do not occupy liturgical leadership roles and are not alleged to be intimately involved in the propagation of Catholic doctrine. Therefore, defendants' invocation of the ecclesiastical exemption is without any effect under the facts presented here.

Determination of the validity of the contract rights asserted by plaintiffs does not require the trial court to stray into questions of religious doctrine or ecclesiastical polity. The claim is based on consideration given by the plaintiffs, reliance on the past practice of the school in readmitting the children, and specified claims of damages. Therefore, plaintiffs' contract claim is cognizable by the civil courts and the trial court properly denied defendants' motion for summary disposition.

I dissent.

---

[3] The requisite magnitude of the state interest was described in *Assemany* as being satisfied only by "governmental interests of the highest order." *Id.* at 759 [citing *Wisconsin v Yoder,* 406 US 205, 214-215; 92 S Ct 1526; 32 L Ed 2d 15 (1972)]. In light of the Supreme Court's most recent statement regarding this issue, see *Employment Division, Oregon Dep't of Human Resources v Smith,* 494 US 872, 883-889; 110 S Ct 1595; 108 L Ed 2d 876 (1990) (expressly rejecting the "compelling interest" test), the stringent *Assemany* standard is no longer valid. See also *Smith* at 878 (if a burden on the free exercise of religion is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended").

GARVELINK v THE DETROIT NEWS

Docket No. 141515. Submitted January 18, 1994, at Detroit. Decided September 6, 1994, at 9:25 A.M. Leave to appeal sought.

Roger Garvelink, who served as superintendent of the Birmingham public schools, brought an action in the Oakland Circuit Court against The Detroit News and Chuck Moss, alleging that he was defamed in a column written by Moss and published in the editorial pages of The Detroit News. Under the heading " 'Punishment Cuts' Work Like a Charm," the column related an interview by Moss of "local Supt. Gravelhead" in which Gravelhead indicated that the elimination of certain school programs following the electorate's rejection of a millage increase ensures its passage in a subsequent election, and that education professionals like him, and not parents, know what is best for students. The court, Robert C. Anderson, J., denied summary disposition for the defendants. The defendants appealed by leave granted.

The Court of Appeals *held:*

Because the column cannot reasonably be interpreted by a reader as stating actual facts about the plaintiff, given its satirical tenor, humorous tone, and appearance in the biased and opinion-filled editorial pages of the newspaper, it does not contain falsehood upon which the plaintiff can maintain an action for defamation.

Reversed and remanded for entry of summary disposition for the defendants.

1. LIBEL AND SLANDER — PUBLIC OFFICIALS OR FIGURES.

A public official or figure who brings an action for defamation must prove that the publication was a defamatory falsehood

REFERENCES

Am Jur 2d, Libel and Slander, §§ 25, 173-175, 205, 290, 296, 297, 299, 301.

Necessity and sufficiency of plaintiff's allegations as to falsity in defamation action. 85 ALR2d 460.

Libel and slander: what constitutes actual malice, within federal constitutional rule requiring public officials and public figures to show actual malice. 20 ALR3d 988.

Libel and slander: defamation by cartoon. 52 ALR4th 424.

and that the statement was made with actual malice, i.e., with knowledge that it was false or with reckless disregard of whether it was false or not.

2. LIBEL AND SLANDER — PUBLIC OFFICIALS — PARODIES, POLITICAL CARTOONS, AND SATIRE.

Statements about a public official contained in a parody, political cartoon, or satirical editorial that cannot reasonably be interpreted by a reader as stating actual facts about the official are protected by the First Amendment as public debate and are not actionable for defamation (US Const, Am I).

Cross Wrock, P.C. (by *Jack O. Kalmink* and *Dirk H. Beckwith*), for the plaintiff.

Butzel Long (by *James E. Stewart, Leonard M. Niehoff,* and *Kevin F. O'Shea*), for the defendants.

Before: JANSEN, P.J., and McDONALD and G. M. HOCKING,* JJ.

JANSEN, P.J. Defendants appeal by leave granted from a May 31, 1991, order of the Oakland Circuit Court denying their motion for summary disposition pursuant to MCR 2.116(C)(8). We reverse.

Plaintiff Roger Garvelink was the superintendent of the Birmingham school system from March 1978 through June 1990. In March 1989, the Birmingham voters were presented with a millage proposal for a $65 million bond increase. The proposal produced some controversy, apparently stemming from a redistricting decision the school board made a year earlier, and the millage was defeated. Because of the millage defeat, plaintiff and others made a number of budget cuts amounting to $7 million. Plaintiff then sought to make further cuts of $5 million from the following year's budget.

On June 3, 1989, The Detroit News printed an

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

editorial column, which appeared on the editorial page, by Chuck Moss under the heading, " 'Punishment Cuts' Work Like a Charm." In the column, Moss described an "interview" with "local Supt. Roger Gravelhead." In the interview, Dr. Gravelhead boasted about using the budget cuts to punish voters for rejecting the millage proposal and stated that educational professionals knew more about what students needed than the parents did.[1]

[1] In its entirety, the column reads as follows:

> A lot of school boards and district leaderships are under fire these days. Without even counting the ruined, collapsed Detroit system, you can see millages croaking, school boards being yanked and supervisors queueing up for resume services just as Leningraders do for toilet paper. For the big scoop, I sat down with local Supt. Roger Gravelhead.
>
> "Your millage went down, Doc," I said. "What now?"
>
> "Time for us educational professionals to provide decisive leadership," he said sternly. "It's time for punishment cuts."
>
> "Punishment cuts?"
>
> "Yes, punishment cuts." He folded his soft hands across his well-cut suit. "Just because these foolish voters defeated a millage, don't think we professionals are down! There's a time-honored strategy for putting the great unwashed in their place."
>
> "Punishment cuts?"
>
> "Sure thing." He laughed. "Within two weeks, you regretfully announce a new 'money-saving budget': no more sports, no more band, drama, art, music, study hall. All extracurricular activities are axed. Bus service is severely curtailed. Support staffs are reduced and their unions trashed. Of course, essential administrative personnel like me and my pals stay safe, nor do we cancel vital expenditures such as the new carpet for the Administration Building. Just things that impact the voters."
>
> "Does this work?"
>
> "Like a charm!" He rubbed his hands together. "We make the kids hurt and the parents howl. When they come back screaming, we just shake our heads. 'Too bad, chums. The next millage will be on the calendar in six months.' I guarantee, the electorate will be fighting for the privilege to raise its own taxes!"
>
> "Gee Doc, this sounds, well, cynical."
>
> "Not at all," Dr. Gravelhead said. "Educational professionals have a duty to manage the system in the best interests of the children . . . and who knows better what your kids need than educational professionals?"

Plaintiff filed his complaint on June 1, 1990, alleging defamation. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) on April 10, 1991, but the trial court denied the motion. This Court then granted defendants' application for leave to appeal on October 22, 1991.

On appeal, the trial court's grant or denial of summary disposition is reviewed de novo, because this Court must review the record to determine whether the moving party is entitled to judgment as a matter of law. *Adkins v Thomas Solvent Co,* 440 Mich 293, 302; 487 NW2d 715 (1992). MCR 2.116(C)(8) permits summary disposition in favor of a defendant when the plaintiff has failed to state a claim upon which relief can be granted. A motion pursuant to MCR 2.116(C)(8), therefore, determines whether the plaintiff's pleadings allege a prima facie case. *Radtke v Everett,* 442 Mich 368, 373;

"The parents," I ventured. "Some of them are professionals. Lawyers, doctors . . . ."

"Parents!" he barked. "Parents are the last people we rely on." He handed me a paper. "Like the Birmingham Public Schools say, parents are 'emotional,' 'diffused,' 'submissive,' 'helpless,' individualized,' and concerned 'with the here and now.' While we professionals are 'objective,' 'dominant,' 'universal,' and 'focus on the whole class or group.' Parents are just happy-go-lucky big kids. It's our duty to make the parents understand that we professionals know what's best for their children. We need to give them the wider perspective."

"By punishing the electorate."

He smiled. "Let's just call it re-education. We feel the voters just didn't UNDERSTAND the issues involved."

"Maybe they were trying to send you a message, whup you upside the head and get your attention. You've made some questionable moves over the years . . . spent bad money, sold needed buildings. At a time of budget crisis you have an $80,000 community affairs director while the city manager only makes $60,000. Maybe the voters want to teach you a lesson."

"Teaching without a license?" Gravelhead laughed. "They're not in the union."

"In union is strength, I recall."

"RECALL?" He gasped. "Please! Not that word! It's, it's . . . ."

"Unprofessional?"

501 NW2d 155 (1993). A court may grant a motion pursuant to MCR 2.116(C)(8) only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade v Dep't of Corrections,* 439 Mich 158, 163; 483 NW2d 26 (1992).

Our review is also governed by the Supreme Court's pronouncements in defamation cases implicating the First Amendment. Courts must make an independent examination of the record to assure that the judgment does not constitute a forbidden intrusion on the field of free expression. *New York Times Co v Sullivan,* 376 US 254, 285; 84 S Ct 710; 11 L Ed 2d 686 (1964); *Bose Corp v Consumers Union of United States, Inc,* 466 US 485, 499; 104 S Ct 1949; 80 L Ed 2d 502 (1984); *Locricchio v Evening News Ass'n,* 438 Mich 84, 110; 476 NW2d 112 (1991). Where a public official or public figure is involved in a defamation case, the public official or public figure must prove that the publication was a defamatory falsehood and that the statement was made with actual malice, that is, that it was made with knowledge that it was false or with reckless disregard of whether it was false or not. *Sullivan, supra* at 279-280; *Curtis Publishing Co v Butts,* 388 US 130; 87 S Ct 1975; 18 L Ed 2d 1094 (1967). In the instant case, it is undisputed that plaintiff is a public official.

For both public officials and public figures, a showing of actual malice is subject to a clear and convincing standard of proof. *Gertz v Robert Welch, Inc,* 418 US 323, 342; 94 S Ct 2997; 41 L Ed 2d 789 (1974). The question whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law. *Harte-Hanks Communications, Inc v Connaughton,* 491 US 657, 685; 109 S Ct 2678; 105 L Ed 2d 562 (1989).

Keeping these principles in mind, the Supreme Court has further recognized constitutional limits on the type of speech that may be the subject of defamation actions. In cases where the statements cannot reasonably be interpreted as stating actual facts about the individual, those statements are protected under the First Amendment. *Milkovich v Lorain Journal Co,* 497 US 1, 20; 110 S Ct 2695; 111 L Ed 2d 1 (1990); *Hustler Magazine v Falwell,* 485 US 46; 108 S Ct 876; 99 L Ed 2d 41 (1988); *Letter Carriers v Austin,* 418 US 264; 94 S Ct 2770; 41 L Ed 2d 745 (1974); *Greenbelt Cooperative Publishing Ass'n v Bresler,* 398 US 6; 90 S Ct 1537; 26 L Ed 2d 6 (1970). Defendants argue that there was no defamatory falsehood because the column could not reasonably be interpreted as stating actual facts about plaintiff and, therefore, the issue of actual malice need not be considered.

We are required to conduct an independent review of the column and pleadings to ensure against the forbidden intrusion on the field of free expression and to examine the statements and the circumstances under which they were made to determine whether they are of a character that the principles of the First Amendment protect. See *Sullivan, supra* at 285; *Locricchio, supra* at 110. Therefore, it is the function of this Court to review the column to determine whether it could reasonably be understood as describing actual facts about plaintiff. Although plaintiff argues that there is a material factual dispute for the jury to determine, that is the appropriate standard for a motion for summary disposition pursuant to MCR 2.116(C)(10), but this case is before us by way of a motion pursuant to MCR 2.116(C)(8). Furthermore, where there are First Amendment implications such as whether a satirical column in a newspaper is capable of bearing a defamatory falsehood by im-

plying the assertion of undisclosed facts, this is a question of law and the court must consider whether the alleged defamatory expression could reasonably be understood as describing actual facts about the plaintiff. See *Hoppe v Hearst Corp,* 53 Wash App 668; 770 P2d 203 (1989).

After reviewing the column and the pleadings, we hold as a matter of law that the column cannot reasonably be interpreted as stating actual facts about plaintiff and it is, therefore, protected speech. The tenor of the column is satirical. *The Random House College Dictionary* (1988) defines satire as "the use of ridicule in exposing, denouncing, or deriding vice, folly, etc." and "a literary composition, in verse or prose, in which human folly, vice, etc. are held up to scorn, derision, or ridicule." Similarly, a lampoon is a form of satire, "often political or personal, characterized by the malice or virulence of its attack." *Id.* As the Supreme Court noted in *Falwell, supra* at 54:

> . . . The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided.

Thus, in this area of parodies, political cartoons, and satirical columns, especially involving public officials, while the tenor of the column may be caustic or even vicious, the Supreme Court has clearly recognized that "[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those who are 'intimately involved in the resolution of important public questions . . . .' " *Falwell, supra* at 51.

The column appeared on the editorial page, uses an obviously fictitious name (Gravelhead), and presents a mock interview. No reasonable reader would believe that a school superintendent would have actually made the comments in the column. The column's tone is humorous and the writing style suggests that the column did not concern actual events. The column was written after controversial budget cuts had been made and after a proposed school millage increase recently had been defeated. Thus, in the context of a controversial school millage proposal, school budget cuts, and because the column appeared on the editorial page, a reader is prepared for exaggerations, mischaracterizations, and biases of the writer. *Hoppe, supra.*

Also of importance, the column appeared on the editorial page, where a reader expects to find the opinions and biases of the individual writers. The appearance on an editorial page clearly indicates to any reader that the opinions of the writer will be reflected in the column as opposed to only facts. This column did not appear in the general news articles section and is therefore easily distinguishable as opinion-writing because of its appearance on the editorial page. We emphasize that the appearance of the column on the editorial page, where a reader expects to find the opinions and biases of the writer, is important and may be considered even though this case is before us by way of a motion for summary disposition pursuant to MCR 2.116(C)(8). In *Moldea v New York Times Co,* — US App DC —; 22 F3d 310 (1994), the court upheld a grant of summary judgment in favor of the New York Times before either party had begun discovery. The court specifically noted that the statements at issue were made in the context of a book review, and that this context could be consid-

ered in evaluating whether the challenged statements were defamatory. *Id.* at —. The importance of considering the context of the challenged statements was also addressed in *Phantom Touring, Inc v Affiliated Publications,* 953 F2d 724 (CA 1, 1992). In *Phantom Touring,* the court held that a newspaper theater column was not actionable in part because the context of the column was such that the language could not reasonably be interpreted as stating actual facts about the appellant's honesty. The court stated that a theater column is the type of article generally known to contain opinionated writing more than a typical news report. *Id.* at 729.

The column in the instant case is obviously satire intended to criticize the school budget cuts, which was a controversial issue at the time. Further, the column contains "the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining" that this was an actual interview with plaintiff. *Milkovich, supra* at 21. The column, which appeared on the editorial page, clearly contains language intended to be the author's opinion about the school budget cuts, and a reasonable reader would understand that the author was conveying an opinion about a controversial subject at that time rather than relating an actual interview with plaintiff. Thus, there can be no false statement of fact because, in its context, the column cannot reasonably be interpreted as stating actual facts about plaintiff. Therefore, even if the writer is motivated by hatred or ill-will, the column is still protected in the area of public debate concerning public officials. *Falwell, supra* at 53.

No further factual development could possibly justify a right of recovery because the column

cannot be understood as stating actual facts about plaintiff or understood as being an actual interview with plaintiff and is, therefore, not defamatory as a matter of law. Accordingly, the trial court erred in denying defendants' motion for summary disposition.

Reversed and remanded for entry of an order of summary disposition in defendants' favor. We do not retain jurisdiction.

ORLEY ENTERPRISES, INC v TRI-POINTE, INC

Docket No. 147428. Submitted April 12, 1994, at Detroit. Decided September 6, 1994, at 9:30 A.M.

Donald C. and Rudale W. Austin brought an action in the Wayne Circuit Court against Orley Enterprises, Inc., alleging breach of a lease agreement. Orley, which had assigned the lease and financed the sale of its business assets to Lyons & Company, Inc., pursuant to an asset purchase agreement and promissory note, brought a third-party action against Tri-Pointe, Inc., and others who had succeeded Lyons & Company as assignees of the lease and purchasers of the business assets and who had returned the business assets to Orley following their default on the lease. Orley contended that it was entitled to both a return of the business assets and payment on the promissory note under the terms of the asset purchase agreement. The court, Michael L. Stacey, J., granted summary disposition for the third-party defendants, ruling that return of the business assets and payment on the promissory note were alternative, and not cumulative, remedies under the asset purchase agreement. Orley appealed.

The Court of Appeals *held:*

1. The default provision of the asset purchase agreement provides for the remedy of return of the business assets or payment of the balance owed under the agreement, but not both.

2. The promissory note and the asset purchase agreement were part of the same transaction. Orley may not pursue a separate action on the promissory note because to allow it to do so could result in double redress for a single injury, which would be contrary to the doctrine of election of remedies.

Affirmed.

TAYLOR, J., dissenting, stated that the default provision of the asset purchase agreement provides for the cumulative, and not mutually exclusive, remedies of return of the business assets and payment of the balance due, that the cumulative remedies do not violate the doctrine of election of remedies because the remedies could have been intended for distinct injuries, and that other provisions in the asset purchase agreement and the

promissory note precluded merger of the promissory note and asset purchase agreement.

Paskin, Nagi & Baxter, P.C. (by *Jeannette A. Paskin* and *Daniel J. Seymour*), for Orley Enterprises, Inc.

H. Nathan Resnick, for Tri-Pointe, Inc., Pamela Lyons, and Robert Marzolino.

Cresence C. Schwartz, for Michelle Lyons.

Before: SHEPHERD, P.J., and TAYLOR and R. D. GOTHAM,* JJ.

SHEPHERD, P.J. On February 8, 1991, Donald C. and Rudale W. Austin sued Orley Enterprises, Inc., and Lyons & Company, Inc., for breach of a lease and damages.[1] On March 19, 1991, contemporaneous with its response to plaintiffs' complaint, Orley filed a third-party complaint against the assignees of the lease, Tri-Pointe, Inc., Pamela Lyons, Michelle Lyons, and Robert Marzolino, alleging default on the lease and seeking indemnification, damages under an asset purchase agreement, and payment of a promissory note. The primary action was resolved on November 26, 1991, when the court entered consent judgments against Orley and Lyons & Company. On July 3, 1991, Orley moved for partial summary disposition in the third-party action, which the court denied. Subsequently, third-party defendants moved for summary disposition, arguing that by demanding return of the business, Orley had foreclosed the possibility of pursuing any other remedies for the default on the lease. In an order dated November

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

[1] Plaintiffs also sued Over the Rainbow, Inc., a prior lessee; however, a discussion of that party's interest is not necessary for purposes of this appeal.

25, 1991, the trial court dismissed the third-party complaint. Orley appeals from that order as of right. We affirm.

The focal point of this case is an agreement between Orley and Lyons & Company for the transfer of Orley's lease with the Austins, and the purchase of Orley's business assets. On March 17, 1990, before the lease was assigned to Lyons & Company, Orley and Lyons & Company entered into an asset purchase agreement. Pursuant to the terms of the agreement, Orley sold Lyons & Company the leasehold improvements, equipment, fixtures, supplies, business documentation, business name, goodwill, and telephone number for $85,000. The payment terms in the agreement provided that, at the time of the closing, Lyons & Company was to deliver to Orley a security agreement, a Uniform Commercial Code financing statement, and a promissory note in the amount of $70,000. Further, the agreement provided that in order to secure payment of the note, Lyons & Company's shareholders were required to personally and individually guarantee payment of the security agreement and promissory note. The asset purchase agreement was made contingent on Orley securing plaintiffs' consent to assign the lease of the property to Lyons & Company. Orley assigned its lease to Lyons & Company on April 16, 1990. Subsequently, the asset purchase agreement was assigned to Tri-Pointe, Inc., a successor in interest to Lyons & Company.

On April 30, 1990, third-party defendants signed a promissory note, the terms of which paralleled those outlined in the asset purchase agreement, with a principal amount of $70,000. Pamela Lyons signed the note in her individual capacity and as

president of Tri-Pointe, Inc. Michelle Lyons and Robert Marzolino signed in their individual capacities.

After third-party defendants defaulted on the lease, they returned the business to Orley as demanded by Orley. Subsequently, Orley sought payment of the balance owing under the purchase agreement. Orley argued that it was a holder in due course of the promissory note and was entitled to payment on the note. The trial court denied Orley's motion for summary disposition. Later, third-party defendants brought their own motion for summary disposition, arguing that Orley was precluded from demanding payments under the asset purchase agreement or the promissory note because Orley had elected to have the business returned. The trial court granted third-party defendants' motion for summary disposition.

On appeal, Orley argues that the trial court erred in dismissing its third-party complaint. Orley argues that it may maintain a separate action to recover principal and interest on the promissory note in addition to its recovery of the business under the terms of the purchase agreement. In response, third-party defendants argue that the trial court properly granted summary disposition in their favor. Third-party defendants argue that Orley is barred from seeking recovery under the promissory note because the business has been returned.

This Court interprets language in contracts according to its plain meaning. *Rome v Sinai Hosp,* 112 Mich App 387, 392; 316 NW2d 428 (1982). Where written documents are unambiguous and unequivocal, their construction is for the court to decide as a matter of law. *Mt Carmel Mercy Hosp*

v Allstate Ins Co, 194 Mich App 580, 588; 487 NW2d 849 (1992).[2]

In the present case, the default provision in the asset purchase agreement provided in relevant part as follows:

> In the event of Default by the Purchaser in any material aspect of any of the terms of this Agreement, including but not limited to, failure to pay rent and failure to pay Seller for a period in excess of sixty (60) days, Seller shall have the option of:
>
> (a) Demanding payment of the total balance due under this Agreement;
>
> (b) Requiring Purchaser to return ownership of the business to Seller, including the lease, all fixtures, furniture and equipment, existing on the date of closing and anything subsequently added by Purchaser up to the date of election of remedies by Seller. Upon this election by Seller, Purchaser shall execute any and all necessary documents to effect the total transfer of the business and the lease to Seller.

Our interpretation of the plain meaning of the default provision is that Orley could elect either to demand payment of the total balance due under the agreement or to require the return of the business. *Rome, supra; Mt Carmel, supra.* Orley argues that the absence of the disjunctive term "or" between options a and b indicates that the remedies are concurrent rather than mutually exclusive. However, the language in the provision concerning the seller's "election of remedies" and the "option" of the two choices convinces us that Orley was required to choose one of the two remedies.

---

[2] The prior published opinion in *Mt Carmel, supra,* was vacated in part on other grounds on rehearing. See *Mt Carmel Mercy Hosp v Allstate Ins Co,* unpublished opinion per curiam of the Court of Appeals, decided March 22, 1993 (Docket No. 119978).

In the alternative, Orley argues that regardless of its remedies under the purchase agreement, it should be permitted to pursue a separate action as a holder in due course of the promissory note. We disagree with Orley's position. Here, the promissory note and the purchase agreement were clearly all part of the same transaction. Indeed, the purchase agreement dictated the terms of the promissory note. To allow Orley to pursue a separate action on the promissory note would run contrary to the doctrine of election of remedies. *Riverview Cooperative, Inc v First Nat'l Bank & Trust Co of Michigan,* 417 Mich 307, 311; 337 NW2d 225 (1983). In the present case, to allow a separate action on the promissory note would be logically inconsistent with Orley's prior election to have the business returned, and could result in double redress for a single injury. *Id.* at 312, 322; *Jim-Bob, Inc v Mehling,* 178 Mich App 71, 91; 443 NW2d 451 (1989); *Gersonde Equipment Co v Walters,* 363 Mich 49, 54; 109 NW2d 1 (1961).

The cases cited by Orley on appeal, *McBride v Arends,* 79 Mich App 440; 263 NW2d 5 (1977), and *Badour v Zifkin,* 96 Mich App 325; 292 NW2d 201 (1980), are distinguishable from the situation in the present case because in each of those cases the Court found that separate agreements pertained to different property interests. In the present case, both the promissory note and the default provision in the purchase agreement provided security for the same business assets. Thus, *McBride* and *Badour* are inapposite to the case at bar.

Similarly, *Production Finishing Corp v Shields,* 158 Mich App 479; 405 NW2d 171 (1987), is distinguishable from the present case. In that case, the plaintiff sought damages for breach of fiduciary duties, diversion of a corporate opportunity, and breach of an employment contract. *Id.* at 495.

Although all of the claims therein arose out of the same course of conduct by the defendant, the counts sought different categories of damages, i.e., lost profits as opposed to bonuses. *Id.* In the present case, both the promissory note and the default provision in the purchase agreement were intended to provide a remedy for the same underlying harm—breach of the purchase agreement. Thus, *Production Finishing* is also inapplicable to the present case.

Accordingly, the trial court properly granted summary disposition for third-party defendants because Orley has already been afforded a remedy through the return of the business. *Riverview Cooperative, supra* at 311-312. We do not share the dissent's concern that this opinion will contribute to the drying up of venture capital in the case of small start-up businesses. This case is of much less significance than the dissent would imply. The case involves nothing more than an interpretation of a specific agreement. Other agreements exist under which it is clear that all remedies are cumulative. This was not such an agreement. In the grand scheme of American entrepreneurialism, free enterprise survives notwithstanding the inartful and unwise language of one transaction out of the thousands that are consummated every day.

Affirmed.

R. D. GOTHAM, J., concurred.

TAYLOR, J. *(dissenting.)* I respectfully dissent.

When contractual language is clear, its interpretation is a question of law for the court. When presented with a dispute, a court must determine what the parties' agreement is and enforce it. Contractual language should be given its plain and ordinary meaning. *G & A, Inc v Nahra,* 204 Mich App 329, 330-331; 514 NW2d 255 (1994). Our task,

then, is to determine if the language at issue is ambiguous.

The parties in this case provided for default remedies in the purchase agreement as follows:

> In the event of Default by the Purchaser in any material aspect of any of the terms of this Agreement . . . Seller shall have the option of:
>
> (a) Demanding payment of the total balance due under this Agreement;
>
> (b) Requiring Purchaser to return ownership of the business to Seller, including the lease, all fixtures, furniture and equipment, existing on the date of closing and anything subsequently added by Purchaser up to the date of election of remedies by the Seller. Upon this election by Seller, Purchaser shall execute any and all necessary documents to effect the total transfer of the business and the lease to Seller.

It is necessary to determine if clauses a and b are to be read conjunctively or disjunctively. Because the parties have used common English grammar, reference to the rules that control such punctuation is appropriate. Semicolons are commonly used to separate items in a list when the items themselves are lengthy or contain commas; when so used they act to join, not to contrast. If the choices are to be mutually exclusive, it is customary to place the word "or" after the semicolon. Simply stated, it is proper under these neutral grammatical principles to read an "and," not an "or," following the semicolon in clause a. Thus, the remedies in a and b are cumulative, i.e., the seller can use them both.

Much is made in the majority opinion of the doctrine of election of remedies. It is argued, in effect, that the election of remedies language in clause b requires the seller to elect between a and b, and possibly even the remedies in the promissory note. This is incorrect on all fronts.

First, underlying the majority's analysis is a misunderstanding of the doctrine of election of remedies. An election of remedies is not intended to prevent recourse to alternate remedies, but, rather, to prevent double redress for a single injury. *Riverview Cooperative, Inc v First Nat'l Bank & Trust Co of Michigan,* 417 Mich 307, 312; 337 NW2d 225 (1983). If the alternate remedies are consistent or cumulative, the doctrine never comes into play. *Id.,* pp 312-313; *Production Finishing Corp v Shields,* 158 Mich App 479, 495; 405 NW2d 171 (1987). The majority's application of this doctrine depends on the unexplained assumption that "both the promissory note and the default provision in the purchase agreement were intended to provide a remedy for the same underlying harm." It is not at all certain that this was the intent of the parties and, therefore, unless such intent is proved, the election of remedies is not required.

For example, the damages under clause a of the promissory note might have been intended to remedy unpaid property taxes or waste to the business realty or equipment. Such arrangements are permissible should parties choose to so contract. Indeed, in *Ames v Maxson,* 157 Mich App 75, 80, 83; 403 NW2d 501 (1987), this Court, interpreting the summary proceedings statute, MCL 600.5750; MSA 27A.5750, held that damages and forfeiture were both allowed. Similarly, in *Davis v Louis G Palmer Co,* 262 Mich 76, 78; 247 NW 112 (1933), a lessor brought a summary proceeding against a defaulting lessee and was awarded restitution of the premises and rent due. The lessor also kept the lessee's deposit of $1,250, which the lease provided would be retained as damages in the event of a default. Reversing the trial court's award of this amount to the lessee, the Supreme Court noted that the lessee's use of the property as a parking lot had required the demolition of buildings and

the leveling of the land. *Id.*, p 81. The lessor had small hope of leasing this property again without first making improvements. Thus, the lessor was entitled to retain the deposit to make him whole after the lessee's default, despite the successful summary proceedings.

There can be no question, then, that such provisions in a private contract to allow forfeiture and damages are permissible and in accord with public policy. The contract should be enforced as written to allow both remedies.

Further, the remedies under the promissory note should not be held to be merged into the purchase agreement because of the express anti-merger language that the parties adopted. Section 13.07 of the purchase agreement clearly states:

> This Agreement shall survive the closing and not merge in the documents delivered at the closing.

Section 2.3(d) of the agreement indicates that the promissory note was one of the documents that Lyons and Company was to deliver at the closing. This was done and the instruments should not be merged.

Moreover, the majority's assumption that double recovery would result from an award on the promissory note is contradicted by the parties' stated intent in the note:

> This Note made in the State of Michigan, shall be construed according to the laws thereof, and if any provision[s] hereof are in conflict with any statute or rule of the law of the State of Michigan or are otherwise unenforceable for any reason whatsoever, then such provision(s) shall be deemed null and void to the extent of such conflict or unenforceability, but shall be deemed separable from and shall not invalidate any other provisions hereof.

This provision precludes a verdict for Orley on the promissory note only to the degree the factfinder determines that a double recovery would result and, even then, only if such recovery is not contemplated by the parties, as evidenced by the language of their contractual agreement.

In my view, then, both provisions in the purchase agreement are cumulatively enforceable and the promissory note was not merged into the purchase agreement and is independently enforceable. Thus, I would reverse the trial court's decision and remand this case for further proceedings consistent with this determination.

It is important, I believe, to comment upon the unfortunate policy implications of the majority's handling of this matter. Many entrepreneurial endeavors are undertaken by financially precarious entities or individuals. It is axiomatic that we are all better off because of their efforts, for by such means are jobs, even whole industries, created. Yet, when one contracts with such a fledgling entity, the traditional safeguard for those who provide goods and products, or, as in this case, a building, has been to demand strong, financially secure individuals or entities to guarantee the payments of the entrepreneur. Without such assurances, there will be reasonable reluctance to contract with them. Because we wish to facilitate commerce with struggling, undercapitalized business ventures, the law should encourage arrangements such as the ones at issue. To not do so will only serve to dry up funds and services to start-up businesses.

THORNE v BELL

Docket Nos. 142116, 142122, 145272, 145273. Submitted May 16, 1994, at Grand Rapids. Decided September 6, 1994, at 9:35 A.M.

Thomas W. and Sandra H. Thorne brought in the Kalamazoo Circuit Court an action against Robert Bell and another action against Roger Cayo, Little Caesar Enterprises, Inc., and others. Cayo and others filed a counterclaim against the Thornes. Little Caesar Enterprises, Inc., brought an action in the same court against Cayo and others, who in turn brought a third-party action against the Thornes. The Thornes filed a counterclaim against Cayo and others in the third-party action. The actions were consolidated for trial and the court, Michael H. Cherry, J., entered a discovery order directing the parties to reveal their respective exhibits, witnesses, and summaries of the expected testimony of the witnesses. When the Thornes failed to do so, Bell and Cayo and others moved for summary disposition of the Thornes' claims against them. The court granted the motions pursuant to MCR 2.504(B)(1) and MCR 2.313(B)(2)(c) and entered default judgments against the Thornes in their actions against Bell and Cayo and others. Cayo and others subsequently moved to strike the Thornes' answer to the third-party complaint, arguing that the Thornes filed the answer late. The court granted the motions and entered a default judgment against the Thornes. Cayo and others were awarded damages, interest, costs, and attorney fees on their default judgments against the Thornes following a bench trial. The Thornes filed four separate appeals, and the appeals were consolidated.

The Court of Appeals *held:*

The trial court abused its discretion in dismissing the Thornes' claims against Bell and Cayo and others. Although the Thornes failed to comply with the discovery order directing them to reveal their exhibits, witnesses, and expected testi-

REFERENCES

Am Jur 2d, Depositions and Discovery, §§ 374-376, 391, 392.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions. 30 ALR4th 9.

mony of witnesses, default judgment as a sanction for the Thornes' violation was not appropriate, given the absence of a history of recalcitrance or deliberate noncompliance with discovery orders by the Thornes, delay by Bell and Cayo and others in seeking dismissal of the claims, the trial court's failure to evaluate other sanctions, and the trial court's disparate treatment of Little Caesar Enterprises' identical violation of the discovery order. The dismissal of the Thornes' complaints against Bell and Cayo and others must be reversed. The trial court's grant of the motion to strike the Thornes' answer to the complaint in the third-party action also must be reversed, and the default judgments and award of damages, costs, and attorney fees against the Thornes must be vacated. At trial on remand, the Thornes are limited to calling as witnesses only parties to the consolidated cases.

Reversed and remanded.

M. G. HARRISON, J., concurring, stated that there should be no obligation by Bell and Cayo and others to secure the Thornes' compliance with the trial court's discovery order.

PRETRIAL PROCEDURE — DISCOVERY — REMEDIES — DEFAULT JUDGMENTS.

A court contemplating a default judgment as a sanction for discovery abuses should consider whether a failure to respond to discovery requests extended over a substantial period, whether there was compliance with a court order directing discovery, the amount of time that elapsed between the violation and the motion for default judgment, and whether wilfulness was shown; the court also must evaluate on the record other available options before concluding that a default judgment is warranted; a default judgment should be employed only where there has been a flagrant and wanton refusal to facilitate discovery (MCR 2.313[B][2][c]).

Gruel, Mills, Nims & Pylman (by *Scott R. Melton* and *Brion J. Brooks*), for Thomas W. Thorne and Sandra H. Thorne.

Oosterbaan, Cooper & Peterson (by *Wesley L. McPeek*), for Robert Bell.

Alan H. Silverman, P.C. (by *Alan H. Silverman* and *Danielle L. Streed-Curtis*), for Roger Cayo, Jack L. Stevens, and Larry Leatz.

Before: DOCTOROFF, C.J., and TAYLOR and M.G. HARRISON,* JJ.

DOCTOROFF, C.J. In Docket Nos. 142116 and 142122, plaintiffs Thomas W. Thorne and Sandra H. Thorne appeal as of right from a May 17, 1991, order dismissing their complaints against defendant Robert Bell and defendants Roger Cayo, James L. Stevens, Roccy M. DeFrancesco and Larry Leatz (defendants Cayo et al) and dismissing their answer to the counterclaim of defendants Cayo et al for failure to timely reveal trial witnesses and exhibits. In Docket Nos. 145272 and 145273, plaintiffs appeal as of right from a September 25, 1991, judgment of default entered against them as a result of their failure to timely file an answer to the third-party complaint of defendants Cayo et al. We reverse and remand.

In 1984, defendants Cayo et al formed a Michigan corporation known as A-1 Food Enterprises, Inc., for the purpose of developing and operating Little Caesar Pizza restaurants in Nebraska. In 1986, plaintiffs became interested in obtaining a Little Caesar Pizza franchise and were directed to contact defendants Cayo et al, who indicated they would entertain other investors in A-1. Plaintiffs invested $50,000 in A-1 and received five hundred shares of common stock as a twenty-percent owner of the corporation in January 1987. Other acquaintances of plaintiffs, including Jack DeMaagd, Robert Kropf, and William Schlee also invested in A-1.

In July 1987, defendants Cayo and DeFrancesco sought to redeem their shares in A-1. To accomplish this, plaintiffs and other shareholders of A-1 signed a hold harmless agreement for the benefit of defendants Cayo and DeFrancesco, a promissory note to repay defendant Cayo the sum of $15,000,

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

and a personal guarantee on amounts due and owing to defendant Cayo by A-1.

Soon thereafter, plaintiffs discovered A-1's financial status was not as solid as they had believed. According to plaintiffs, defendants Cayo et al made false representations and failed to disclose material information to plaintiffs regarding, but not limited to, A-1's financial situation, A-1's franchisee status, and defendants' ability to assign their franchise agreement with Little Caesar to plaintiffs and the other new shareholders. Plaintiffs alleged these misrepresentations induced them to infuse additional capital into A-1 and to execute the redemption, hold harmless agreement, promissory note, and personal guarantee. As a result, plaintiffs filed a complaint against defendants Cayo et al on August 26, 1988, alleging that the defendants' conduct violated federal and state securities laws and constituted common-law fraud (Lower Court Case No. 88-002264).

Plaintiffs amended their complaint to add Little Caesar Enterprises, Inc. (LCE), asserting that LCE committed fraud or made material misrepresentations regarding A-1's status as an approved franchisee, the value of the Nebraska franchises, and the availability of purchasers for the Nebraska franchises.

On October 2, 1989, defendants Cayo et al filed a countercomplaint against plaintiffs, asserting that Thomas Thorne (1) defaulted on the promissory note and personal guarantee for $15,000 in connection with the redemption of Cayo's stock in A-1, (2) breached the hold harmless agreement releasing defendants Cayo and DeFrancesco from all liability in connection with A-1, and (3) breached the hold harmless agreement by failing to obtain releases from A-1's creditors on behalf of defendants Cayo and DeFrancesco.

On October 25, 1989, plaintiffs filed an answer to the countercomplaint, claiming defendants Cayo et al made material misrepresentations and omissions that caused plaintiffs to sign the redemption agreement, hold harmless agreement, promissory note, and personal guarantee. Therefore, these documents were not binding and were unenforceable.

During the course of these proceedings, plaintiffs also filed suit against Robert Bell on April 27, 1989, alleging that Bell was A-1's certified public accountant, that Bell prepared the corporation's financial statements, that Bell breached his fiduciary duty to plaintiffs, and that plaintiffs relied to their detriment on Bell's misrepresentations regarding the corporation's status when plaintiffs agreed to redeem defendants Cayo and DeFrancesco's shares in A-1 (Lower Court Case No. 89-001112).

LCE subsequently filed a complaint against defendants Cayo et al for collection of royalties and payment of certain promissory notes associated with A-1's Little Caesar franchises operated in Nebraska (Lower Court Case No. 89-001050). In connection with this complaint, defendants Cayo et al filed a third-party complaint against several individuals, including Thomas Thorne, for indemnification regarding Little Caesar's allegations, pursuant to the agreement to redeem stock and agreement to hold harmless. This third-party complaint is substantively identical to the counterclaim filed by defendants Cayo et al in Lower Court No. 88-002264.

The three actions were consolidated in the trial court. On July 17, 1990, a pretrial order was entered providing in pertinent part:

1. On or before November 16, 1990, Plaintiffs

shall *reveal* all exhibits and witnesses, including experts, together with a short summary of the witnesses' expected testimony.

2. On or before February 15, 1991, Defendants shall reveal all exhibits and witnesses, including experts, together with a short summary of the witnesses' expected testimony.

3. All discovery shall be completed by April 19, 1991.

4. All substantive motions shall be filed by April 19, 1991.

Plaintiffs never filed formal witness or exhibit lists.

On April 18, 1991, one day before the discovery deadline, defendant Bell filed a motion for summary disposition pursuant to MCR 2.116(C)(10), or alternatively, a motion to dismiss with prejudice pursuant to MCR 2.504(B)(1) and MCR 2.313(B)(2). In his motion, defendant Bell asserted that plaintiffs failed to reveal their exhibits, lay and expert witnesses, and a summary of the witnesses' proposed testimony, which prejudiced defendant Bell's ability to take necessary discovery depositions, rebut plaintiffs' claims, and establish a defense at trial. Defendant Bell argued that plaintiffs, having failed to timely disclose their witnesses and exhibits, were thereby precluded from calling any witnesses or introducing any exhibits at trial, which in turn entitled defendant Bell to summary disposition because there were no genuine issues of material fact in controversy. On April 19, 1991, defendants Cayo et al filed an identical motion.

In their brief opposing these motions, plaintiffs asserted they complied with the court's pretrial order by revealing their witnesses and exhibits during exhaustive depositions of plaintiffs and through their answers to interrogatories drafted

by defendants Bell and LCE. Plaintiffs asserted that defendants suffered no prejudice.

Recognizing that dismissal with prejudice was the most extreme sanction a court could impose, the court nevertheless granted summary disposition for defendants Bell and defendants Cayo et al, dismissing plaintiffs' complaint against defendant Bell in case no. 89-001112,[1] and also dismissing plaintiffs' complaint against defendants Cayo et al and plaintiffs' answer to the counterclaim of defendants Cayo et al in case no. 88-002264, and entering default judgments in both cases.[2]

Plaintiffs filed a motion for reconsideration accompanied by a witness list and an exhibit list. The trial court denied the motion.

On May 1, 1991, a stipulated order dismissing plaintiffs' claims against LCE in lower court no. 88-002264 was entered.

On May 24, 1991, defendants Cayo et al filed a motion to strike plaintiffs' answer to defendants' third-party complaint in case no. 89-001050 for plaintiffs' late filing of the answer. The trial court granted defendants' motion, striking plaintiffs' answer to the third-party complaint pursuant to MCR 2.115 and MCR 2.401, and entered an order finding that plaintiffs had defaulted.

On August 21, 1991, a bench trial was commenced on the third-party complaint of defendants Cayo et al against Jack DeMaagd and to determine damages on the default judgments of defendants Cayo et al against plaintiffs in case nos. 88-002264 and 89-001050. Plaintiffs' counsel was not permitted to call witnesses, but could cross-exam-

[1] The Thornes appealed this decision in Court of Appeals Docket No. 142116.

[2] The Thornes appealed this decision in Court of Appeals Docket Nos. 142122 and 145273.

ine the only two trial witnesses, defendants DeFrancesco and Cayo.

At the close of proofs, the trial court entered judgment in favor of defendants Cayo et al and against plaintiffs and Jack DeMaagd, jointly and severally, in the amount of $29,078 plus interest, reasonable costs, and $6,000 in attorney fees. The trial court further entered judgment in favor of defendant DeFrancesco against the same parties in the amount of $28,078 plus interest, costs, and $6,000 in attorney fees. The court also ordered plaintiffs and DeMaagd to pay defendant Cayo $15,000 plus interest, which was due and payable on July 1, 1988, pursuant to the promissory note.[3]

In October 1991, defendants Cayo et al and LCE stipulated the dismissal of all claims existing between them.

Plaintiffs first argue that the trial court abused its discretion in dismissing their complaints against defendant Bell and defendants Cayo et al for failure to comply with the trial court's discovery order. We agree.

The trial court dismissed plaintiffs' complaints against defendant Bell and defendants Cayo et al under MCR 2.504(B)(1) and MCR 2.313(B)(2). MCR 2.504(B)(1) provides that a defendant may move for the dismissal of an action if the plaintiff fails to comply with the court rules or a court order. MCR 2.313(B)(2)(c) authorizes a trial court to enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery.

Before imposing the sanction of a default judgment, a trial court should consider whether the

[3] The Thornes appealed the judgment on the third-party complaint of defendants Cayo et al in Court of Appeals Docket No. 145272. All four claims of appeal filed by the Thornes were consolidated on appeal.

failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to defendant, and whether wilfulness has been shown. *Mink v Masters,* 204 Mich App 242, 244; 514 NW2d 235 (1994); *Frankenmuth Mutual Ins Co v ACO, Inc,* 193 Mich App 389, 396-397; 484 NW2d 718 (1992). The court should evaluate other options before concluding that a drastic sanction is warranted. *Mink, supra.* The sanction of a default judgment should be used only when there has been a flagrant and wanton refusal to facilitate discovery. *Id.* We review discovery sanctions for an abuse of discretion. *Dean v Tucker,* 182 Mich App 27, 32; 451 NW2d 571 (1990).

First, contrary to plaintiffs' arguments, we find that they violated the trial court's scheduling order in failing to file witness and exhibit lists. The language in the scheduling order indicated that the parties had to reveal all exhibits and witnesses together with a short summary of the witnesses' expected testimony. For plaintiffs to argue that the order did not require them to file formal witness and exhibit lists is somewhat lame in light of the standards of litigation practice throughout the state. Moreover, any revelation of witnesses that occurred in the answers to interrogatories did not include a complete summary of the witnesses' expected testimony as required by the scheduling order. Failure to file witness and exhibit lists violated the trial court's order.

However, violation of the order did not justify the dismissal of plaintiffs' complaints against defendant Bell and defendants Cayo et al under the facts of this case. The record does not disclose a history of recalcitrance or deliberate noncompli-

ance with discovery orders, which typically precedes the imposition of such a harsh sanction. Also, neither defendant Bell nor defendants Cayo et al previously moved to obtain an order to compel plaintiffs to file witness and exhibit lists before the motion for summary disposition was filed. Instead, defendants Bell and Cayo et al waited until the close of discovery, five months after the date plaintiffs were required to reveal their trial witnesses and exhibits, before filing the motion for summary disposition. Such a delay on the defendants' part works against them on their motion for entry of a default judgment.

Next, there is no indication in the record that plaintiffs wilfully disregarded the order. The proceedings in these consolidated cases were complex, involving three actions that in turn included two counterclaims and a third-party complaint. The first two years of discovery were complicated by several recusals, reassignments, and amendments of pleadings. The confusion in the proceedings below, together with the absence of any pattern of recalcitrance or affirmative evidence that noncompliance with the scheduling order was deliberate, dictates the conclusion that the violation was not wilful.

We do not accept the argument that defendant Bell and defendants Cayo et al suffered substantial prejudice by plaintiffs' failure to file witness and exhibit lists. Defendants had deposed plaintiffs. Moreover, plaintiffs had previously indicated to defendants the names of potential trial witnesses and trial exhibits in their answers to interrogatories. Plaintiffs' answers to LCE's interrogatories even included a general summary of the testimony of named witnesses. Also, the majority of potential witnesses named by plaintiffs in the answers to interrogatories were defendants and other parties

to the action. Further reducing the prejudice suffered by defendant Bell and defendants Cayo et al is the fact that defendants could have moved sooner to compel the information from plaintiffs. This would have resulted in the information desired by defendants in time to conduct further discovery if needed.

Finally, the trial court's dismissal of plaintiffs' complaints is inconsistent with the various discretionary discovery sanction options available to it. *Grubor Enterprises, Inc v Kortidis,* 201 Mich App 625, 628-629; 506 NW2d 614 (1993). The court's failure to evaluate these options on the record before concluding that dismissal of the complaint was warranted constituted error. *Frankenmuth, supra.*

In addition to the factors set forth above, the trial court's disparate treatment of LCE for an identical violation of the trial court's scheduling order necessitates a finding of abuse of discretion. LCE, in its action against defendants Cayo et al in case no. 89-001050, also failed to timely file witness and exhibit lists. When defendants Cayo et al moved to dismiss LCE's complaint against them for noncompliance with the trial court's scheduling order and raised the same arguments that persuaded the trial court to dismiss plaintiffs' complaints, the trial court denied the motion. The trial court stated that it was persuaded by LCE's participation in discovery and noted that LCE's failure to file was accidental. The trial court also noted that LCE had revealed its witnesses and exhibits in its pretrial summary of December 27, 1991, resulting in only slight prejudice to Cayo et al

The trial court's attempt to distinguish between plaintiffs and LCE is unsuccessful. Contrary to the trial court's statement, LCE had a more extensive

history of noncompliance with discovery than plaintiffs. Also, plaintiffs, like LCE, filed a pretrial summary that contained a list of trial exhibits. Taking plaintiffs' pretrial summary and their answers to interrogatories together, defendants were given as much notice of plaintiffs' witnesses and exhibits as they were of LCE's. The trial court's disparate treatment of LCE and plaintiffs under identical circumstances is contrary to our notion of fairness and its ruling with respect to plaintiffs must be reversed.

The trial court erred in dismissing plaintiffs' complaints and entering default judgments in favor of defendant Bell and defendants Cayo et al on the eve of trial in the absence of a flagrant refusal to facilitate discovery. We reverse the trial court's dismissal of plaintiffs' complaints in case nos. 89-001112 and 88-002264. To eliminate the possibility of any prejudice to defendants resulting from plaintiffs' failure to file witness and exhibit lists while allowing plaintiffs' to effectively pursue their claims against defendant Bell and defendants Cayo et al, pursuant to this court's authority under MCR 7.216(A), we order that plaintiffs are limited to calling only parties to the consolidated cases at trial.

In light of our resolution of the foregoing issue, we also reverse the trial court's grant of the motion by defendants Cayo et al to strike plaintiffs' answer to the third-party complaint in case no. 89-001050 and the September 25, 1991, default judgment awarding defendant Cayo and defendant DeFrancesco damages and attorney fees. While defendants Cayo et al moved for and obtained a default judgment against plaintiffs in case no. 89-001050 on different grounds than that which we found inadequate above, because the counterclaim of defendants Cayo et al in case no. 88-002264 is

substantively identical to the third-party complaint in case no. 89-001050 and because we have determined that plaintiffs are entitled to proceed on their claims against defendants Cayo et al, we order that the entire matter be remanded for a trial on the merits.

Our vacation of the judgment against plaintiffs also makes it unnecessary for this Court to determine whether the trial court erred in awarding attorney fees.

We remand these consolidated cases for a trial on plaintiffs' claims against defendant Bell in case no. 89-001112, on plaintiffs' claims against defendants Cayo et al and on the claims of defendants Cayo et al against plaintiffs in case nos. 88-002264 and 89-001050 with the condition that plaintiffs are restricted to calling only parties to these consolidated cases as witnesses at trial.

Reversed and remanded.

TAYLOR, J., concurred.

M. G. HARRISON, J. *(concurring).*I concur except to the extent the majority opinion implies an obligation to take affirmative action to compel the disclosure of witnesses previously ordered by a court to be disclosed by a certain date in order to obtain the relief sought in this matter. No party should be required to secure compliance with a mandated order. Particularly in light of the facts of this case, I trust this expectation is dicta.

PEOPLE v MILLER

Docket No. 156613. Submitted April 12, 1994, at Grand Rapids. Decided September 6, 1994, at 9:40 A.M.

Bradley C. Miller pleaded guilty in the Barry Circuit Court, Richard M. Shuster, J., of operating a vehicle while under the influence of intoxicating liquor or a controlled substance, third offense. The court sentenced him to the maximum possible term of imprisonment, forty to sixty months, a fine of $3,500, and costs of $1,500. The defendant appealed by leave granted.

The Court of Appeals *held:*

1. The imposition of the fine in addition to the maximum term of imprisonment was authorized by statute and was proportionate punishment.

2. The fine imposed did not violate the clauses of the Michigan and federal constitutions prohibiting excessive fines, nor did it violate all standards of reasonableness in view of the defendant's criminal history and the Legislature's purpose in authorizing hefty fines for repeat offenders.

3. Despite the fact that at the time of the defendant's conviction the statutory language permitting a court to order a convicted defendant to pay costs was in the subsection of the statute dealing with first-time offenders, it is clear that the Legislature intended that courts also be authorized to order repeat offenders to pay court costs. The imposition of court costs was not error.

4. The trial court's imposition of the maximum term of imprisonment authorized was not based on improper considerations regarding the practices of the Department of Corrections and is supported by the record.

Affirmed.

REFERENCES

Am Jur 2d, Automobiles and Highway Traffic, § 310; Costs, § 100; Criminal Law, §§ 604, 613-615, 1044, 1049.

Items of costs of prosecution for which defendant may be held. 65 ALR2d 854.

Supreme Court's construction and application of excessive fines clause of Federal Constitution's Eighth Amendment. 106 L Ed 2d 729.

1. INTOXICATING LIQUORS — AUTOMOBILES — SENTENCES.
A person who is convicted of operating a vehicle while under the influence of intoxicating liquor or a controlled substance, third-offense, may be sentenced to both a fine and a term of imprisonment (MCL 257.625[6], 257.902; MSA 9.2325[6], 9.2602).

2. SENTENCES — FINES — EXCESSIVENESS.
The question of excessive fines necessarily involves a consideration of the purpose sought to be accomplished by the Legislature in authorizing the fines and of the seriousness of the problem with which it undertook to deal.

3. INTOXICATING LIQUORS — AUTOMOBILES — SENTENCES — COSTS.
The statute that imposes penalties for driving under the influence of intoxicating liquor or a controlled substance, even before its 1991 amendment, authorized a sentencing court to order repeat offenders to pay court costs in addition to imposing a fine or a sentence (1991 PA 98; MCL 257.625; MSA 9.2325).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Dale A. Crowley,* Prosecuting Attorney, and *Carole F. Barnett,* Assistant Attorney General, for the people.

State Appellate Defender (by *Sheila N. Robertson*), for the defendant on appeal.

Before: MICHAEL J. KELLY, P.J., and HOOD and S. B. MILLER,* JJ.

MICHAEL J. KELLY, P.J. Defendant pleaded guilty of operating a vehicle while under the influence of intoxicating liquor or a controlled substance (OUIL), third offense, MCL 257.625(6); MSA 9.2325(6). The circuit court sentenced defendant to the maximum possible term of imprisonment, forty to sixty months, and imposed a fine of $3,500 and costs of $1,500. Defendant now appeals by leave granted. We affirm.

Defendant first argues that the $3,500 fine in addition to the maximum term of imprisonment

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

constitutes a violation of the principle of proportionate punishment set forth in *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). We disagree. The imposition of both a fine and a term of imprisonment is provided for in MCL 257.902; MSA 9.2602:[1]

> Any person who is convicted of a violation of any of the provisions of this act declared to constitute a felony [MCL 257.625(6); MSA 9.2325(6)], unless a different penalty is expressly provided herein, shall be punished by imprisonment for not less than 1 year nor more than 5 years, or by a fine of not less than $500.00 nor more than $5,000.00, or by both such fine and imprisonment.

Defendant's punishment falls short of the $5,000 maximum fine possible under this statutory provision. The punishment is proportionate not only to the severity of the crime committed but also to defendant's criminal background. The trial court properly considered all pertinent factors.

Defendant also contends that his fine violates the excessive fines clauses of the Michigan and federal constitutions, Const 1963, art 1, § 16; US Const, Am VIII. In *People v Wolfe,* 338 Mich 525, 540; 61 NW2d 767 (1953), our Supreme Court stated that the question of excessive fines "necessarily involves a consideration of the purpose sought to be accomplished by the legislature and of the seriousness of the problem with which it undertook to deal." The hefty fines provided for in MCL 257.902; MSA 9.2602 represent the Legisla-

[1] On January 1, 1992, a new statutory scheme for OUIL offenses under MCL 257.625; MSA 9.2325 took effect, superseding the scheme that applies to defendant's March 1991 violation. 1991 PA 98. The punishment provision cited here is now incorporated into MCL 257.625(6); MSA 9.2325(6).

ture's response to those persons who ignore lessons of leniency after a previous conviction.

Defendant urges this Court to take into consideration his financial status in determining whether the fine is excessive. See *Hindt v State,* 421 A2d 1325, 1333 (Del, 1980), citing *State v Trailer Service, Inc,* 61 Wis 2d 400, 409; 212 NW2d 683 (1973), for the proposition that determining excessiveness of a fine in a constitutional sense includes consideration "in some instances [of] the ability of the accused to pay." Although defendant has enjoyed only seasonal employment as an asphalt layer and has no significant assets, we do not believe that a $3,500 fine violates all standards of reasonableness in view of defendant's criminal history and the legislative purpose of the fine.

Defendant's next argument is that the circuit court lacked the authority under MCL 257.902; MSA 9.2602 to impose costs. Defendant correctly points out that first-time OUIL offenders under MCL 257.625(4); MSA 9.2325(4) may be subject to costs while MCL 257.625(6); MSA 9.2325(6),[2] via MCL 257.902; MSA 9.2602, does not expressly provide the same for three-time offenders. On this ground, the prosecution concedes that the portion of defendant's sentence requiring him to pay costs should be vacated. However, an order vacating that portion of defendant's sentence would contravene the holding in *People v Cousins,* 196 Mich App 715; 493 NW2d 512 (1992). There, this Court held that costs may be imposed under MCL 257.625(6); MSA 9.2325(6) because it would be unreasonable to interpret the OUIL provisions as authorizing costs for a first-time offender but not

[2] Since the time of defendant's offense, MCL 257.625; MSA 9.2325 has undergone significant modification. 1991 PA 98, § 1 effective January 1, 1992.

for repeat violators.[3] Although defendant submits that the *Cousins* decision is erroneous, it is precedential under Administrative Order No. 1994-4.

Finally, defendant argues that he is entitled to resentencing because his sentence was based on inaccurate legal and factual information in the presentence information report (PSIR) with regard to the potential for early release. The PSIR recommended the maximum term of imprisonment because defendant would "continue to be a threat to the public" and it would be "entirely probable" that he would be released back into the community by the Department of Corrections after a short period of time. Although a sentencing court may not impose a lengthy sentence solely out of concern that the Department of Corrections will grant a legislatively authorized early release, *People v Fleming,* 428 Mich 408, 422; 410 NW2d 266 (1987); *People v McCracken,* 172 Mich App 94, 102; 431 NW2d 840 (1988), we cannot say that such concern motivated the trial court to impose the maximum term of imprisonment. In contrast to *Fleming, supra,* where the trial court cited the defendant's possible early release as a reason for departing from the Sentencing Guidelines, and *McCracken, supra,* where the trial court's comments revealed displeasure with the practices of the Department of Corrections, the record in this case contains no evidence of improper considerations by the trial court. The court cited defendant's criminal background and the public danger posed by his drinking and driving habits as reasons for defendant's sentence. There was no impro-

[3] As noted in footnote 1, *supra,* 1991 PA 98 amended MCL 257.625; MSA 9.2325, effective January 1, 1992. Subsection 7 of the amended statute specifically provides that, in addition to imposing the sanctions prescribed under subsections 4, 5, and 6, the court may also order a person violating those sections to pay the costs of prosecution.

priety in imposing a maximum term of imprisonment regardless of the practices of the Department of Corrections.

Affirmed.

MICHAELS v AMWAY CORPORATION

Docket No. 156629. Submitted April 12, 1994, at Grand Rapids. Decided September 6, 1994, at 9:45 A.M.

Shirlee Michaels and Joan Baker brought an action in the Kent Circuit Court against Amway Corporation, alleging that the defendant breached its contract with the plaintiffs as high-level distributors in its pyramid sales structure by permitting some of the plaintiffs' down-line distributors to transfer to the sales network of another high-level distributor contrary to the provisions in the defendant's Business Reference Manual. The plaintiffs also alleged violation of the provisions of the Michigan Consumer Protection Act and fraud. The defendant conceded that it was bound by the provisions of the manual, but claimed that the time requirement set forth in the manual for the transfer of distributors could be waived pursuant to the reservation-of-rights provision in the manual, which reserved to the defendant "the sole right to adopt, amend, modify, supplement, or rescind" any rule or portion of a rule necessary to promote the goals and objectives of the sales plan. The defendant further claimed that the plaintiffs could not assert their contractual rights under the manual because they had breached their contractual duties by failing to supply, train, and motivate their distributors properly and had attempted to involve their distributors in the sale of another product. The court, George R. Buth, J., granted summary disposition for the defendant. The plaintiffs appealed.

The Court of Appeals *held:*

1. The trial court erred in holding that the reservation-of-rights provision of the manual authorized the defendant to waive the time requirement of the manual with respect to the transfer of the specific distributors at issue in this case. The power to amend, modify, or rescind rules does not encompass necessarily the power to create exceptions to rules case by case. Although the defendant has the power to amend a rule in the

REFERENCES

Am Jur 2d, Contracts, §§ 513, 520-522, 621, 701.
See ALR Index under Contracts.

manual if the change would affect all of its distributors equally, it does not have unequivocal power to change a rule at will case by case, as it did here. The contractual language being ambiguous, summary disposition for either party would be inappropriate.

2. Although one who substantially breaches a contract cannot maintain an action against the other contracting party for that party's subsequent breach of contract, the record, viewed in the light most favorable to the plaintiffs, does not demonstrate conclusively a substantial breach of contract by the plaintiffs. Accordingly, the trial court erred in granting summary disposition for the defendant with respect to the claim for breach of contract.

3. The claim of unfair business practices under the Michigan Consumer Protection Act is an extension of the claim for breach of contract, and, accordingly, summary disposition should not have been granted with respect to that claim.

4. A claim based on fraud requires a misrepresentation of a past or existing fact. Because the plaintiffs' claim that the defendant misrepresented the meaning of the reservation-of-rights provision was not a misrepresentation of a past or existing fact, the trial court did not err in granting summary disposition for the defendant with respect to the plaintiffs' fraud claim.

Affirmed in part, reversed in part, and remanded.

1. CONTRACTS — AMENDMENT OF CONTRACTS — WAIVER OF CONTRACT PROVISIONS.

The power to amend, modify, or rescind the provisions of a contract covering a large number of persons does not encompass necessarily the power to create exceptions to the provisions with respect to specific persons case by case.

2. CONTRACTS — ACTIONS — BREACH OF CONTRACT.

One who first substantially breaches a contract cannot maintain an action for the subsequent breach or failure to perform by the other contracting party.

Buchanan & Bos (by *Bradley K. Glazier* and *Gwen E. Buday*), for the plaintiffs.

Cynthia Stoddard Fitzgerald and *Cholette, Perkins & Buchanan* (by *Robert E. Attmore*), for the defendant.

Before: MICHAEL J. KELLY, P.J., and HOOD and S. B. MILLER,* JJ.

MICHAEL J. KELLY, P.J. Plaintiffs appeal as of right a circuit court order granting defendant's motion for summary disposition. We affirm in part and reverse in part.

I

Plaintiff Shirlee Michaels became affiliated with defendant Amway Corporation as a distributor in 1969. An Amway distributor's business grows by sponsoring other "down-line" distributors and thereby establishing a personal distribution network. Michaels sponsored plaintiff Joan Baker and her husband in 1975. The Bakers in turn sponsored Mary and Maurice VanDusen and Marlis and Donald Shamblin. In 1979, the VanDusens sponsored George and Barbara Simmons. In 1985, the Shamblins sponsored Lillian Cummings. The Simmonses and Cummings in turn each established their own networks of down-line distributors so that, by 1990, plaintiffs Michaels and Baker stood atop a large and lucrative pyramid of down-line distributors and operated their own sizeable Amway warehouses.

In 1983, the Bakers moved to Hong Kong and set up servicing agreements with several other high-level Amway distributors in order to ensure that their down-line distributors would have continuity of supply in their absence. One of those agreements was with Dick and Doreen Yost, who agreed to provide Amway products for the Simmonses and Cummings, among others. When the Bakers returned from Hong Kong in 1987, they terminated most of the servicing agreements, in-

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

cluding the agreement with the Yosts, and reopened their Amway warehouse.

The Bakers kept regular pickup hours at their warehouse from 3:00 P.M. to 5:00 P.M. on Mondays and Thursdays. They used these hours to discuss training and motivating of new distributors. The Bakers also maintained contact with their distributors by setting up lunch and dinner appointments with members of their distribution group.

In August 1989, the Bakers began selling a health drink manufactured by a company called Matol. The Bakers met with George Simmons, among other down-line distributors, to advise him of their association with Matol and to assure him that their primary commitment was to Amway. Defendant received complaints from Simmons and other down-line distributors. Although Simmons was not actively solicited to join the Matol business, he contacted defendant after the meeting to complain about the Bakers' involvement with Matol. In January 1990, Paul Burt, of defendant's Business Conduct and Rules Department, informed the Bakers that the Code of Ethics and Rules of Conduct in defendant's Business Reference Manual (BRM) prohibited them from selling Matol to any Amway distributors except those directly sponsored by them.

Three times in the spring and summer of 1990, George Simmons requested a transfer to another network of distributors, citing the Bakers' Matol business and their alleged failure to offer enough meetings to down-line distributors. However, defendant's BRM provides that a distributor wishing to change sponsors must be inactive for six months and that a distributor wishing to take along down-line distributors must be inactive for two years.

Notwithstanding these rules, the Simmonses were able to terminate their association with the

Bakers' in December 1990, and transfer to the Yosts' network in January 1991. Eight down-line distributors accompanied them. Robert Kerkstra, the director of defendant's Business Conduct and Rules Department, approved the transfer. Shortly thereafter, Cummings received permission to do the same. She subsequently sent a formal letter of resignation to the Bakers in February 1991 and became a member of the Simmonses' distribution network one month later, taking nineteen down-line distributors with her.

II

At issue is the effect of a provision in the BRM on the propriety of Kerkstra's decision to waive the two-year inactivity requirement for the Simmonses and Cummings. This provision reads:

> The Rules are designed to preserve the benefits available to all independent distributors under the Amway Sales and Marketing Plan. To this end, Amway reserves to itself the sole right to adopt, amend, modify, supplement, or rescind all or such a portion of the Rules, as necessary, in order to promote the goals, objectives and benefits of the Amway Sales and Marketing Plan.

Defendant concedes that it is contractually bound by the BRM and that its decision to allow the Simmonses and Cummings to transfer violated the two-year rule. However, defendant relies on the reservation-of-rights provision to justify its action. Alternatively, defendant argues that plaintiffs may not invoke their contractual rights under the BRM because they already had breached that contract by failing to properly supply, train, and motivate their down-line distributors with weekly meetings and regular mail contact and by attempting to

involve their distributors in the Matol distribution scheme.

The circuit court order did not specify under which court rule it was granting summary disposition. Defendant submitted its motion under both MCR 2.116(C)(8) and (10). However, it is apparent from the circuit court record that the motion was decided under MCR 2.116(C)(10). We will review the matter accordingly.

A motion for summary disposition under MCR 2.116(C)(10) tests whether a genuine issue of material fact remains upon which reasonable minds could differ. In making this determination, a court must review all relevant affidavits, depositions, admissions, and other documentary evidence and construe the evidence in favor of the nonmoving party. *Farm Bureau Mutual Ins Co of Michigan v Stark,* 437 Mich 175, 184-185; 468 NW2d 498 (1991).

When deciding a motion for summary disposition in a claim for breach of contract, a court may interpret the contract only where the terms are clear. If the terms are ambiguous, a factual development is necessary to determine the intent of the parties, and summary disposition is inappropriate. *SSC Associates Ltd Partnership v General Retirement System of the City of Detroit,* 192 Mich App 360, 363; 480 NW2d 275 (1991).

III

The circuit court concluded that the reservation-of-rights clause in the BRM permitted defendant to modify the two-year rule. We believe that the court's interpretation was not the only reasonable interpretation and conclude that the contract was ambiguous.

The power to amend, modify, or rescind rules

does not encompass necessarily the power to create exceptions to rules case by case. A reasonable person could determine that the term "rule" refers to a policy that applies to everyone and, thus, that "modification" of a "rule" involves a change affecting everyone equally, a change in the BRM itself. See, e.g., *Cain v Allen Electric & Equipment Co,* 346 Mich 568, 580; 78 NW2d 296 (1956); *Dalton v Herbruck Egg Sales Corp,* 164 Mich App 543, 546; 417 NW2d 496 (1987). Such an interpretation also would make common sense, because a reservation to change any rule at will case by case would essentially render plaintiffs' rights under the BRM illusory.

Accordingly, the circuit court erred in granting defendant's motion for summary disposition. However, because the contract is susceptible to more than one interpretation, we decline to grant plaintiffs' request for an order of summary disposition in their favor.

IV

Defendant argues that any breach of contract by it was rendered nonactionable by plaintiffs' breach of the provisions of the BRM. "The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Flamm v Scherer,* 40 Mich App 1, 8-9; 198 NW2d 702 (1972). See also *Nat'l Teleinformation Network, Inc v Michigan Public Service Comm,* 687 F Supp 330, 337 (WD Mich, 1988); 5 Callaghan's Michigan Civil Jurisprudence, § 249, pp 809-810. However, that rule only applies when the initial breach is substantial. *Baith v Knapp-Stiles, Inc,* 380 Mich 119, 126; 156 NW2d 575 (1968). See also Callaghan's, *supra,* § 249, p 810.

Here, there is an issue of fact concerning whether plaintiffs breached the contract substantially. Defendant alleges that plaintiffs failed to properly supply, train, and motivate their down-line distributors as provided in the BRM. Defendant points to the terms of the BRM, which required plaintiffs to conduct weekly sales meetings and maintain frequent mail contact with their down-line distributors, and to the complaints from those distributors regarding plaintiffs' performance. The record evidence reveals, however, that plaintiffs opened their warehouse for pickup from 3:00 P.M. to 5:00 P.M. twice a week and that they used this time to discuss training and motivation. In addition, they set up lunch appointments and dinners with their distributors to discuss Amway business. With regard to their sale of Matol products, plaintiffs dispute that they ever solicited distributors. The evidence, construed in plaintiffs' favor, does not conclusively demonstrate a substantial breach of contract. Accordingly, summary disposition was not proper on the breach of contract claim.

V

Because an issue of fact exists regarding the meaning of the reservation-of-rights clause, we cannot say that summary disposition was appropriate with regard to plaintiffs' claim under § 3 of the Michigan Consumer Protection Act (MCPA), MCL 445.903(1); MSA 19.418(3)(1). Plaintiffs allege that defendant failed to reveal the material fact that it could change the rules in the BRM unilaterally case by case under the reservation-of-rights provision. The MCPA claim is essentially an extension of the breach of contract claim. Because the reservation-of-rights clause is ambiguous and, therefore, arguably misleading and confusing, plaintiffs have

a justiciable claim that defendant engaged in an unfair and deceptive commercial practice by causing them to rely on the clause. Cf. *Lesatz v Standard Green Meadows,* 164 Mich App 122, 128; 416 NW2d 334 (1987) (holding that a lease provision did not violate the MCPA where it was not ambiguous, confusing, or misleading with regard to the plaintiffs' rights, obligations, or remedies).

VI

Notwithstanding our resolution of the preceding issues, the circuit court did not err in granting summary disposition of plaintiffs' fraud claim. Again, plaintiffs base their claim on defendant's alleged misrepresentation of the meaning of the reservation-of-rights provision. To constitute fraud, the misrepresentation in question must be predicated on a statement of past or existing fact. *Kamalnath v Mercy Memorial Hosp Corp,* 194 Mich App 543, 554; 487 NW2d 499 (1992). A mere promise that is broken is neither fraud nor evidence of fraud. *Marrero v McDonnell Douglas Capital Corp,* 200 Mich App 438, 444; 505 NW2d 275 (1993). The reservation-of-rights provision was not a statement regarding past or existing facts. Accordingly, the circuit court did not err in dismissing plaintiffs' fraud claim.

Affirmed in part, reversed in part, and remanded.

PEOPLE v CANNON

Docket No. 161001. Submitted June 16, 1994, at Grand Rapids. Decided September 6, 1994, at 9:50 A.M.

Terrence J. Cannon pleaded guilty in the Bay Circuit Court, Eugene C. Penzien, J., of attempting to carry a concealed weapon and was sentenced to five years' probation with the condition that he be incarcerated in the county jail from December 7, 1992, to June 7, 1993. The defendant moved for amendment of the probation order, arguing that the specification of a date of release from jail would deny him good-time credits he was entitled to earn as provided under MCL 51.282; MSA 5.883(2). The court denied the motion. The defendant appealed.

The Court of Appeals *held:*

MCL 51.282(2); MSA 5.883(2)(2) grants every county jail prisoner who does not violate the rules and regulations of the jail a good-time credit of one day for every six days served. By setting a specific release date in the probation order, the trial court improperly denied the defendant the good-time credits he was entitled to earn under the statute and frustrated the purposes behind the statute of encouraging good behavior while incarcerated and of reducing jail overcrowding.

Reversed and remanded for entry of an amended order of probation.

SENTENCES — PROBATION — JAIL TERMS — GOOD-TIME CREDITS — SPECIFIC RELEASE DATES.

A court, in imposing a jail term as a condition of a sentence of probation, may not set a specific date for the defendant's release from jail; setting a specific release date could deny the defendant the opportunity to earn good-time credit as provided by statute (MCL 51.282[2]; MSA 5.883[2][2]).

Frank J. Kelley, Attorney General, *Thomas L.*

REFERENCES

Am Jur 2d, Criminal Law, §§ 535-537, 568-570.

Propriety of conditioning probation on defendant's serving part of probationary period in jail or prison. 6 ALR4th 446.

Casey, Solicitor General, *Joseph K. Sheeran,* Prosecuting Attorney, and *Martha G. Mettee,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Anne Yantus*), for the defendant on appeal.

Before: MURPHY, P.J., and JANSEN and CONNOR, JJ.

JANSEN, J. Defendant pleaded guilty in the Bay Circuit Court of attempting to carry a concealed weapon, MCL 750.227; MSA 28.424; MCL 750.92; MSA 28.287. In exchange for the plea, the prosecutor dismissed a charge of carrying a concealed weapon and a charge of receiving and concealing stolen property over $100. The trial court subsequently sentenced defendant to five years' probation with the condition that defendant serve a term in the county jail from December 7, 1992, until June 7, 1993. In a postconviction motion, defendant moved to amend the order of probation, arguing that the imposition of a specific jail term with a specified release date was invalid pursuant to MCL 51.282; MSA 5.883(2) because it denied him good-time credit. The trial court denied the motion. We reverse the order of probation and remand for further proceedings.

Although defendant's issue is technically moot because it is now past his set release date, we will review the merits of the issue because it is one of public significance and is likely to recur in the future yet evade appellate review. *In re Closure of Jury Voir Dire,* 204 Mich App 592, 594; 516 NW2d 514 (1994).

The issue before us is one of statutory interpretation. Statutory interpretation is a question of law. *Smeets v Genesee Co Clerk,* 193 Mich App

628, 633; 484 NW2d 770 (1992). Questions of law are reviewed de novo on appeal. *Cardinal Mooney High School v Michigan High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991).

A fundamental rule of statutory interpretation is to determine the purpose and intent of the Legislature in enacting a provision. *Farrington v Total Petroleum, Inc,* 442 Mich 201, 212; 501 NW2d 76 (1993). The Legislature is presumed to have intended the meaning it plainly expressed. *Guardian Industries Corp v Dep't of Treasury,* 198 Mich App 363, 381; 499 NW2d 349 (1993). Where the language of a statute is clear, there is no need for interpretation and the statute must be applied as written. *Farrington, supra,* p 208.

Const 1963, art 7, § 4 provides for the office of the sheriff. Pursuant to MCL 51.75; MSA 5.868, the "sheriff shall have the charge and custody of the jails of his county, and of the prisoners in the same." The provision at issue states:

> Every prisoner whose record shows that there are no violations of the rules and regulations shall be entitled to a reduction from his or her sentence as follows: 1 day for each 6 days of sentence. The sheriff may, by general rule, subject to amendment from time to time, prescribe how much of the good time earned under this subsection a prisoner shall forfeit for any infraction of the general rules and regulations, and for any act of insubordination the sheriff may by special order take away any portion of or the whole of the good time made by any prisoner up to the date of such offense. The sheriff may as a reward for especially good conduct, in case of insubordination, restore to any prisoner the whole or any portion of the good time lost because of any minor infraction of the rules. [MCL 51.282(2); MSA 5.883(2)(2).]

We find the above provision to be clear and unam-

biguous. In clear and unmistakable terms, the Legislature has stated that every county prisoner *shall* be entitled to a reduction of sentence of one day for every six days served where there are no violations of the rules and regulations. There are no exceptions in the provision for probationers or otherwise. Further, the *sheriff* is to prescribe how much good-time is to be forfeited for any infraction of the general rules and regulations.

In *People v Fleming,* 428 Mich 408, 425; 410 NW2d 266 (1987), the Supreme Court held that a sentencing court may not consider good-time credits to enhance a defendant's sentence. In so holding, the Court stated that the sentencing court should not circumvent or nullify the good-time statute, MCL 800.33; MSA 28.1403, by taking away good-time credits in advance. *Fleming, supra,* p 427; see also *People v Rushlow,* 437 Mich 149, 156; 468 NW2d 487 (1991) (where the Supreme Court reiterated that taking away disciplinary credits in advance would frustrate legislative intent). Further, this Court has held that although there is no constitutional right to good-time credit, once a good-time credit provision is adopted and a prisoner earns that credit, the deprivation of good-time credit constitutes a substantial sanction, and a prisoner may claim that a deprivation of good-time credit is a denial of a protected liberty interest without due process of law. *Tessin v Dep't of Corrections (After Remand),* 197 Mich App 236, 241; 495 NW2d 397 (1992); *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections,* 199 Mich App 681, 695; 503 NW2d 465 (1993).

Therefore, it follows that a court may not deprive a prisoner of good-time credit to which the prisoner may be entitled under statute before that prisoner has even begun serving the term of im-

prisonment. Here, MCL 51.282(2); MSA 5.883(2)(2) clearly states that "*[e]very* prisoner whose record shows that there are no violations of the rules and regulations *shall* be entitled to a reduction from his or her sentence" by one day for each six days of the sentence (emphasis added). The trial court could not deprive defendant of his statutory right to earn good-time credit by setting a specific term of imprisonment with a set release date in the order of probation. By denying the defendant his entitlement to good-time credit, a trial court frustrates the purposes behind the statute of encouraging good behavior of prisoners while incarcerated and of reducing jail overcrowding.

The prosecutor's argument that the term of imprisonment in this case is merely a condition of probation and not a sentence is disingenuous. Probation is an actual sentence. MCL 771.3(1); MSA 28.1133(1); *People v Moon,* 125 Mich App 773, 780; 337 NW2d 293 (1983); *People v Leonard,* 144 Mich App 492, 495; 375 NW2d 745 (1985). It follows that incarceration in the county jail, even if as a condition of probation, is part of the sentence. Thus, the prosecutor's argument that imprisonment in the county jail is a condition of probation but is not a sentence is a distinction without a difference.

We hold that the trial court erred in setting a specific term of imprisonment in the county jail, with a specific release date, as a condition of probation. Such a condition violated MCL 51.282(2); MSA 5.883(2)(2) because it prohibited defendant from obtaining good-time credit that he was lawfully entitled to earn.

Reversed and remanded for entry of an amended order of probation consistent with this opinion. Jurisdiction is not retained.

PEOPLE v HAZZARD

Docket No. 156978. Submitted May 10, 1994, at Detroit. Decided September 6, 1994, at 9:55 A.M.

Damion Hazzard, a juvenile, pleaded guilty in the Recorder's Court of Detroit, Warfield Moore, Jr., J., of two counts of first-degree criminal sexual conduct and was sentenced as an adult to concurrent prison terms of twenty-two to forty years. The defendant appealed, arguing that the sentences must be set aside because the trial court failed to make specific findings of fact with respect to the statutory factors of MCL 769.1(3); MSA 28.1072(3) that must be considered in determining whether to sentence a juvenile as an adult.

The Court of Appeals *held:*

The trial court was required by court rule, MCR 6.931(E)(4), to make specific findings concerning each of the requisite statutory factors before determining to sentence the defendant as an adult. Because it does not appear that the trial court attempted to weigh the relevant factors in any meaningful way at the sentencing hearing, the court abused its discretion in determining to sentence the defendant as an adult. The sentences must be reversed, and the matter must be remanded for further proceedings before a different judge to determine whether to sentence the defendant as a juvenile or as an adult.

Reversed and remanded.

CRIMINAL LAW — JUVENILES — SENTENCING — FINDINGS OF FACT.

A sentencing court in determining whether to sentence a juvenile as an adult must make specific findings of fact concerning the statutory factors that are required to be considered before sentencing a juvenile as an adult and must weigh the relevant factors in a meaningful way (MCL 769.1[3],[5]; MSA 28.1072[3],[5]; MCR 6.931[E][3],[4]).

Frank J. Kelley, Attorney General, *Thomas L.*

REFERENCES

Am Jur 2d, Criminal Law, § 603; Juvenile Courts and Delinquent and Dependent Children, §§ 8-12.

Possibility of rehabilitation as affecting whether juvenile offender should be tried as adult. 22 ALR4th 1162.

Casey, Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Randy E. Davidson*), for the defendant on appeal.

Before: MARILYN KELLY, P.J., and SHEPHERD and L. P. BORRELLO,* JJ.

SHEPHERD, J. Defendant, a juvenile, pleaded guilty in the trial court to two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), in exchange for the dismissal of an additional charge of first-degree criminal sexual conduct and a charge of armed robbery. Defendant was sentenced as an adult to twenty-two to forty years' imprisonment for each offense, to run concurrently. We reverse defendant's sentences and remand for further proceedings.

Defendant's sole argument on appeal is that the trial court failed to make specific findings of fact as required under MCR 6.931(E)(4),[1] concerning each of the statutory factors outlined in MCL 769.1(3); MSA 28.1072(3),[2] for determining whether to sentence him as an adult. After reviewing the record of the sentencing hearing, we agree with defendant's position.

MCL 769.1(3); MSA 28.1072(3) requires trial courts to consider the following criteria when determining whether to sentence a juvenile offender as an adult:

---

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

[1] MCL 769.1(5); MSA 28.1072(5) contains language similar to that in MCR 6.931(E)(4), also requiring specific findings on each of the factors.

[2] See also MCR 6.931(E)(3), which mirrors the factors listed in MCL 769.1(3); MSA 28.1072(3) for determining whether to sentence a juvenile as an adult.

(a) The prior record and character of the juvenile, his or her physical and mental maturity, and his or her pattern of living.

(b) The seriousness and the circumstances of the offense.

(c) Whether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations:

(i) The juvenile is not amenable to treatment.

(ii) That despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of other juveniles in the treatment program.

(d) Whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public if released at the age of 21.

(e) Whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.

(f) What is in the best interests of the public welfare and the protection of the public security.

The trial court in the present case did not make detailed findings concerning each statutory factor. Rather, the trial judge engaged in a rather lengthy diatribe at sentencing—comparing his own upbringing with defendant's.[3] While it does appear that the trial judge made a number of piecemeal findings that were potentially relevant to the statutory criteria, the trial court did not make complete, detailed findings with respect to each of the requisite factors as required under MCR 6.931(E)

[3] While a certain amount of personal reflection may be interesting and even potentially helpful to a full articulation of findings under the requisite factors, we would discourage the trial court from embarking upon such a lengthy autobiography in the future. Our review of the record reveals that much of the trial court's discussion is composed of irrelevant personal information, which is not conducive to the efficient administration of justice.

(3) and (4) and MCL 769.1(3) and (5); MSA 28.1072(3) and (5). It does not appear from the record that the trial court attempted to weigh the relevant factors in any meaningful way at the sentencing hearing. Accordingly, the trial court's decision to sentence defendant as an adult constituted an abuse of discretion. *People v Passeno,* 195 Mich App 91, 103-104; 489 NW2d 152 (1992).

In sum, we are not satisfied with the trial court's findings concerning whether defendant should be sentenced as an adult. MCR 6.931(E)(3) and (4) and MCL 769.1(3) and (5); MSA 28.1072(3) and (5).

We reverse defendant's sentences and remand for further proceedings before a different judge, *People v Evans,* 156 Mich App 68, 72; 401 NW2d 312 (1986), to determine whether defendant should be sentenced as a juvenile or as an adult. We do not retain jurisdiction.

PEOPLE v STEWART (ON REHEARING)

Docket No. 139830. Submitted March 9, 1994, at Detroit. Decided September 7, 1994, at 9:00 A.M. Leave to appeal sought.

Jerry L. Stewart was convicted by a jury in the Oakland Circuit Court, Fred M. Mester, J., of manslaughter committed in the operation of a motor vehicle and by another jury before the same judge of being an habitual offender, third offense. The defendant appealed. The Court of Appeals, CAVANAGH, P.J., and WAHLS and G. W. CROCKETT, III, JJ., in an unpublished opinion per curiam, decided May 10, 1994 (Docket No. 139830), reversed and remanded for a new trial. The Court of Appeals subsequently granted the prosecution's motion for a rehearing.

On rehearing, the Court of Appeals *held:*

1. Administrative Order No. 1994-4 constrains the Court of Appeals to follow *People v Tims,* 202 Mich App 335 (1993), lv gtd 445 Mich 862 (1994), and hold that the trial court committed error requiring reversal when it instructed the jury that it could find the defendant guilty of manslaughter if his actions were a substantial cause of the decedent's death. On retrial, the trial court must instruct the jury that it must find the defendant's conduct to have been the substantial cause of the decedent's death in order to convict the defendant of manslaughter.

2. The defendant's two prior convictions of operating a motor vehicle while under the influence of liquor, third offense, may not underlie the habitual offender charge. Although the Supreme Court, in *People v Bewersdorf,* 438 Mich 55 (1991), held that the habitual offender act fully applies to third and subsequent OUIL convictions, the Court of Appeals, in *People v Doyle,* 203 Mich App 294 (1994), held that *Bewersdorf* cannot be retroactively applied. *Bewersdorf* cannot be applied to this case because the alleged manslaughter was committed before *Bewersdorf* was decided.

Reversed and remanded for new trial.

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

Michael J. Brady, for the defendant on appeal.

ON REHEARING

Before: CAVANAGH, P.J., and WAHLS and G. W. CROCKETT, III,* JJ.

PER CURIAM. Defendant was convicted in two separate jury trials presided over by the same judge of manslaughter with a motor vehicle, MCL 750.321; MSA 28.553, and of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced as an habitual offender to fifteen to thirty years' imprisonment. Defendant appeals from his conviction and sentence. We are constrained by Administrative Order No. 1994-4 to reverse and remand for a new trial.

In the early morning hours of July 24, 1990, the vehicle in which defendant and Sandra Groves were traveling went off a freeway exit ramp and rolled over. Both occupants were thrown from the car, and Groves was killed. Defendant, who was found to have a blood alcohol level of 0.18 percent, was charged with manslaughter with a motor vehicle. A jury found him guilty as charged. A second jury then convicted defendant of being an habitual offender, third offense, on the basis of two prior convictions of operating a motor vehicle while under the influence of intoxicating liquor, third offense (OUIL-third), MCL 257.625(6); MSA 9.2325(6). This appeal followed.

Defendant's first issue on appeal is whether the trial court committed error requiring reversal when it instructed the jury that it could find defendant guilty of manslaughter if his actions were a, rather than the, substantial cause of

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

Groves' death, in light of expert testimony that the allegedly defective design of the freeway ramp may have been partially or wholly to blame for the death.

A panel of this Court recently addressed this issue in *People v Tims,* 202 Mich App 335; 508 NW2d 175 (1993), lv gtd 445 Mich 862 (1994). In that case, Judge MARILYN KELLY reluctantly concluded that, on the basis of Supreme Court precedent, in order for a defendant to be convicted of vehicular homicide, his conduct must be the proximate cause of the death. *Id.* at 339-340, citing *People v Layman,* 299 Mich 141, 145; 299 NW 840 (1941); *People v Townsend,* 214 Mich 267, 275; 183 NW 177 (1921); *People v Barnes,* 182 Mich 179, 199; 148 NW 400 (1914). The remaining members of that panel concurred in the result.

We do not agree that the *Tims* result was mandated by the Supreme Court cases cited. If we were not constrained by Administrative Order No. 1994-4 to follow *Tims,* we would affirm the manslaughter conviction because we believe that it is both confusing and unnecessarily restrictive to instruct the jury that defendant's conduct must be the substantial cause of death. However, on retrial the court shall instruct the jury that defendant's conduct must have been the substantial cause of Groves' death.

In light of our conclusion, it is not necessary to address defendant's remaining allegations of trial error.

Defendant next contends that the trial court erred in denying his motion to have the habitual offender charges dismissed, because the prior felonies (OUIL-third) used to enhance the manslaughter charge were themselves both enhanced misdemeanors.

On August 22, 1991, our Supreme Court deter-

mined in *People v Bewersdorf,* 438 Mich 55; 475 NW2d 231 (1991), that the habitual offender act fully applies to third and subsequent OUIL convictions, thus effectively overruling *People v Tucker,* 177 Mich App 174; 441 NW2d 59 (1989). However, in the recent case of *People v Doyle,* 203 Mich App 294; 512 NW2d 59 (1994), a divided panel of this Court held that *Bewersdorf* could not be retroactively applied (even though the Supreme Court in that case applied the new rule retroactively). *Doyle, supra* at 296-297. Accordingly, because the offense in this case was committed on July 24, 1990, we must conclude that defendant's two OUIL-third convictions may not serve as the underlying felonies for the habitual offender charge. *Doyle, supra; Tucker, supra.*

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

CITY OF MARSHALL v CONSUMERS POWER COMPANY (ON REMAND)

CITY OF MARSHALL v CONSUMERS POWER COMPANY (ON SECOND REMAND)

CITY OF MARSHALL v CONSUMERS POWER COMPANY

Docket Nos. 156321, 156322, 156464. Submitted May 18, 1994, at Lansing. Decided September 7, 1994, at 9:05 A.M. Leave to appeal sought.

The City of Marshall filed a complaint with the Public Service Commission, seeking to have Consumers Power Company enjoined from extending electric service to Progressive Dynamics, Inc., a customer of the city's electric utility company, without first seeking a certificate of public convenience and necessity pursuant to 1929 PA 69, MCL 460.501 *et seq.*; MSA 22.141 *et seq.* Consumers argued that it was not required to seek a certificate of necessity pursuant to Act 69 because it held a vested contractual right under a franchise, issued pursuant to 1905 PA 264, to supply electricity within the City of Marshall. The PSC rejected Consumers' argument that the certificate requirement of Act 69 applies only where a utility provides service within a municipality for the first time, declined to determine whether Consumers had a valid franchise under Act 264, and prohibited Consumers from extending service to Progressive without first seeking a certificate of necessity pursuant to Act 69. Consumers appealed. The Court of Appeals dismissed the appeal, holding that there was no appeal of right from the PSC's order. Unpublished order of the Court of Appeals, decided August 14, 1991 (Docket No. 132581). The Supreme Court remanded the matter to the Court of Appeals for consideration as on leave granted, directing the Court of Appeals to determine whether it had jurisdiction over the appeal. Sub nom *In re Complaint of the City of Marshall Against Consumers Power Company,* 440 Mich 914 (1992). The appeal was docketed as Docket No. 156321.

During the pendency of the proceedings before the Public Service Commission relative to the complaint concerning electrical service to Progressive Dynamics, Inc., the City of Marshall brought an action in the Calhoun Circuit Court against Con-

sumers Power Company, seeking an injunction prohibiting Consumers from connecting or providing electric service to Progressive during the pendency of the proceedings before the PSC. The court, James Kingsley, J., entered an injunctive order. Consumers appealed. The Court of Appeals vacated the circuit court's order and dismissed the matter for lack of subject-matter jurisdiction, holding that there was no statutory authority for equitable intervention in aid of PSC proceedings. Unpublished order of the Court of Appeals, decided July 2, 1990 (Docket No. 126502). The Supreme Court remanded for consideration as on leave granted. 435 Mich 881 (1990). The Court of Appeals dismissed the appeal as moot. Unpublished order of the Court of Appeals, decided August 14, 1992 (Docket No. 132884). The Supreme Court again remanded for consideration as on leave granted. 440 Mich 914 (1992). The appeal was docketed as Docket No. 156322.

The City of Marshall filed a complaint with the Public Service Commission, seeking to have Consumers Power Company enjoined from providing electric service to the Marshall Training Center, a facility owned by Consumers but serviced by the city's electric utility company, without first seeking a certificate of public convenience and necessity pursuant to Act 69. The PSC held that its decision in the Progressive case was controlling and that Consumers could not provide electric service to its Marshall Training Center facility until it secured a certificate of necessity pursuant to Act 69. Consumers appealed. The appeal was docketed as Docket No. 156464.

The appeals were consolidated.

The Court of Appeals *held:*

1. By statute, MCL 462.26(1); MSA 22.45(1), an appeal as of right to the Court of Appeals exists from an order of the Public Service Commission fixing services. However, the order in this case did not fix a service, the providing of electricity, and did not determine with finality whether Consumers could supply electricity. Accordingly, there lies no appeal as of right from these orders of the PSC. Because there is no appeal as of right with respect to these orders, the Court of Appeals also lacks authority to grant leave to appeal from such orders. MCR 7.203(B)(4).

2. A party aggrieved by an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful and unreasonable.

3. The certificate requirement of Act 69 is not inherently inconsistent with a franchise granted under Act 264. Consumers has not met its burden of showing that the PSC's orders

requiring it to satisfy the certificate requirement of Act 69 were unlawful or unreasonable.

4. In this case and under these facts, the circuit court had jurisdiction to grant equitable relief to preserve the status quo during the pendency of the proceedings before the PSC.

Affirmed.

Varnum, Riddering, Schmidt & Howlett (by *Teresa S. Decker*), for the City of Marshall.

W. E. Wisner, for Consumers Power Company.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Don L. Keskey* and *Tonatzin M. Alfaro Garcia,* Assistant Attorneys General, for the Public Service Commission.

Amici Curiae:

Dickinson, Wright, Moon, Van Dusen & Freeman (by *Kester K. So* and *Michael S. Ashton*), for the Michigan Municipal League and others.

Bauckham, Sparks, Rolfe & Thomsen, P.C. (by *Lynda E. Thomsen*), for the Michigan South Central Power Agency.

Before: MURPHY, P.J., and MCDONALD and F. D. BROUILLETTE,* JJ.

PER CURIAM. In Docket No. 156321, Consumers Power Company claims an appeal from an order entered on August 30, 1990, by the Public Service Commission (PSC) in Case No. U-9561, granting the complaint filed by plaintiff, City of Marshall, and enjoining Consumers from extending electric service to Progressive Dynamics, Inc., without first seeking to obtain a certificate of public conve-

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

nience and necessity (CPCN) pursuant to 1929 PA 69 (Act 69), MCL 460.501 *et seq.*; MSA 22.141 *et seq.* Consumers' original claim of appeal was dismissed by this Court for lack of jurisdiction for the reason that the August 30, 1990, order issued by the PSC was not appealable as of right pursuant to MCL 462.26(1); MSA 22.45(1). Unpublished order of the Court of Appeals, decided August 14, 1991 (Docket No. 132581). Our Supreme Court remanded the case to this Court for consideration as on leave granted. This Court was directed to determine whether it has jurisdiction over the appeal by claim or otherwise. Sub nom *In re Complaint of the City of Marshall Against Consumers Power Company,* 440 Mich 914 (1992).

In Docket No. 156322, Consumers appeals an order entered on February 15, 1990, by the Calhoun Circuit Court enjoining it from connecting or providing electric service to Progressive during the pendency of the case before the PSC. This order is before this Court for the third time. Originally, this Court vacated the circuit court's order and dismissed the matter for lack of subject-matter jurisdiction. This Court's order stated that no statutory authority recognized equitable intervention in aid of PSC proceedings. Unpublished order of the Court of Appeals, decided July 2, 1990 (Docket No. 126502). Our Supreme Court remanded the case for consideration as on leave granted. 435 Mich 881 (1990). Thereafter, this Court dismissed the appeal as moot. This Court's order stated that the PSC's order of August 30, 1990, prohibiting Consumers from extending service to Progressive without first seeking to obtain a CPCN had the same effect as the preliminary injunction issued by the circuit court. Unpublished order of the Court of Appeals, decided August 14, 1992 (Docket No. 132884). Our Supreme Court remanded the case

for consideration as on leave granted. 440 Mich 914 (1992).

In Docket No. 156464, Consumers claims an appeal from an order entered on August 25, 1992, by the PSC in Case No. U-10006, granting the complaint filed by the city, ordering Consumers to discontinue providing electric service to the Marshall Training Center (MTC), and directing that Consumers not restore such service without first obtaining a CPCN.

This Court consolidated the cases for purposes of hearing and decision. We affirm in each case.

FACTS PERTINENT TO DOCKET NOS. 156321 AND 156322

Electric service in Marshall, Michigan, is provided by the city and Consumers. The city owns and operates the municipal electric utility. The utility provides electric service throughout the municipality to all but sixteen residents and businesses within the city limits. Consumers, a privately owned public utility, provides electric service to and conducts an electricity business in the city pursuant to a franchise granted to its predecessor, Jackson Light & Power Company. 1905 PA 264, popularly known as the Foote act, granted a franchise to electric utilities, including those in municipalities, to use the streets to conduct an electricity business and to transmit electric power. Consumers provides electric service to sixteen customers within the city. Ten of the sixteen customers receive electric service from both Consumers and the city. Consumers has only four exclusive customers within the City of Marshall.

In December 1989, the city learned that Consumers was planning to construct a line to extend service to Progressive Dynamics, an exclusive customer of the city. On December 26, 1989, the city

filed with the PSC a formal complaint alleging that Consumers was required to obtain a CPCN before constructing facilities for or providing electric service to Progressive. The city alleged that allowing Consumers to provide electric service to Progressive without first obtaining a CPCN would result in an unnecessary duplication of facilities, would not serve the public convenience, and would constitute an attempt by Consumers to unlawfully take a customer from the city's exclusive territory.

In January 1990, the city filed an action in the Calhoun Circuit Court seeking to enjoin Consumers from serving Progressive until the PSC acted on its complaint. In a preliminary injunction dated February 15, 1990, the circuit court, James Kingsley, J., enjoined Consumers from providing electric service to Progressive while the matter was pending before the PSC.

In the proceedings before the PSC, Consumers moved to dismiss the city's complaint, arguing that it was not required to obtain a CPCN pursuant to Act 69 because it had a Foote act franchise, which predated Act 69, to provide electric service to any customer located within the City of Marshall. Consumers relied on *Traverse City v Consumers Power Co,* 340 Mich 85; 64 NW2d 894 (1954), in which the Supreme Court held that a Foote act franchise constituted a vested contractual right that could not be impaired by abrogation of the Foote act by a subsequently adopted constitutional provision, Const 1908, art 8, § 28.

In response to the motion, the city argued that the provisions of Act 69 applied to activities undertaken by utilities after April 23, 1929, the effective date of the act. Moreover, assuming that Consumers had a valid Foote act franchise, application of Act 69 would not be retroactive because the city was not contending that Consumers should obtain

a CPCN to serve customers it had been serving before 1929. The city argued that *Traverse City, supra,* was not controlling because that case dealt with an attempt by the city to preclude the utility from constructing facilities in any part of the city that it or its predecessors in interest had not previously served and because it did not address the impact of or refer to Act 69. In that case the utility intended to serve a new customer.

On May 22, 1990, the PSC hearing officer issued a proposal for decision, finding that, in light of the holding in *Traverse City, supra,* a utility operating under a Foote act franchise has the right to extend service throughout a municipality and holding that Consumers was not required to obtain a CPCN before extending service to Progressive or to any other customer in the City of Marshall. The hearing officer recommended that the city's complaint be dismissed.

On August 30, 1990, the PSC issued its opinion and order. The PSC found that *Traverse City, supra,* was distinguishable because it dealt with an injunction that barred the utility from constructing facilities in any part of the city that it or its predecessors in interest had not previously served and because it dealt with the utility's desire to serve a new customer. The PSC concluded that, in light of these differences, *Traverse City, supra,* did not support dismissal of the city's complaint.

In addition, the PSC rejected Consumers' argument that Act 69 required a utility to obtain a CPCN only when the utility constructs facilities or provides service within the municipality for the first time. The PSC found that this interpretation could lead to a significant amount of waste. Act 69 was designed to preclude such unnecessary duplication. While the application of Act 69 does not limit a utility's ability to compete with the munici-

pality for new customers, it regulates the utility's ability to take existing customers from a municipality.

Given its resolution of the case, the PSC declined to reach the issues whether Consumers holds a valid Foote act franchise and whether Act 69 was intended to have prospective or retroactive effect. The PSC also declined to prohibit Consumers from extending service to any other customer located within the city limits.

The PSC ordered that Consumers' motion to dismiss was denied, and that the city's complaint was granted. Consumers was prohibited from extending service to Progressive without first seeking to obtain a CPCN. The PSC reserved jurisdiction and the authority to issue further orders as the facts and circumstances required.

FACTS PERTINENT TO DOCKET NO. 156464

In 1968, Consumers purchased the MTC and began erecting buildings on the property. The city provided electric service to the MTC and continued to do so after Consumers purchased the property. On October 18, 1991, Consumers bypassed the city's service and began providing its own service to the MTC. Consumers installed a generator and constructed service drops. The service provided by Consumers was identical to that provided by the city. On October 18, 1991 the city filed a complaint with the PSC challenging Consumers' attempt to provide service to the MTC without first obtaining a CPCN. On November 12, 1991, Consumers filed a motion to dismiss the complaint. Consumers denied that providing electric service to its own facility would constitute either serving a retail customer or an unnecessary duplication of facilities.

In an order entered on August 25, 1992, the PSC held that its decision in Case No. U-9561 was controlling. The PSC did not agree that any Foote act franchise held by Consumers obviated the need for Consumers to obtain a CPCN. The PSC found that compliance with the requirements of Act 69 was distinct from compliance with franchise requirements.

DISCUSSION OF DOCKET NOS. 156321 AND 156464

This Court dismissed Consumers' claim of appeal from the PSC's order of August 30, 1990, for lack of jurisdiction, because the order was not appealable as of right pursuant to MCL 462.26(1); MSA 22.45(1). In remanding the case for consideration as on leave granted, our Supreme Court directed this Court to consider whether this Court has jurisdiction over the appeal by leave or otherwise. The issue of jurisdiction applies to both Docket Nos. 156321 and 156464, because the same type of order was issued by the PSC in each case.

MCL 462.26(1); MSA 22.45(1) provides in part:

> Except as otherwise provided . . . in this section, any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within 30 days from the issuance and notice of that order file an appeal as of right in the court of appeals.

Although Consumers is a party in interest and is dissatisfied with the PSC's orders, it does not have an appeal of right from the orders of August 30, 1990, and August 25, 1992. The orders prohibit Consumers from extending electric service to Progressive and the MTC without first seeking to ob-

tain a CPCN pursuant to Act 69. That which is involved in these cases is a service, i.e., the provision of electricity. The PSC's orders do not fix the service and do not determine with finality whether Consumers can supply electricity to these customers. Consumers must apply for the CPCN, a hearing must be held, and the PSC must issue an order granting or denying the CPCN before the question whether Consumers may render service to the customers will be final (fixed). Any party aggrieved by an order granting or denying a CPCN would have an appeal of right to this Court pursuant to MCL 462.26(1); MSA 22.45(1).

In addition, we conclude that this Court has no jurisdiction over the appeal by leave. Pursuant to MCL 600.308(2)(d); MSA 27A.308(2)(d), our Supreme Court has determined that this Court may grant leave to appeal from "any other judgment or order appealable to the Court of Appeals by law or rule." MCR 7.203(B)(4). No party has pointed to any law or rule that allows a party aggrieved by an order of the type entered by the PSC on August 30, 1990, and August 25, 1992, to seek leave to appeal.

Notwithstanding our conclusion that we lack jurisdiction over the appeals by right or by leave, we consider the substance of the issue raised in Docket Nos. 156321 and 156464 pursuant to our Supreme Court's remand order.

Consumers argues that pursuant to 1905 PA 264, the Foote act, it has a franchise to provide electric service to customers within the City of Marshall. This franchise created contractual rights that were not destroyed by the abrogation of the Foote act by Const 1908, art 8, § 28. *Traverse City, supra* at 103; see also *Lansing v Michigan Power Co,* 183 Mich 400; 150 NW 250 (1914); *Village of Constantine v Michigan Gas & Electric Co,* 296

Mich 719; 296 NW 847 (1941). The franchise gives Consumers the right to provide electric service to any customer within the City of Marshall and imposes on it the duty to do so upon reasonable demand.

The language of Act 69, § 2, MCL 460.502; MSA 22.142, which speaks of a utility beginning construction of a plant or system, indicates that a utility that commences operation in a municipality after April 23, 1929, the effective date of the act, must first obtain a CPCN. Consumers asserts that because it was operating within the City of Marshall before 1929 pursuant to its Foote act franchise, it is not seeking to commence operations. Rather, it is seeking to extend service to a customer within the city limits. It does not propose to render service outside its present service area; therefore, no CPCN is needed. *Indiana & Michigan Electric Co v Miller,* 19 Mich App 16, 21; 172 NW2d 223 (1969).

The standard of review for PSC orders is narrow and well established. Pursuant to MCL 462.25; MSA 22.44, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm,* 389 Mich 624; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). The term "unlawful" has been defined as an erroneous interpretation or application of the law, and the term "unreasonable" has been defined as unsupported by the evidence. *Associated Truck Lines, Inc v Public Service Comm,* 377 Mich 259; 140 NW2d 515 (1966). Moreover, Const 1963, art 6, § 28 also applies, and provides that a final agency order

must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. See *Attorney General v Public Service Comm,* 165 Mich App 230, 235; 418 NW2d 660 (1987). A reviewing court gives due deference to the PSC's administrative expertise and is not to substitute its judgment for that of the PSC. *Yankoviak v Public Service Comm,* 349 Mich 641, 648; 85 NW2d 75 (1975); *Building Owners & Managers Ass'n of Metropolitan Detroit v Public Service Comm,* 131 Mich App 504, 517; 346 NW2d 581 (1984), aff'd 424 Mich 494; 383 NW2d 72 (1986).

Section 2 of Act 69, MCL 460.502; MSA 22.142, reads:

> No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension.

Consumers' argument that by virtue of its Foote act franchise it has the right and the duty to serve any customer in the franchise area is without merit. Consumers relies on *Indiana & Michigan, supra,* in which this Court held that the utility did not need a CPCN tc construct a wire across the defendant's farm, for the proposition that the existence of a Foote act franchise allows it to extend service to any customer in an area regardless of

whether that customer is already being served by another utility. This reliance is misplaced. That case does not indicate that the utility was attempting to provide service to an existing customer of another utility. *Indiana & Michigan, supra,* relied on the decisions of our Supreme Court in *Huron Portland Cement Co v Public Service Comm,* 351 Mich 255; 88 NW2d 492 (1958), and *Panhandle Eastern Pipe Line Co v Public Service Comm,* 328 Mich 650; 44 NW2d 324 (1951). Those cases made it clear that Act 69 was enacted to prevent duplication of facilities and the waste inherent in situations in which a public utility seeks to serve another utility's existing customer.

The cases recognizing the validity of a Foote act franchise, including *Traverse City, supra,* do not address the issue of the impact of subsequent regulation by the state pursuant to its police powers, as it did by the enactment of Act 69. The Foote act and Act 69 are not inherently inconsistent. The Act 69 CPCN requirement applies in specific circumstances, such as those in the instant cases, when duplication would result by virtue of extension of service by one utility to the existing customer of another utility.

Nothing in the Foote act grants a franchisee priority over other utilities in the area. *Public Service Comm v Cheboygan,* 324 Mich 309, 325; 37 NW2d 116 (1949). Moreover, Consumers' argument that the failure to refer to extension of service at the beginning of MCL 460.502; MSA 22.142 ignores the fact that at the end of the single sentence encompassing this section there is language that clearly provides that no extension of service can occur without first obtaining a CPCN. The language of the statute supports the position taken by the city rather than that taken by Consumers.

Assuming arguendo that Consumers has a valid

Foote act franchise, the fact that the franchise predates Act 69 does not make the application of Act 69 a retroactive application. The PSC's orders do not apply the requirements of Act 69 to service extended by Consumers to any customer obtained before 1929. Consumers does not argue that in the absence of a valid Foote act franchise it would not be required to seek a CPCN to extend service either to Progressive or to the MTC. Under the PSC's analysis, Act 69 applies regardless whether Consumers has a valid Foote act franchise.

Consumers has not met its burden of showing that the PSC's orders of August 30, 1990, and August 25, 1992, were unlawful or unreasonable.

We note that, ultimately, Consumers applied for a CPCN to serve Progressive. In an order entered on May 6, 1992, by the PSC in Case No. U-10005, the application was dismissed. Consumers did not appeal that order. Presumably, Consumers is proceeding with the appeal in Docket No. 156321 on the theory that because of the existence of its Foote act franchise, it was never actually required to apply for the CPCN. Nothing indicates that Consumers has applied for a CPCN to serve the MTC.

DISCUSSION OF DOCKET NO. 156322

Consumers argues that the circuit court lacked jurisdiction to issue an injunction in this case. The PSC has exclusive jurisdiction to determine which utility may render electric service to a customer. MCL 460.502; MSA 22.142. Because the PSC has exclusive jurisdiction, the circuit court lacked equity jurisdiction to enter a preliminary injunction. *Fletcher Paper Co v Detroit & Mackinac R Co,* 175 Mich 234; 141 NW 613 (1913). The city's reliance on *Consumers Power Co v Public Service Comm,*

415 Mich 134; 327 NW2d 875 (1982), for the proposition that the circuit court had jurisdiction to enter a preliminary injunction in this case, is misplaced. In that case, the PSC had acted and found that Consumers was entitled to increased rates, but delayed entering a final order. The circuit court entered an injunction allowing Consumers to post a bond and collect the increased revenues subject to refund following final PSC action and appellate review. The circuit court action was upheld. In this case, the PSC had not acted before injunctive relief was sought, and the city did not post a bond. Consumers asserts that *Consumers Power, supra,* is distinguishable and does not support the circuit court's exercise of its powers of equity under the circumstances of this case.

Initially, we note that the circuit court dissolved the preliminary injunction at issue here on July 18, 1990. Moreover, in its order of August 30, 1990, the PSC granted the city's formal complaint and prohibited Consumers from extending electric service to Progressive without first seeking to obtain a CPCN. This clause in the PSC's order had the same effect as the preliminary injunction issued by the circuit court. Resolution of this issue will make no practical difference in this matter. Nevertheless, by virtue of our Supreme Court's order remanding the case, this Court is obligated to consider the merits of the issue.

The power to regulate electric service is vested exclusively in the PSC. MCL 460.502; MSA 22.142. Circuit courts are courts of equity, and have jurisdiction in all matters not prohibited by law. Const 1963, art 6, § 13. MCL 460.502; MSA 22.142 does not deprive the circuit courts of equity jurisdiction. In *Consumers Power, supra,* our Supreme Court held that the statutes delineating the powers of the PSC did not deprive the circuit courts of gen-

eral equity jurisdiction and that if administrative procedures inadequately protected the substantive rights of a party, the circuit courts could exercise equitable powers to avoid irreparable harm. See also *White Lake Improvement Ass'n v Whitehall,* 22 Mich App 262; 177 NW2d 473 (1970). In the instant case the circuit court acted to prevent irreparable harm, specifically the taking of a large electric customer, to the city. The city had no other adequate means of preventing this harm.

Consumers' argument that *Consumers Power* is distinguishable because in that case the PSC had made a final decision, but simply had not issued a final order, is not persuasive. Here, the circuit court did not attempt to determine whether Consumers was required to obtain a CPCN before providing electric service to Progressive. Rather, the circuit court issued a preliminary injunction to maintain the status quo while the city's complaint was pending before the PSC. The question whether the circuit court had equity jurisdiction in this case is more properly analyzed under *Consumers Power,* than under *Fletcher Paper.* In this case, and under these facts, the circuit court had jurisdiction to grant equitable relief to preserve the status quo while the city's complaint was pending before the PSC.

Affirmed.

LORENZO v NOEL

Docket No. 151948. Submitted February 9, 1994, at Detroit. Decided September 7, 1994, at 9:10 A.M.

Linda Lorenzo brought an action in the Macomb Circuit Court against Lurlene Noel, claiming that the defendant sold her a defective home. The plaintiff alleged fraud and misrepresentation by nondisclosure and fraud and mutual mistake and sought either rescission or damages. The court, George C. Steeh, III, J., granted summary disposition for the defendant, finding no questions of material fact. The plaintiff appealed.

The Court of Appeals *held:*

1. The suppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent to a false representation and will support an action in fraud.

2. In the context of a real estate action based on fraud, not negligence, an unreasonable danger need not be shown in order to show liability.

3. The "as is" clause in the purchase agreement did not bar the plaintiff's action. "As is" clauses allocate the risk of loss arising from conditions unknown to the parties. Therefore, the plaintiff's claim of mutual mistake is barred.

4. The defendant's claim that she knew nothing of the alleged defect created a question of fact. The same is true of conflicting evidence presented by two of the defendant's experts. The trial court erred in granting the defendant's motion for summary disposition regarding the claim of misrepresentation by nondisclosure.

Reversed and remanded.

REFERENCES

Am Jur 2d, Fraud and Deceit §§ 144, 146, 158, 273; Vendor and Purchaser § 329.

Construction and effect of provision in contract for sale of realty by which purchaser agrees to take property "as is" or in its existing condition. 8 ALR5th 312.

Fraud predicated on vendor's misrepresentation or concealment of danger or possibility of flooding or other unfavorable water conditions. 90 ALR3d 568.

1. FRAUD — "SILENT FRAUD."

The "silent-fraud" doctrine provides that a fraud arising from the suppression of the truth is as prejudicial as fraud that springs from the assertion of a falsehood; the suppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent to a false representation and will support an action in fraud.

2. VENDOR AND PURCHASER — DEFECTS IN PROPERTY — LIABILITY — DUTY TO WARN.

A vendor of land who surrenders title, possession, and control of real property shifts all responsibility for the land's condition to the vendee and is not liable for any harm resulting from defects existing at the time of sale except where there is a failure to disclose to the vendee any concealed condition known to the vendor that involves an unreasonable danger or there is active concealment of such a condition; the vendor is also liable to those outside the land after the sale for harm resulting from a dangerous condition on the land until the vendee discovers or should have discovered the condition and has a reasonable opportunity to take precautions; under either exception, knowledge of a defect by the vendee relieves the vendor of any duty or liability.

3. VENDOR AND PURCHASER — REALTY — UNREASONABLY DANGEROUS DEFECTS.

A buyer of realty need not show that a defect was unreasonably dangerous in order to show liability in a real estate action between the buyer and seller based on fraud, not negligence.

4. SALES — "AS IS" CONTRACTS — CONCEALED DEFECTS.

An "as is" clause in a purchase agreement allocates the risk of loss arising from conditions unknown to the parties; the clause transfers the risk of loss where the defect reasonably should have been discovered upon inspection, but was not; the clause does not transfer the risk of loss where the seller makes fraudulent representations before the purchaser signs a binding agreement.

UAW-Chrysler Legal Services Plan (by *Donald D. Beller* and *Barbara G. Robb*), for the plaintiff.

Glime Daoust, P.C. (by *Donald G. Miller*), for the defendant.

Before: GRIBBS, P.J., and HOOD and H. E. BROWN,* JJ.

PER CURIAM. This case involves the sale of an allegedly defective home. Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We reverse.

Plaintiff bought defendant's home in 1988 without having it inspected. The basement started leaking in 1989. In 1991, she had the paneling removed from the basement walls and discovered that the walls were bowed-in and cracked. She sued.

Plaintiff's amended complaint alleged fraud and misrepresentation by nondisclosure and, in a separate count, fraud and mutual mistake. She prayed for either rescission or damages. Plaintiff argues that the trial court erred in finding that there were no questions of material fact and that defendant was entitled to judgment as a matter of law.[1] We agree in part.

The beginnings of the "silent-fraud" doctrine alleged by plaintiff have been traced as far back as 1886: " 'A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud.' " *Williams v Benson,* 3 Mich App 9, 18-19; 141 NW2d 650 (1966), quoting *Tompkins v Hollister,* 60 Mich 470, 483; 27 NW 651 (1886). Thus, "the suppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

[1] Plaintiff has abandoned any claims relating to the allegedly defective condition of the attic.

to a false representation and will support an action in fraud." *Williams* at 19.

In *Williams,* the sellers failed to inform the buyers that the premises had once been infested by termites. *Id.* at 13. When the sellers themselves purchased the motel, four years earlier, they had been informed of the infestation by the previous owner. *Id.* at 12-13. It was this previous owner who had discovered and assertedly exterminated the termites. *Id.* This Court held that the trial court properly granted summary disposition to the buyers regarding the question of liability premised on the "silent-fraud" doctrine; the Supreme Court reversed and remanded for trial in 378 Mich 721 (1966).

In *Ball v Sweeney,* 354 Mich 616; 93 NW2d 298 (1958), the sellers of a resort neglected to inform the buyers that they had been having problems with the Department of Health because the sewer system had been installed improperly. Although the Court did not discuss the "silent-fraud" doctrine, it noted that the plaintiffs' complaint alleged fraud on the basis of the sellers' "failure to inform" the buyers of the sewer problem. *Id.* at 618. The Supreme Court affirmed the trial court's decision to permit rescission of the contract.

A similar doctrine has been applied in the negligence area in the context of determining whether the former owner of land owes a duty to subvendees injured by a dangerous condition (contaminated water) that the seller failed to disclose to the original buyer. See *Christy v Prestige Builders, Inc,* 415 Mich 684, 693-694; 329 NW2d 748 (1982). The *Christy* Court noted that, at "common law, a land vendor who surrenders title, possession, and control of property shifts all responsibility for the land's condition to the purchaser. Caveat emptor prevails in land sales, and the vendor, with two

exceptions, is not liable for any harm due to defects existing at the time of sale." *Id.* at 694. "The first exception is the vendor's duty to disclose to the purchaser any concealed condition known to him which involves an unreasonable danger." *Id.* "Failure to make such a disclosure or efforts to actively conceal a dangerous condition render the vendor liable for resulting injuries." *Id.* "The second exception is that a vendor is liable to those outside the land for a dangerous condition on the land after the sale until the purchaser discovers or should have discovered it." *Id.* "Once the purchaser discovers the defect and has had a reasonable opportunity to take precautions, third parties such as subvendees have no further recourse against the vendor. Under both exceptions, then, knowledge of the defect on the part of the purchaser relieves the vendor of any duty or liability." *Id.* at 694-695.

This language has been relied upon in real estate cases that involve neither negligence claims nor third-party buyers. See, e.g., *Clemens v Lesnek,* 200 Mich App 456, 459; 505 NW2d 283 (1993); *Conahan v Fisher,* 186 Mich App 48; 463 NW2d 118 (1990); *Farm Bureau Mutual Ins Co v Wood,* 165 Mich App 9, 16; 418 NW2d 408 (1987); *Stewart v Isbell,* 155 Mich App 65, 75; 399 NW2d 440 (1986).

Wood and *Stewart* involved arguably dangerous conditions: an improperly installed wood-burning stove and an improperly capped artesian well. *Conahan* involved termites but was decided on other grounds. However, *Clemens* involved improper roof repairs and a defective septic system. The *Clemens* Court, without discussion, held that a buyer need not establish that a defect was unreasonably dangerous in order to show liability. *Id.* at 460-461. We agree with *Clemens* that, in the con-

text of a real estate action between a buyer and a seller based on fraud, not negligence, an unreasonable danger need not be shown.[2]

Defendant argues, however, that the "as is" clause in the purchase agreement bars plaintiff's action in this case. We disagree.

"As is" clauses allocate the risk of loss arising from conditions unknown to the parties. See *Lenawee Co Bd of Health v Messerly,* 417 Mich 17, 32-33; 331 NW2d 203 (1982). Thus, plaintiff's mutual mistake claim is therefore barred. "As is" clauses also transfer the risk of loss where the defect should have reasonably been discovered upon inspection, but was not. See *Conahan, supra* at 49-50. They do not, however, transfer the risk of loss where "a seller makes fraudulent representations before a purchaser signs a binding agreement." *Clemens, supra* at 460. That is, at least arguably, what happened here.

Plaintiff submitted the affidavit of Leon Mancour, a licensed contractor, who indicated that he inspected plaintiff's leaky basement after the wall paneling was removed.[3] He found that the stud wall onto which the paneling was nailed had been built two inches away from the wall to accommodate the inward bowing of the basement walls. He found large cracks in the walls behind the paneling that had been filled and painted over before the installation of the stud wall. Some of the studs had been shimmed to accommodate the bowing of the walls. Mr. Mancour further found evidence that the walls had continued to bow since the

[2] We note, however, that the bowing of the basement walls involved in this case could result in the collapse of the structure and therefore is, at least arguably, an unreasonably dangerous condition.

[3] Contrary to defendant's assertions, signed and notarized originals of affidavits by Leon Mancour and Theodore Dziurman submitted by plaintiff were filed with the trial court before the hearing regarding defendant's motion.

installation of the paneling, including separation of the caulk and paint previously applied, damage to the studs, and evidence of movement in the furring strips to which the paneling was nailed.

Theodore Dziurman, a civil engineer, also inspected the house after the paneling was removed. He found severe cracks and bowing in the basement walls and considerable evidence of long-term water leakage. He also observed evidence that the cracks had been caulked and painted over before the paneling was installed. He concluded that "[t]he wall failure had existed for at least thirty (30) years" and that the "basement walls [were] structurally unsound and should be repaired as soon as possible."

Defendant's claim that she knew nothing of the defective condition of the basement walls, rather than entitling her to summary disposition, creates a question of fact. The same is true of conflicting evidence given by two of defendant's experts. One indicated that there were cracks and bowing above grade that were obvious from outside the house. The other indicated that the home looked good and fully square from the outside.

The trial court erred in granting defendant's motion for summary disposition regarding the claim of misrepresentation by nondisclosure.[4]

Reversed and remanded. We do not retain jurisdiction.

GRIBBS, P.J., concurred in the result only.

[4] Counsel acknowledged at oral argument that some exhibits presented to this Court were not a part of the record below. Such documents were not considered. MCR 7.210(A)(1).

In re HILL

Docket Nos. 168982, 168983. Submitted July 14, 1994, at Detroit. Decided September 7, 1994, at 9:15 A.M. Leave to appeal sought.

The Department of Social Services initiated child protective proceedings in the Oakland County Probate Court for the benefit of minors Ryan Hill and Christina Frederick and her siblings. The Attorney General appeared on behalf of the department. Subsequently, in both proceedings, the Oakland County Prosecutor petitioned the court for termination of parental rights. The court, Barry M. Grant, J., ruled that the prosecutor lacked standing to bring the petitions. The Oakland Circuit Court, Gene Schelz, J., affirmed the probate court ruling. The prosecutor appealed by leave granted in each case, and the appeals were consolidated.

The Court of Appeals *held:*

The prosecutor lacked standing to appear in the proceedings below. The Probate Code allows a prosecutor to appear in a child protective proceeding only where the probate court requests the prosecutor's appearance, where the Department of Social Services requests the prosecutor's appearance, or where the prosecutor files the original petition for termination of parental rights. None of these situations occurred in the proceedings below.

Affirmed.

PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — PROSECUTING ATTORNEY — STANDING.

A prosecutor may not appear in a child protective proceeding unless the probate court or the Department of Social Services has requested the appearance of the prosecutor or the prosecutor has filed the original petition for termination of parental rights (MCL 712A.17[4], 712A.17[5], 712A.19b[1]; MSA 27.3178[598.17][4], 27.3178[598.17][5], 27.3178[598.19b][1]).

Richard Thompson, Prosecuting Attorney, *Rich-*

REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 37.

See ALR Index under Children.

ard H. Browne, Acting Chief, Appellate Division, and *Anica Letica,* Assistant Prosecuting Attorney, for Oakland County Prosecuting Attorney.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Bernard Rosner, Judy A. Hartsfield,* and *Howard G. Grodman,* Assistant Attorneys General, for Department of Social Services.

Otlewski & Maloney, P.C. (by *Douglas Otlewski*), for Stephanie Hill.

Baker & Chadwick (by *Paul N. Baker*), for Kevin Hill.

Andrew L. Finn, for Carol Frederick.

Karen Gullberg Cook, for Frederick children.

Amicus Curiae:

Anthony M. Damiano, Jeffrey R. Fink, and *Scott K. Hanson,* for Prosecuting Attorneys Association of Michigan.

Before: NEFF, P.J., and MCDONALD and M. WARSHAWSKY,* JJ.

PER CURIAM. The prosecutor appeals by leave granted from an October 13, 1993, circuit court order affirming a probate court ruling that the prosecutor had no independent standing in the instant child protective proceedings. We affirm.

An analysis of the facts underlying the probate court's assumption of jurisdiction in both matters is unnecessary for the determination of the issue raised on appeal. The question to be decided is one

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

of law—whether the prosecutor has independent standing to proceed in child protective proceedings when the Department of Social Services requests and obtains representation from the Attorney General's office.

We find the prosecutor, under certain circumstances, has standing to petition the probate court for the termination of a parent's parental rights and to appear at all child protective proceedings regardless of the Department of Social Services' position and representation by the Attorney General's office. Nonetheless, for the reasons set forth below, we find no error in the circuit court's affirmance of the probate court's ruling that the prosecutor had no standing with regard to the instant matters, in part because the prosecutor did not properly petition the court for termination.

Child protective proceedings are governed by the Juveniles and Juvenile Division Chapter of the Probate Code, MCL 712A.1 *et seq.*; MSA 27.3178(598.1) *et seq.,* and subchapter 5.900 of the Michigan Court Rules. The code affords the prosecutor standing to appear in child protective proceedings under three circumstances. MCL 712A.17(4); MSA 27.3178(598.17)(4) provides for the prosecutor's appearance at all hearings upon the request of the court, see also MCR 5.914(A); MCL 712A.17(5); MSA 27.3178(598.17)(5) provides for the prosecutor's appearance on behalf of the Department of Social Services when requested by the department; and MCL 712A.19b(1); MSA 27.3178(598.19b)(1) permits the prosecutor to file a petition for termination of parental rights after a child has remained in foster care or the custody of a guardian for a specified duration.[1] See also MCR

[1] The prosecutor suggests MCL 49.153; MSA 5.751 also provides the prosecutor standing to appear in child protective proceedings. We disagree. MCL 49.53; MSA 5.751 is a broad provision outlining the

5.974(A)(1), which authorizes a prosecutor to file original, amended, and supplemental petitions for termination.

In each of the underlying matters, the prosecutor failed to obtain standing pursuant to any of these provisions. Although it appears the prosecutor in each case could have filed an original petition seeking termination of parental rights independent of the department's actions, no such petitions were filed. In both cases, the original petitions were filed by the Department of Social Services. Although the prosecutor filed an "amended petition" in the Hill case and attempted to file a "supplemental petition" in the Frederick case, these actions did not act to confer standing on the prosecutor. The prosecutor could not amend or supplement another party's petition. Until the prosecutor filed his own petition for termination as set forth in MCL 712A.19b(1); MSA 27.3178(598.19b)(1), absent a finding that the probate court requested the prosecutor's appearance pursuant to MCL 712A.17(4); MSA 27.3178(598.17)(4), the prosecutor had no standing independent of his representation of the department of social services pursuant to MCL 712A.17(5); MSA 27.3178(598.17)(5). Because the prosecutor unequivocally denies appearing on behalf of the department, the only remaining vehicle through which the prosecutor could have obtained standing in either matter was by invitation of the court, MCL 712A.19b(1); MSA 27.3178(598.19b)(1). The prosecutor suggests he received such invitation through receipt of notices of the various hearings. However, as noted by the probate court judge, the

duties of a prosecutor. Even if the provision was interpreted as addressing a prosecutor's standing, the more specific statutory provisions of the Probate Code would control. *In re PSC Determination, No 1,* 204 Mich App 344; 514 NW2d 535 (1994).

prosecutor was notified of the proceedings because the prosecutor had specifically requested to receive such notice. We find receipt of notice of hearings insufficient to constitute a formal request by the court to appear on behalf of the people in child protective proceedings pursuant to the code.

Thus, although we conclude a prosecutor may have independent standing to appear at all stages of child protective proceedings, in these cases the prosecutor failed to obtain such standing.

Affirmed.

PEOPLE v EDWARDS

Docket No. 150752. Submitted August 11, 1994, at Lansing. Decided September 7, 1994, at 9:20 A.M. Leave to appeal sought.

Sharon Edwards was convicted by a jury in the Genesee Circuit Court, Judith A. Fullerton, J., of second-degree child abuse and was sentenced to two to four years in prison. The defendant appealed.

The Court of Appeals *held:*

The trial court, in giving a jury instruction regarding recklessness, erred in using the defendant's conduct itself as an example of a reckless act. The use of such an example made a determination regarding an element of the charged offense of first-degree child abuse, and removed the element of recklessness from the jury's consideration. The failure to permit the jury to make the critical determination regarding whether the defendant's conduct constituted a reckless act requires reversal and a new trial.

Reversed and remanded.

1. TRIAL — JURY INSTRUCTIONS — EXAMPLES.

It is error for a trial court in instructing a jury regarding the elements of second-degree child abuse to remove the element of recklessness from the jury's consideration by using the defendant's conduct itself as an example of a reckless act where the only contested issue in the case is the element of recklessness (MCL 750.136b[3]; MSA 28.331[2][3]).

2. TRIAL — JURY INSTRUCTIONS — EXAMPLES.

A trial court instructing a jury may give an example in order to clarify the meaning of a complex legal term but must indicate clearly that the example is only an example and that the jury must determine guilt or innocence by following the jury instructions as a whole.

REFERENCES

Am Jur 2d, Evidence § 865; Trial §§ 1135, 1137, 1245, 1448.

When is hearsay statement an "excited utterance" admissible under Rule 803 (2) of the Federal Rules of Evidence. 48 ALR Fed 451.

3. EVIDENCE — HEARSAY — EXCITED UTTERANCES.

The admissibility of a statement under the excited utterance exception to the hearsay rule is governed by a two-step test for determining whether the declarant had time to contrive or misrepresent: whether the interval between the event and the statement was long enough to make fabrication possible and whether the declarant's emotional state at the time permitted fabrication (MRE 803[2]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Arthur A. Busch,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Research, Training, and Appeals, and *Morris R. Kent,* Assistant Prosecuting Attorney, for the people.

Roger A. Lange, for the defendant.

Before: FITZGERALD, P.J., and BRENNAN and J. M. BATZER,* JJ.

PER CURIAM. Following a jury trial, defendant was convicted of second-degree child abuse, MCL 750.136b(3); MSA 28.331(2)(3), and was sentenced to a prison term of two to four years. Defendant appeals as of right. We reverse and remand for a new trial.

Defendant was charged with first-degree child abuse after her daughter received second-degree burns over thirty-three percent of her body as a result of contact with boiling hot water. Although there is a dispute over the manner in which the child came into contact with the water, there is no dispute that defendant left a bucket of boiling hot water on a floor in a location easily accessible to her children.[1] The prosecution's theory was that defendant threw the water at the child. The de-

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

[1] The hot water heater in defendant's home was broken, and defendant had to boil water to use for bathing and cleaning.

fense theory was that defendant, who is deaf, was drawing a bath for the children and did not see how the child came into contact with the water.

In instructing the jury on the elements of second-degree child abuse, the trial court stated:

> Second, that the defendant did some reckless act. In this act, for example, leaving a large pail of scalding hot water in a bucket on the floor of a room easily accessible to small children.

Although the defendant did not object to this instruction, the instruction regarding recklessness was error that requires reversal. Defendant admitted leaving the bucket of water on the floor. The trial court told the jury in this instruction that it was reckless to leave a bucket of hot water on the floor in the presence of children. The instruction removed the element of recklessness from the jury's consideration. The failure to permit the jury to make the critical determination regarding whether defendant's conduct constituted a reckless act requires reversal and a new trial. See, e.g., *People v Allensworth,* 401 Mich 67, 71; 257 NW2d 81 (1977).

The prosecution argues that the trial court merely gave an example of a reckless act in an effort to "clarify the meaning of a complex legal term." *People v Shepherd,* 63 Mich App 316; 234 NW2d 502 (1975). While acknowledging that examples may be useful for this purpose, however, the *Shepherd* Court cautioned:

> [T]he jury is likely to give undue weight to examples, since they are easier to comprehend, and it may simply compare the defendant's conduct with the example. To prevent these adverse effects, the trial judge must clearly indicate that the examples are *only* examples, and that the jury

> must determine guilt or innocence by following the jury instructions as a whole. [*Id.* at 322.]

In this case, the trial court used defendant's conduct itself as an example of a reckless act. The court exceeded the danger contemplated in *Shepherd* that the jury might simply compare the defendant's conduct with the example. Rather, the court's "example" made a determination regarding one of the elements of the charged offense.

The error cannot be deemed harmless in this case. The jury's rejection of the charge of first-degree child abuse reveals that the jury did not find beyond a reasonable doubt that defendant threw the water at the child. Given defendant's admission that she left the bucket of water on the floor, the only contested issue was whether placing a bucket of hot water on the floor constitutes a reckless act.

For purposes of avoiding possible error on retrial, we turn to defendant's allegation that the trial court improperly excluded as hearsay the victim's statements made to others. We first note that defendant failed to characterize the statements at trial as excited utterances, and it is unclear from the record whether the trial court ruled with regard to the question whether the statements were excited utterances. On retrial, should defendant attempt to admit the statements as excited utterances under MRE 803(2), admissibility is governed by a two-step test for determining whether the declarant had time to contrive or misrepresent; that is, whether the interval between the event and the statement was long enough to make fabrication possible and whether the declarant's emotional state at the time permitted it. *People v Carson,* 87 Mich App 163, 168; 274 NW2d 3 (1978).

Reversed and remanded for a new trial.

MASSEY v CITY OF FERNDALE

Docket No. 137034. Submitted February 2, 1993, at Detroit. Decided September 19, 1994, at 9:00 A.M.

Douglas Massey and Darryl Johnson brought an action in the Oakland Circuit Court against the City of Ferndale, the Ferndale Police Department, and others, alleging false arrest or imprisonment, intentional infliction of emotional distress, slander, false light invasion of privacy, and violations of constitutional rights, after they allegedly were detained wrongfully by an off-duty Ferndale police officer who also confiscated certain items from the plaintiffs, including plaintiff Massey's knife. After the plaintiffs commenced their action, Massey was charged in the Oakland Circuit Court with carrying a concealed weapon as a result of the incident. The plaintiffs then asserted the Fifth Amendment privilege against self-incrimination and refused to participate in any discovery in their civil action. The criminal action against Massey was dismissed by the trial court, Francis X. O'Brien, J., on the basis that the prosecution was untimely. The prosecution appealed that decision to the Court of Appeals. An order staying the proceedings in the civil action for six months was entered by the trial court, Jessica R. Cooper, J., at the plaintiffs' request. Two stipulated orders continuing the stay for one year (or six months each) were entered on January 30, 1990, and August 1, 1990. At a pretrial conference on August 21, 1990, the court indicated that it would not allow any further stays. The court then entered a calendar conference order setting discovery cutoff and mediation for December 1990 and trial for February 4, 1991. The Court of Appeals, MURPHY, P.J., and MACKENZIE and GRIFFIN, JJ., denied the plaintiffs' application for leave to appeal the conference order in an order entered on October 15, 1990 (Docket No. 132332). The plaintiffs continued to refuse to participate in discovery because the prosecution's appeal in the criminal case was still pending. The trial court in the civil action entered an order on September 26, 1990, compelling

REFERENCES

Am Jur 2d, Depositions and Discovery §§ 373, 374; Witnesses §§ 80, 87.

See ALR Index under Discovery; Self-Incrimination.

answers to the defendants' interrogatories. On October 17, 1990, the trial court, finding that the plaintiffs had failed to obey its discovery order, entered an order in the civil action dismissing the case without prejudice and assessing costs against the plaintiffs payable only in the event that they refiled their complaint. The Court of Appeals then affirmed the dismissal of the criminal charge against Massey. *People v Massey,* unpublished opinion per curiam, decided December 20, 1990 (Docket No. 118486). The Supreme Court denied the prosecution's application for leave to appeal that decision. 437 Mich 974 (1991). The plaintiffs appealed from the order granting dismissal for failure to obey the discovery order.

The Court of Appeals *held:*

1. The trial court's decision to dismiss without prejudice was not an abuse of discretion, and that part of the court's order should be affirmed. The court protected the plaintiffs' Fifth Amendment rights by issuing stays during the pendency of the criminal proceedings. Only after the criminal proceedings were concluded at the trial court level did the trial court call a halt to further delays and refuse to permit stays in the civil case while the criminal proceedings were appealed. The court was entitled to impose sanctions because the plaintiffs obviously refused to obey a proper discovery order, and the sanction of dismissal without prejudice was reasonable because it left neither party disadvantaged.

2. The plaintiffs' argument that possible operation of the statute of limitation might prejudice their ability to refile their civil complaint if the criminal proceedings became lengthy is moot because the Court of Appeals affirmed the dismissal of the criminal charge and the Supreme Court denied leave to appeal that decision.

3. The trial court erred in assessing costs against the plaintiffs in the event they refiled their complaint, and that part of the order must be reversed. The court's actions operated as a tax upon the plaintiffs' exercise of Fifth Amendment rights and a deterrent against refiling the complaint and effectively made the dismissal order with prejudice.

Affirmed in part and reversed in part.

WAHLS, P.J., concurring in part and dissenting in part, stated that the trial court's order should be reversed because of the provision imposing costs upon the plaintiffs and because the trial court abused its discretion in arbitrarily ordering the case to proceed, regardless of the parties' stipulation to stay the proceedings, simply because it was the oldest case on the court's docket.

PRETRIAL PROCEDURE — DISCOVERY — SANCTIONS — APPEAL.

A trial court may impose sanctions that it deems just where a party fails to obey an order to provide or permit discovery; however, the court may not impose substantial penalties because a witness elects to exercise the Fifth Amendment privilege against self-incrimination; the court's decision will not be overturned on appeal absent an abuse of discretion (US Const, Am V ; MCR 2.313[B]).

Ernest L. Jarrett, P.C. (by *Ernest L. Jarrett*), for the plaintiffs.

Cummings, McClorey, Davis & Acho, P.C. (by *Marcia L. Howe*), for the defendants.

Before: WAHLS, P.J., and MICHAEL J. KELLY and CONNOR, JJ.

MICHAEL J. KELLY, J. Plaintiffs appeal as of right a circuit court order granting defendants' motion to dismiss for failure to obey a discovery order. We affirm in part and reverse in part.

This action arises out of an incident that occurred on January 14, 1988, at Comerica Bank in Ferndale, Michigan. Plaintiffs claim that they were detained wrongfully by off-duty Ferndale police officer Paul Gheldorf after cashing their paychecks. Although certain items were confiscated, including plaintiff Massey's knife, they were allowed to leave and at that time were not charged with any crime.

On June 22, 1988, plaintiffs commenced an action against defendants alleging false arrest or imprisonment, intentional infliction of emotional distress, slander, false light invasion of privacy, and violations of constitutional rights.[1] Plaintiffs claimed the search was racially motivated. Notice

[1] Plaintiffs also named Comerica Bank and Lawrence Wolf Properties as defendants. A stipulation to dismiss those parties was entered after oral argument on March 1, 1993.

of the lawsuit was served on Officer Gheldorf at the end of September or beginning of October 1988. On October 12, 1988, Gheldorf prepared a police report regarding the January incident at the bank. A warrant was issued against plaintiff Massey, who ultimately was charged with carrying a concealed weapon. No charges were filed against plaintiff Johnson.

Both plaintiffs subsequently asserted the Fifth Amendment privilege against self-incrimination and thereby refused to participate in any discovery in the civil action.[2] On May 5, 1989, the criminal charges against plaintiff Massey were dismissed on the basis that the prosecution was untimely. The prosecution appealed the dismissal to this Court.

On July 24, 1989, an order staying the proceedings in the civil action for six months was entered by the trial court at plaintiffs' request. Two stipulated orders continuing the stay for one year (or six months each) were entered on January 30, 1990, and August 1, 1990. At a pretrial conference on August 21, 1990, the court indicated that it would not allow any further stays. The court entered a calendar conference order setting discovery cutoff and mediation for December 1990 and trial for February 4, 1991. This Court, MURPHY, P.J., and MACKENZIE and GRIFFIN, JJ., denied plaintiffs' application for leave to appeal the conference order in an order entered on October 15, 1990 (Docket No. 132332).

[2] The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions, US Const, Am V; Const 1963, art 1, § 17, and protects an accused from being compelled to testify against himself or provide evidence of a testimonial or communicative nature. *People v Burhans,* 166 Mich App 758, 761-762; 421 NW2d 285 (1988). The constitutional privilege against self-incrimination applies to evidence in a civil proceeding that might subject the witness to criminal prosecution. *Malloy v Hogan,* 378 US 1, 11; 84 S Ct 1489; 12 L Ed 2d 653 (1964); *Paramount Pictures Corp v Miskinis,* 418 Mich 708; 344 NW2d 788 (1984).

Plaintiffs subsequently refused to participate in discovery because the prosecution's appeal in the criminal case was pending. An order compelling answers to defendants' interrogatories was entered on September 26, 1990. Following a hearing regarding defendants' motion to dismiss with prejudice on October 17, 1990,[3] the trial court entered an order dismissing the case without prejudice and assessing costs payable only in the event that the plaintiffs refiled their complaint.

This Court then affirmed the dismissal of the criminal charge against plaintiff Massey. *People v Massey,* unpublished opinion per curiam, decided December 20, 1990 (Docket No. 118486). The Supreme Court denied the prosecution's application for leave to appeal on April 16, 1991. 437 Mich 974 (1991).

A trial court is authorized to impose sanctions as it deems just where a party fails to obey an order to provide or permit discovery. MCR 2.313(B). However, the court may not impose substantial penalties because a witness elects to exercise his Fifth Amendment privilege against self-incrimination. *Lefkowitz v Cunningham,* 431 US 801, 805; 97 S Ct 2132; 53 L Ed 2d 1 (1977). The court's decision will not be overturned on appeal absent an abuse of discretion. *Barlow v John Crane-Houdaille, Inc,* 191 Mich App 244, 251; 477 NW2d 133 (1991).

Here, the trial court's decision to dismiss without prejudice did not constitute an abuse of discretion. The court protected plaintiffs' Fifth Amendment rights by issuing stays during the pendency of the criminal proceedings. Only after the crimi-

[3] Before filing this motion, plaintiffs filed a motion for voluntary dismissal without prejudice on October 5, 1990, and set the hearing for October 24, 1990. This motion was not addressed at the hearing on October 17, 1990.

nal proceedings were concluded at the trial level did the court call a halt to further delays and refuse to permit stays in the civil case while the criminal proceedings were appealed, whether as of right or by application for leave by the prosecutor. Because plaintiffs obviously refused to obey a proper discovery order, the court was entitled to impose sanctions pursuant to MCR 2.313(B). The sanction of dismissal without prejudice was reasonable because it left neither party disadvantaged. See *McKelvie v Mount Clemens,* 193 Mich App 81, 86; 483 NW2d 442 (1992); *Bruce v Grace Hosp,* 96 Mich App 627, 631-632; 293 NW2d 654 (1980).

Plaintiffs' argument that possible operation of the statute of limitation might prejudice their ability to refile their complaint if criminal proceedings became lengthy is moot because this Court affirmed the dismissal of the criminal charge on December 20, 1990, and the Supreme Court denied leave to appeal four months later.

Our conclusion that the trial court did not abuse its discretion rests on the fact that dismissal was without prejudice. Another part of the dismissal order, however, assessed costs against plaintiffs in the event they refiled their complaint. This part of the order essentially operated as a tax upon the exercise of plaintiffs' Fifth Amendment rights and, even after their statute-of-limitations and self-incrimination concerns became moot, as a deterrent against refiling the complaint. Effectively, the assessment of costs made the dismissal order with prejudice. We therefore reverse the part of the order assessing costs against plaintiffs.

Affirmed in part and reversed in part.

CONNOR, J., concurred.

WAHLS, P.J. *(concurring in part and dissenting*

in part). I agree with the majority that the part of the order that imposed costs upon plaintiffs should be reversed. However, I would additionally find that the trial court abused its discretion in arbitrarily ordering the case to proceed, regardless of the parties' stipulation to stay the proceedings, simply because it was the oldest case on the court's docket. Obviously, defendants were not concerned about proceeding with discovery, as evidenced by their stipulation to the August 1990 order to stay the proceedings an additional six months. I find no justification for the court's sudden reversal of its past willingness to allow a stay, and subsequent dismissal of plaintiffs' lawsuit, even though the dismissal was without prejudice. Accordingly, I decline to join the majority's "no harm, no foul" analysis.

In re FORD ESTATE

McCARTHY v FORD

Docket No. 156052. Submitted April 12, 1994, at Detroit. Decided September 19, 1994, at 9:05 A.M.

James E. McCarthy, as personal representative of the estate of Edith M. Ford, deceased, petitioned the Wayne County Probate Court for a determination of the ownership of certain real estate, bank accounts, and other property, previously owned solely by the decedent, contending that, before her death, the decedent had been fraudulently induced or unduly influenced into allowing Roy L. and Marjorie J. Ford to become joint owners with the decedent of the contested assets during the decedent's lifetime and, pursuant to the decedent's will, sole owners upon her death. The court, Martin T. Maher, J., consistent with a jury's verdict, entered an order directing the Fords to tender the contested assets to the estate. The Fords appealed.

The Court of Appeals *held:*

1. The trial court erred in excluding the testimony of an attorney and his secretary concerning their witnessing of the decedent's execution of her will. The attorney-client privilege, as raised by the personal representative, does not preclude the testimony because the attorney had not drafted the will and was not acting as the decedent's attorney when he witnessed the decedent's will. Even if the attorney had represented the decedent for purposes of the will and its execution, the attorney-client privilege still would not apply because disclosures made by a testator to a person functioning as a witness are necessarily intended to be disclosed if the witness is called upon to prove the will.

2. The trial court did not err in admitting evidence of the decedent's medical records and of a videotaped deposition.

Reversed and remanded.

REFERENCES

Am Jur 2d, Witnesses §§ 355, 388.

See ALR Index under Attorney-Client Privilege.

ATTORNEY AND CLIENT — ATTORNEY-CLIENT PRIVILEGE — EXECUTION OF WILLS — ATTORNEYS AS WITNESSES.

The attorney-client privilege does not apply to communications by a testator to an attorney at the execution of the testator's will where the attorney serves as a witness to the execution of the will.

James E. McCarthy, in propria persona.

John Richard Slate, for Roy L. Ford and Marjorie J. Ford.

Before: SHEPHERD, P.J., and TAYLOR and R. D. GOTHAM,* JJ.

TAYLOR, J. Appellee James McCarthy, the personal representative of the estate of Edith Mildred Ford, deceased, petitioned for a determination of title to real property, bank accounts, and other assets allegedly held in a constructive trust. Appellants Roy and Marjorie Ford, decedent's son and daughter-in-law responded to the petition.

The parties stipulated below that decedent's final will, dated December 4, 1987, was valid and properly executed. Thus, this case does not involve a will contest. Rather, this case involves possible fraudulent inducement or undue influence on the decedent when making a number of earlier transfers to appellants. Decedent's final will indicated that certain assets and accounts naming family members as co-owners were to become the sole property of those persons upon her death. In other words, those prior transfers were not to be considered part of decedent's estate. The residual estate was to be shared by decedent's children equally. Appellee challenged the earlier transfers, rather than the will itself.

On March 20, 1982, a jury returned a verdict in

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

appellee's favor. The trial court subsequently entered an order dated August 20, 1992, requiring appellants to transfer the assets to the estate. Appellants appeal as of right from that order. We reverse and remand.

Appellants raise a number of issues on appeal. However, only one issue merits extended discussion. Appellants argue that the trial court erred in excluding the testimony of Gary Holland and Joyce Wooten regarding their observations of and discussions with decedent when they witnessed the execution of her final will. Holland is an attorney, and Wooten is Holland's secretary. While neither party contests decedent's final will per se, appellants argue that Holland and Wooten were able to contribute testimony relevant to the prior transfers by decedent.

At the trial below, appellee invoked the attorney-client privilege on behalf of the estate in order to prevent Holland and Wooten from giving testimony to the jury concerning the prior transfers. The trial court honored the privilege, but created a special record outside the presence of the jury concerning Holland's professional relationship with decedent. Holland testified that decedent consulted him in order to witness the execution of a will drafted by another attorney. Holland acknowledged that he had discussed the provisions in the will with decedent, but denied the existence of an attorney-client relationship at that time.[1]

The trial court ruled that Holland's discussion of the provisions in the will with decedent constituted legal advice sufficient to invoke the attorney-client privilege. The trial court then precluded Holland from giving any further testimony on the

[1] Holland later represented decedent in another matter, and acknowledged that an attorney-client relationship was established at that time.

special record concerning his discussions with decedent about the provisions in the will. None of Holland's testimony from the special record reached the jury. The trial court also precluded the jury from hearing testimony by Wooten on the basis of the attorney-client privilege as Holland's agent.

On appeal, appellants acknowledge that Holland was acting as decedent's attorney at the time of the signing of the will. Although appellants agree that decedent's communications with Holland were privileged during her lifetime, appellants argue that the privilege ceased to exist upon decedent's death. We agree, but for reasons different from those tendered by appellants.

Initially, the parties' stipulation that Holland was functioning as decedent's attorney at the time of witnessing the will is not binding on this Court because it relates to a question of law. *In re Finlay Estate,* 430 Mich 590, 595; 424 NW2d 272 (1988); *Eaton Co Rd Comm v Schultz,* 205 Mich App 371, 375; 521 NW2d 847 (1994). This means that the parties to a civil matter cannot by their mere agreement supersede procedures and conditions set forth in statutes or court rules. *In re Estate of Meredith,* 275 Mich 278, 292; 266 NW 351 (1936).

Because the will was drafted by Joseph C. Fisher, he is the only attorney covered by the attorney-client privilege in that regard. Holland, who may have represented the testatrix in other matters, did not thereby become her attorney for all purposes. In any event, even if he had been testatrix's attorney with respect to some aspects of the will, because witnesses to a will may properly be called upon to prove the will, MCL 700.146; MSA 27.5146, disclosures made by the testatrix to a person functioning as a witness are necessarily

intended to be disclosed to third parties and, therefore, are not confidential communications protected by the attorney-client privilege. *Yates v Keane,* 184 Mich App 80, 83; 457 NW2d 693 (1990). Mr. Holland was therefore not precluded by the attorney-client privilege from offering evidence concerning Mrs. Ford's intention and understanding, her soundness of mind, and whether she was operating under the undue influence of any person.

In light of the foregoing, we are convinced that the trial court erred in precluding the jury from hearing the testimony of Holland and Wooten.

With respect to the remaining issues raised by the appellants, we believe there was no error in denying the admission of medical records because the parties stipulated decedent's medical condition at the time of the videotaped deposition. Further, the admission of the videotaped deposition, to the degree it was used to show that decedent was unduly influenced when she made transfers to her son, Roy Ford, is admissible, and the court did not abuse its discretion in admitting the tape. *Price v Long Realty, Inc,* 199 Mich App 461, 466; 502 NW2d 337 (1993).

Reversed and remanded for proceedings consistent with this opinion.

OTIS ELEVATOR COMPANY v MID-AMERICA REALTY INVESTORS

Docket No. 151651. Submitted May 10, 1994, at Detroit. Decided September 19, 1994, at 9:10 A.M.

Otis Elevator Company brought an action in the Wayne Circuit Court against Mid-America Realty Investors, seeking damages for Mid-America's refusal to pay for work done by Otis at Mid-America's David Whitney Building. A consent judgment of $6,030 for Otis was entered in November 1991, and a judgment on a mediation evaluation of $100,000 for Otis was entered in January 1992. In February 1992, Otis sought to garnish the rental payments of the tenants of the David Whitney Building in an effort to collect on its judgments. Firemen's Insurance Company of Newark, New Jersey, intervened, claiming that it had a prior perfected security interest in the rental income under a 1986 mortgage that provided for the assignment of such rents in the event of Mid-America's default. Firemen's further claimed that a default had occurred in 1989 and that statutory notice of the default had been filed with the Wayne County Register of Deeds in February 1990. Otis argued that the assignment of the rents did not vest until Firemen's served notice of the default on the individual tenants, by which time Otis had commenced the garnishment proceedings and thus had priority of claim to the rental income. The court, Susan D. Borman, J., determined that Firemen's interest in the rental income was superior to that of Otis, dissolved Otis' writs of garnishment, and granted summary disposition for Firemen's. Otis appealed.

The Court of Appeals *held:*

MCL 554.231; MSA 25.1137(1) provides that a mortgagee of commercial or industrial property may take as additional security an assignment of rents that is binding on the assignor only in the event of a default of the mortgage. As between a mortgagee and mortgagor, a default of the mortgage is sufficient to perfect the right of the mortgagee to the assigned

REFERENCES

Am Jur 2d, Attachment and Garnishment §§ 113, 145, 464, 472.
See ALR Index under Attachment or Garnishment.

rents. Accordingly, the trial court properly determined that by the time of the garnishment proceeding instituted by Otis, Firemen's already had a perfected security interest in those rents pursuant to the assignment provision of the mortgage.

Affirmed.

GARNISHMENT — RENTS — MORTGAGES — ASSIGNMENTS — DEFAULT.

A mortgagee of a mortgage on commercial or industrial property that provides as additional security an assignment of rents from the property upon default of the mortgage has priority of claim to such rents over a judgment creditor of the mortgagor where the default of the mortgage occurs before garnishment proceedings are commenced by the judgment creditor (MCL 554.231; MSA 25.1137[1]).

Cardelli, Schaefer & Mason, P.C. (by *Cheryl A. Cardelli*), for the plaintiff.

Kerr, Russell & Weber (by *Edward C. Cutlip, Jr., James R. Cambridge,* and *Patrick J. Haddad*), for Firemen's Insurance Company.

Dickinson, Wright, Moon, VanDusen & Freeman (by *John R. Clark*), for Mid-America Realty.

Before: MARILYN KELLY, P.J., and SHEPHERD and L. P. BORRELLO,* JJ.

SHEPHERD, J. Plaintiff, Otis Elevator Company, appeals as of right from an April 2, 1992, order of the trial court in favor of defendant Firemen's Insurance Company of Newark, New Jersey, on the parties' cross motions for summary disposition. We affirm.

On November 1, 1986, Mid-America Realty Investors entered into a mortgage and security agreement with Firemen's whereby Firemen's agreed to loan monies to Mid-America, retaining a security interest in the David Whitney Building in Detroit, with additional security provided by an

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

assignment of rents and leases in the event of default. On October 13, 1989, Firemen's made a demand for Mid-America to cure a default or face foreclosure. In February 1990, a statutory notice of default in the terms and conditions of mortgage was recorded with the Wayne County Register of Deeds.

On November 12, 1991, Otis obtained a consent judgment against Mid-America in the amount of $6,030. On January 7, 1992, Otis obtained a judgment against Mid-America in the amount of $100,000. In February 1992, Otis sought to garnish the rental payments of the tenants of the building in an effort to collect on the judgments. Shortly thereafter, Firemen's informed Otis that it had a prior perfected interest in the rental proceeds and demanded a retraction of the garnishment proceeding.

On March 4, 1992, Firemen's served the tenants of the building with a notice of default and a copy of the mortgage agreement. On March 6, 1992, the trial court entered a preliminary injunction restraining Otis' garnishment efforts until the validity of the garnishments could be determined. On April 2, 1992, the trial court determined that Firemen's interest in the rent proceeds was superior to that of Otis, dissolved Otis' writs of garnishment, and granted summary disposition in favor of Firemen's. Plaintiff appeals from the April 2, 1992, order of the trial court.

The sole issue on appeal concerns the order of priority between Otis and Firemen's to the rent proceeds. Simply stated, this case concerns the priority between a judgment creditor (Otis) and a prior perfected secured creditor (Firemen's) for the assets of a common debtor (Mid-America) where the assets were specifically designated as additional security in the security agreement.

Plaintiff argues that in order to avail itself of the rent assignment provision in the mortgage, Firemen's was required to serve the building tenants with notice of default in the mortgage as required by MCL 554.231; MSA 25.1137(1). In response, Firemen's argues that once it recorded the mortgage and the mortgagor's default, the assignment of rents was valid and enforceable as between the mortgagor (Mid-America) and mortgagee (Firemen's). Thus, Firemen's contends that Otis could not garnish the rents because Mid-America no longer had an interest in the rents. We agree with the position of Firemen's Insurance Company.

MCL 554.231; MSA 25.1137(1) provides as follows:

> Hereafter, in or in connection with any mortgage on commercial or industrial property other than an apartment building with less than 6 apartments or any family residence to secure notes, bonds or other fixed obligations, it shall be lawful to assign the rents, or any portion thereof, under any oral or written leases upon the mortgaged property to the mortgagee, as security in addition to the property described in such mortgage. Such assignment of rents shall be binding upon such assignor only in the event of default in the terms and conditions of said mortgage, and shall operate against and be binding upon the occupiers of the premises from the date of filing by the mortgagee in the office of the register of deeds for the county in which the property is located of a notice of default in the terms and conditions of the mortgage and service of a copy of such notice upon the occupiers of the mortgaged premises.

Notably, the statutory language states that such an "assignment of rents shall be binding upon such assignor only in the event of default. . . ."

Thus, the mortgagor's default is sufficient to finalize the mortgagee's interest in the rents as against the mortgagor. The additional language requiring service of notice of default upon the "occupiers" or tenants concerns the operation of the assignment as against the tenants, not as against the assignor.

A similar interpretation of MCL 554.231; MSA 25.1137(1) was adopted recently by the bankruptcy courts. In the case of *In re Mount Pleasant Limited Partnership,* 144 Bankr 727, 733-734 (WD Mich, 1992), the bankruptcy court stated as follows:

> Under section 1 of Michigan's statute, giving "binding effect" to the assignment is conditioned only upon default. Therefore, at the point of default the mortgagor becomes obligated as contractually provided in the assignment.
>
> * * *
>
> . . . Once default occurs, . . . the assignment becomes binding, and the mortgagee has a "choate" or present vested right in the rents. . . . [T]he service requirement only determines which party has the initial right to collect the rents, and is intended as a protection for the tenants. It does not affect the rights between mortgagor and mortgagee.

Similarly, the decision of the bankruptcy court in the case of *In re Coventry Commons Associates,* 143 Bankr 837, 838 (ED Mich, 1992) also provides support for our opinion, as follows:

> In Michigan, the assignment of rents is governed by statute—M.C.L.A. §§ 554.231 and 554.232 (West 1988) ("§ 231" and "§ 232"). These provisions, this Court concludes, permit a mortgagor to grant to a mortgagee an assignment of rents as additional security and that the assignee/mortgagee's rights

> are perfected and binding against the assignor/mortgagor when such assignment is recorded and a default occurs in the terms and conditions of the mortgage.

Accordingly, we agree with the opinion of the trial court that Otis could not garnish Mid-America's interest in rents because Mid-America no longer had a valid property interest in the rents after its default on its mortgage with Firemen's.

Affirmed.

ERB LUMBER COMPANY v HOMEOWNER CONSTRUCTION LIEN RECOVERY FUND

Docket Nos. 150628, 159195. Submitted March 15, 1994, at Detroit. Decided September 19, 1994, at 9:15 A.M. Leave to appeal sought.

Erb Lumber Company brought in the Oakland Circuit Court an action against the Homeowner Construction Lien Recovery Fund, D.A. Derusha, Inc., and others, seeking to enforce a construction lien for materials supplied in the construction of a residence, and a similar action against the fund, Vittorio A. Basilisco, Jr., and others. In each of the actions, the fund consented to a judgment in favor of Erb Lumber and agreed to pay Erb Lumber's claim except for a time-price differential charge provided under the supply contract of two percent a month for payments not made within 150 days of delivery of materials. The court, Hilda R. Gage, J., and Deborah G. Tyner, J., subsequently determined that Erb Lumber's construction liens included the time-price differential charges and ordered the fund to pay the charges. The fund appealed in each case, and the appeals were consolidated.

The Court of Appeals *held:*

A lien acquired pursuant to the Construction Lien Act may not exceed the amount of the lien claimant's contract less payments made on the contract. In these consolidated cases, the time-price differential provision of the supply contracts set the contract amounts depending on when payments were made. Accordingly, the time-price differential charges, as part of the supply contracts, properly were included in the construction liens.

Affirmed.

MECHANICS' LIENS — CONSTRUCTION LIEN ACT — TIME-PRICE DIFFERENTIAL CHARGES.

A lien acquired pursuant to the Construction Lien Act includes time-price differential charges where the contract to furnish

REFERENCES

Am Jur 2d, Mechanics' Liens §§ 81, 112.
See ALR Index under Mechanics' Liens.

labor or materials provides that a percentage of the outstanding balance will be added periodically to the contract price if payment is not made by a certain date (MCL 570.1101 *et seq.*; MSA 26.316[101] *et seq.*).

May, Simpson & Strote (by *Ronald P. Strote* and *John A. Forrest*), for Erb Lumber Company.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Michael A. Lockman* and *Jack Blumenkopf,* Assistant Attorneys General, for Homeowner Construction Lien Recovery Fund.

Before: MURPHY, P.J., and MARILYN KELLY and W. C. BUHL,* JJ.

MARILYN KELLY, J. In these consolidated cases, the defendant, Homeowner Construction Lien Recovery Fund, appeals as of right from orders in two separate construction lien actions granting Erb Lumber's motion for summary disposition. MCR 2.116(C)(10). We affirm.

I

In the first case, Docket No. 150628, Erb Lumber provided building materials and supplies to D.A. Derusha, Inc. for a residence that the contractor was building for George P. and Mary Alice Johnson. The supply contract provided that payment for materials must be made within 150 days of delivery. If not, a time-price differential charge of two percent per month would be added until the total was fully paid.

Erb sought to recover pursuant to the Construction Lien Act. MCL 570.1101 *et seq.*; MSA 26.316(101) *et seq.* Because the structure was a residence, Erb was required to name the State of

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

Michigan, Department of Licensing and Regulation, Homeowner Construction Lien Recovery Fund as a party. MCL 570.1201 *et seq.*; MSA 26.316(201) *et seq.*

Erb obtained a consent judgment in which the Fund agreed to pay Erb Lumber's entire lien claim except for the time-price differential which the Fund refused to pay. Erb moved for summary disposition on the question of whether the time-price differential charge was properly included in Erb's lien claim and whether the Fund was liable for the amount. The circuit court judge found in favor of Erb Lumber, concluding that the time-price differential was properly included in the construction lien claim. The Fund appeals only from inclusion of the time-price differential in the construction lien claim.

II

In Docket No. 159195, while the contractor and the homeowners involved were different, the facts are similar. The homeowners and the Fund entered into a partial consent judgment with Erb Lumber but again disputed the Fund's duty to pay the time-price differential. The judge in that case also granted Erb's motion for summary disposition on the question. The Fund appeals from the trial court's decision. The Court of Appeals consolidated the two cases on March 31, 1993.

III

The Fund contends that the two percent time-price differential is not an improvement as the term is defined in the Construction Lien Act. MCL 570.1104; MSA 26.316(104). It also argues that both the language of the statute and case law

demonstrate that interest payments are not properly included in determining the amount of a lien. MCL 570.1107; MSA 26.316(107).

Two sections of the Construction Lien Act are relevant to resolution of the dispute. MCL 570.1107; MSA 26.316(107) provides in part:

> (1) Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property shall have a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property . . . . A construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract. [MCL 570.1107; MSA 26.316(107).]

The term "improvement" is defined in MCL 570.1104; MSA 26.316(104):

> (7) "Improvement" means the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, pursuant to a contract. [MCL 570.1104; MSA 26.316(104).]

A fundamental rule of statutory construction 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). The first criterion to consider 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, and the statute must be enforced as written. *Frasier v Model Coverall Service, Inc,* 182 Mich App 741, 744; 453 NW2d 301 (1990). Unless defined in the statute, words and phrases should be accorded their plain and ordinary meanings. MCL 8.3a; MSA 2.212(1); *People v Tracy,* 186 Mich App 171, 176; 463 NW2d 457 (1990).

When the term "improvement", defined in MCL 570.1104; MSA 26.316(104), is used in MCL 570.1107; MSA 26.316(107), it does not fix or define the extent of the lien as the Fund contends. Rather, it identifies the parties who are eligible to seek a lien. Thus, despite the Fund's claims to the contrary, use of the term "improvement" in MCL 570.1107; MSA 26.316(107) is not helpful in determining which sums can properly be included in a construction lien. However, the same section of the statute provides that the amount of the lien is calculated by taking the lien claimant's contract price, less the amount already paid on it.

Thus, it becomes necessary to decide if the two percent time-price differential was part of the contract price of the materials. The Fund argues that the time-price differential amounts to a finance charge and should not be considered part of the contract price. However, the cases cited in support of its position are unpersuasive.

III

A

The Fund relies on *Brede v Rose,* 236 Mich 651; 211 NW 58 (1926). In that case, our Supreme Court limited recovery under a lien to the work performed and the materials used. The plaintiff and the defendant had entered into an agreement whereby the plaintiff would decorate and paint the

defendant's home. A dispute arose in connection with the plaintiff's workmanship, and the defendant refused to allow the plaintiff to complete the work. The trial court rendered a judgment for the plaintiff in quantum meruit, and the defendant appealed. Our Supreme Court agreed that the plaintiff was entitled to recover but excluded profit and overhead from the judgment amount. In reaching its decision, the Court implicitly accepted that profit and overhead are included in a contract price. The Court also suggested that, had plaintiff proceeded on a contract theory, he would have been entitled to recover a portion of the overhead and profit. However, as plaintiff had sued under a quantum meruit theory, he was entitled to recover only for the value of the work done and materials furnished up to the time of the breach.

In contrast to the plaintiff in *Brede,* plaintiff here relies on the terms of the contract to establish its costs. By including a time-price differential, plaintiff essentially set differing costs for the materials depending on when they were paid for after delivery. Following *Brede,* since the contract terms established the cost of the materials, and profit and overhead were included, plaintiff is entitled to recover the time-price differential as well. Furthermore, the statute here clearly contemplates that recovery is based on the value of the contract less amounts already paid.

III

B

Defendant also relies on *North v Globe Fence Co,* 144 Mich 557; 108 NW 285 (1906). In *North,* the Court held that the amount of the lien could not include materials that were furnished but not used pursuant to the contract. However, the lan-

guage of the Mechanics Lien Act which was the basis for the Court's decision in *North* was more limiting than the statute at issue here. Thus, the two cases are distinguishable.

III

C

Finally, defendant relies on *Canvasser Custom Builders, Inc v Seskin,* 38 Mich App 643; 196 NW2d 859 (1972). In *Canvasser,* our Court stated that the amount of a mechanic's lien is limited to the extent of the enhancing value of the lien claimant's material and labor. *Id.,* p 647. The statement was dictum and did not cite supporting law. In the case before us, a statute is under consideration that does not contain or suggest such a limitation, but relies on the terms of the contract to establish the size of the lien.

Thus, we hold that, under the language of the controlling statute, Erb Lumber was entitled to seek a lien which included a sum representing the time-price differential.

Finally, we find the Fund's public policy arguments unpersuasive. Public policy is best served by following the plain language of the statute and allowing the terms of the contract to govern the amount of a construction lien.

Affirmed.

INDEX-DIGEST

ACTIONS.

See, also, CONTRACTS 1.

EMPLOYMENT.

1. The Legislature has provided overlapping remedies for an employee whose employment is terminated for reporting wage and fringe benefits violations by an employer; the employee may initiate a cause of action in the circuit court alleging a violation of the Whistleblowers' Protection Act while at the same time pursuing administrative rights under the wage and fringe benefits act (MCL 15.361 *et seq.,* 408.471 *et seq.*; MSA 17.428[1] *et seq.,* 17.277[1] *et seq.*). *Faulkner v Flowers,* 206 Mich App 562.

PARTIES.

2. A domestic nonprofit corporation organized for civic, protective, or improvement purposes has standing to bring an action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating to such an expenditure (MCR 2.201[B][4]). *Mich Soft Drink v Treas Dep't,* 206 Mich App 392.

TORTS.

3. *Lingle v Berrien Co,* 206 Mich App 528.

ADMINISTRATIVE LAW.

DEPARTMENT OF MENTAL HEALTH.

1. A guideline adopted by the Department of Mental Health that prescribes the provisions of the mandatory standard-form contract used by the department to contract for mental health services with private group-home providers is a rule within the meaning of the Administrative Procedures Act and is subject to the formal rule-making procedures of the APA (MCL 24.207; MSA 3.560[107]). *AFSCME v Mental Health Dep't,* 206 Mich App 382.

WETLAND PROTECTION ACT.

2. The Wetland Protection Act provides that the Department of Natural Resources, where it does not hold a hearing on a wetland fill permit application, must either approve or disapprove the permit application within ninety days after a completed application is filed; an application that cannot be acted upon because of a lack of information is not complete until it contains sufficient information to be acted upon; the act only requires that the department approve or disapprove the appli-

ADMINISTRATIVE LAW—Cont'd
cation within ninety days, not that the applicant be given notice of such action within ninety days (MCL 281.708[2]; MSA 18.595[58][2]). *Harkins v DNR,* 206 Mich App 317.

ADMINISTRATIVE PROCEDURES ACT—*See*
ADMINISTRATIVE LAW 1

"AFFILIATED GROUP"—*See*
TAXATION 3

AGE DISCRIMINATION—*See*
CIVIL RIGHTS 1-3

ALIMONY—*See*
DIVORCE 1, 2

AMENDMENT OF CONTRACTS—*See*
CONTRACTS 2

AMENDMENT OF RATE SCHEDULES—*See*
PUBLIC UTILITIES 1

AMENDMENT OF STATUTES—*See*
WORKER'S COMPENSATION 5

ANTITRUST LIABILITY—*See*
TORTS 1, 2

APPEAL.
See, also, CRIMINAL LAW 1, 5; PRETRIAL PROCEDURE 2; PUBLIC UTILITIES 2; SENTENCES 1, 2; TAXATION 1, 7.
MOOTNESS.
1. *People v F P Books,* 206 Mich App 78.
2. *People v Mansour,* 206 Mich App 81.

APPEAL OF RIGHT—*See*
CRIMINAL LAW 1

APPLICANT'S FALSE REPRESENTATION—*See*
INSURANCE 4

APPOINTMENT OF COUNSEL—*See*
CRIMINAL LAW 1

APPORTIONMENT—*See*
TAXATION 6

APPORTIONMENT OF LIABILITY FOR CLEANUP COSTS—*See*
ENVIRONMENT 1

ARBITRATION—*See*
LABOR RELATIONS 1, 2

ARBITRATION—Cont'd
SECURITIES REGULATION 1, 2

ARMED ROBBERY—*See*
ROBBERY 1

ARSON—*See*
HOMICIDE 1

"AS IS" CLAUSES—*See*
VENDOR AND PURCHASER 2

"AS IS" CONTRACTS—*See*
SALES 1

ASSESSMENTS—*See*
TAXATION 2

ASSIGNMENTS—*See*
GARNISHMENT 1

"ASSOCIATED PERSON"—*See*
SECURITIES REGULATION 2

ATTORNEY AND CLIENT.
ATTORNEY-CLIENT PRIVILEGE.
1. The attorney-client privilege does not apply to communications by a testator to an attorney at the execution of the testator's will where the attorney serves as a witness to the execution of the will. *In re Ford Estate,* 206 Mich App 705.

ATTORNEY-CLIENT PRIVILEGE—*See*
ATTORNEY AND CLIENT 1

ATTORNEYS AS WITNESSES—*See*
ATTORNEY AND CLIENT 1

ATTRACTIVE NUISANCE—*See*
GOVERNMENTAL IMMUNITY 2

AUTOMOBILES—*See*
INTOXICATING LIQUORS 1, 2
SEARCHES AND SEIZURES 1-3

BANK HOLDING COMPANIES—*See*
BANKS AND BANKING 1

BANKS AND BANKING.
BANK HOLDING COMPANIES.
1. *Seabrook v Mich National Corp,* 206 Mich App 314.

BEST INTEREST OF CHILD—*See*
PARENT AND CHILD 1

BODILY INJURY—*See*
INSURANCE 2

BONA FIDE RETIREMENT POLICIES—*See*
CIVIL RIGHTS 4

BOTTLE LAW—*See*
CONSTITUTIONAL LAW 1

BREACH OF CONTRACT—*See*
CONTRACTS 1

BRINE INJECTION WELLS—*See*
GAS AND OIL 1

BURDEN OF PROOF—*See*
INSURANCE 9

BYSTANDERS—*See*
ACTIONS 3

CERTIFICATE OF NECESSITY—*See*
PUBLIC UTILITIES 2

CHANGE OF CIRCUMSTANCES—*See*
PARENT AND CHILD 1

CHILD ABUSE—*See*
CONSTITUTIONAL LAW 2

CHILD CUSTODY—*See*
PARENT AND CHILD 1

CHILD CUSTODY ACT—*See*
PARENT AND CHILD 2

CHILD PROTECTIVE PROCEEDINGS—*See*
PARENT AND CHILD 3

CHILDREN—*See*
INSURANCE 1

CHILD SEXUALLY ABUSIVE ACTIVITY—*See*
CRIMINAL LAW 2, 4

CIVIL RIGHTS.

CIVIL RIGHTS ACT.

1. A plaintiff must establish membership in a protected class and subjection to adverse employment action because of age to establish a prima facie case of age discrimination (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*). *Zoppi v Chrysler Corp,* 206 Mich App 172.

CIVIL RIGHTS—Cont'd
2. The Civil Rights Act was conceived to deter discrimination against older workers who still are capable (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*). *Zoppi v Chrysler Corp,* 206 Mich App 172.
3. The determination whether a plaintiff is a member of a protected class for age discrimination claims is not based on the age of the plaintiff per se; also to be considered is the age of the person or persons who benefit from a defendant's discriminatory actions (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*). *Zoppi v Chrysler Corp,* 206 Mich App 172.
4. A retirement policy that exists and pays benefits is bona fide and therefore exempt from the provisions of the Civil Rights Act (MCL 37.2202[2]; MSA 3.548[202][2]). *Zoppi v Chrysler Corp,* 206 Mich App 172.

CIVIL RIGHTS ACT—*See*
CIVIL RIGHTS 1-4

COLLATERAL ESTOPPEL—*See*
ESTOPPEL 1

COLLECTIVE BARGAINING AGREEMENTS—*See*
LABOR RELATIONS 1, 2

COMPENSABLE TAKINGS—*See*
CONSTITUTIONAL LAW 10

CONCEALED DEFECTS—*See*
SALES 1

CONCEALED WEAPONS—*See*
CONSTITUTIONAL LAW 3

CONFESSIONS—*See*
CRIMINAL LAW 3

CONFESSIONS OF ACCOMPLICES—*See*
CRIMINAL LAW 8, 9

CONFLICT OF LAWS.
See, also, CRIMINAL LAW 3.
PREEMPTION.
1. A state law that relates to employee benefit plans is preempted by the Employee Retirement Income Security Act unless the state law regulates the business of insurance, banking, or securities; states may not treat self-insured ERISA plans as insurers in order to subject them to state insurance regulation; a state law relates to an employee benefit plan and would be preempted by the ERISA if it alters the level of benefits that would be paid out under a given plan from state to state, alters the terms of the plan such as requirements for eligibility, or

CONFLICT OF LAWS—Cont'd
subjects the fiduciaries of a plan to claims other than those provided in the ERISA itself (29 USC 1001 *et seq.*). *BPS Labs v Blue Cross,* 206 Mich App 570.

CONSECUTIVE SENTENCES—*See*
CRIMINAL LAW 11

CONSIDERATION OF PRIOR CONVICTIONS—*See*
SENTENCES 2

CONSOLIDATED TAX RETURNS—*See*
TAXATION 3

CONSTITUTIONAL LAW.
See, also, CRIMINAL LAW 2, 4; TORTS 1, 2.

BOTTLE LAW.
1. The unclaimed deposit amendments of the bottle law do not offend the takings clauses of the federal or state constitutions (US Const, Ams V, XIV; Const 1963, art 10, § 2; 1989 PA 148, MCL 455.573b, 455.573d; MSA 18.1206[13b], 18.1206[13d]). *Mich Soft Drink v Treas Dep't,* 206 Mich App 392.

CHILD ABUSE.
2. The child abuse statute in defining the crime of child abuse in the fourth degree is neither vague nor overbroad in the constitutional sense (MCL 750.136b[5]; MSA 28.331[2][5]). *People v Gregg,* 206 Mich App 208.

DOUBLE JEOPARDY.
3. A person may be convicted of both carrying a concealed pistol in a motor vehicle and intentional discharge of a firearm from a motor vehicle even if the crimes arise out of a single incident (MCL 750.227[2], 750.234a; MSA 28.424[2], 28.431[1]). *People v Cortez,* 206 Mich App 204.

POLICE POWERS.
4. Although both tangible and intangible property may be the subject of an impermissible taking for public use, there is no property right to potential or future profits; absent legal entitlement to specific profits, there can be no property interest and thus no taking without just compensation; an appropriation of money does not constitute a taking per se, as would a physical occupation of property or a denial of all its beneficial use. *Mich Soft Drink v Treas Dep't,* 206 Mich App 392.

PRIVATE PROPERTY.
5. The federal and state constitutions protect private property from being taken for public use without just compensation; to prevail on a takings claim, a claimant first must demonstrate a cognizable interest in the affected private property (US Const, Ams V, XIV; Const 1963, art 10, § 2). *Mich Soft Drink v Treas Dep't,* 206 Mich App 392.
6. Property rights that arise from a statutory scheme are subject to amendment and may be taken away prospectively by amend-

CONSTITUTIONAL LAW—Cont'd
ment without violating the constitutional prohibition against taking private property without just compensation (US Const, Ams V, XIV; Const 1963, art 10, § 2). *Mich Soft Drink v Treas Dep't,* 206 Mich App 392.
7. Three factors should be considered in identifying a taking forbidden by the taking clause: the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action (US Const, Ams V, XIV). *Mich Soft Drink v Treas Dep't,* 206 Mich App 392.
RIGHT TO COUNSEL.
8. A defendant who, upon a plea of nolo contendere, is convicted and sentenced while represented by a person whose license to practice law has been suspended for disciplinary reasons is denied the right to counsel; because denial of the right to counsel can never be considered harmless, the conviction of such a defendant must be reversed on appeal. *People v Pubrat,* 206 Mich App 340.
9. *People v Brown,* 206 Mich App 535.
WETLAND PROTECTION ACT.
10. A compensable taking does not occur where the Department of Natural Resources, pursuant to the Wetland Protection Act, properly denies a property owner's request for a wetland fill permit if the owner is not denied all economically viable use of the property (MCL 281.701 *et seq.*; MSA 18.595[51] *et seq.*). *Harkins v DNR,* 206 Mich App 317.

CONSTRUCTION LIEN ACT—*See*
MECHANICS' LIENS 1

CONTRACTS.
See, also, ADMINISTRATIVE LAW 1; COURTS 3; JUDGMENTS 2.
ACTIONS.
1. One who first substantially breaches a contract cannot maintain an action for the subsequent breach or failure to perform by the other contracting party. *Michaels v Amway Corp,* 206 Mich App 644.
AMENDMENT OF CONTRACTS.
2. The power to amend, modify, or rescind the provisions of a contract covering a large number of persons does not encompass necessarily the power to create exceptions to the provisions with respect to specific persons case by case. *Michaels v Amway Corp,* 206 Mich App 644.
INSURANCE.
3. The failure of an insured to read the terms of an insurance contract does not prevent reformation of the contract on the basis of mutual mistake. *Mantua v Auto Club,* 206 Mich App 274.
INTERPRETATION OF CONTRACTS.
4. The interpretation of unambiguous and unequivocal contracts

CONTRACTS—Cont'd

is a question of law. *Mass Indemnity v Thomas,* 206 Mich App 265.

PRIZE CONTESTS.

5. The relationship between a sponsor of a prize contest and an entrant in a contest is governed by contract law; the rights of an entrant who has performed the act required by a sponsor's offer are limited by the conditions and rules of the contest. *Bellows v Del McDonald's Corp,* 206 Mich App 555.

SALES OF BUSINESS ASSETS.

6. *Orley Enterprises v Tri-Pointe,* 206 Mich App 614.

STATUTE OF FRAUDS.

7. A person may assume original liability by a direct promise to pay for services to be rendered to another in the future; such an original promise does not fall within the statute of frauds' provision requiring a special promise to answer for the debt, default, or misdoings of another person to be in writing (MCL 566.132[1][b]; MSA 26.922[1][b]). *Schier, D & P, PC v Bennett,* 206 Mich App 281.

TERMINATION OF CONTRACTS.

8. Good faith in the termination of a contract is required only where the terminating party has unbridled discretion with respect to the other party's performance under the contract; where a party's discretion to terminate is limited, good faith need only have existed at the time the agreement was made. *Eastway v Citizens Ins Co,* 206 Mich App 299.

CONTRIBUTIONS—*See*

UNEMPLOYMENT COMPENSATION 1

CONTROLLED SUBSTANCES.

SENTENCES.

1. The mandatory sentence of not less than twenty years nor more than thirty years of imprisonment without parole for possession of more than 225 grams but less than 650 grams of cocaine is not cruel or unusual punishment under the state constitution (Const 1963, art 1, § 16; MCL 333.7403[2][a][ii], 791.234[4]; MSA 14.15[7403][2][a][ii], 28.2304[4]). *People v DiVietri,* 206 Mich App 61.
2. It is not an abuse of discretion for a court to refuse to depart from the mandatory minimum sentence set by statute for certain controlled substance convictions, even though it is almost certain that a defendant will be deported (MCL 333.7401[4]; MSA 14.15[7401][4]). *People v Arcos,* 206 Mich App 374.

COORDINATION OF BENEFITS—*See*

WORKER'S COMPENSATION 1

COSTS.

See, also, INTOXICATING LIQUORS 2.

COSTS—Cont'd

DAMAGES.

1. The court rule providing that, before granting a preliminary injunction or temporary restraining order, a court may require the applicant to give security for the payment of costs and damages that may be incurred or suffered by a party who is found to have been wrongfully enjoined or restrained is limited to security for a preliminary injunction or a temporary restraining order only; the rationale for requiring security is not applicable where a full hearing on the merits is held before an injunction is issued (MCR 3.310[D][1]). *BPS Labs v Blue Cross,* 206 Mich App 570.

COUNTIES—*See*
GOVERNMENTAL IMMUNITY 1

COURSE OF EMPLOYMENT—*See*
WORKER'S COMPENSATION 3

COURT RULES—*See*
COSTS 1

COURTS.

See, also, PRISONS AND PRISONERS 1; PUBLIC UTILITIES 2; RELIGIOUS CORPORATIONS AND ASSOCIATIONS 1; WORKER'S COMPENSATION 2.

JURISDICTION.

1. State courts lack jurisdiction to hear claims brought pursuant to the Employee Retirement Income Security Act that allege a breach by a plan administrator of its fiduciary duty; exclusive jurisdiction of such claims lies in the federal courts (29 USC 1132[a][1][A], [e][1]). *Townsend v Brown Corp,* 206 Mich App 257.
2. State courts lack jurisdiction to hear claims brought pursuant to the Employee Retirement Income Security Act seeking relief based on equitable estoppel (29 USC 1132[e][1]). *Townsend v Brown Corp,* 206 Mich App 257.

STANDING.

3. A union representing employees of private group-home providers of services for the Department of Mental Health and the employees of those providers have standing to bring an action against the Department of Mental Health challenging a guideline adopted by the department that incorporates the standard-form contract used by the department to contract for group-home services. *AFSCME v Mental Health Dep't,* 206 Mich App 382.

CRIMES—*See*
ACTIONS 3

CRIMINAL LAW.

See, also, CONSTITUTIONAL LAW 2.

CRIMINAL LAW—Cont'd

APPEAL.

1. *People v Kincade (On Rem),* 206 Mich App 477.

CHILD SEXUALLY ABUSIVE ACTIVITY.

2. The statute prohibiting child sexually abusive activity provides adequate notice of the acts prohibited so as to avoid being vague in the constitutional sense; the statute clearly provides fair notice that the taking of photographs of a sixteen-year-old girl's exposed breasts for the purpose of making pornographic materials is a prohibited act (MCL 750.145c[2]; MSA 28.342a[2]). *People v Heim,* 206 Mich App 439.

CONFLICT OF LAWS.

3. *People v Krause,* 206 Mich App 421.

CONSTITUTIONAL LAW.

4. The Legislature intended that the crimes of criminal sexual conduct and child sexually abusive activity be punished separately; therefore, the Double Jeopardy Clause's prohibition against multiple punishments is not violated where a defendant is convicted of both child sexually abusive activity and first- and second-degree criminal sexual conduct for sexual penetration and sexual contact that occurred during the child sexually abusive activity (MCL 750.145c, 750.520b[1][c], 750.520c[1][c]; MSA 28.342a, 28.788[2][1][c], 28.788[3][1][c]). *People v Ward,* 206 Mich App 38.

EVIDENCE.

5. A violation of the Confrontation Clause or the erroneous admission of evidence may be found to be harmless error where the appellate court can confidently conclude, beyond any reasonable doubt, that the error did not affect the jury's verdict; an error is not harmless if an average jury would have found the prosecution's case significantly less persuasive had the error not occurred (US Const, Am VI; Const 1963, art 1, § 20). *People v Spinks,* 206 Mich App 488.

6. Where an unlawful detention has been employed as a tool to directly procure a confession from a detainee, the resulting evidence generally should be excluded as the fruit of the poisonous tree; however, suppression is not required where there is no causal nexus between the illegal arrest and the confession; a causal nexus is determined by examining the time elapsed between the illegal arrest and the confession, the flagrancy of official misconduct, any intervening circumstances, and any circumstances that occurred after the arrest. *People v Spinks,* 206 Mich App 488.

GUILTY PLEAS.

7. A trial court may allow a defendant to withdraw a guilty plea before sentencing where the defendant establishes that withdrawal of the plea would be in the interest of justice and the prosecutor fails to demonstrate that substantial prejudice would result from withdrawal (MCR 6.310[B]). *People v Gomer,* 206 Mich App 55.

CRIMINAL LAW—Cont'd

HEARSAY EVIDENCE.

8. The portions of a nontestifying accomplice's hearsay statement that are against the declarant's own penal interest are admissible in a defendant's trial; however, those portions that inculpate the defendant are admissible only if the circumstances under which the statement was made vouch for its reliability; a statement may be found to be unreliable where it is made to the police while the declarant is under custodial interrogation and is motivated by a desire to win favorable treatment (MRE 804[b][3]). *People v Spinks,* 206 Mich App 488.

9. Where there is adequate indicia of reliability, the admission in a defendant's trial of a nontestifying accomplice's hearsay statement does not violate the defendant's constitutional right of confrontation; a statement generally will be found to be reliable where the statement was voluntarily given, made contemporaneously with the events referenced, made to family, friends, colleagues, or confederates, and uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener; a statement generally will be unreliable where it was made to law enforcement officers or at the prompting or inquiry of the listener, it minimizes the role or responsibility of the declarant or shifts blame to the accomplices, it was made to avenge the declarant or to curry favor, and the declarant had a motive to lie or distort the truth (US Const, Am VI; Const 1963, art 1, § 20). *People v Spinks,* 206 Mich App 488.

JUVENILES.

10. A sentencing court in determining whether to sentence a juvenile as an adult must make specific findings of fact concerning the statutory factors that are required to be considered before sentencing a juvenile as an adult and must weigh the relevant factors in a meaningful way (MCL 769.1[3],[5]; MSA 28.1072[3],[5]; MCR 6.931[E][3],[4]). *People v Hazzard,* 206 Mich App 658.

SENTENCES.

11. A consecutive sentence imposed under the parolee consecutive sentence statute commences to run upon the completion of the maximum term of the sentence previously imposed; a reoffending parolee sentenced under the parolee consecutive sentence statute is not eligible for parole until the maximum term of the previous sentence and the minimum term of the consecutive sentence have been served (MCL 768.7a[2]; MSA 28.1030[1][2]). *People v Young,* 206 Mich App 144.

SENTENCING.

12. The rule announced in *People v Blount,* 197 Mich App 174 (1992), that a defendant who pleads guilty and is sentenced in accordance with a plea bargain and sentencing agreement waives the right to challenge the sentence unless there is also an attempt to withdraw the plea for a sound legal reason is to be given full retroactive effect. *People v Ward,* 206 Mich App 38.

CRIMINAL SEXUAL CONDUCT—*See*
CRIMINAL LAW 4

CUSTODIAL ENVIRONMENT—*See*
PARENT AND CHILD 1

CUSTODY ACTIONS—*See*
PARENT AND CHILD 2

DAMAGES—*See*
COSTS 1

DEFAULT—*See*
GARNISHMENT 1

DEFAULT JUDGMENTS—*See*
PRETRIAL PROCEDURE 1

DEFECTS IN PROPERTY—*See*
VENDOR AND PURCHASER 1

DEPARTMENT OF MENTAL HEALTH—*See*
ADMINISTRATIVE LAW 1

DEPARTMENT OF NATURAL RESOURCES—*See*
ADMINISTRATIVE LAW 2
GAS AND OIL 1

DEPARTURE—*See*
CONTROLLED SUBSTANCES 2

DEPORTATION—*See*
CONTROLLED SUBSTANCES 2

DESIGNATION AS GAME ANIMAL—*See*
GAME 1, 3

DETERMINATION REGARDING EMPLOYMENT RELATIONSHIP —*See*
WORKER'S COMPENSATION 2

DISCHARGE FROM PAROLE—*See*
PRISONS AND PRISONERS 1

DISCHARGE OF FIREARMS—*See*
CONSTITUTIONAL LAW 3

DISCIPLINARY CREDITS—*See*
SENTENCES 4

DISCOVERY—*See*
PRETRIAL PROCEDURE 1, 2

DISMISSALS—*See*
JUDGMENTS 1

DISPUTES—*See*
LABOR RELATIONS 1, 2

DIVORCE.
See, also, JUDGMENTS 2.
ALIMONY.
1. The intent of the parties is the overriding concern in determining whether an award of alimony in a judgment of divorce was for periodic alimony or alimony in gross; the number and type of contingencies included in the award should be considered only as factors in determining intent. *Pinka v Pinka,* 206 Mich App 101.
2. The parties' or the trial court's intent regarding whether the alimony provided in a judgment of divorce is in gross or periodic should be expressed clearly and unequivocally on the record and in the ultimate instrument that incorporates the alimony provision; where the parties agree to provide for alimony in gross, the payee should articulate clearly, through testimony or otherwise, that the payee understands that the alimony is in gross and therefore nonmodifiable; where the alimony is periodic, the payor should articulate clearly that the payor fully understands that a change in circumstances may cause the award to be modified. *Pinka v Pinka,* 206 Mich App 101.

DOUBLE JEOPARDY—*See*
CONSTITUTIONAL LAW 3
CRIMINAL LAW 4

DRAMSHOP ACT—*See*
INTOXICATING LIQUORS 3

DUTY OF CARE—*See*
PUBLIC OFFICERS 1, 2

DUTY TO WARN—*See*
VENDOR AND PURCHASER 2

ECCLESIASTIC QUESTIONS—*See*
RELIGIOUS CORPORATIONS AND ASSOCIATIONS 1

ELECTION BY EMPLOYER—*See*
WORKER'S COMPENSATION 1

ELECTRIC FRANCHISES—*See*
PUBLIC UTILITIES 2

ELEMENTS—*See*
FRAUD 1

EMOTIONAL DISTRESS—*See*
ACTIONS 3

EMPLOYEE BENEFIT PLANS—*See*
CONFLICT OF LAWS 1

EMPLOYEE RETIREMENT INCOME SECURITY ACT—*See*
CONFLICT OF LAWS 1
COURTS 1, 2

EMPLOYEES—*See*
BANKS AND BANKING 1

EMPLOYMENT—*See*
ACTIONS 1

ENVIRONMENT.
ENVIRONMENTAL RESPONSE ACT.
1. Private parties jointly and severally liable under the Environmental Response Act to the government for the cleanup or closure costs of environmental contamination may apportion the costs of such cleanup between themselves in any manner they see fit, including the release by one party of the other party's liability (MCL 299.612d; MSA 13.32[12d]). *Stolaruk v Central Nat'l Ins,* 206 Mich App 444.

ENVIRONMENTAL RESPONSE ACT—*See*
ENVIRONMENT 1

EQUITABLE ESTOPPEL—*See*
COURTS 2

EQUITY—*See*
PUBLIC UTILITIES 2

ERRATIC DRIVING—*See*
SEARCHES AND SEIZURES 3

ESTOPPEL.
COLLATERAL ESTOPPEL.
1. Collateral estoppel bars a plaintiff from relitigating issues in a second action where the litigants in the second action are the agents, servants, or employees of the litigants involved in the first action, the issues raised in the second action were fully and fairly litigated in the first action, and those issues were decided against the plaintiff in the first action. *Arim v General Motors,* 206 Mich App 178.

EVIDENCE.
See, also, CRIMINAL LAW 5, 6; ROBBERY 1; TAXATION 7.
HEARSAY.
1. The admissibility of a statement under the excited utterance

EVIDENCE—Cont'd
exception to the hearsay rule is governed by a two-step test for determining whether the declarant had time to contrive or misrepresent: whether the interval between the event and the statement was long enough to make fabrication possible and whether the declarant's emotional state at the time permitted fabrication (MRE 803[2]). *People v Edwards,* 206 Mich App 694.

EXAMPLES—*See*
TRIAL 1, 2

EXCESSIVENESS—*See*
SENTENCES 3

EXCITED UTTERANCES—*See*
EVIDENCE 1

EXCLUSIVE REMEDY PROVISION—*See*
WORKER'S COMPENSATION 3

EXECUTION OF WILLS—*See*
ATTORNEY AND CLIENT 1

EXHAUSTION OF REMEDIES—*See*
ZONING 1

FAILURE TO PAY BENEFITS—*See*
WORKER'S COMPENSATION 4

FEDERAL ARBITRATION ACT—*See*
SECURITIES REGULATION 1

FEDERAL COURTS—*See*
JUDGMENTS 1

FEES—*See*
REGISTERS OF DEEDS 2

FELONY MURDER—*See*
HOMICIDE 1

FIDUCIARY DUTY—*See*
COURTS 1

FINDINGS OF FACT—*See*
CRIMINAL LAW 10

FINES—*See*
SENTENCES 3

FIREMAN'S RULE—*See*
NEGLIGENCE 1

FIRST OPEN SEASON—*See*
GAME 1

FRAUD.

ELEMENTS.

1. To state an action for fraud or misrepresentation, a plaintiff must prove: the defendant made a material misrepresentation; it was false; when the defendant made it, the defendant knew it was false or made it recklessly without knowledge of its truth or falsity; the defendant made it with the intent that the plaintiff would act upon it; the plaintiff acted in reliance upon it; and the plaintiff suffered damage. *Arim v General Motors,* 206 Mich App 178.

"SILENT FRAUD.".

2. The "silent-fraud" doctrine provides that a fraud arising from the suppression of the truth is as prejudicial as fraud that springs from the assertion of a falsehood; the suppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent to a false representation and will support an action in fraud. *Lorenzo v Noel,* 206 Mich App 682.

FRAUDULENT CONCEALMENT—*See*
VENDOR AND PURCHASER 2

FULFILLING REQUIREMENTS—*See*
INSURANCE 3

GAME.

DESIGNATION AS GAME ANIMAL.

1. Only the Legislature may designate a species of animal as game; once an animal has been designated as game, only the Legislature may authorize the establishment of the first open season for that animal (MCL 300.261; MSA 13.1261). *Mich Audubon Society v NRC,* 206 Mich App 1.

WILDLIFE CONSERVATION ACT.

2. Section 8(1)(b) of the Wildlife Conservation Act does not give the Natural Resources Commission or the Department of Natural Resources the authority to issue permits allowing the taking of animals not defined as game in the act; the authority granted to the commission in § 8(1)(b) to determine "the kinds of animals that may be taken" applies only to animals that have been designated as game and for which an open season has been declared under § 11 of the act (MCL 300.258[1][b], 300.261; MSA 13.1258[1][b], 13.1261). *Mich Audubon Society v NRC,* 206 Mich App 1.

3. Section 7 of the Wildlife Conservation Act does not authorize the Natural Resources Commission to establish an open season for an animal that is not game or give the commission the power to designate a species as game (MCL 300.257; MSA 13.1257). *Mich Audubon Society v NRC,* 206 Mich App 1.

GARNISHMENT.

RENTS.

1. A mortgagee of a mortgage on commercial or industrial property that provides as additional security an assignment of rents from the property upon default of the mortgage has priority of claim to such rents over a judgment creditor of the mortgagor where the default of the mortgage occurs before garnishment proceedings are commenced by the judgment creditor (MCL 554.231; MSA 25.1137[1]). *Otis Elevator v Mid-America,* 206 Mich App 710.

GAS AND OIL.

BRINE INJECTION WELLS.

1. A township may not regulate an oil and gas well that has been converted to a brine injection well; the regulation of such wells is within the exclusive jurisdiction of the Department of Natural Resources (MCL 125.271, 319.1 *et seq.*; MSA 5.2963[1], 13.139[1] *et seq.*). *Dart Energy v Iosco Twp,* 206 Mich App 311.

GOOD FAITH—*See*
CONTRACTS 8

GOOD-TIME CREDITS—*See*
SENTENCES 4, 5

GOVERNMENTAL IMMUNITY.

HIGHWAYS.

1. A township needs the approval of the county in which it is located in order to maintain or repair a public sidewalk that is adjacent to a county road within the township; accordingly, for purposes of the highway exception to governmental immunity, the township lacks sufficient jurisdiction over such sidewalks to incur liability for personal injury sustained thereon (MCL 41.288(1), 41.288a, 691.1401[e], 691.1402; MSA 9.585[3][1], 9.585[4], 3.996[101][e], 3.996[102]). *Listanski v Canton Twp,* 206 Mich App 356.

NUISANCE.

2. There is no attractive nuisance exception to governmental immunity from tort liability. *Summers v Detroit,* 206 Mich App 46.

GUARDIANS—*See*
PARENT AND CHILD 2

GUILTY PLEAS—*See*
CRIMINAL LAW 7, 12

HABITUAL OFFENDERS—*See*
HOMICIDE 2

HARMLESS ERROR—*See*
CRIMINAL LAW 5

HEARINGS—*See*
PUBLIC UTILITIES 1
TAXATION 7

HEARSAY—*See*
EVIDENCE 1

HEARSAY EVIDENCE—*See*
CRIMINAL LAW 8, 9

HIGHWAYS.
See, also, GOVERNMENTAL IMMUNITY 1.
ICE.
1. *Williams v Transport Dep't,* 206 Mich App 71.

HOMEOWNER'S INSURANCE—*See*
INSURANCE 1, 2

HOMICIDE.
FELONY MURDER.
1. *People v McKenzie,* 206 Mich App 425.
MANSLAUGHTER WITH MOTOR VEHICLE.
2. *People v Stewart (On Reh),* 206 Mich App 662.

ICE—*See*
HIGHWAYS 1

INCOME FROM OTHER ENTITIES—*See*
TAXATION 5

INDIGENT DEFENDANTS—*See*
CRIMINAL LAW 1

INFORMING SUSPECT OF AVAILABILITY OF RETAINED COUNSEL—*See*
CONSTITUTIONAL LAW 9

INJURY IN COURSE OF EMPLOYMENT—*See*
WORKER'S COMPENSATION 2

INSURABLE INTEREST—*See*
INSURANCE 6

INSURANCE.
See, also, CONFLICT OF LAWS 1; CONTRACTS 3.
HOMEOWNER'S INSURANCE.
1. For purposes of a homeowner's insurance policy that excludes liability coverage for reasonably foreseeable bodily injury resulting from an occurrence caused by an intentional act of an insured person, the foreseeability of bodily injury to a child caused by an intentional sexual act by an insured child is to be

INSURANCE—Cont'd
determined from the standpoint of a child of age, ability, intelligence, and experience similar to that of the insured child. *Fire Ins Exchange v Diehl,* 206 Mich App 108.
2. The term "bodily injury," where defined in a liability insurance policy as bodily harm, sickness, or disease, does not encompass psychiatric injury where no physical manifestations are alleged. *State Farm v Basham,* 206 Mich App 240.

MOTOR VEHICLE FINANCIAL RESPONSIBILITY ACT.
3. The scope of coverage regarding an automobile accident is determined by the motor vehicle financial responsibility act, which provides that the requirements for a motor vehicle liability policy may be fulfilled by combining the policies of one or more insurance carriers (MCL 257.520[j]; MSA 9.2220[j]). *Integral Ins Co v Maersk Co,* 206 Mich App 325.

NO-FAULT.
4. *Phipps v State Farm (Aft Rem),* 206 Mich App 199.
5. A no-fault insurer may rescind any coverage in excess of the statutory limits of coverage where there was a material misrepresentation made in an application for insurance even if, at the time the misrepresentation is discovered, a claim by an innocent third party has been made; under those circumstances, the insurer's liability to the third party is limited to the statutory limits of coverage (MCL 257.520[f][1], [g]; MSA 9.2220[f][1], [g]). *Farmers Ins Ex v Anderson,* 206 Mich App 214.

NO-FAULT ACT.
6. Public policy prevents an automobile liability insurance policy from containing exclusions not specifically authorized by the Legislature; however, an exclusionary clause is not per se invalid simply because it is not specifically provided for in the no-fault act (MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*). *Integral Ins Co v Maersk Co,* 206 Mich App 325.

RELEASE BY INSURED.
7. A release of liability given by an insured to a tortfeasor destroys the insurer's right of subrogation against the tortfeasor and bars an action on the policy by the insured. *Stolaruk v Central Nat'l Ins,* 206 Mich App 444.

RENTAL VEHICLES.
8. A car rental company may provide in its rental agreement that the renter of a vehicle has the option of refusing bodily injury and property damage insurance coverage by the rental company and supplying that coverage independently; such a clause establishes priority of coverage where there is other coverage for the rented vehicle. *State Farm v Enterprise Leasing,* 206 Mich App 7.

RESCISSION OF CONTRACT.
9. The insurer bears the burden of proving materiality in determining whether a misrepresentation in an application for insurance was material and, therefore, whether rescission of an insurance contract is allowed on that basis; evidence of the insurer's practices with regard to the acceptance or rejection of

INSURANCE—Cont'd
similar risks is admissible; a material misrepresentation is one that, if known, would have led the insurer to refuse to make the contract (MCL 500.2218[3]; MSA 24.12218[3]). *Zulcosky v Farm Bureau Life Ins,* 206 Mich App 95.

INSURER'S LIABILITY—*See*
INSURANCE 7

INTENT—*See*
DIVORCE 2

INTENTIONAL-ACTS EXCLUSION—*See*
INSURANCE 1

INTEREST—*See*
TAXATION 8

INTERPRETATION OF CONTRACTS—*See*
CONTRACTS 4

INTOXICATING LIQUORS.

AUTOMOBILES.

1. A person who is convicted of operating a vehicle while under the influence of intoxicating liquor or a controlled substance, third-offense, may be sentenced to both a fine and a term of imprisonment (MCL 257.625[6], 257.902; MSA 9.2325[6], 9.2602). *People v Miller,* 206 Mich App 638.
2. The statute that imposes penalties for driving under the influence of intoxicating liquor or a controlled substance, even before its 1991 amendment, authorized a sentencing court to order repeat offenders to pay court costs in addition to imposing a fine or a sentence (1991 PA 98; MCL 257.625; MSA 9.2325). *People v Miller,* 206 Mich App 638.

DRAMSHOP ACT.

3. A plaintiff seeking damages under the dramshop act must give written notice to all defendants within 120 days after entering into an attorney-client relationship for the purpose of pursuing a claim under the act; the failure to give such notice may serve as a basis for dismissal of an action without a showing of prejudice resulting from the lack of notice; the failure to give such notice is grounds for dismissal of a claim against any defendants that did not receive notice unless sufficient information for determining that a retail licensee might be liable under the act was not known and reasonably could not have been known within the 120 days (MCL 436.22[5]; MSA 18.993[5]). *Lautzenheiser v Jolly Bar,* 206 Mich App 67.

INVESTIGATORY STOPS—*See*
SEARCHES AND SEIZURES 1

JAIL TERMS—*See*
SENTENCES 5

JOINT VENTURES—*See*
TAXATION 4

JUDGMENTS.
See, also, DIVORCE 2; TAXATION 8.
DISMISSALS.
1. A federal court's dismissal of a plaintiff's federal claims that does not state whether the dismissal is with or without prejudice is presumed to be with prejudice (FR Civ P 41[b]). *Bell v Fox,* 206 Mich App 522.
DIVORCE.
2. Judgments entered pursuant to the agreement of the parties, such as a settlement agreement in a judgment of divorce, are of the nature of a contract and are to be construed and applied as such; absent a showing of factors such as fraud or duress, courts act properly when they enforce such agreements. *Mass Indemnity v Thomas,* 206 Mich App 265.
RES JUDICATA.
3. Res judicata bars the relitigation in a state court of a plaintiff's federal claims that have been considered and decided in a final binding decision by a federal court. *Bell v Fox,* 206 Mich App 522.

JUDICIAL CONSTRUCTION—*See*
CONTRACTS 6
CRIMINAL LAW 11

JURISDICTION—*See*
COURTS 1, 2
PRISONS AND PRISONERS 1
RELIGIOUS CORPORATIONS AND ASSOCIATIONS 1

JURY INSTRUCTIONS—*See*
TRIAL 1, 2

JUVENILES—*See*
CRIMINAL LAW 3, 10

LABOR RELATIONS.
COLLECTIVE BARGAINING AGREEMENTS.
1. Whether a dispute is arbitrable under a collective bargaining agreement is a question for the court, but the inquiry is confined to ascertaining whether the party seeking arbitration is making a claim that on its face is governed by the agreement; whether the moving party is right or wrong is a question of contract interpretation for the arbitrator; doubts about the arbitrability of an issue should be resolved in favor of arbitration. *Kentwood Schs v Kent Co Ed Ass'n,* 206 Mich App 161.
2. Absent an express provision in a collective bargaining agreement excluding a particular grievance from arbitration under the arbitration clause, or the most forceful evidence of a

LABOR RELATIONS—Cont'd
purpose to exclude such a claim, the matter should go to arbitration. *Kentwood Schs v Kent Co Ed Ass'n,* 206 Mich App 161.

LATENT DEFECTS—*See*
VENDOR AND PURCHASER 2, 3

LEAVE TO APPEAL—*See*
CRIMINAL LAW 1

LIABILITY—*See*
VENDOR AND PURCHASER 1

LIBEL AND SLANDER.
PUBLIC OFFICIALS.
1. Statements about a public official contained in a parody, political cartoon, or satirical editorial that cannot reasonably be interpreted by a reader as stating actual facts about the official are protected by the First Amendment as public debate and are not actionable for defamation (US Const, Am I). *Garvelink v Detroit News,* 206 Mich App 604.

PUBLIC OFFICIALS OR FIGURES.
2. A public official or figure who brings an action for defamation must prove that the publication was a defamatory falsehood and that the statement was made with actual malice, i.e., with knowledge that it was false or with reckless disregard of whether it was false or not. *Garvelink v Detroit News,* 206 Mich App 604.

LIMITATION OF BENEFITS—*See*
WORKER'S COMPENSATION 5

LIMITS OF COVERAGE—*See*
INSURANCE 4

MANDAMUS—*See*
REGISTERS OF DEEDS 1

MANDATORY MINIMUM SENTENCES—*See*
CONTROLLED SUBSTANCES 2

MANSLAUGHTER WITH MOTOR VEHICLE—*See*
HOMICIDE 2

MATERIAL MISREPRESENTATIONS—*See*
INSURANCE 9

MECHANICS' LIENS.
CONSTRUCTION LIEN ACT.
1. A lien acquired pursuant to the Construction Lien Act includes time-price differential charges where the contract to furnish

MECHANICS' LIENS—Cont'd
labor or materials provides that a percentage of the outstanding balance will be added periodically to the contract price if payment is not made by a certain date (MCL 570.1101 *et seq.*; MSA 26.316[101] *et seq.*). *Erb Lumber v Lien Fund,* 206 Mich App 716.

MENTAL HEALTH PROVIDERS—*See*
ADMINISTRATIVE LAW 1
COURTS 3

MODIFICATION—*See*
DIVORCE 1

MONEY—*See*
CONSTITUTIONAL LAW 4

MOOTNESS—*See*
APPEAL 1, 2

MORTGAGES—*See*
GARNISHMENT 1

MOTOR VEHICLE FINANCIAL RESPONSIBILITY ACT—*See*
INSURANCE 3

MOTOR VEHICLES—*See*
CONSTITUTIONAL LAW 3

MULTIPLE CARRIERS—*See*
INSURANCE 3

MULTIPLE PUNISHMENTS—*See*
CRIMINAL LAW 4

NATURAL ACCUMULATIONS—*See*
HIGHWAYS 1

NEGLIGENCE.
FIREMAN'S RULE.
1. *Stehlik v Johnson (On Reh),* 206 Mich App 83.
PODIATRIC MALPRACTICE.
2. A podiatrist against whom an action for malpractice has been brought is held to the recognized standard of care in the community in which the podiatrist practices or in a similar community (MCL 600.2912a; MSA 27A.2912[1]). *Jalaba v Borovoy,* 206 Mich App 17.

NEW YORK STOCK EXCHANGE RULES—*See*
SECURITIES REGULATION 1, 2

NO-FAULT—*See*
INSURANCE 4, 6

NO-FAULT ACT—*See*
INSURANCE 5

NONGAME ANIMALS—*See*
GAME 2, 3

NOTICE—*See*
HIGHWAYS 1
INTOXICATING LIQUORS 3
PUBLIC UTILITIES 1

NOTICE OF CANCELLATION—*See*
INSURANCE 6

NOTICE OF PROHIBITED CONDUCT—*See*
CRIMINAL LAW 2

NUISANCE—*See*
GOVERNMENTAL IMMUNITY 2

NURSING AND ATTENDANT CARE—*See*
WORKER'S COMPENSATION 5

OFFENSE VARIABLES—*See*
SENTENCES 9

OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF LIQUOR—*See*
HOMICIDE 2

OPTIONAL COVERAGE—*See*
INSURANCE 8

ORAL PROMISE TO PAY FOR FUTURE SERVICES OF ANOTHER—*See*
CONTRACTS 3

OVERBREADTH—*See*
CONSTITUTIONAL LAW 2

OWNER-IMPOSED RESTRAINTS ON SALE OR USE—*See*
TAXATION 2

PARENT AND CHILD.

CHILD CUSTODY.

1. A party seeking a change of custody of a child where there is a prior court order regarding custody has the burden of showing first that there is proper cause for the change of custody or that there has been a change in circumstances warranting a change in custody; until such cause or change in circumstances has been established, a court is without authority to consider the prior decision or to reconsider the best interest of the child

PARENT AND CHILD—Cont'd
or the existence of an established custodial environment (MCL 722.27[1][c]; MSA 25.312[7][1][c]). *Rossow v Aranda,* 206 Mich App 456.

CHILD CUSTODY ACT.

2. A limited guardian, but not a full guardian, of a child over whom parental rights have been suspended loses standing to bring an action for custody of the child when the child's parent or parents substantially comply with the terms of a reintegration plan (MCL 722.26b; MSA 25.312[6b]). *Newsome v Labby,* 206 Mich App 434.

CHILD PROTECTIVE PROCEEDINGS.

3. A prosecutor may not appear in a child protective proceeding unless the probate court or the Department of Social Services has requested the appearance of the prosecutor or the prosecutor has filed the original petition for termination of parental rights (MCL 712A.17[4], 712A.17[5], 712A.19b[1]; MSA 27.3178[598.17][4], 27.3178[598.17][5], 27.3178[598.19b][1]). *In re Hill,* 206 Mich App 689.

PARODIES, POLITICAL CARTOONS, AND SATIRE—*See*
LIBEL AND SLANDER 1

PAROLE—*See*
CRIMINAL LAW 11
PRISONS AND PRISONERS 1

PARTIES.
See, also, ACTIONS 2.

STANDING.

1. Standing denotes a party's interest in the outcome of litigation that ensures sincere and vigorous advocacy; standing requires a demonstration that a substantial interest of the plaintiff will be affected detrimentally in a manner different from the interests of the citizenry at large. *Mich Soft Drink v Treas Dep't,* 206 Mich App 392.

PENALTY—*See*
WORKER'S COMPENSATION 4

PERMITS TO TAKE—*See*
GAME 2

PERSONAL LIABILITY—*See*
INSURANCE 2

"PERSONS"—*See*
TAXATION 4

PETITIONING GOVERNMENT—*See*
TORTS 1, 2

PHOTOCOPIES—*See*
REGISTERS OF DEEDS 1, 2

PODIATRIC MALPRACTICE—*See*
NEGLIGENCE 2

POLICE—*See*
SEARCHES AND SEIZURES 2

POLICE DISPATCHERS—*See*
PUBLIC OFFICERS 1

POLICE INTERROGATION—*See*
CONSTITUTIONAL LAW 9

POLICE OFFICERS—*See*
PUBLIC OFFICERS 2

POLICE POWERS—*See*
CONSTITUTIONAL LAW 4

POSSESSION OF MORE THAN 225 GRAMS BUT LESS THAN 650 GRAMS OF COCAINE—*See*
CONTROLLED SUBSTANCES 1

PREEMPTION—*See*
CONFLICT OF LAWS 1

PREJUDICE—*See*
INTOXICATING LIQUORS 3
JUDGMENTS 1

PRELIMINARY INJUNCTIONS—*See*
COSTS 1

PRESERVING QUESTION—*See*
CRIMINAL LAW 12
SENTENCES 1

PRETRIAL PROCEDURE.

DISCOVERY.

1. A court contemplating a default judgment as a sanction for discovery abuses should consider whether a failure to respond to discovery requests extended over a substantial period, whether there was compliance with a court order directing discovery, the amount of time that elapsed between the violation and the motion for default judgment, and whether wilfulness was shown; the court also must evaluate on the record other available options before concluding that a default judgment is warranted; a default judgment should be employed only where there has been a flagrant and wanton refusal to facilitate discovery (MCR 2.313[B][2][c]). *Thorne v Bell,* 206 Mich App 625.

PRETRIAL PROCEDURE—Cont'd
2. A trial court may impose sanctions that it deems just where a party fails to obey an order to provide or permit discovery; however, the court may not impose substantial penalties because a witness elects to exercise the Fifth Amendment privilege against self-incrimination; the court's decision will not be overturned on appeal absent an abuse of discretion (US Const, Am V ; MCR 2.313[B]). *Massey v Ferndale,* 206 Mich App 698.

PRIMA FACIE CASE—*See*
CIVIL RIGHTS 1

PRIOR CRIMINAL CONDUCT—*See*
SENTENCES 8

PRIOR DISMISSAL OF CHARGES—*See*
SENTENCES 1

PRIORITY OF COVERAGE—*See*
INSURANCE 8

PRISONS AND PRISONERS.
PAROLE.
1. A trial court has jurisdiction to set aside a discharge from parole by the Department of Corrections where the discharge was granted before the parolee had completed successfully the term of parole, because until the parole has been completed successfully any discharge would be illegal. *People v Young,* 206 Mich App 144.

PRIVATE PROPERTY—*See*
CONSTITUTIONAL LAW 5-7

PRIZE CONTESTS—*See*
CONTRACTS 5

PROBABLE CAUSE—*See*
SEARCHES AND SEIZURES 4

PROBATION—*See*
SENTENCES 5

PROBATIONARY TEACHERS—*See*
SCHOOLS 1

PROPERTY—*See*
CONSTITUTIONAL LAW 4

PROPOSAL B OFFENDERS—*See*
SENTENCES 4

PROSECUTING ATTORNEY—*See*
PARENT AND CHILD 3

PSYCHIATRIC INJURY—*See*
INSURANCE 2

PUBLIC DUTY DOCTRINE—*See*
PUBLIC OFFICERS 1, 2

PUBLIC OFFICERS.

POLICE DISPATCHERS.

1. A police dispatcher owes no special duty of care toward the victims of crimes that are reported to the police by third parties, because under those circumstances there exists no special relationship between the dispatcher and the victim; in such circumstances, the public duty doctrine applies. *White v Humbert,* 206 Mich App 459.

POLICE OFFICERS.

2. A police officer who is at the scene of a reported crime, is informed of the danger to a specific victim, and is in a position to render possible assistance to that particular victim owes a duty of care to that specific victim such that the public duty doctrine does not apply. *White v Humbert,* 206 Mich App 459.

PUBLIC OFFICIALS—*See*
LIBEL AND SLANDER 1

PUBLIC OFFICIALS OR FIGURES—*See*
LIBEL AND SLANDER 2

PUBLIC UTILITIES.

AMENDMENT OF RATE SCHEDULES.

1. *Attorney General v PSC,* 206 Mich App 290.

ELECTRIC FRANCHISES.

2. *Marshall v Consumers Power,* 206 Mich App 666.

PURPOSE OF ACT—*See*
STATUTES 1

QUESTIONS OF LAW—*See*
LABOR RELATIONS 1
TAXATION 7

REAL PROPERTY TAXES—*See*
TAXATION 2

REALTY—*See*
VENDOR AND PURCHASER 2-4

REASONABLENESS—*See*
SEARCHES AND SEIZURES 2, 3

RECORDS—*See*
REGISTERS OF DEEDS 1, 2

REFORMATION—*See*
CONTRACTS 3

REGISTERS OF DEEDS.
RECORDS.
1. Registers of deeds have the discretion to permit parties seeking copies of records maintained in the office of the register of deeds to make their own copies of the records or, in the alternative, to supply those copies for those parties for a fee; because the choice of the manner in which the copies are supplied is left to the discretion of the register of deeds, mandamus does not lie to require a register of deeds to permit a party to make its own copies (MCL 565.551; MSA 26.791). *Abstract Co v Reg of Deeds,* 206 Mich App 508.
2. Registers of deeds may charge a fee of $1 a page for copies of documents produced for parties requesting such copies; a court lacks authority to create an exception to that legislatively authorized fee (MCL 565.551, 600.2567[1][b]; MSA 26.791, 27A.2567[1][b]). *Abstract Co v Reg of Deeds,* 206 Mich App 508.

REIMBURSEMENT—*See*
WORKER'S COMPENSATION 6

RELEASE BY INSURED—*See*
INSURANCE 7

RELIGIOUS CORPORATIONS AND ASSOCIATIONS.
COURTS.
1. The issue of admission to an ecclesiastical organization's liturgical or eduational functions would entangle civil courts in matters of doctrine or ecclesiastical polity; a civil court should decline to hear such questions on the basis of lack of subject-matter jurisdiction. *Dlaikan v Roodbeen,* 206 Mich App 591.

REMEDIES—*See*
APPEAL 1, 2
PRETRIAL PROCEDURE 1

RENTAL VEHICLES—*See*
INSURANCE 8

RENTS—*See*
GARNISHMENT 1

REPAIR NOTICES AND ORDERS—*See*
VENDOR AND PURCHASER 3

RESCISSION OF CONTRACT—*See*
INSURANCE 4, 9

RES JUDICATA—*See*
JUDGMENTS 3

RETALIATORY DISCHARGE—*See*
ACTIONS 1

RIGHT AGAINST COMPELLED SELF-INCRIMINATION—*See*
CONSTITUTIONAL LAW 9

RIGHT OF CONFRONTATION—*See*
CRIMINAL LAW 9

RIGHT TO COUNSEL—*See*
CONSTITUTIONAL LAW 8, 9

ROBBERY.
ARMED ROBBERY.
1. *People v Johnson,* 206 Mich App 122.

SALES.
"AS IS" CONTRACTS.
1. An "as is" clause in a purchase agreement allocates the risk of loss arising from conditions unknown to the parties; the clause transfers the risk of loss where the defect reasonably should have been discovered upon inspection, but was not; the clause does not transfer the risk of loss where the seller makes fraudulent representations before the purchaser signs a binding agreement. *Lorenzo v Noel,* 206 Mich App 682.

SALES OF BUSINESS ASSETS—*See*
CONTRACTS 6

SANCTIONS—*See*
PRETRIAL PROCEDURE 2

SCHOOLS.
See, also, RELIGIOUS CORPORATIONS AND ASSOCIATIONS 1.
TEACHER TENURE ACT.
1. A probationary teacher who does not complete a two-year probationary period and therefore does not acquire tenure may not seek a remedy under the teacher tenure act (MCL 38.91, 38.101, 38.121; MSA 15.1991, 15.2001, 15.2021). *Kentwood Schs v Kent Co Ed Ass'n,* 206 Mich App 161.

SCOPE OF COVERAGE—*See*
INSURANCE 3

SEARCHES AND SEIZURES.
AUTOMOBILES.
1. *People v Bordeau,* 206 Mich App 89.
2. The following rules apply with respect to the stopping, searching, and seizing of motor vehicles: reasonableness is the test that is to be applied for both the stop and the search of moving motor vehicles; said reasonableness will be determined from the facts and circumstances of each case; fewer foundation facts

SEARCHES AND SEIZURES—Cont'd
are necessary to support a finding of reasonableness where moving vehicles are involved than if a house or a home were involved; and a stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search is conducted by the police. *People v Christie (On Rem),* 206 Mich App 304.
3. A person's erratic driving may give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop of the person's vehicle by a police officer. *People v Christie (On Rem),* 206 Mich App 304.

SEARCH WARRANTS.
4. Probable cause for the issuance of a search warrant must be based on facts presented to the magistrate by oath or affirmation; the affidavit must contain facts within the knowledge of the affiant, rather than conclusions or beliefs, and must state facts that justify inferences; the affiant is not free to draw inferences, but must state matters that justify the drawing of them. *People v Sloan,* 206 Mich App 484.

SEARCH WARRANTS—*See*
SEARCHES AND SEIZURES 4

SECURITIES REGULATION.
ARBITRATION.
1. The federal arbitration act controls actions in both state and federal courts; state courts are bound under the Supremacy Clause to enforce the substantive provisions of the act; the arbitration provisions in the constitution and rules of the New York Stock Exchange are sufficient to compel arbitration of disputes covered under the act irrespective of whether they are incorporated into a separate agreement (US Const, art VI, § 2; 9 USC 1-15). *Lucas v Peters,* 206 Mich App 530.
2. New York Stock Exchange Rule 600(a) requires "associated persons" to submit to arbitration any claims or disputes with a customer or nonmember arising out of the business of the associated person in connection with activities as an associated person; an associated person is a person associated with a member as, inter alia, an officer, director, branch manager, or employee of a broker or dealer that is a member (15 USC 78c[a][18], 78c[a][21]). *Lucas v Peters,* 206 Mich App 530.

SECURITY—*See*
COSTS 1

SECURITY INTERESTS—*See*
UNEMPLOYMENT COMPENSATION 1

SENTENCES.
See, also, CONTROLLED SUBSTANCES 1, 2; CRIMINAL LAW 11; INTOXICATING LIQUORS 1, 2; CRIMINAL LAW 10, 12.

SENTENCES—Cont'd

APPEAL.

1. A defendant fails to preserve for appellate review a challenge to a sentencing court's use of information in a presentence investigation report regarding charges that were dismissed in a different court in exchange for the defendant's plea of guilty in that court where the defendant is given an opportunity to challenge the accuracy or relevance of the dismissed charges at the time of sentencing but fails to do so (MCL 771.14[5]; MSA 28.1144[5]). *People v Lawrence,* 206 Mich App 378.

CONSIDERATION OF PRIOR CONVICTIONS.

2. A claim on appeal that a prior misdemeanor conviction obtained without counsel for the defendant was improperly considered at sentencing is essentially a challenge to the information contained in the presentence investigation report concerning the prior conviction; to preserve the issue for appellate review, the defendant must object in the trial court to the alleged inaccuracies in the presentence investigation report. *People v Hamm,* 206 Mich App 270.

FINES.

3. The question of excessive fines necessarily involves a consideration of the purpose sought to be accomplished by the Legislature in authorizing the fines and of the seriousness of the problem with which it undertook to deal. *People v Miller,* 206 Mich App 638.

GOOD-TIME CREDITS.

4. A person convicted of a Proposal B offense and receiving good-time credits against the maximum sentence before December 30, 1982, is thereafter entitled to continue receiving good-time credits against the maximum sentence and to receive disciplinary credits against the minimum sentence (MCL 791.233b, 800.33[5]; MSA 28.2303[3]; 28.1403[5]). *Lowe v Corrections Dep't (On Reh),* 206 Mich App 128.

PROBATION.

5. A court, in imposing a jail term as a condition of a sentence of probation, may not set a specific date for the defendant's release from jail; setting a specific release date could deny the defendant the opportunity to earn good-time credit as provided by statute (MCL 51.282[2]; MSA 5.883[2][2]). *People v Cannon,* 206 Mich App 653.

SENTENCING AGREEMENTS.

6. A sentencing agreement that provides for a general recommendation by the prosecution that the minimum sentence of imprisonment be within the range recommended by the sentencing guidelines is breached where the prosecution recommends a specific minimum sentence. *People v Swirles,* 206 Mich App 416.

7. The terms of a sentencing agreement must be fulfilled where a defendant's plea of guilty is induced by the agreement. *People v Swirles,* 206 Mich App 416.

SENTENCES—Cont'd
SENTENCING GUIDELINES.
8. *People v Bivens,* 206 Mich App 284.
9. Offense variables under the sentencing guidelines should be scored only with respect to the specific criminal transaction that gave rise to the conviction for which sentence is imposed unless the instructions for a variable specifically direct otherwise. *People v Chesebro,* 206 Mich App 468.

SENTENCING AGREEMENTS—*See*
SENTENCES 6, 7

SENTENCING GUIDELINES—*See*
SENTENCES 8, 9

SETTLEMENT AGREEMENTS—*See*
JUDGMENTS 2

SHAM EXCEPTION—*See*
TORTS 2

SIDEWALKS—*See*
GOVERNMENTAL IMMUNITY 1

"SILENT FRAUD"—*See*
FRAUD 2

SILICOSIS, DUST DISEASE, AND LOGGING INDUSTRY COMPENSATION FUND—*See*
WORKER'S COMPENSATION 6

SINGLE BUSINESS TAX ACT—*See*
TAXATION 3-6

SNOW—*See*
HIGHWAYS 1

SPECIFIC RELEASE DATES—*See*
SENTENCES 5

STANDARD OF CARE—*See*
NEGLIGENCE 2

STANDING—*See*
ACTIONS 2
COURTS 3
PARENT AND CHILD 2, 3
PARTIES 1

STATUTE OF FRAUDS—*See*
CONTRACTS 7

STATUTES.

See, also, CONSTITUTIONAL LAW 6; CRIMINAL LAW 11.

WETLAND PROTECTION ACT.

1. The primary purpose of the Wetland Protection Act is to ensure that wetland habitats are preserved and protected; the act advances a legitimate state interest (MCL 281.701 *et seq.*; MSA 18.595[51] *et seq.*). *Harkins v DNR,* 206 Mich App 317.

SUBROGATION—*See*
INSURANCE 7

SUCCESSOR EMPLOYERS—*See*
UNEMPLOYMENT COMPENSATION 1

SUFFICIENCY OF EVIDENCE—*See*
ROBBERY 1

SUMMARY DISPOSITION—*See*
BANKS AND BANKING 1

SUSPENDED ATTORNEYS—*See*
CONSTITUTIONAL LAW 8

TAKEN FOR PUBLIC USE—*See*
CONSTITUTIONAL LAW 4, 5, 7

TAKING OF PROPERTY—*See*
ZONING 1

TAXATION.

APPEAL.

1. The Tax Tribunal has no authority to grant a delayed appeal where the petition for appeal has not been filed within the statutorily mandated thirty-day period after a final decision of the Department of Treasury (MCL 205.22, 205.735; MSA 7.657[22], 7.650[35]). *Curis Big Boy v Treas Dep't,* 206 Mich App 139.

REAL PROPERTY TAXES.

2. *Canada Creek v Montmorency Twp,* 206 Mich App 498.

SINGLE BUSINESS TAX ACT.

3. An affiliated group may be permitted to file a consolidated tax return under the Single Business Tax Act; an affiliated group is two or more corporations, one of which owns or controls, directly or indirectly, eighty percent or more of the capital stock with voting rights of the other corporation or corporations (MCL 208.3[1], 208.77; MSA 7.558[3][1], 7.558[77]). *Con Alum v Treas Dep't (Aft Rem),* 206 Mich App 222.

4. A joint venture is a separate and distinct taxpayer subject to the single business tax if it conducts business in the state regardless of whether it is a part of a unitary business composed of other taxpayers; a joint venture is a separate person

TAXATION—Cont'd
under the Single Business Tax Act (MCL 208.6[1]; MSA 7.558[6][1]). *Con Alum v Treas Dep't (Aft Rem),* 206 Mich App 222.
5. The Single Business Tax Act excludes from the principal taxpayer's tax base income or losses from any other entity, including a joint venture of which the taxpayer is a member, that is subject to the tax or that would be subject to the tax if it conducted business in the state (MCL 208.9[9]; MSA 7.558[9][9]). *Con Alum v Treas Dep't (Aft Rem),* 206 Mich App 222.
6. The individual tax base components stated in § 9 of the Single Business Tax Act are not independent variables to be adjusted without reference to each other; rather, they must be added together before they are apportioned under § 45 (MCL 208.9, 208.45; MSA 7.558[9], 7.558[45]). *Con Alum v Treas Dep't (Aft Rem),* 206 Mich App 222.

TAX TRIBUNAL.
7. The Tax Tribunal may rely upon the evidence presented by the taxpayer when deciding to uphold an assessment by the Department of Treasury in an action involving primarily questions of law; the fact that the department does not present evidence to support the assessment at the tribunal's hearing does not mandate reversal of the tribunal's decision. *Con Alum v Treas Dep't (Aft Rem),* 206 Mich App 222.
8. Interest on a refund of taxes paid as a result of a reduction by the Tax Tribunal of an assessment is calculated by computing the interest for the period from the date the tax was paid to the date of entry of the judgment of the Tax Tribunal, adding that amount to the amount of the judgment, and, then, computing the interest on the entire judgment, including the prejudgment interest, for the period from the date of entry of the judgment to the date of the satisfaction of the judgment (MCL 205.737[4]; MSA 7.650[37][4]). *Southfield W, Inc v Southfield,* 206 Mich App 334.

TAX BASE—*See*
TAXATION 6

TAX TRIBUNAL—*See*
TAXATION 1, 7, 8

TEACHER TENURE ACT—*See*
SCHOOLS 1

TEMPORARY RESTRAINING ORDERS—*See*
COSTS 1

TERMINATION OF CONTRACTS—*See*
CONTRACTS 8

TIME-PRICE DIFFERENTIAL CHARGES—*See*
MECHANICS' LIENS 1

TORTS.
See, also, ACTIONS 3.

TORTS—Cont'd

CONSTITUTIONAL LAW.

1. Parties who, pursuant to the First Amendment, petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent; the protection of this doctrine extends to efforts to influence administrative agencies and the courts; the doctrine is not limited to federal antitrust actions and extends to protect First Amendment petitioning of the government from claims brought under federal and state laws, including claims under 42 USC 1983 or alleging tortious interference with contractual relations in violation of the common law (US Const, Am I). *Arim v General Motors,* 206 Mich App 178.
2. The "sham" exception to the doctrine that parties who, pursuant to the First Amendment, petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even through their petitions are motivated by anticompetitive intent applies when one party begins litigation not to win that litigation but to force its competitor to waste time and money in defending itself or engages in the administrative process only to preclude or delay its competitor's access to the process (US Const, Am I). *Arim v General Motors,* 206 Mich App 178.

TOWNSHIPS—*See*

GOVERNMENTAL IMMUNITY 1

TRIAL.

JURY INSTRUCTIONS.

1. It is error for a trial court in instructing a jury regarding the elements of second-degree child abuse to remove the element of recklessness from the jury's consideration by using the defendant's conduct itself as an example of a reckless act where the only contested issue in the case is the element of recklessness (MCL 750.136b[3]; MSA 28.331[2][3]). *People v Edwards,* 206 Mich App 694.
2. A trial court instructing a jury may give an example in order to clarify the meaning of a complex legal term but must indicate clearly that the example is only an example and that the jury must determine guilt or innocence by following the jury instructions as a whole. *People v Edwards,* 206 Mich App 694.

UNCLAIMED DEPOSITS—*See*

CONSTITUTIONAL LAW 1

UNEMPLOYMENT COMPENSATION.

SUCCESSOR EMPLOYERS.

1. A person who purchases seventy-five percent or more of the assets of an employer from a lender to whom a security interest in the assets had been given by the employer and the

UNEMPLOYMENT COMPENSATION—Cont'd
assets surrendered in payment of the employer's debt to the lender may be deemed to be the successor of the employer and liable for the contributions left unpaid by the employer to the Michigan Employment Security Commission at the time the assets were acquired from the lender; the liability of the purchaser for unpaid contributions is to be reduced by the amount of any security interest in the assets that is superior to the lien or interest of the commission (MCL 421.15[g], 421.41[2][a]; MSA 17.515[g], 17.543[2][a]). *K & K Woodworking v MESC,* 206 Mich App 515.

UNINHABITABLE REALTY—*See*
VENDOR AND PURCHASER 3

UNLAWFUL DETENTION—*See*
CRIMINAL LAW 6

UNREASONABLY DANGEROUS DEFECTS—*See*
VENDOR AND PURCHASER 4

VAGUENESS—*See*
CONSTITUTIONAL LAW 2
CRIMINAL LAW 2

VENDOR AND PURCHASER.

DEFECTS IN PROPERTY.

1. A vendor of land who surrenders title, possession, and control of real property shifts all responsibility for the land's condition to the vendee and is not liable for any harm resulting from defects existing at the time of sale except where there is a failure to disclose to the vendee any concealed condition known to the vendor that involves an unreasonable danger or there is active concealment of such a condition; the vendor is also liable to those outside the land after the sale for harm resulting from a dangerous condition on the land until the vendee discovers or should have discovered the condition and has a reasonable opportunity to take precautions; under either exception, knowledge of a defect by the vendee relieves the vendor of any duty or liability. *Lorenzo v Noel,* 206 Mich App 682.

REALTY.

2. An "as is" clause in a purchase agreement for the sale of realty does not preclude a purchaser from alleging fraudulent concealment of a latent defect; fraudulent concealment is established by showing that the hidden defect, which need not be unreasonably dangerous, was known to the vendor and that the purchaser had no knowledge of it. *Shimmons v Mortgage Corp,* 206 Mich App 27.

3. The issuance of a repair notice and order regarding realty following a township building department's declaration of the realty as uninhabitable is a latent defect that must be disclosed by the owner when selling the property. *Shimmons v Mortgage Corp,* 206 Mich App 27.

VENDOR AND PURCHASER—Cont'd
4. A buyer of realty need not show that a defect was unreasonably dangerous in order to show liability in a real estate action between the buyer and seller based on fraud, not negligence. *Lorenzo v Noel,* 206 Mich App 682.

WAGE AND FRINGE BENEFITS ACT—*See*
ACTIONS 1

WAIVER OF CONTRACT PROVISIONS—*See*
CONTRACTS 2

WETLAND FILL PERMITS—*See*
ADMINISTRATIVE LAW 2
CONSTITUTIONAL LAW 10

WETLAND PROTECTION ACT—*See*
ADMINISTRATIVE LAW 2
CONSTITUTIONAL LAW 10
STATUTES 1

WHISTLEBLOWERS' PROTECTION ACT—*See*
ACTIONS 1

WILDLIFE CONSERVATION ACT—*See*
GAME 2, 3

WITHDRAWAL OF PLEAS BEFORE SENTENCING—*See*
CRIMINAL LAW 4

WORDS AND PHRASES—*See*
SECURITIES REGULATION 2

WORKER'S COMPENSATION.
COORDINATION OF BENEFITS.
1. Once an employer makes an initial selection to reduce a disabled employee's worker's compensation benefits under either §§ 354 or 357 of the Worker's Disability Compensation Act, § 357(2) prohibits the employer from serially switching the selection; an exception to this general rule may be found where the specific circumstances involved require a different result in order to prevent injustice, e.g., a change in a party's disability status may be viewed as a new event that may terminate prior elections by the employer and permit a new election (MCL 418.354, 418.357; MSA 17.237[354], 17.237[357]). *Saraski v Dexter Davison,* 206 Mich App 347.
COURTS.
2. Although the Bureau of Worker's Disability Compensation has exclusive jurisdiction to decide whether a worker's injury was suffered in the course of employment, the courts retain the jurisdiction to determine the fundamental issue whether an employee-employer relationship exists. *Integral Ins Co v Maersk Co,* 206 Mich App 325.

WORKER'S COMPENSATION—Cont'd

EXCLUSIVE REMEDY PROVISION.

3. An employee may maintain an action for premises liability against an employer that operates a retail food establishment where the employee, after having gone to the place of employment to secure a paycheck, thereby arguably having been engaged in the course of the employment relationship, ceases the employment relationship by purchasing food at retail price and eating the food in the public dining area of the establishment before being injured while on the premises; under such circumstances, the exclusive remedy provision of the Worker's Disability Compensation Act is not applicable (MCL 418.131; MSA 17.237[131]). *Zarka v Burger King,* 206 Mich App 409.

FAILURE TO PAY BENEFITS.

4. It is error for the Worker's Compensation Appellate Commission to refuse to assess penalties against an employer for failure to pay seventy percent of a disabled employee's benefits pending an appeal to the commission; whether the commission ultimately denies the benefits sought is not relevant (MCL 418.862[1]; MSA 17.237[862][1]). *Saraski v Dexter Davison,* 206 Mich App 347.

NURSING AND ATTENDANT CARE.

5. *Sokolek v Gen Motors (On Remand),* 206 Mich App 31.

SILICOSIS, DUST DISEASE, AND LOGGING INDUSTRY COMPENSATION FUND.

6. Other benefits coordinated with worker's compensation benefits pursuant to MCL 418.354; MSA 17.237(354) are not to be considered when determining whether an employer or its insurer has paid the amount of worker's compensation benefits for silicosis or other dust disease required by MCL 418.531(1); MSA 17.237(531)(1) for commencement of reimbursement of the employer or its insurer by the Silicosis, Dust Disease, and Logging Industry Compensation Fund (MCL 418.531; MSA 17.237[531]). *Griswold v Sealed Power (On Rem),* 206 Mich App 251.

WRONGFUL DEATH.

7. An employer or a worker's compensation carrier may seek reimbursement from a third-party tort recovery for the death of an employee, including damages for loss of consortium or loss of society and companionship, where the recipient of the tort recovery also is eligible to receive worker's compensation benefits (MCL 418.827[5]; MSA 17.237[827][5]). *Beaudrie v Anchor Packing Co,* 206 Mich App 245.

WRONGFUL DEATH—*See*
WORKER'S COMPENSATION 7

ZONING.

TAKING OF PROPERTY.

1. *Paragon Properties v Novi,* 206 Mich App 74.