Michigan. Court of Appeals.

MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN COURT OF APPEALS

FROM

December 6, 1994 to February 21, 1995

WILLIAM F. HAGGERTY
REPORTER OF DECISIONS

NORMAN C. HELFER
DEPUTY REPORTER OF DECISIONS

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MYRON H. WAHLS, Detroit	1999
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ROMAN S. GRIBBS, Northville	2001
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MARK J. CAVANAGH, Royal Oak	1997
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MARILYN J. KELLY, Bloomfield Hills	2001
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MAUREEN P. REILLY, Grosse Pointe Park	1997
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---

1 To January 1, 1995.

2 From December 23, 1994.

3 From January 1, 1995.

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CHIEF JUSTICE

JAMES H. BRICKLEY, TRAVERSE CITY	1997[1]
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DOROTHY COMSTOCK RILEY, GROSSE POINTE FARMS	2001
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CLERK: CORBIN R. DAVIS, LANSING

CRIER: DAVID G. PALAZZOLO, WILLIAMSTON

REPORTER OF DECISIONS: WILLIAM F. HAGGERTY, EAST LANSING

1 From January 4, 1995.
2 To January 4, 1995.
3 From January 1, 1995.
4 To March 17, 1994.
5 From April 25, 1994.
6 From June 1, 1994.
7 From March 6, 1995.



JUDGE

HENRY WILLIAM SAAD

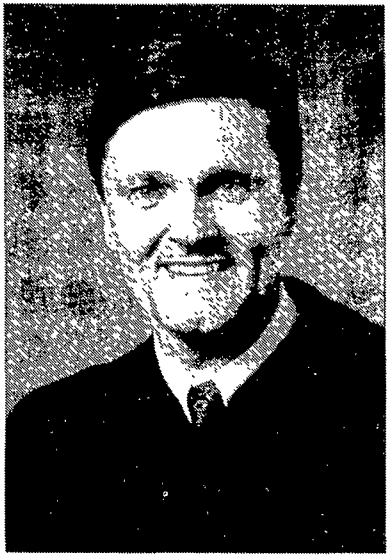
Judge Henry William Saad was born on July 15, 1948, in Detroit. He graduated from Cody High School and received a degree of Bachelor of Science in Business Administration with distinction from Wayne State University in 1971 and graduated magna cum laude with a Juris Doctor degree from Wayne State University in 1974.

Judge Saad was an associate with Dickinson, Wright, Moon, Van Dusen & Freeman from 1974 until 1981 and a partner of that firm from 1981 to 1994. He has been an adjunct professor at both the University of Detroit School of Law and the Wayne State University Law School. He has served both as an arbitrator with the Michigan Employment Relations Commission and as a hearing referee with the Michigan Department of Civil Rights.

Judge Saad is a member of the State Bar of Michigan and the American, Detroit, and Oakland County Bar Associations, as well as a member of the Arab American Bar Association, in which he served as both treasurer and secretary. He has been involved with New Detroit, Inc., the United Foundation, and American Arabic and Jewish Friends and has been a board member of the Oakland Community College Foundation, The National Conference of Christians and Jews, Inc., and The Greater Detroit Inter-Faith Round Table of the National Conference of Christians and Jews, as well as having served as president of the Wayne State University Law Alumni Association.

Judge Saad has had articles published in the *Employee Relations Law Journal, Management Solutions, Michigan Journal, Michigan Lawyers Weekly, Editor & Publisher, The Wayne Law Review,* and *OCBA Laches.*

Judge Saad resides in Birmingham. He was appointed to the Court of Appeals by Governor John Engler, effective December 23, 1994, to fill the unexpired term of Judge John Shepherd, a term ending January 1, 1997.



JUDGE
RICHARD A. BANDSTRA

Judge Richard A. Bandstra was born in Chicago on April 2, 1950, and grew up in South Holland, Illinois, a suburb south of the city. He attended Calvin College in Grand Rapids, Michigan, where he received a bachelor's degree in sociology. Judge Bandstra then returned to Chicago to earn a masters degree in sociology from the University of Chicago and to teach sociology at Trinity Christian College in Palos Heights, Illinois.

Judge Bandstra earned his law degree at the University of Chicago where he was an associate editor of *The Law Review.* Following graduation in 1980, Judge Bandstra entered private practice with Warner, Norcross & Judd in Grand Rapids, Michigan. A litigator, he developed special expertise defending manufacturers from products liability claims and media clients from libel accusations.

In 1985, Grand Rapids voters elected Judge Bandstra to the Michigan House of Representatives. He served there for ten years, sponsoring major legislation, including the 1988 Community Dispute Resolution Act. He served as vice-chair of the House Judiciary Committee and was a member of the Commission on the Courts in the Twenty-First Century. As Floor Leader of the Michigan House, Judge Bandstra helped craft the "shared power agreement," which governed the chamber during the historic term (1993-94) in which an equal number of representatives were elected from each of the parties. On the basis of his work in the House, Judge Bandstra

received many awards, including national recognition for his efforts in civil justice reform.

Judge Bandstra has been active in a number of community projects and, as a result, earned the Grand Rapids Jaycees Distinguished Service Award in 1988. He and his family are members of the Christian Reformed Church, where he has served as a deacon. Judge Bandstra has been married since 1970 to Cynthia Triezenberg Bandstra; they have two daughters, Carissa and Justine.

In November 1994, Judge Bandstra was elected to the Court of Appeals for an eight-year term ending January 1, 2003.



JUDGE

JOEL P. HOEKSTRA

Judge Joel P. Hoekstra was born on May 10, 1947, in Grand Rapids. He attended Grand Rapids Christian High School; Calvin College, where he received a Bachelor of Arts degree in History and Education in 1970; and Valparaiso University School of Law, where he received a Juris Doctor degree in 1973. From 1973 to 1985, he served as an assistant prosecutor in the Kent County Prosecuting Attorney's Office, where his duties included founding the office's Juvenile Division. He was elected judge of the 61st District Court in 1984, reelected in 1990, and served as Chief Judge from 1989 to 1992. He teaches as an adjunct professor of criminal justice at Calvin College.

Judge Hoekstra is a member of the State Bar of Michigan, the American Bar Association, the Grand Rapids Bar Association, the American Judges Association, and the American Judicature Society. He is a board member of Family Impact, Kent County Domestic Violence Coordinating Committee, Very Special Arts, Grand Rapids Christian School Association, and Young Life-Urban Board. He is a former board member of Project Rehab and Kent County Community Corrections.

Judge Hoekstra is married to the former Greta J. Buis and has two children. He is a member and former deacon of Shawnee Park Christian Reformed Church.

In November 1994, Judge Hoekstra was elected to the Court of Appeals for a ten-year term ending January 1, 2005.



JUDGE
JANE E. MARKEY

Judge Jane E. Markey was born on May 27, 1951, in Saginaw. She attended Michigan State University from 1969 to 1973, receiving a Bachelor of Arts degree, with high honors. Judge Markey attended the Thomas M. Cooley Law School from 1978 to 1981, where she was editor-in-chief of the *Thomas M. Cooley Law Review*, receiving her Juris Doctor degree, with honors.

Judge Markey was employed as a teacher and as a caseworker for the Saginaw County Department of Social Services from 1973 to 1978. From 1981 to 1982, she served as a prehearing attorney and a judicial law clerk for the Michigan Court of Appeals. Judge Markey practiced law from 1982 to 1984 with Baxter & Hammond in Grand Rapids, and from 1984 to 1991 with Dykema Gossett in Grand Rapids. Judge Markey was elected to the 61st District Court in Grand Rapids in November 1990 and reelected in November 1992.

Judge Markey is a member of the American Bar Association, the State Bar of Michigan, the Grand Rapids Bar Association, the American Judges Association, and the Women Lawyers Association of Michigan and West Michigan. She also has served as a hearing panelist for the State of Michigan Attorney Discipline Board from 1989 to the present, is a Fellow of the Michigan State Bar Foundation, has served on the faculty of the Hillman Advocacy Program, United States District Court for the Western District of Michigan, the Michigan Judicial Institute, and the Institute

of Continuing Legal Education, and has been a member of the Michigan State Bar Grievance Committee and the Academic Committee for District Court.

Judge Markey is married to attorney Curt Benson. They have two children, Caitlin and Robert, and reside in Grand Rapids.

In November 1994, Judge Markey was elected to the Court of Appeals for an eight-year term ending January 1, 2003.



JUDGE
STEPHEN J. MARKMAN

Judge Stephen J. Markman was born on June 4, 1949, in Detroit. He received a Bachelor of Arts degree in 1971 from Duke University, Durham, North Carolina, and a Juris Doctor degree in 1974 from the University of Cincinnati Law School, Cincinnati, Ohio.

Judge Markman served from 1975 to 1976 as a legislative assistant to United States Representative Edward Hutchinson of Michigan, ranking member, House Committee on Judiciary, and from 1976 to 1978 as a legislative assistant to United States Representative Thomas Hagedorn of Minnesota. From 1978 to 1985, he was Chief Counsel for the United States Senate Subcommittee on the Constitution, and in 1984, he was Deputy Chief Counsel for the United States Senate Committee on Judiciary. Following his nomination by President Ronald Reagan and confirmation by the United States Senate, he served from 1985 to 1989 as Assistant Attorney General of the United States for Legal Policy. Following his nomination by President George Bush and confirmation by the United States Senate, he served from 1989 to 1993 as United States Attorney, Eastern District of Michigan. He also served as the coordinating prosecutor for the Great Lakes Organized Crime and Drug Enforcement Task Force. Judge Markman joined the law firm of Miller, Canfield, Paddock & Stone in 1993.

Judge Markman's bar memberships include the State Bar of Michigan, the United States Supreme Court, the United States Court of Claims, and the United States

Sixth Circuit Court of Appeals. His activities include: Fellow, Michigan State Bar Foundation; Master of Bench, American Inns of Court; Federalist Society; Alliance for Safe Streets in Detroit; Urban League Save Our Streets Campaign; Southwest Detroit Anti-Gang Coalition; and New Detroit, Inc.

Judge Markman has authored numerous articles dealing with constitutional and criminal justice topics in such publications as the *University of Michigan Journal of Law Reform, Detroit College of Law Review, Stanford Law Review, University of Chicago Law Review, Rutgers Law Journal, American Criminal Justice Law Review, Barrister's Law Journal,* and *Harvard Journal of Law and Public Policy.* Additional titles include Contributing Editor, *National Review* magazine and Professor of Constitutional Law, Hillsdale College.

Judge Markman and his wife, Mary Kathleen, live in Mason. He has two sons, James and Charles.

Judge Markman was appointed to the Court of Appeals by Governor John Engler, effective January 1, 1995, to a term ending January 1, 1997.



JUDGE

PETER D. O'CONNELL

Judge Peter D. O'Connell was born on August 15, 1948, in Harrison Township, Macomb County. He graduated from Ferndale High School and received a Bachelor of Business Administration degree from Western Michigan University in 1970 and a Juris Doctor degree from the Detroit College of Law in 1975. He was one of the first three judges in the United States to obtain a Masters of Judicial Studies from the University of Nevada (1987). Judge O'Connell is on the faculty of the Michigan Judicial Institute, the National Judicial College and is an adjunct professor at the Thomas M. Cooley Law School.

Judge O'Connell served sixteen years as judge of the 76th District Court. He is a former chief assistant prosecutor for Isabella County and has been a visiting circuit, district, or probate judge in thirty Michigan counties.

Judge O'Connell is past president of the Michigan District Judges Association, and has had articles published in the *Detroit Law Review, Criminal Practice Law Review, Colleague, Benchmarks,* and the *Michigan Bar Journal.* He has lectured extensively concerning the subject of jury management, jury selection, and pretrial publicity. His article regarding pretrial publicity is available on WestLaw.

Judge O'Connell resides in Mt. Pleasant. In November 1994, he was elected to the Court of Appeals for a six-year term ending January 1, 2001.



JUDGE

MICHAEL R. SMOLENSKI

Judge Michael R. Smolenski was born on November 28, 1944, in Grand Rapids, Michigan. He graduated from Grand Rapids Catholic Central High School in 1962, attended Aquinas College from 1962 to 1964, graduated from the University of Michigan with a Bachelor of Arts degree in political science in 1966, and graduated from the University of Michigan Law School with a Juris Doctor degree in 1969. He worked for the Kent County Legal Aid Society in 1969, was a Judge Advocate General officer and Special Court Martial Judge in the United States Marine Corps from 1970 to 1973. He was employed by the Grand Rapids City Attorney's Office in 1973. He was in private practice from 1973 to 1977 with Bergstrom, Slykhouse & Shaw, P.C., and was a partner with attorney Michael B. Quinn from 1977 to 1984. He was appointed judge of the 61st District Court in 1984, filling a vacancy created by the retirement of his father, Judge J. Robert Smolenski. In 1980, he was elected judge of the Kent Circuit Court.

Judge Smolenski is a founding member of the Garfield Park Neighborhood Association, the Stepping Stones Montessori School, and the New Start Program. He formerly served on the boards of directors for the Baxter Community Center and the Dispute Resolution Center, and is a former member of the St. John's Home Advisory Board, the Kent County Domestic Violence Coordinating Committee, and the Citizens Advisory Task Force for community development in Grand Rapids.

Judge Smolenski is married to Kathleen Smolenski and has seven children. He is a member of the Immaculate Heart of Mary Parish in Grand Rapids.

In November 1994, Judge Smolenski was elected to the Court of Appeals for a six-year term ending January 1, 2001.

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COURT OF APPEALS CASES

PEOPLE v BORDASH

Docket No. 163671. Submitted August 1, 1994, at Grand Rapids. Decided December 6, 1994, at 9:00 A.M.

Laurie J. Bordash pleaded guilty in the Kent Circuit Court, Michael R. Smolenski, J., of drawing a check of $200 or more without sufficient funds. The defendant appealed, claiming that she was denied effective assistance of counsel because her court-appointed attorney advised her to offer an unconditional plea of guilty even though the prosecutor had not made a good-faith effort to bring her to trial within 180 days as required by MCR 6.004(D)(1)(a) and that she had not waived her constitutional right of a speedy trial.

The Court of Appeals *held:*

1. The guilty plea offered by the defendant was knowing and voluntary and was unconditional. The plea waived any claim arising out of the failure to satisfy the requirements of MCR 6.004(D)(1)(a). Administrative Order No. 1994-4 requires that the holding in *People v Vonins (After Remand),* 203 Mich App 173 (1993), be followed. Accordingly, the unconditional plea waived any claim of ineffective assistance of counsel that arose out of the underlying claim that was waived by the unconditional plea.

2. The unconditional guilty plea waived any claim of a denial of the constitutional right of a speedy trial.

Affirmed.

J. L. MARTLEW, J., concurring, stated that there is a need to resolve the question whether the failure to satisfy the 180-day requirement is a jurisdictional defect.

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

Kathleen M. Gaydos, for the defendant on appeal.

Before: HOOD, P.J., and MARILYN KELLY and J. L. MARTLEW,* JJ.

PER CURIAM. Defendant appeals as of right from her conviction based on her guilty plea to a charge of drawing a check over $200 without sufficient funds. MCL 750.131(3)(c); MSA 28.326(3)(c). She raises two issues on appeal. First, she claims ineffective assistance of counsel, because her court-appointed attorney advised her to unconditionally plead guilty, even though the prosecutor had already violated the 180-day rule in MCR 6.004(D)(1)(a). She also contends that she did not waive her right to a speedy trial. We affirm, but only for the reasons set forth below.

When reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, our Court must determine whether the defendant tendered a plea voluntarily and understandingly. *In re Oakland Prosecutor,* 191 Mich App 113, 120; 477 NW2d 455 (1991). Our Court has also concluded that a defendant waives review of a claim that the 180-day rule had been violated upon entry of an unconditional guilty plea. *People v Irwin,* 192 Mich App 216, 218; 480 NW2d 611 (1991). Furthermore, our Court recently decided that a defendant waives ineffective assistance claims by unconditionally pleading guilty where the issues relate solely to the state's capacity to prove factual guilt. *People v Vonins (After Remand),* 203 Mich App 173, 175; 511 NW2d 706 (1993). There, a panel of our Court said:

> Where the alleged deficient actions of defense counsel relate to issues that are waived by a valid unconditional guilty plea, the claim of ineffective assistance of counsel relating to those actions is

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

also waived. [*Vonins,* p 176, citing *People v Nunn,* 173 Mich App 56, 58; 433 NW2d 331 (1988).]

Having reviewed the record, we are persuaded that defendant's guilty plea was essentially knowing and voluntary. Defendant indicated that she wished to have all charges against her resolved. To that end, she had contacted each county having an outstanding warrant for her arrest. A sufficient factual basis supported her guilty plea in this case.

However, we are not convinced that defendant's guilty plea should stand. It seems obvious to us that her attorney failed to advise her of the legal effect of the 180-day rule violation in this case. We cannot conceive that, otherwise, she would have pleaded guilty to the charges against her. We do not believe that counsel's error was trivial. The enhanced punishment permitted by our habitual offender statutes makes any felony conviction significant in future criminal actions against the party. We do not believe any defendant would voluntarily waive dismissal of the charges against him, unless his counsel was ineffective.

We acknowledge that, in numerous other instances, waiver of a supplemental claim of ineffective assistance is proper when a defendant waives an underlying issue by an unconditional guilty plea. A defendant and defense counsel are not permitted to harbor error and create an appellate parachute. But no such advantage accrues to a defendant if his attorney refrains from advising that the 180-day rule has been violated.

Notwithstanding our persuasion, pursuant to Administrative Order No. 1994-4, we are bound to follow *Vonins, supra.* Consequently, we rule that entry of defendant's unconditional guilty plea waived any claim of a 180-day rule violation; she cannot raise a supplemental ineffective assistance

of counsel claim based on defense counsel's failure to pursue the rule violation.

Defendant has waived a claim that her constitutional right to a speedy trial was violated. Entry of her unconditional guilty plea made voluntarily and knowingly clearly waived further review of it. *Irwin,* p 218.

Affirmed.

J. L. MARTLEW, J., *(concurring).* I agree with the reasoning of the majority. I write a separate concurrence only because I have read *People v Smith,* 438 Mich 715; 475 NW2d 333 (1991), several times and still don't know whether violation of the 180-day rule is a jurisdictional defect. See *People v New,* 427 Mich 482, 492; 398 NW2d 358 (1986), and *People v Irwin,* 192 Mich App 216, 218; 480 NW2d 611 (1991). I think that question needs to be resolved before the issues raised by this defendant can be decided with finality.

MAPES v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 148806. Submitted September 13, 1994, at Lansing. Decided December 6, 1994, at 9:05 A.M. Leave to appeal sought.

Michael Mapes brought an action in the Midland Circuit Court against Auto Club Insurance Association, his no-fault automobile insurer, after the defendant rejected an uninsured motorist claim filed by the plaintiff on November 12, 1990, concerning an October 3, 1987, accident involving the plaintiff's automobile and that of another driver. After the accident, the plaintiff had pursued negotiations with the other driver's insurer until he was informed by the Insurance Bureau on January 3, 1990, that the insurer was insolvent. The court, Paul J. Clulo, J., granted summary disposition for the defendant, ruling that the claim was not timely under the defendant's policy, which requires that a demand for arbitration be made, or suit filed, within three years of the accident giving rise to the uninsured motorist claim. The plaintiff appealed.

The Court of Appeals *held:*

The period of limitation governing an action on an insurance contract, whether it is six years pursuant to statute or a shorter one pursuant to contract, begins to run from the date an insured has a legally enforceable claim against the insurer. In this case, the plaintiff did not have a legally enforceable uninsured motorist claim against the defendant until January 3, 1990, because the other driver was not uninsured until that date. Accordingly, the plaintiff had three years from January 3, 1990, within which to file a claim against the defendant, and his November 12, 1990, claim therefore was timely.

Reversed and remanded.

Gruel, Mills, Nims & Pylman (by *William F. Mills* and *J. Paul Janes*), for the plaintiff.

John A. Lydick, for the defendant.

Before: WEAVER, P.J., and CAVANAGH and C. C. SCHMUCKER,* JJ.

PER CURIAM. In this automobile insurance case we are called upon to determine the date of accrual of plaintiff's uninsured motorist claim.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) (claim time-barred). Plaintiff appeals as of right, and we reverse.

Plaintiff, Michael Mapes, was injured in an accident involving his automobile and that of another on October 3, 1987, after which he commenced negotiations with the other driver's insurance carrier, Cadillac Insurance Company. On January 3, 1990, the Michigan Insurance Bureau notified plaintiff that Cadillac was insolvent. On June 27, 1990, plaintiff filed a proof of claim with the Michigan Insurance Bureau. On August 20, 1990, the Michigan Property and Casualty Guaranty Association informed plaintiff that, under MCL 500.7931(3); MSA 24.17931(3), plaintiff was required to pursue an uninsured motorist claim before he would be eligible to recover from the association. On November 12, 1990, plaintiff notified his insurer, defendant AAA Insurance Company (more properly referred to as Auto Club Insurance Association), of his uninsured motorist claim. On November 30, 1990, defendant denied the claim as untimely on the basis of a provision in the insurance policy requiring a claim to be brought within three years of the date of the accident. On February 4, 1991, the association denied plaintiff's claim because of his delay in pursuing his uninsured motorist claim.

Plaintiff filed suit, and the court granted defen-

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

dant's motion for summary disposition. This appeal followed.

Essentially, the sole issue on appeal is whether the trial court erred in finding that plaintiff's uninsured motorist claim accrued on the date of the accident rather than on the date he was notified of Cadillac's insolvency.

The statute of limitations on an insurance contract begins to run from the date an insured has a legally enforceable claim against the insurer. *Strachura v Metropolitan Life Ins Co,* 123 Mich App 190, 193; 333 NW2d 219 (1983), rev'd on other grounds 417 Mich 1100.20 (1983). An insurer may contractually shorten the statutory six-year limitation period for bringing a claim for recovery of uninsured motorist benefits. See *Tom Thomas Organization, Inc v Reliance Ins Co,* 396 Mich 588, 592; 242 NW2d 396 (1976); *Jacobs v DAIIE,* 107 Mich App 424, 430; 309 NW2d 627 (1981).

In the instant case, the uninsured motorist provisions of plaintiff's policy required that a demand for arbitration be made, or suit filed, within three years of the date of the accident. We agree with the trial court that the policy was not ambiguous. Moreover, the three-year time limitation is not unreasonable. See *Thomas, supra.* However, plaintiff did not have a legally enforceable uninsured motorist claim until January 3, 1990, because, in effect, the alleged tortfeasor was not uninsured until that date. See *Strachura, supra.*[1]

The intent of the parties was that plaintiff would have three years in which to file an uninsured motorist claim. By operation of law, that

[1] In this case, the alleged tortfeasor was not uninsured at the time of the accident but became so some two years later. This case is thus distinguishable from *Sallee v Auto Club Ins Ass'n,* 190 Mich App 305, 307-308; 475 NW2d 828 (1991), where this Court held that it would not impose a discovery rule of accrual.

period did not commence until January 3, 1990. Accordingly, the claim, which was filed on November 12, 1990, was timely.

Reversed and remanded. We do not retain jurisdiction.

ISAGHOLIAN v TRANSAMERICA INSURANCE CORPORATION

Docket No. 142460. Submitted October 19, 1994, at Detroit. Decided December 6, 1994, at 9:10 A.M.

Leon B. Isagholian brought an action in the Wayne Circuit Court against Transamerica Insurance Corporation and Transamerica Insurance Company, seeking damages both for the defendants' breach of the insurance contract issued to the plaintiff and for mental and emotional distress caused by the defendants' bad-faith dealings with the plaintiff. The court, James A. Hathaway, J., granted partial summary disposition for the defendants, dismissing the plaintiff's tort claim. A jury returned a verdict for the plaintiff with respect to the breach of contract claim, and the court entered a judgment in the amount of the policy limit of contents coverage of the homeowner's policy issued by the defendants to the plaintiff. The court denied the defendants' motion for a new trial. The defendants appealed, and the plaintiff cross appealed.

The Court of Appeals *held:*

1. The trial court did not abuse its discretion by denying the defendants' motion for a new trial. The evidence concerning the defendants' repeated denials of the plaintiff's repeated claim for benefits was relevant, and admission of it was not unduly prejudicial. The jury instructions concerning the defendants' bad faith in processing the claim, when viewed in the context of the entire instruction, were harmless.

2. The trial court did not abuse its discretion in denying the defendants' motion for a directed verdict. Viewing the evidence in the light most favorable to the plaintiff, there was sufficient evidence to raise a question of fact whether the defendants breached their duties under the contract of insurance.

3. The trial court did not err in admitting into evidence testimony concerning affidavits that had been submitted to the defendants along with the plaintiff's claim for benefits. Those affidavits were not admitted into evidence, and the testimony was only for the purpose of establishing the existence of the affidavits and not for the truth of the matters asserted in them and, thus, was not hearsay.

4. The defendants provided no authority supporting their

assertion that the trial court erred in refusing to admit into evidence court documents relating to the plaintiff's prior divorce.

5. Because the circumstances do not establish that the plaintiff had any control over the actions of his brother, the defendants were not entitled to a jury instruction that any evidence the brother might have testified to would have been favorable to them, the plaintiff having no special obligation to produce that testimony.

6. The defendants were not denied a fair and impartial trial by the innocuous comments concerning the defendants' motives made by plaintiff's counsel during closing arguments.

7. Because there was no allegation of tortious conduct independent of the breach of contract, the trial court properly dismissed the tort claim for mental and emotional distress.

8. Because the plaintiff did not plead as special damages reimbursement of his attorney fees or show that he was entitled to attorney fees under these circumstances, no error resulted from the trial court's refusal to order payment of attorney fees.

Affirmed.

Goodman, Eden, Millender & Bedrosian and *Williams & Youngblood, P.C.* (by *Amos E. Williams*), for the plaintiff.

Hewson & Van Hellemont, P.C. (by *Jerald Van Hellemont* and *Michael M. Carey*), for the defendants.

Before: CAVANAGH, P.J., and T. G. KAVANAGH* and L. V. BUCCI,** JJ.

PER CURIAM. This case involves the breach of an insurance contract. Defendant[1] appeals as of right from the jury verdict in favor of plaintiff and from the court's order denying a new trial. Plaintiff

* Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1994-7.

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

[1] For all practical purposes, defendants are a single entity and will be referred to as such in this opinion.

cross appeals as of right from the court's grant of defendant's motion for partial summary disposition dismissing plaintiff's tort claim and from the court's denial of attorney fees. We affirm in all respects.

We have disregarded defendant's statement of the facts, which ignores the requirements of MCR 7.212(C)(5). In particular, the statement is self-serving and devoid of reference to the record.

On January 4, 1988, the home of plaintiff, Leon Isagholian, was burglarized. Plaintiff learned of the burglary the next day and contacted the police.

Plaintiff was covered by a homeowner's insurance policy issued by defendant, Transamerica Insurance. Plaintiff timely notified his local insurance agent of his loss. After contacting defendant's office and making a tape-recorded telephone statement regarding the loss, plaintiff on May 26, 1988, submitted the proof of loss form required by defendant. Plaintiff estimated the value of the stolen property to be more than $136,000.

Defendant rejected the proof of loss form on June 28, 1988. It asserted that plaintiff claimed an actual cash value in excess of the true value of the loss, failed to provide substantial proof of ownership, and failed to provide other information in support of the proof of loss.

Plaintiff continued to submit his proof of loss, and defendant continued to reject it. The claim was finally denied in October 1988.

Plaintiff filed suit in January 1989.

In January 1991, the trial court entered its order granting defendant's motion for partial summary disposition and dismissing plaintiff's count II, "Bad Faith Dealings."

The jury found in favor of plaintiff with respect

to the remaining breach of contract count, and the judgment specified damages of $64,604 (the limit of insurance coverage under the policy), plus interest and mediation sanctions.

Defendant's motion for a new trial was denied, as was plaintiff's postverdict request for attorney fees. This appeal followed.

I

Defendant's first two issues on appeal essentially raise the question whether the trial court erred in denying defendant's motion for a new trial based on the allegedly improper admission of evidence of bad-faith dealings and improper argument of plaintiff's counsel.

This issue is without merit. The good faith of both parties was integral to this action. The conduct of plaintiff's counsel in this regard was no more reprehensible than that of defense counsel. Moreover, the evidence of defendant's repeated denials of the claim was relevant and not unduly prejudicial.

Any error in instructing the jury concerning defendant's bad faith and including a related question on the verdict form was harmless because, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Wiegerink v Mitts & Merrill,* 182 Mich App 546, 548; 452 NW2d 872 (1990).[2]

The trial court did not clearly abuse its discretion in denying the motion for a new trial. *Means v Jowa Security Services,* 176 Mich App 466, 475; 440 NW2d 23 (1989).

[2] Defendant has produced no evidence whatsoever of a "collusive atmosphere" between plaintiff's counsel and the trial court, and we find offensive its gratuitous comment in this regard. Defendant does not assist the presentation of its case by engaging in such tactics.

II

Defendant next argues that the trial court erred in denying its motion for a directed verdict. Defendant asserts that plaintiff failed to offer testimony relating to the existence and value of each and every item that was stolen and, hence, that plaintiff did not establish a prima facie case of breach of contract.

In deciding whether the trial court erred in denying a motion for a directed verdict, this Court reviews all the evidence presented up to the time of the motion in a light most favorable to the nonmoving party to determine whether a question of fact existed. *Morrow v Boldt,* 203 Mich App 324, 327; 512 NW2d 83 (1994); *Stoken v J E T Electronics & Technology, Inc,* 174 Mich App 457, 463; 436 NW2d 389 (1988). The trial court's decision will not be disturbed absent a clear abuse of discretion. *Howard v Canteen Corp,* 192 Mich App 427, 431; 481 NW2d 718 (1992).

Viewing the evidence in the light most favorable to plaintiff, there was a question of fact whether defendant had breached the contract of insurance by denying plaintiff's claim. Defendant has cited no authority, and we have found none, for the proposition that the value of each individual item was required to be shown separately. In any event, there was evidence that the aggregate value of the stolen property exceeded $136,000. This was sufficient to establish a prima facie case.

The court did not abuse its discretion in denying the motion for a directed verdict.

III

Defendant next claims that the court erroneously admitted certain hearsay evidence. This issue is without merit.

During the claims process, defendant required plaintiff to provide proof of ownership of the items that were stolen. With respect to any items that were gifts, defendant requested a written statement from the giver.

At trial, in an apparent attempt to establish that he complied with defendant's requirements, plaintiff questioned defendant's representative about the affidavits of certain people who had given plaintiff some of the items and of others who had seen the items in plaintiff's home. Defendant objected that the information constituted hearsay. The court overruled the objection.

The affidavits themselves were not admitted into evidence. Any reference to them at trial was for the purpose of establishing their existence and not for the truth of the matters asserted in them. Thus, the evidence was not hearsay, and the court did not abuse its discretion in admitting it. MRE 801(c); *Price v Long Realty, Inc,* 199 Mich App 461, 466; 502 NW2d 337 (1993).

IV

Defendant next takes issue with the trial court's refusal to admit into evidence a 1979 court document relating to plaintiff's divorce. Defendant asserts that the document was relevant to show the existence or nonexistence of several of the allegedly stolen items.

Defendant has abandoned this issue by failing to show how the documentary evidence, which on its face constitutes hearsay, was admissible. This Court will not search for authority to sustain or reject a party's position. *Speaker-Hines & Thomas, Inc v Dep't of Treasury,* 207 Mich App 84; 523 NW2d 826 (1994).

Even assuming that the document was not inad-

missible hearsay, the trial court did not abuse its discretion in refusing to admit it, *Price, supra,* in light of its marginal relevance and the fact that counsel was permitted to cross-examine plaintiff about the document.

V

Next, defendant claims error in the trial court's denial of its motion in limine concerning the absence of testimony of plaintiff's brother, Shabaz Isagholian, who apparently had given plaintiff a number of the items that were stolen.

Shabaz' deposition was originally scheduled to take place in June 1989, but it was adjourned at plaintiff's request. Shabaz was ill on the date of the rescheduled deposition. He was diagnosed as suffering from cancer in February or March 1990 and died in August 1990.

Before trial, defendant asked the court to instruct the jury, consistent with SJI2d 6.01, that, had Shabaz been deposed, his testimony would have been adverse to plaintiff. Defendant argued that Shabaz was under plaintiff's control and plaintiff refused to produce him for deposition. The trial court denied the motion.

The requested jury instruction should be given only where the missing evidence was under the party's control. See *Prudential Ins Co of America v Cusick,* 369 Mich 269; 120 NW2d 1 (1963); *Barringer v Arnold,* 358 Mich 594, 601-602; 101 NW2d 365 (1960). Control has been found where the witness was an officer or agent of the party. See *Prudential Ins, supra; Barringer, supra.* It has not been found where the witness was merely a relative not living in the party's household, and there was no evidence that the witness was subject to the party's control. *Barringer, supra* at 602. Where

a witness is equally available to either party, the presumption that the missing witness would testify adversely to any particular theory is not recognized. *Id.* at 603-605.

The facts set forth by counsel do not establish that plaintiff had control of his adult brother, who lived in California. Thus, the court did not abuse its discretion in declining to give the instruction. MCR 2.516(D)(2); *Constantineau v DCI Food Equipment, Inc,* 195 Mich App 511, 516; 491 NW2d 262 (1992).

VI

Finally, defendant claims that the trial court erred in failing to grant its motion for a mistrial, brought during plaintiff's closing argument when counsel argued that defendant's motive was to retain the $64,604 and made other references to defendant's bad faith.

We do not believe that defendant was denied a fair and impartial trial on the basis of those fairly innocuous comments. Counsel's behavior did not compare with the egregious conduct of the attorneys in *Reetz v Kinsman Marine Transit Co,* 416 Mich 97; 330 NW2d 638 (1982), and in *Wayne Co Road Comm'rs v GLS LeasCo, Inc,* 394 Mich 126; 229 NW2d 797 (1975), the only cases cited by defendant in support of its argument. Thus, the trial court did not abuse its discretion in denying the motion.

VII

We next turn to plaintiff's issues on cross appeal. Plaintiff first argues that the court erred in granting partial summary disposition for defendant and dismissing his separate tort count claim-

ing damages for mental and emotional distress. We disagree.

Plaintiff's count II is entitled "Bad Faith Dealings." It alleges that defendant violated its duties of good faith and fair dealing by failing to pay plaintiff's claim and in the way it treated plaintiff in connection with the claim.

Damages for mental distress are not recoverable in a breach of contract action absent allegation and proof of tortious conduct existing independently of the breach of contract. *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401, 419-421; 295 NW2d 50 (1980); *Taylor v Blue Cross & Blue Shield of Michigan,* 205 Mich App 644, 657; 517 NW2d 864 (1994); *Wendt v Auto-Owners Ins Co,* 156 Mich App 19, 24; 401 NW2d 375 (1986). In this case, as in *Kewin, Taylor,* and *Wendt,* plaintiff has pleaded no more than defendant's bad-faith failure to pay its contractual obligation. This is insufficient to establish an independent tort action. *Roberts v Auto-Owners Ins Co,* 422 Mich 594, 607-608; 374 NW2d 905 (1985); *Taylor, supra.*

We note that, in general, a violation of the Uniform Trade Practices Act, MCL 500.2001 *et seq.*; MSA 24.12001 *et seq.,* does not give rise to a private cause of action. *Young v Mich Mutual Ins Co,* 139 Mich App 600, 604-606; 362 NW2d 844 (1984).

Thus, the court correctly dismissed plaintiff's bad-faith count.

VIII

We need not consider the merits of plaintiff's claim that he was entitled to reimbursement of his attorney fees in light of his failure to plead such as an element of special damages. MCR 2.112(I);

Van Pembrook v Zero Mfg Co, 146 Mich App 87, 107; 380 NW2d 60 (1985).

Regardless, it appears that attorney fees may not be recovered under these circumstances. *Taylor, supra* at 658. To the extent that the court held otherwise in *Murphy v Cincinnati Ins Co,* 772 F2d 273 (CA 6, 1985), we hold that its opinion misconstrues Michigan law.

IX

Defendant raises one further issue relating to the propriety of plaintiff's attaching as exhibits on appeal certain documents that were not part of the record below. Two of those items (Exhibits F and H) are not found in the trial record, and we have disregarded them. *Nationwide Mutual Ins Co v Quality Builders, Inc,* 192 Mich App 643, 648; 482 NW2d 474 (1992).

Affirmed.

RADECKI v DIRECTOR OF BUREAU OF WORKER'S DISABILITY COMPENSATION

Docket No. 166784. Submitted October 18, 1994, at Detroit. Decided December 6, 1994, at 9:15 A.M.

Casimir Radecki and others brought an action in the Wayne Circuit Court against the Director of the Bureau of Worker's Disability Compensation and others, seeking a writ of mandamus to compel the defendant director to recalculate tables for the average weekly wage and eighty percent of the after-tax average weekly wage for the years 1988 to 1992. Section 313 of the worker's compensation act, MCL 418.313; MSA 17.237(313), as adopted in 1980 and amended in 1982, requires the defendant director to publish annually such tables. The plaintiffs contended that, following a 1987 amendment of the state Income Tax Act that incorporated the Internal Revenue Code of 1986 into the act, the tables should reflect the use of the standard deduction adopted in the Internal Revenue Code of 1986 in place of the zero bracket amount in calculating federal income tax liability. The court, Richard C. Kaufman, J., denied the requested order of mandamus and dismissed the action. The plaintiffs appealed.

The Court of Appeals *held:*

1. The trial court did not abuse its discretion by denying the writ of mandamus inasmuch as the plaintiffs did not have a clear legal right to have the tables recalculated. In the absence of an amendment of MCL 418.313; MSA 17.237(313) that adopts by reference the Internal Revenue Code of 1986, § 313 must be construed to continue to refer to the Internal Revenue Code as formulated in 1980 and 1982, when § 313 was adopted and amended to require calculation of federal income tax liability pursuant to the Internal Revenue Code in 1980 and 1982.

2. The incorporation of the Internal Revenue Code of 1986 by reference in § 112 of the state Income Tax Act is effective for purposes of that act only and does not affect the calculation of federal income tax liability for purposes of § 313 of the worker's compensation act.

3. The plaintiffs' equal protection argument lacks merit, given their failure to show that there is no rational basis relating to a governmental purpose for according different

treatment to worker's compensation claimants injured in 1993 and thereafter.

Affirmed.

Prather & Foley, P.C. (by *James R. Stearns*), for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Rose A. Houk,* Assistant Attorney General, for Director of Bureau of Worker's Disability Compensation.

Thomas M. Malone and *James W. Seitz,* for ANR Freight System, Inc.

Bodman, Longley & Dahling (by *Theodore Souris* and *James A. Smith*), for General Motors Corporation and State Farm Fire & Casualty Company.

Plunkett & Cooney, P.C. (by *Ernest R. Bazzana* and *Michael E. Thoits*), for United States Fidelity & Guaranty Company.

Conklin, Benham, Ducey, Listman & Chuhran, P.C. (by *Martin L. Critchell*), for Roadway Express, Inc.

Before: CAVANAGH, P.J., and T. G. KAVANAGH* and L. V. BUCCI,** JJ.

PER CURIAM. Plaintiffs in this worker's compensation case appeal as of right from a circuit court order denying reconsideration of an order denying plaintiffs' petition for a writ of mandamus and dismissing the case. We affirm.

The Worker's Disability Compensation Act, MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.,* provides

* Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1994-7.

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

at § 351(1), MCL 418.351(1), MSA 17.237(351)(1), for payment of a weekly benefit to an injured worker of "80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate of compensation, as determined under section 355." Section 313 of the act provides:

> (1) As used in this act, "after-tax average weekly wage" means average weekly wage as defined in section 371 reduced by the prorated weekly amount which would have been paid under the federal insurance contributions act, 26 U S C 3101 to 3126, state income tax and federal income tax, calculated on an annual basis using as the number of exemptions the disabled employee's dependents plus the employee, and without excess itemized deductions. Effective January 1, 1982, and each January 1 thereafter, the applicable federal and state laws in effect on the preceding July 1 shall be used in determining the after-tax weekly wage.
>
> (2) Each December 1 the director shall publish tables of the average weekly wage and 80% of after-tax weekly wage that are to be in effect on the following January 1. These tables shall be conclusive for the purpose of converting an average weekly wage into 80% of after-tax average weekly wage. [MCL 418.313; MSA 17.237(313).]

Effective December 28, 1987, the Legislature amended the state Income Tax Act of 1967, MCL 206.1 *et seq.*; MSA 7.557(101) *et seq.,* to incorporate the United States Internal Revenue Code of 1986, which eliminated the zero bracket amount and replaced it with a standard deduction for purposes of calculating federal income tax liability. MCL 206.12; MSA 7.557(112). The standard deduction was not used to calculate the tables of the average weekly wage and eighty percent of the after-tax average weekly wage for the years 1988 through 1992.

Plaintiffs sought a writ of mandamus to compel defendant Jack Wheatley, Director of the Bureau of Worker's Disability Compensation, to recalculate the benefit rate tables for all recipients of worker's disability compensation benefits with injury dates between 1988 and 1992, inclusive. The circuit court denied the petition and dismissed the case, and subsequently denied plaintiffs' motion for reconsideration. This appeal followed.

Plaintiffs argue that the circuit court erred in denying their petition for a writ of mandamus. We disagree.

A trial court's decision to deny a writ of mandamus will not be reversed absent an abuse of discretion. *Keaton v Village of Beverly Hills,* 202 Mich App 681, 683; 509 NW2d 544 (1993); *McDonald's Corp v Canton Twp,* 177 Mich App 153, 155-156; 441 NW2d 37 (1989).

Mandamus is an extraordinary remedy that will be granted only where there is no other remedy, legal or equitable. A writ of mandamus will only be issued 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 the act; and (3) the act is ministerial, i.e., there is no room for the exercise of discretion. *Keaton, supra; Delly v Bureau of State Lottery,* 183 Mich App 258, 261; 454 NW2d 141 (1990). The party seeking the writ must prove entitlement to such relief. *Keaton, supra* at 684; *McDonald's Corp, supra* at 156.

We first consider whether plaintiffs had a clear legal right to have the rate tables recalculated and defendant a clear legal duty to recalculate the tables.

Plaintiffs argue that because the Legislature amended the state Income Tax Act to adopt the

1986 Federal Tax Reform Act, § 313 of the Worker's Disability Compensation Act must also be read to incorporate the amended Internal Revenue Code. We disagree.

Statutes that incorporate existing federal statutes by reference are valid and constitutional. *Pleasant Ridge v Governor,* 382 Mich 225, 243-248; 169 NW2d 625 (1969); *People v Urban,* 45 Mich App 255, 262-263; 206 NW2d 511 (1973). However, it is an unlawful delegation of legislative power to adopt by reference future legislation enacted by another sovereign entity. *Urban, supra.*

Thus, when a Michigan statute adopts by reference a federal law that is subsequently amended, but the Michigan statute remains unchanged, the courts are constitutionally required to construe the statute as continuing to refer to the original federal enactment before amendment. By failing to amend the Michigan statute, the Legislature is presumed to have intended to freeze the federal law as it was at the time of the original state statute. *Id.* at 264.

We conclude that, by failing to amend the Worker's Disability Compensation Act to incorporate the 1986 federal tax reforms, the Legislature intended the act to continue to refer to the pre-1986 Internal Revenue Code. See *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections,* 199 Mich App 681, 690-691; 503 NW2d 465 (1993).

Plaintiffs attempt to support their argument by reference to MCL 8.3u; MSA 2.212(21), which provides in part that "[i]f any provision of a law is repealed and in substance re-enacted, a reference in any other law to the repealed provision shall be deemed a reference to the reenacted provision." Plaintiffs contend that because MCL 206.12; MSA 7.557(112) was amended in 1987 to refer to the Internal Revenue Code of 1986, § 313 should also

be read as referring to the amended Internal Revenue Code. This argument must fail.

First, MCL 206.12; MSA 7.557(112) is a definitional section of the state Income Tax Act adopted only for purposes of that act. MCL 206.2(1); MSA 7.557(102)(1). Secondly, the state Income Tax Act and the Worker's Disability Compensation Act should not be read and construed together because the statutes do not relate to the same class of persons or things, nor do they have a common purpose, i.e., they are not in pari materia. See *Michigan Humane Society v Natural Resources Comm,* 158 Mich App 393, 401; 404 NW2d 757 (1987). Thirdly, the rule set forth in MCL 8.3u; MSA 2.212(21) applies only to the construction of state statutes; it is inapplicable in the context of a federal statute. MCL 8.3; MSA 2.212.

Section 313 must be construed as referring to the United States Internal Revenue Code as it existed at the time of the section's adoption in 1980 or its amendment in 1982. The Worker's Disability Compensation Act could not constitutionally incorporate subsequent amendments of the federal Internal Revenue Code. Consequently, plaintiffs did not have a clear legal right to have the rate tables recalculated, nor did defendant have the clear legal duty to recalculate the tables. The trial court did not abuse its discretion by denying the petition for a writ of mandamus.

In light of the above determination, we need not consider plaintiffs' remaining issues on appeal. However, we note that plaintiffs' equal protection argument is without merit, because plaintiffs have failed to show that there is no rational basis relating to a legitimate governmental purpose for according different compensation treatment to those injured in 1993 and thereafter. *Doe v Dep't*

of Social Services, 439 Mich 650, 661-662; 487 NW2d 166 (1992); *Wartella v East Detroit,* 161 Mich App 552, 556; 411 NW2d 751 (1987).

Affirmed.

DETROIT EDISON COMPANY v CITY OF DETROIT

Docket No. 155688. Submitted October 18, 1994, at Detroit. Decided December 6, 1994, at 9:20 A.M.

Detroit Edison Company brought an action in the Wayne Circuit Court against the City of Detroit, seeking reimbursement of the costs associated with the relocation of its electrical equipment from streets and alleys that were abandoned by the city as part of the Jefferson-Connor Industrial Revitalization Project so that the land eventually could be transferred to Chrysler Corporation for the construction of an automobile assembly plant. On stipulated facts, the court, William L. Cahalan, J., granted summary disposition for the defendant, finding that utility companies are to bear the costs of relocating facilities and equipment associated with actions undertaken by a city in discharge of its governmental function, that the rehabilitation project in question was for a public purpose and the abandonment of the streets and alleys was a governmental function, and that the city's termination of the plaintiff's interest in rights of way by the vacation of the streets and alleys did not entitle the plaintiff to compensation for extinguishment of a property right. The plaintiff appealed.

The Court of Appeals *held:*

1. The rehabilitation project in question was for a public purpose. Further, a utility must bear relocation costs if those costs are necessitated by a city's discharge of a governmental function. Because the land clearance occasioning the vacation of the rights of way was necessary for a public purpose, the relocation was necessitated by the city's discharge of a governmental function, and the relocation costs must be borne by the utility.

2. Because the plaintiff's interests in the use of the rights of way arose out of a franchise granted by the city, and because the franchise made those interests subject to all city ordinances, restrictions, and regulations, the plaintiff's interests

REFERENCES

Am Jur 2d, Eminent Domain §§ 171, 174, 181, 254.

Eminent domain: restrictive covenant or right to enforcement thereof as compensable property right. 4 ALR3d 1137.

were subordinate to those of the defendant. At most, a contractual right to use the city's rights of way was granted to the plaintiff, and, accordingly, the plaintiff had no ownership interest in the streets and alleys that were vacated such as would entitle it to compensation for extinguishment of a property right.

3. The power of a city to abandon streets and alleys arises out of its right to control its streets and alleys, and the power to make such vacation is not dependent on specific statutory authorization contained in the statute creating a particular method of industrial revitalization. The city did not abuse its discretion in deciding to vacate the streets and alleys for this particular project.

Affirmed.

1. PUBLIC UTILITIES — RELOCATION OF UTILITY EQUIPMENT — VACATION OF STREETS — ECONOMIC DEVELOPMENT CORPORATIONS ACT — GOVERNMENTAL FUNCTION.

The costs of relocating equipment owned by an electric utility as the result of a municipality's vacation of streets and alleys for eventual conveyance of the property to a private party for a public purpose, undertaken pursuant to the Economic Development Corporations Act, must be borne by the utility, because vacation of the streets and alleys under those circumstances is an exercise of the city's governmental function (MCL 125.1601 *et seq.*; MSA 5.3520[1] *et seq.*).

2. PUBLIC UTILITIES — MUNICIPAL CORPORATIONS — USE OF STREETS AND ALLEYS — RIGHTS OF WAY — OWNERSHIP INTERESTS.

A franchise by a municipal corporation granted to an electric utility permitting the utility to place its facilities and equipment within the municipality subject to the municipality's ordinances and regulations creates a right of way but does not create an ownership interest for which the utility is entitled to compensation if the municipality in the reasonable exercise of its police power decides to terminate the right of way by vacating the street or alley.

Thomas P. Beagen and *Peter A. Marquardt,* for the plaintiff.

Cooper, Fink & Zausmer, P.C. (by *David H. Fink, Avery K. Williams, Sara D. Lile,* and *Ted Peters*), Special Assistant Corporation Counsel, for the defendant.

Before: CAVANAGH, P.J., and T. G. KAVANAGH* and L. V. BUCCI,** JJ.

PER CURIAM. This case presents the question whether a utility must be reimbursed for the cost of relocating its equipment from within certain public rights of way that were vacated in conjunction with an economic development project.

Plaintiff, the Detroit Edison Company, appeals as of right from an order granting summary disposition in favor of defendant, City of Detroit. Because we conclude that plaintiff was required to bear the cost of the relocation, we affirm.

We take our statement of pertinent facts from the parties' stipulations of fact.

By virtue of a franchise granted to its predecessor-in-interest under the ordinances of the defendant city, plaintiff, a privately owned electric utility, is permitted to place its facilities and equipment within the city's streets and alleys, subject at all times "to the city ordinances and to any and all restrictions and regulations hereinafter imposed." Detroit Revised Ordinances, tit XXI, ch CLXI, § 1 (1886); Detroit Revised Ordinances, tit XXI ch CLXII, § 1 (1889).

The Jefferson-Conner Industrial Revitalization Project is an economic development project undertaken to provide jobs in the city and stabilize its tax base. Central to the project was the construction by Chrysler Corporation of a state-of-the-art automobile assembly plant within the Conner Creek Industrial Corridor. Defendant acquired land for the purpose by condemnation pursuant to the Economic Development Corporations Act (EDCA), MCL 125.1601 *et seq.*; MSA 5.3520(1) *et seq.*

* Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1994-7.

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

Because Chrysler required a "green field" site, it was necessary to vacate certain streets and alleys and remove and relocate the utilities.

From the outset, plaintiff contended that it could not relocate its equipment without some arrangement for payment. Defendant responded that reimbursement would be "in accordance with Michigan Law, and/or as negotiated with the City of Detroit." Plaintiff agreed to relocate its utility equipment on condition that the question of reimbursement be determined by a court of law.

In December 1988, plaintiff filed this lawsuit to recover its relocation costs. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), and the trial court granted the motion on the basis of the stipulated facts. This appeal followed.

Plaintiff's first issue, restated, is whether the condemnation of property for the project was for a public purpose, such that plaintiff should bear the relocation costs.

This Court has previously addressed the question whether the Jefferson-Conner project was for a public purpose. In *Detroit v Vavro,* 177 Mich App 682, 684-685; 442 NW2d 730 (1989), the Court determined that the project was indistinguishable from that involved in *Poletown Neighborhood Council v Detroit,* 410 Mich 616; 304 NW2d 455 (1981), where our Supreme Court sanctioned the city's use of the power of eminent domain to take private property and turn it over to General Motors Corporation for the construction of an automobile assembly plant. The *Vavro* panel disagreed with the *Poletown* opinion, but was constrained by the doctrine of stare decisis to follow that decision and affirm the determination of necessity and of the existence of a public purpose for the Jefferson-Conner project. We agree with the Court in *Vavro* that *Poletown* is controlling. Accordingly, we must

also conclude that the Jefferson-Conner project was for a public purpose.

Relocation costs must be borne by the utility if necessitated by the city's discharge of a governmental function, while the expenses must be borne by the city if necessitated by its discharge of a proprietary function. *Detroit Edison Co v Detroit,* 180 Mich App 145, 148; 446 NW2d 615 (1989), citing *Pontiac v Consumers Power Co,* 101 Mich App 450, 453; 300 NW2d 594 (1980).

Because the land clearance was necessary for a public purpose, and was undertaken pursuant to the EDCA, we conclude that the relocation was necessitated by the city's discharge of a governmental function. *Detroit Edison, supra* at 150-151. Further support for this conclusion may be found in *Detroit v Michigan Bell Telephone Co,* 374 Mich 543, 551; 132 NW2d 660 (1965), where it was stated that urban renewal is a governmental function, even where the cleared area subsequently passes into private hands.

Consequently, the trial court properly determined that plaintiff had no right to reimbursement of its relocation costs.

Plaintiff also argues that it is entitled to compensation for the extinguishment of its property rights in the vacated streets and alleys. We disagree.

This precise issue does not appear to have been addressed in Michigan. Accordingly, we turn to other jurisdictions for guidance.[1] In *New Orleans Gaslight Co v Drainage Comm of New Orleans,*

[1] Although the Court in *Center Line v Michigan Bell Telephone Co,* 387 Mich 260; 196 NW2d 144 (1972), considered the question "of a public utility's right to reimbursement costs in relocating its equipment in connection with an urban renewal project," *id.* at 263, the outcome of that case was determined by application of the rehabilitation of blighted areas act, MCL 125.71 *et seq.*; MSA 5.3501 *et seq.,* which is not involved in the instant case.

197 US 453; 25 S Ct 471; 49 L Ed 831 (1905), construction of a municipal drainage system necessitated the relocation of gas pipe lines. The Court held that the utility company was responsible for the relocation costs and was not entitled to compensation. The Court explained:

> The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria.* [*Id.* at 462.]

In *Northwest Natural Gas Co v City of Portland,* 300 Or 291; 711 P2d 119 (1985), the Supreme Court of Oregon was presented with the question whether the relocation of utilities necessitated by the construction of a mass transit system constituted a taking that must be compensated under the law of eminent domain. As in the present case, the utilities had been granted by franchise the right to locate their facilities within the public rights of way. The Court reasoned:

> The answer to the contention that the relocation of the utilities constitutes a taking of private property is simple. No private property is being taken by the defendants. The only "property" the utilities acquired by franchise and permit is the right to locate their facilities somewhere in the

> public rights-of-way, and to use the rights-of-way to the extent necessary to furnish their respective services to the public. [*Id.* at 311-312.]

The Court held further that a city charter provision stating that a franchise granted under the charter would be deemed property and subject to property tax did not convert the right to use the public rights of way into an ownership interest in the street itself. *Id.* at 312.

Our Supreme Court has held that the rights acquired under a franchise granted to a utility are dependent upon the nature of the original grant and any reservations therein and are subordinate to the rights of the municipality in the reasonable exercise of its police power. *Detroit v Michigan Bell, supra* at 552 (O'HARA, J., dissenting in part). The majority in that case concluded that, under the rehabilitation of blighted areas act, the defendant utilities were not entitled to the reservation of easements in vacated public rights of way and, hence, that the city was not required to pay relocation costs. *Id.* at 562. The Court noted that because no reservation of an easement was required, the refusal to reserve could not be considered extinguishment of the easement. *Id.*

The franchise granted to plaintiff in this case allowed it to use defendant's streets and alleys "subject, however, at all times to the city ordinances and to any and all restrictions and regulations hereinafter imposed." Thus, plaintiff's rights in the streets and alleys were clearly subordinate to those of the defendant city.

We conclude that, under the reasoning of *New Orleans Gaslight, supra,* and *Northwest Natural Gas Co, supra,* plaintiff had, at most, a contractual right to use city rights of way for its own purposes. It had no ownership interest in the particular

streets and alleys that were vacated. See 12 McQuillin, Municipal Corporations (3d ed, 1994 Cum Supp), § 34.74a, p 32; see also *Center Line v Michigan Bell Telephone Co,* 387 Mich 260, 267; 196 NW2d 144 (1972) (SWAINSON, J., dissenting). Plaintiff's franchise remains unimpaired. Because plaintiff's property was not taken, plaintiff was not entitled to compensation.

Finally, plaintiff asserts that the EDCA does not authorize the vacation of public roads.

Regardless of whether plaintiff's assertion is correct, and without deciding whether plaintiff has standing to raise this issue, it is indisputable that a municipality's right to control its streets and alleys includes the power to vacate those streets and alleys. The question of vacation is for the municipality and not for the courts to decide, and it will not be reviewed absent a clear abuse of discretion. *Tomazewski v Palmer Bee Co,* 223 Mich 565; 194 NW 571 (1923); see MCL 117.4h(1); MSA 5.2081(1).

We conclude that the defendant city did not abuse its discretion in deciding to vacate its streets and alleys in furtherance of the Jefferson-Conner revitalization project.

Affirmed.

PENINSULA SANITATION, INC v CITY OF MANISTIQUE

Docket No. 160365. Submitted May 10, 1994, at Marquette. Decided December 6, 1994, at 9:25 A.M.

Peninsula Sanitation, Inc., brought an action in the Schoolcraft Circuit Court against the City of Manistique and certain townships within Schoolcraft County, seeking, on the basis of a violation of due process, injunctive and declaratory relief with regard to solid waste collection contracts that the defendants had entered into with one of the plaintiff's competitors. The defendants had combined certain of their functions to establish the Schoolcraft County Department of Public Works (DPW), which had formulated a plan and solicited competitive bids for a contractor to collect residential and commercial solid waste pursuant to the plan. Manistique Rentals, Inc. (MRI), had been awarded a contract granting it the exclusive right to collect solid waste within the member municipalities. The municipalities then each had adopted ordinances supporting the agreement with MRI. The court, Charles H. Stark, J., ruled that the bidding process for the contract and the exclusive waste collection agreements were reasonably related to the ends sought to be accomplished by the municipalities in the exercise of their police powers, so that no due process violation occurred. The court granted the defendants' counterclaim for injunctive relief, enjoining the plaintiff from collecting Type II waste from the residents of the defendant municipalities in violation of the exclusivity provisions of the agreements and ordinances. The plaintiff appealed.

The Court of Appeals *held:*

1. The court properly found that no due process violation occurred. The ordinances involved are rationally related to a legitimate governmental purpose, the collection and lawful disposal of solid waste. Considerations of public health provide sufficient justification for granting an exclusive contract for the collection of solid waste.

2. The trial court did not abuse its discretion in enjoining the

REFERENCES

Am Jur 2d, Constitutional Law §§ 212, 216, 251, 252, 403, 417, 424, 427, 431; Injunctions §§ 26, 31, 39, 48, 158, 160, 163.

See ALR Index under Constitutional Law; Injunctions.

plaintiff from collecting Type II solid waste within the defendant municipalities.

Affirmed.

1. CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — ORDINANCES.

Ordinances are presumed to be valid and courts have a duty to construe an ordinance as being constitutional, unless it is clearly apparent that the ordinance is unconstitutional.

2. CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — ORDINANCES.

A party challenging the constitutionality of an ordinance has the burden of proving the invalidity of the ordinance; where the legislative judgment is supported by any facts either known or that reasonably could be assumed, although such facts may be debatable, the legislative judgment must be accepted.

3. CONSTITUTIONAL LAW — DUE PROCESS — MUNICIPAL CORPORATIONS — ORDINANCES.

In analyzing a plaintiff's claim that an ordinance of a municipality interferes with its business in violation of the constitutional guarantee of due process, the ordinance will be found to comport with due process where it is rationally related to a legitimate governmental purpose.

4. MUNICIPAL CORPORATIONS — CONTRACTS — DISPOSAL OF SOLID WASTE — PUBLIC HEALTH — POLICE POWERS.

Considerations of public health provide sufficient justification for a municipality's granting of an exclusive contract for the collection of solid waste; waste collection is an aspect of the police power of a municipality that concerns the legitimate goal of ensuring the proper disposition of solid waste.

5. INJUNCTIONS — PREREQUISITES.

There are three prerequisites to obtaining injunctive relief: justice must require that the court grant the injunction, there must be no adequate remedy at law, and there must be a real and imminent danger of irreparable injury.

Steward, Peterson, Sheridan & Nancarrow (by *Paul A. Peterson*), for the plaintiff.

Davis, Olsen, Filoramo, Jarvi & McNamara, P.C. (by *John R. Filoramo*), for the City of Manistique and the Townships of Doyle, Hiawatha, Inwood, Manistique, and Thompson.

Peter J. Hollenbeck, Schoolcraft County Attorney, for the Schoolcraft County Department of Public Works.

Before: MACKENZIE, P.J., and NEFF and R. L. OLZARK,* JJ.

PER CURIAM. Plaintiff appeals as of right from a judgment enjoining it from conducting its solid waste collection business within the defendant municipalities in violation of an agreement between the municipalities and defendant Manistique Rentals, Inc. (MRI). We affirm.

On May 3, 1992, the landfill used by residents of Schoolcraft County was closed by the Michigan Department of Natural Resources. Before the closure, the defendant municipalities had combined certain of their functions to establish the Schoolcraft County Department of Public Works (DPW). The DPW was responsible for developing a new county-wide solid waste disposal plan and administering the plan once the landfill was closed.

Defendant DPW held public meetings to formulate its waste disposal plan, and in April 1992, it solicited competitive bids for a contractor to collect residential and commercial solid waste pursuant to the plan. The bid specifications indicated that the successful bidder would serve all residents of the county and would pay the DPW a fee of 1⅔ cents for each pound of garbage hauled. The DPW ultimately received two bids, one of which was untimely, for the solid waste collection contract. Defendant MRI's timely bid was accepted.

Defendants then executed two contracts, entitled "Schoolcraft County-Wide Residential Solid Waste Agreement" and "Schoolcraft County-Wide Commercial Solid Waste Agreement," granting MRI the

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

exclusive right to collect solid waste within the municipalities, effective May 4, 1992. Both agreements provided in relevant part:

> 19. *Exclusivity:* This agreement grants Contractor the sole and exclusive right and responsibility to collect all Type 2 solid waste generated within each of the respective municipalities which are parties to this agreement, during the term hereof, including any extensions, and each such municipality agrees to take such action as is necessary and permitted by law to prevent or enjoin any third party from collecting Type 2 refuse within its boundaries, during the term of this agreement or any extension thereof, subject, however, to the provisions of paragraph 16 of this agreement.

Paragraph 16 provided that the agreements would not interfere with or void any "valid contract, executed prior to the execution of this agreement" for solid waste removal between a hauler and residents of Schoolcraft County.

The defendant municipalities subsequently each adopted ordinances in conjunction with the agreements making it unlawful for any person or business, other than the contractor under the solid waste collection contract, to collect waste within the municipalities. The ordinances also reserved the municipalities' right to seek injunctive relief to compel compliance with the ordinances.

Plaintiff is another company engaged in the business of solid waste collection. It also had commercial and residential customers within the defendant municipalities. Although plaintiff was aware in March 1992 that defendant DPW was soliciting competitive bids for a solid waste collection contractor, plaintiff never submitted a bid for the contract.

After the solid waste collection contract was

awarded to MRI, plaintiff brought this action for declaratory and injunctive relief. As relevant to this appeal, plaintiff asserted that the exclusive nature of defendants' waste collection agreements and the supporting ordinances were in violation of the state and federal Due Process Clauses, Const 1963, art 1, § 17; US Const, Am XIV. Defendants counterclaimed, seeking injunctive relief and alleging that plaintiff was collecting Type II solid waste in the defendant municipalities contrary to the ordinances.

Following a bench trial, the court ruled that the bidding process and the exclusive waste collection agreements were reasonably related to the ends sought to be accomplished by the municipalities in the exercise of their police powers, so that no due process violation occurred. Additionally, the court enjoined plaintiff from violating the exclusivity provisions of the solid waste agreements and the supporting ordinances by collecting Type II waste from residents of the defendant municipalities.

On appeal, plaintiff contends that the trial court erred in failing to conclude that the exclusive waste collection contracts and the supporting ordinances constituted a violation of due process. We disagree.

Ordinances are presumed valid. *Detroit v Qualls,* 434 Mich 340, 364; 454 NW2d 374 (1990). The courts have a duty to construe them as constitutional, unless unconstitutionality is clearly apparent. *Ullery v Sobie,* 196 Mich App 76, 79; 492 NW2d 739 (1992). Where the legislative judgment is supported by any facts either known or that reasonably could be assumed, although such facts may be debatable, the legislative judgment must be accepted. *Katt v Ins Bureau,* 200 Mich App 648, 651-652; 505 NW2d 37 (1993), citing *Carolene Products Co v Thomson,* 276 Mich 172, 178; 267 NW

608 (1936), and *Shavers v Attorney General,* 402 Mich 554, 612; 267 NW2d 72 (1978). The party challenging an ordinance's constitutionality has the burden of proving its invalidity. *Qualls, supra,* p 364.

In analyzing claims involving due process challenges to ordinances, courts first determine the type of matters to which the governmental action relates. *Id.,* p 365. When the action relates to matters of economics or general social welfare, the test to determine whether the law comports with due process is whether it bears a reasonable relation to a legitimate governmental purpose. *Id.* See also *Shavers, supra,* pp 612-614. Here, plaintiff's claim is that the municipalities' ordinances interfere with its business. Thus, the ordinances need only rationally relate to a legitimate governmental purpose. *Qualls, supra.*

It is essentially undisputed by the parties that the collection and lawful disposal of solid waste is an aspect of the police powers of defendants DPW and the municipalities, and that the ordinances address a legitimate governmental purpose. The Solid Waste Management Act, MCL 299.401 *et seq.*; MSA 13.29(1) *et seq.,* for example, mandates that municipalities and counties "shall assure that all solid waste is removed from the site of generation frequently enough to protect the public health, and is delivered to licensed disposal areas." MCL 299.424(1); MSA 13.29(24)(1). The act also requires each county to prepare a solid waste management plan that includes "an enforceable program and process to assure that the nonhazardous solid waste generated" in the county "is collected and . . . disposed of" at appropriate disposal sites. MCL 299.425(1); MSA 13.29(25)(1). County departments of public works are authorized to contract for the acquisition, improvement,

enlargement, or extension of a refuse system. MCL 123.742(1); MSA 5.570(12)(1). Further, municipalities are authorized to take bids and "enter into a contract with 1 or more" of the bidding parties for waste collection, transportation, and disposal. MCL 123.314(1); MSA 5.2725(14)(1).

Furthermore, the overwhelming weight of authority is that considerations of public health provide sufficient justification for granting an exclusive contract for the collection of solid waste. See anno: *Regulation and licensing of private garbage or rubbish removal services,* 83 ALR2d 799. As stated in 56 Am Jur 2d, Municipal Corporations, § 462, pp 512-513:

> In order to effectuate the disposal of garbage, private collectors of garbage are frequently designated by municipalities. Ordinances have been repeatedly upheld which prohibit collection, handling, transportation, and disposal of garbage except by certain designated scavengers under supervision or control of, or under contract with, the municipalities, notwithstanding that such course of activity, among other consequences, may result in . . . destroying the means of livelihood of other scavengers.
>
> *No constitutional interference with private property rights . . . results from ordinances which create exclusive scavenger rights . . . which forbid the collection, handling, transportation, or disposal of the garbage by other than such licensed collector.* In most of the cases, such ordinances have been sustained as against contentions that they were unreasonable. Also, in practically all the cases in which the objection was raised that an exclusive license constituted an invalid monopoly in restraint of trade . . . the courts have decided against such contentions on the ground that the exclusive privilege had been granted within the discretion allowed to the municipality under its police power to protect the health of its residents,

> which it could do more efficiently by controlling one or a few scavengers. [Emphasis added].

According to 7 McQuillin, Municipal Corporations (3d ed), § 24.251, p 140:

> Generally a municipal corporation can contract with one or more persons or corporations for the collection and removal of waste . . . . *It may grant an exclusive privilege to a contractor or licensee to make such collection and removal for a specified period.* Removal of substances of this character must proceed quickly . . . . *Accordingly, an exclusive contract for the removal of these substances constitutes a proper exercise of the police power.* [Emphasis added.]

9 McQuillin, Municipal Corporations (3d ed), § 26.135, p 408 also provides:

> *Licenses or permits [to collect garbage] may be limited in number or made exclusive in order to promote efficiency in the removal of these waste products and in order to make police regulation more concentrated and effective.* No unlawful restraint of trade ensues as a consequence of thus limiting persons engaged in this activity, since it is primarily governmental in nature and object, although private enterprise is utilized in performing it. [Emphasis added].

All of these treatises cite Michigan cases addressing various unsuccessful challenges to municipal ordinances and contracts granting exclusive refuse hauling rights to private companies. In *People v Gordon,* 81 Mich 306, 308-310; 45 NW 658 (1890), our Supreme Court held that the City of Detroit could enjoin a trash collector without a permit from transporting garbage in an unauthorized wagon, given the best interests of the public

health. In *Grand Rapids v De Vries,* 123 Mich 570, 582-583; 82 NW 269 (1900), the Court found that an ordinance granting one company an exclusive contract to haul garbage was not unreasonable and did not create a monopoly. In *Grand Rapids Bd of Health v Vink,* 184 Mich 688, 696-698; 151 NW 672 (1915), the Supreme Court upheld a permanent injunction preventing the defendant from collecting and removing garbage because the defendant's collection efforts would render an exclusive refuse hauling contract incapable of performance.

Finally, the United States Supreme Court in *Gardner v Michigan,* 199 US 325, 328-332; 26 S Ct 106; 50 L Ed 212 (1905), upheld a City of Detroit ordinance that granted an exclusive right to one city contractor for collecting and disposing of garbage. The Court found that the ordinance's exclusive service provisions were both reasonable and necessary and had a substantial relation to protecting the public. See also *California Reduction Co v Sanitary Reduction Works of San Francisco,* 199 US 306, 318-325; 26 S Ct 100; 50 L Ed 204 (1905).

More recently, other states have addressed the issue and found that municipalities have the right to grant exclusive contracts for hauling garbage. See *City of Tigard v Werner,* 15 Or App 335, 337-339; 515 P2d 934 (1973); *Troje v City Council of City of Hastings,* 310 Minn 183, 184-189; 245 NW2d 596 (1976); *Strub v Village of Deerfield,* 19 Ill 2d 401; 167 NE2d 178 (1960).

On the basis of these authorities, we conclude that defendants' exclusive contracts for county-wide solid waste collection, and the ordinances supporting the exclusive contracts, are rationally related to a legitimate objective and therefore are not violative of due process. As noted above, waste

collection is an aspect of the municipalities' police power and concerns the legitimate goal of ensuring the proper disposition of solid waste. The ordinances bear a reasonable relationship to preserving the public health because they ensure efficient handling and disposal of garbage by making it easy for the defendant municipalities to regulate and oversee defendant MRI, which must make financial contributions to assist in the operation of the new landfill and in closing the old one. See *Qualls, supra,* p 365; *Strub, supra,* pp 402-406. Accordingly, we find no due process violation.

Plaintiff further challenges the trial court's decision to enjoin it from collecting Type II solid waste within the defendant municipalities. This claim is also without merit.

There are three prerequisites to obtaining injunctive relief: (1) justice must require that the court grant the injunction, (2) there must be no adequate remedy at law, and (3) there must be a real and imminent danger of irreparable injury. *In re Martin,* 200 Mich App 703, 723; 504 NW2d 917 (1993); *Azzar v Primebank, FSB,* 198 Mich App 512, 520; 499 NW2d 793 (1993). In this case, there was evidence that plaintiff was collecting Type II solid waste within the defendant municipalities although it was not entitled to violate the exclusive solid waste collection contract. *Strub, supra.* Moreover, the existence of criminal or economic penalties does not afford the defendant municipalities an adequate remedy because they would be returning to the courts repeatedly in an effort to stop plaintiff from violating the ordinances. See *Vink, supra,* p 697. Finally, irreparable injury would result if plaintiff were permitted to solicit additional Type II solid waste customers while escaping the obligation to pay the fee of 1⅔ cents for each pound of garbage collected because it

would undermine the operation of the new landfill and the closure of the old one. We therefore find no abuse of discretion in the trial court's decision to enjoin plaintiff from collecting Type II solid waste within the defendant municipalities.

Affirmed.

STORM v CITY OF WYOMING

Docket Nos. 158819, 159583, 159584, 159588, 159589, 159590, 159591, 159592, 159594, 159595, 159596. Submitted October 13, 1994, at Grand Rapids. Decided December 6, 1994, at 9:30 A.M.

John and Janet Storm and other similarly situated owners of parcels of land in the City of Wyoming petitioned the Tax Tribunal for review of their respective special assessments by the city for road improvements. The petitions were consolidated for hearing. The hearing officer, while specifically finding that the report of the petitioners' appraiser was unpersuasive, held that the petitioners had met their burden of proving the illegality of the special assessment by presenting an appraisal that indicated the increase in value of their properties was less than the city's determination of value. The Tax Tribunal adopted the proposed judgment of the hearing officer and entered a judgment reducing the special assessments. The city appealed, and the appeals were consolidated.

The Court of Appeals *held:*

Municipal decisions regarding special assessments are presumed to be valid and, generally, should be upheld absent a substantial or unreasonable disproportionality between the amount assessed and the value that accrues to the land as a result of the improvements. The petitioners' evidence that the increase in value in the properties was less than the amount of increase assumed by the city in the fixing of the special assessments was insufficient to establish a substantial or unreasonable disproportionality between the amount assessed and the value accruing from the improvement. Because the petitioners failed to meet their burden of proving the assessments invalid, the Tax Tribunal erred as a matter of law in modifying the special assessments.

Reversed.

Rhoades, McKee, Boer, Goodrich & Titta (by *Peter A. Titta*), for petitioners.

Garlington & Associates (by *Donald J. Manderfeld*), for the respondent.

Before: FITZGERALD, P.J., and MACKENZIE and L. M. GLAZER,* JJ.

PER CURIAM. In these consolidated cases, respondent, City of Wyoming, appeals as of right the November 2, 1992, opinion and judgment of the Tax Tribunal that incorporated by reference the proposed judgment of the hearing officer of the Tax Tribunal modifying the special assessments imposed by respondent on parcels of land owned by petitioners. We reverse.

Respondent contends that the Tax Tribunal erred as a matter of law when it made a determination de novo of the existence and extent of special benefits following petitioners' presentation of an unpersuasive appraisal. We agree.

Municipal decisions regarding special assessments are presumed to be valid and, generally, should be upheld absent a substantial or unreasonable disproportionality between the amount assessed and the value that accrues to the land as a result of the improvements. *Dixon Rd Group v Novi,* 426 Mich 390, 402-403; 395 NW2d 211 (1986). To challenge effectively special assessments, petitioners, at a minimum, must present credible evidence to rebut the presumption that the assessments are valid. Without such evidence, the Tax Tribunal has no basis to strike down special assessments. *Kadzban v Grandville,* 442 Mich 495, 505; 502 NW2d 299 (1993).

The Tax Tribunal must conduct a proceeding de novo at which the petitioner bears the burden of proving the special assessments are invalid. MCL 205.735(1): MSA 7.650(35)(1); *Kadzban, supra* at 505, n 5, 508-509, 512; *Dixon, supra* at 401. If a petitioner fails to meet the burden of proving the special assessments invalid, the tax tribunal may

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

not make a determination de novo of the benefit and substitute its judgment for that of the municipality. *Kadzban, supra.*

In this case, the hearing officer specifically determined that the value report of petitioners' appraisers was unpersuasive. Despite this determination, the hearing officer concluded that, under *Dixon,* petitioners met their burden of proving the illegality of the special assessment by simply presenting an appraisal that indicated an increase in value that differed from respondent's determination of value. However, *Kadzban* subsequently clarified that

> our decision [in *Dixon*] did not alter the degree of deference that courts afford municipal decisions. When reviewing the validity of special assessments, it is not the task of courts to determine whether there is "a rigid dollar-for-dollar balance between the amount of the special assessment and the amount of the benefit." . . . Rather, a special assessment will be declared invalid only when the party challenging the assessment demonstrates that "there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements. [*Kadzban, supra* at 502.]

> As noted above, special assessments are presumed to be valid. Thus, to effectively challenge special assessments, plaintiffs, at a minimum, must present credible evidence to rebut the presumption that the assessments are valid. Without such evidence, a tax tribunal has no basis to strike down special assessments. [*Id.* at 505.]

Because petitioners failed to meet their burden of proving the special assessments invalid, the Tax Tribunal had no basis to make a determination de novo of benefit and to substitute its judgment for

that of the municipality. Accordingly, the Tax Tribunal erred as a matter of law in modifying the special assessments imposed by respondent. *Daguanno v Dep't of Treasury,* 203 Mich App 130, 133; 512 NW2d 32 (1993).

Given our resolution of the case, we need not address the remainder of the issues raised by respondent.

Reversed.

INTERNATIONAL RECOVERY SYSTEMS, INC v GABLER

Docket No. 161575. Submitted November 16, 1994, at Detroit. Decided December 6, 1994, at 9:35 A.M.

International Recovery Systems, Inc., brought an action in the Oakland Circuit Court against John H. Gabler, seeking enforcement of a Nevada judgment based upon an underlying gambling debt. The court, Barry L. Howard, J., dismissed the action, finding no cause of action against the defendant. The plaintiff appealed.

The Court of Appeals *held:*

Michigan public policy, as pronounced by the Legislature in MCL 600.2939(3); MSA 27A.2939(3), provides that contracts made in furtherance of gambling are unenforceable and loans made for gambling purposes cannot be recovered. Section 4(2) of the Uniform Foreign Money-Judgments Recognition Act, MCL 691.1154(2); MSA 27.955(4)(2), states that a foreign judgment need not be recognized if the cause of action on which the judgment is based is repugnant to Michigan public policy. The trial court did not err in ruling that the judgment at issue was unenforceable and not entitled to full faith and credit in Michigan.

Affirmed.

JUDGMENTS — FOREIGN JUDGMENTS — GAMING — GAMBLING DEBTS.

Michigan public policy against contracts made in furtherance of gambling renders a foreign judgment based upon an underlying gambling debt unenforceable in the courts of Michigan (MCL 600.2939[3], 691.1154[2]; MSA 27A.2939[3], 27.955[4][2]).

Nathanson & Nathanson, P.C. (by *Leonard M. Nathanson* and *Keith M. Nathanson*), for the plaintiff.

REFERENCES

Am Jur 2d, Executions and Enforcement of Judgments §§ 783, 831, 909, 912; Gambling §§ 186, 187, 224, 225.

Construction and application of Uniform Foreign Money-Judgments Recognition Act. 100 ALR3d 792.

Gerald Hale Ladue, for the defendant.

Before: MARILYN KELLY, P.J., and J. H. GILLIS* and M. D. SCHWARTZ,** JJ.

PER CURIAM. Plaintiff, International Recovery Systems, Inc., appeals as of right from dismissal of its action seeking enforcement of a foreign judgment based upon an underlying gambling debt. We affirm.

I

Defendant, John Gabler, issued four checks to the Las Vegas Sands Hotel for $5,000. He used the sum to purchase gambling chips and ultimately dishonored the checks. The hotel assigned defendant's debt to plaintiff, which obtained a default judgment against defendant in a state court of Nevada on November 20, 1991. The judgment awarded plaintiff the amount of the debt plus interest and costs.

Plaintiff sought to enforce the judgment in the courts of our state under the Full Faith and Credit Clauses of the United States Constitution and the Uniform Foreign Money-Judgments Recognition Act. US Const, art IV, § 1; MCL 691.1151 *et seq.*; MSA 27.955(1) *et seq.*

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), and the trial judge found no cause of action against defendant. He reasoned that contracts made in furtherance of gambling are unenforceable as contrary to Michigan public policy.

Later, the judge agreed to reconsider his ruling

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1994-7.

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

if plaintiff could present a Michigan appellate court case supporting enforcement of a foreign judgment based upon an underlying gambling debt. Plaintiff conceded that no such case law existed. The judge then denied the motion for reconsideration.

On appeal, plaintiff argues that the trial court erred in failing to render full faith and credit to the Nevada judgment.

II

A

We review a trial court's grant of summary disposition de novo, examining the record to determine whether the prevailing party was entitled to judgment as a matter of law. *G&A Inc v Nahra,* 204 Mich App 329, 330; 514 NW2d 255 (1994). MCL 691.1154(2); MSA 27.955(4)(2) provides:

> A foreign judgment need not be recognized if:
> (c) The cause of action on which the judgment is based is repugnant to the public policy of this state.

Courts in our state have long held that, as a matter of public policy, contracts made in furtherance of gambling are unenforceable, and loans made for gambling purposes cannot be recovered. *Gibson v Martin,* 308 Mich 178; 13 NW2d 252 (1944); *Raymond v Leavitt,* 46 Mich 447; 9 NW 525 (1881). The conclusion is amply supported by the language of MCL 600.2939(3); MSA 27A.2939(3), which provides:

> All notes, bills, bonds, mortgages, or other securities or conveyances whatever, in which the whole or any part of the consideration, shall be for any

> money or goods won by playing at cards, dice, or any other game whatever, or by betting on the sides or hands of such as are gaming, or by any betting or gaming whatever, or for reimbursing or repaying any moneys knowingly lent or advanced for any gaming or betting, shall be void and of no effect, as between the parties to the same, and as to all persons, except such as shall hold or claim under them in good faith, and without notice of the illegality of such contract or conveyance.

B

The viability of similar default judgments has been considered in the federal District Court for the Eastern District of Michigan on two separate occasions, in 1987 and 1990 respectively. *Nat'l Recovery System v Kasle,* 662 F Supp 139 (ED Mich, 1987); *Boardwalk Regency Corp v Travelers Express Co,* 745 F Supp 1266 (ED Mich, 1990).

In *Kasle,* the judge concluded that enforcement of a judgment based on a gambling debt did not violate Michigan public policy because: 1) otherwise the Michigan statute voiding gambling debts would be given an extraterritorial effect beyond that anticipated by the Legislature; 2) Michigan's interest in prohibiting a competent adult Michigan resident from voluntarily choosing to leave the state and wager in another state is minimal; 3) the facts did not indicate that Kasle was the victim of an illicit activity. The judge also reasoned that, as bingo and the state-run lottery are acceptable enterprises within the state, he could not conclude that gambling is morally and socially unacceptable here.

However, in *Boardwalk,* decided some three years later, a different judge again applied Michi-

gan law and came to the opposite conclusion: the courts of our state have long held that contracts made in furtherance of gambling were unenforceable, and loans made for gambling cannot be recovered. *Gibson, supra; Raymond, supra.* He denied plaintiff's request to honor stolen money orders that defendant signed in order to discharge a prior gambling debt and obtain gambling chips.

The *Boardwalk* court reasoned that MCL 600.2939(3); MSA 27A.2939(3) is the conclusive statement of Michigan public policy regarding the validity of gambling contracts or conveyances. Furthermore, it explicitly rejected the reasoning of *Kasle,* concluding that our Legislature has made limited exceptions to MCL 600.2939(3); MSA 27A.2939(3). Thus, Michigan does not prohibit "legal" gambling here or "legal" gambling in other states. However, that fact does not alter the explicit public policy statement against the enforcement of gambling debts set forth in the statute. *Boardwalk, supra,* p 1271.

Conclusions of the federal district court are not binding upon this Court. By contrast, public policy pronouncements of the Michigan Legislature enacted as statutes certainly do bind us. *Lieberthal v Glens Falls Indemnity Co,* 316 Mich 37, 40; 24 NW2d 547 (1946). MCL 600.2939(3); MSA 27A.2939(3) renders gambling debts unenforceable as against public policy. Moreover, MCL 691.1154(2); MSA 27.955(4)(2) authorizes the court to refuse to enforce a foreign judgment which is repugnant to public policy.

Since enforcement of gambling debts is repugnant to Michigan public policy, the trial court correctly entered a judgment of no cause of action for defendant.

Affirmed.

PEOPLE v YAREMA

Docket No. 177428. Submitted November 1, 1994, at Lansing. Decided December 19, 1994, at 9:00 A.M.

Michael G. Yarema was convicted by a jury in the 72nd District Court, Daniel J. Kelly, J., of operating a vehicle while visibly impaired. The conviction followed the trial court's denial of the defendant's motions to dismiss for failure to arraign the defendant within fourteen days or hold a pretrial conference within thirty-five days. The St. Clair Circuit Court, James T. Corden, J., affirmed the judgment. The Court of Appeals, DOCTOROFF, C.J., and FITZGERALD and TAYLOR, JJ., denied the defendant's application for leave to appeal in an order dated September 30, 1994. The defendant filed a motion for rehearing. The Court of Appeals, in lieu of granting or denying rehearing, issued a peremptory opinion.

The Court of Appeals *held:*

The fourteen-, thirty-five, and seventy-seven-day time limits for an arraignment, pretrial conference, and a trial, respectively, in the drunk driving statute, MCL 257.625b(1) and (2); MSA 9.2325(2)(1) and (2), are directory. Therefore, not only must there be a timely motion to dismiss on the basis of a violation of the statutory time limit, with any resulting dismissal being without prejudice to the reinstitution of charges, but, if the trial court denies the motion for dismissal, the issue can be preserved only by pursuing an interlocutory appeal. Reliance on issues concerning a violation of the time limits is precluded on appeal where there has been a trial, conviction, and sentence. The circuit court properly affirmed the defendant's conviction because, although the defendant timely raised the issue, he failed to pursue the issue with an interlocutory appeal when the district court denied his motions. Because this appeal arose after the judgment and sentence, the issue, being nonsubstantive in nature, is not cognizable.

Affirmed.

REFERENCES

Am Jur 2d, Appeal and Error §§ 554, 578; Criminal Law § 223; Limitation of Actions §§ 20-22.

See ALR Index under Interlocutory Proceedings or Matters; Limitation of Actions; Statutes.

FITZGERALD, J., dissenting in part, stated that in the absence of a persuasive showing of exceptional circumstances to justify a delay beyond the seventy-seven-day deadline for final adjudication, the dismissal of an action with prejudice is the appropriate remedy.

1. STATUTES — JUDICIAL CONSTRUCTION — TIME LIMITS — OFFICIAL DUTIES.

The fundamental rules of statutory construction generally preclude construction of a time limit for performance of an official duty as being mandatory, absent language expressly precluding performance of such duty after the specified time.

2. CRIMINAL LAW — ARRAIGNMENTS — PRETRIAL CONFERENCES — TRIAL — VEHICLE CODE — DISMISSALS — PREJUDICE — APPEAL.

The fourteen-day, thirty-five-day, and seventy-seven-day time limits pertaining to arraignments, pretrial conferences, and trials, respectively, contained in subsections 625b(1) and (2) of the Vehicle Code are directory only; therefore, not only must there be a timely motion to dismiss on the basis of a violation of the statutory time limit, with any resulting dismissal being without prejudice to the reinstitution of charges, but, if the trial court denies the motion for dismissal, the issue properly can be preserved only by pursuing an interlocutory appeal; the defendant may not rely upon such issues where the appeal occurs after trial, conviction, and sentence (MCL 257.625b[1],[2]; MSA 9.2325[2][1],[2]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Elwood L. Brown,* Prosecuting Attorney, and *Peter R. George,* Chief Assistant Prosecuting Attorney, for the people.

Bruce R. Saperstein, for the defendant.

Before: DOCTOROFF, C.J., and FITZGERALD and TAYLOR, JJ.

DOCTOROFF, C.J. Defendant was arrested and charged with operating a vehicle while under the influence of intoxicating liquor in violation of § 625 of the Vehicle Code, MCL 257.625; MSA 9.2325, on September 24, 1993. On October 7, 1993, the dis-

trict court sent notice of arraignment, which was then scheduled for October 11, 1993. At a November 5, 1993, pretrial conference, defense counsel moved for dismissal for failure to arraign defendant within fourteen days or to hold the pretrial conference within thirty-five days as required by § 625b of the Vehicle Code, MCL 257.625b; MSA 9.2325(2).

That motion was denied, and a further motion to dismiss was made and rejected when the original trial date of November 24 was adjourned to December 15, 1993, beyond the seventy-seven-day time limit set forth in the statute. The case proceeded to trial, and defendant was convicted by a jury of the lesser included offense of driving while impaired, MCL 257.625(3); MSA 9.2325(3). His conviction was affirmed on appeal to the St. Clair Circuit Court, and the case comes to this Court by way of a delayed application for leave to appeal.

This Court denied the application in an order dated September 30, 1994. Defendant, through counsel, filed a motion for rehearing suggesting that the bar and the lower court bench need guidance regarding the question whether the time limits set forth in the statute are wholly meaningless. Believing that there is merit in that request, in lieu of granting or denying the motion for rehearing, we have elected, pursuant to MCR 7.205(D)(2), to resolve the issue by this peremptory opinion. *People v Smith,* 200 Mich App 237, 238-239; 504 NW2d 21 (1993).

In *People v Smith, supra,* this Court held that dismissal for violation of the statutory time limits could not be "with prejudice." The Court was careful to avoid the question whether dismissal "without prejudice" was proper, which was not crucial to the proper decision of the issue then presented, as evidenced by the statement in the

opinion that "the original dismissal *may have been appropriate,* but it could not have been 'with prejudice.' " *Id.* at 243. (Emphasis supplied.) The case at bar squarely presents the issue whether dismissal is mandatory.

As this Court held in *Smith, supra,* the fundamental rules of statutory construction generally preclude construction of a time limit for performance of an official duty as being mandatory, absent language that expressly precludes performance of such duty after the specified time has elapsed. Such statutes are normally construed as being "directory." 3 Sutherland, Statutory Construction (5th ed), § 57.19, pp 47-48. *Smith, supra* at 241-242. In this context, the term "directory" means something less than the alternative of compliance or absolute dismissal.

In *Smith,* this Court drew an analogy to the twelve-day time limit for conducting preliminary examinations in felony cases, MCL 766.4; MSA 28.922. The Supreme Court, likewise, has construed that statute as being directory only, meaning that, on timely motion, the charges may be dismissed, but without prejudice, except when the constitutional right to a speedy trial has otherwise also been violated. *People v Weston,* 413 Mich 371, 372; 319 NW2d 537 (1982).

We think that Michigan's developed jurisprudence regarding the twelve-day time limit for preliminary examinations applies by analogy to the fourteen-, thirty-five, and seventy-seven-day time limit in the drunk driving statute for an arraignment, pretrial conference, and trial, respectively. This means that, not only must there be a timely motion to dismiss on the basis of a violation of the statutory time limit, with any resulting dismissal being without prejudice to the reinstitution of charges, *People v Smith, supra,* but, if the trial

court denies the motion for dismissal, the issue properly can be preserved only by pursuing an interlocutory appeal. Appeal after judgment, i.e., after trial, conviction, and sentence, precludes reliance on such issues. *People v Crawford,* 429 Mich 151; 414 NW2d 360 (1987).

The case at bar is therefore directly controlled by the reasoning in *Crawford.* Defendant timely raised the issue, but failed to pursue it by interlocutory appeal when the district court denied his motions to dismiss. This appeal having arisen after the judgment of conviction and sentence, the issue, being nonsubstantive in nature, is not cognizable. Accordingly, no other issue being presented, defendant's conviction is affirmed.

Affirmed.

TAYLOR, J., concurred.

FITZGERALD, J. *(concurring in part and dissenting in part).* I concur with the majority opinion with respect to the fourteen-day time limit for an arraignment and the thirty-five-day time limit for a pretrial conference. I do not agree with the majority's analysis, however, with respect to the seventy-seven-day time limit for final adjudication.

MCL 257.625b(2); MSA 9.2325(2)(2) provides, in relevant part:

> The court shall, except for delay attributable to the unavailability of the defendant, a witness, or material evidence, or due to an interlocutory appeal or exceptional circumstances, but not a delay caused by docket congestion, finally adjudicate, by a plea of guilty or nolo contendere, or the entry of a verdict, or by other final disposition, . . . within 77 days after the person is arrested for the violation or, if an arrest warrant is reissued, not more than 77 days after the date the reissued arrest warrant is served.

Exceptions to the seventy-seven-day deadlines for court and administrative action are narrowly constructed. Although delay would be allowed for "exceptional circumstances," this standard, taken from the Michigan Court Rule regarding speedy trials and delays by prosecutors,[1] is more restrictive than the familiar standard of "good cause." In the absence of a persuasive showing of exceptional circumstances to justify a delay beyond the seventy-seven-day deadline, I believe that dismissal with prejudice is the appropriate remedy.[2]

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[1] MCR 6.004(C)(4)(b).

[2] In *People v Smith*, 200 Mich App 237; 504 NW2d 21 (1993), the arraignment was not held within fourteen days of the arrest. The Court held that violation of the fourteen-day rule is not a jurisdictional defect. Although the Court noted that subsections 625b(1) and (2) of the Vehicle Code did not suggest that a violation of the time limits established is jurisdictional, the holding in the case was limited to the fourteen-day deadline for an arraignment. Therefore, the decision in *Smith* is not outcome-determinative with respect to the seventy-seven-day deadline for final adjudication.

PEOPLE v WILLIAMS (AFTER SECOND REMAND)

Docket No. 169965. Submitted November 17, 1994, at Detroit. Decided December 19, 1994, at 9:05 A.M. Leave to appeal sought.

Marlon A. Williams pleaded guilty in the Saginaw Circuit Court, Robert L. Kaczmarek, J., of possession with intent to deliver less than fifty grams of cocaine and of conspiracy to deliver less than fifty grams of cocaine. The defendant was sentenced to concurrent prison terms of 13½ to 20 years. The Court of Appeals, WALSH, P.J., and T.G. KAVANAGH and W.R. BEASLEY, JJ., in an unpublished memorandum opinion, decided March 25, 1992 (Docket No. 134964), remanded for resentencing after concluding that the sentences violated the principle of proportionality. On remand, the trial court imposed the same sentences for the same reasons it had given earlier. The Court of Appeals, MARILYN KELLY, P.J., and MICHAEL J. KELLY and FITZGERALD, JJ., in an unpublished memorandum opinion, decided July 2, 1993 (Docket No. 153184), remanded for resentencing before a different judge. On remand, the trial court, Patrick M. Meter, J., imposed consecutive prison sentences of 8 to 20 years for the possession conviction and 3½ to 20 years for the conspiracy conviction. The defendant appealed, challenging the consecutive nature of the sentences.

After second remand, the Court of Appeals *held:*

Where a case is remanded from the Court of Appeals because the entire sentence is invalid, every aspect of the sentence is before the judge de novo, unless the order of remand indicates otherwise. Here, the last remand order instructed that the case be treated as if the defendant had not been sentenced previously. The second judge therefore properly could impose consecutive sentences as required by MCL 333.7401(3); MSA 14.15(7401)(3). The consecutive sentences were proportionate to the seriousness of the crimes and the defendant's background.

Affirmed.

SENTENCES — COURT OF APPEALS — REMANDS FOR RESENTENCING.

Where a criminal case is remanded by the Court of Appeals

REFERENCES

Am Jur 2d, Appeal and Error §§ 967, 976.

See ALR Index under Sentence and Punishment.

because the entire sentence is invalid, every aspect of the sentence is before the sentencing judge de novo, unless the order of remand indicates otherwise.

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 on appeal.

AFTER SECOND REMAND

Before: MARILYN KELLY, P.J., and J. H. GILLIS* and M.D. SCHWARTZ,** JJ.

MARILYN KELLY, P.J. Defendant, Marlon Williams, seeks relief from his consecutive sentences of 8 to 20 years and 3½ to 20 years imprisonment. The former was imposed for possession with intent to deliver less than fifty grams of cocaine and the latter for conspiracy to deliver less than fifty grams of cocaine. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv); MCL 750.157a; MSA 28.354(1). We affirm.

I

This case has a long procedural history. Defendant pled guilty to the charges in October, 1990. The trial judge sentenced him to concurrent prison terms of 13⅓ to 20 years. Defendant appealed, claiming his sentences were disproportionate. Our Court agreed and remanded for full resentencing. *People v Williams,* unpublished memorandum

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1994-7.

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

opinion of the Court of Appeals, decided March 25, 1992 (Docket No. 134964).

At resentencing, the trial judge imposed the identical concurrent sentences of 13⅓ to 20 years. Defendant appealed a second time. Our Court noted that the trial judge offered the same reasons he had at the first sentencing to justify exceeding the guidelines' recommendation. We concluded that the cited reasons did not justify an upward departure from the recommendation and that the court failed to state reasons which would justify an upward departure. We again remanded for resentencing, this time before a different judge. We instructed the trial court to complete an updated sentencing information report and, if necessary, SIR departure forms. Defendant was to be given the opportunity to refute any information used in sentencing, and an evidentiary hearing was to be held if necessary. *People v Williams,* unpublished memorandum opinion of the Court of Appeals, decided July 2, 1993 (Docket No. 153184).

At the second resentencing, the prosecutor requested that the judge impose consecutive sentences as required by MCL 333.7401(3); MSA 14.15(7401)(3). Defense counsel objected. He argued that imposition of concurrent sentences at both prior sentencings and the prosecutor's failure to cross-appeal from them precluded the sentencing judge from imposing consecutive sentences at resentencing. He asserted that only those portions of the prior sentences which were reviewed by the appellate court could be considered at resentencing. He argued that their concurrent nature had never been addressed on appeal. He asserted that any parts of the sentences which the appellate court did not disturb were to be considered the law of the case, not subject to further modification.

Notwithstanding defendant's arguments, the

judge sentenced defendant to consecutive terms of 8 to 20 years and 3½ to 20 years imprisonment for the two convictions.

II

A

On appeal defendant asserts that, while the sentencing judge could alter or modify the term of years of the sentences, he was required to impose concurrent sentences. In support, he cites MCL 769.24; MSA 28.1094, which provides:

> Whenever, in any criminal case, the defendant shall be adjudged guilty and a punishment by fine or imprisonment shall be imposed in excess of that allowed by law, the judgment shall not for that reason alone be judged altogether void, nor be wholly reversed and annulled by any court of review, but the same shall be valid and effectual to the extent of the lawful penalty, and shall only be reversed or annulled on writ of error or otherwise, in respect to the unlawful excess.

We reject defendant's argument for a number of reasons. First, this statute must be read in conjunction with the court rule that defines the term "judgment." MCR 6.427 provides:

> Within 7 days after sentencing, the court must date and sign a written judgment of sentence that includes:
>
> (1) the title and file number of the case;
>
> (2) the defendant's name;
>
> (3) the crime for which the defendant was convicted;
>
> (4) the defendant's plea;
>
> (5) the name of the defendant's attorney if one appeared;

(6) the jury's verdict or the finding of guilt by the court;

(7) the term of the sentence;

(8) the place of detention;

(9) the conditions incident to the sentence; and

(10) whether the conviction is reportable to the Secretary of State . . . .

As is clear from a reading of the court rule, the judgment is the final record of a defendant's conviction. MCL 769.24; MSA 28.1094 instructs the judiciary that, if the sentence exceeds that allowed by law, the entire judgment is not rendered null and void. Rather, the court is required only to correct the unlawful sentence.

B

Here, in reviewing defendant's sentences, our Court concluded that, because they were disproportionate, they were unlawful and hence invalid. *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). MCR 6.429 authorizes trial courts to correct an invalid sentence. *In re Dana Jenkins,* 438 Mich 364, 368-369; 475 NW2d 279 (1991). At the second resentencing, the judge was charged with the task of correcting invalid sentences.

In order to determine what would constitute lawful sentences for defendant's convictions, we consider both statute and the instructions of our Court to the resentencing judge.

Defendant's offenses were controlled substances offenses. By statute, the trial court was required to make the sentences consecutive, because MCL 333.7401(3); MSA 14.15(7401)(3) provides:

A term of imprisonment imposed pursuant to

> subsection 2(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony.

See *People v Kent,* 194 Mich App 206, 207-209; 486 NW2d 110 (1992); *People v Cline,* 190 Mich App 1, 2; 475 NW2d 362 (1991).

Furthermore, our Court in its first opinion remanded for a "full resentencing." Docket No. 134964. In our second opinion, we simply remanded "for resentencing." Docket No. 153184. There, we gave additional instructions which indicate that the judge at resentencing was to treat the case as if defendant had not been sentenced previously. New sentence information reports were required. Defendant was given the opportunity to refute the information which was to form the basis of his sentences.

We find no abuse of discretion in the sentences imposed by the judge. When a case is remanded from our Court because the entire sentence is invalid, every aspect of the sentence is before the judge de novo unless the remand indicates otherwise.[1] Furthermore, this defendant's sentences were proportionate to the seriousness of the crimes and his background. *Milbourn.* They also complied fully with the statute which required consecutive sentences. MCL 333.7401(3); MSA 14.15(7401)(3). Defendant is entitled to no further relief in this matter.

Affirmed.

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[1] Our Supreme Court recently released *People v Thomas,* 447 Mich 390; 523 NW2d 215 (1994). Since *Thomas* dealt with a partially invalid sentence, rather than the wholly invalid sentence involved here, the Court's instructions regarding correction of the defendant's sentence are not applicable here.

CITY OF WESTLAND v JON L OKOPSKI

CITY OF WESTLAND v LAVERN OKOPSKI

Docket Nos. 152429, 152436. Submitted October 5, 1994, at Detroit. Decided December 19, 1994, at 9:10 A.M. Leave to appeal sought.

Jon L. Okopski and Lavern Okopski were convicted by a jury following a joint trial in the 18th District Court, Gail McKnight, J., of being a disorderly person and assault and battery of a police officer. Jon Okopski was also convicted of interfering with police. Each defendant was sentenced to eighty-nine days in jail for each conviction and was assessed fines and costs. Both defendants appealed to the Wayne Circuit Court, which affirmed, Kaye Tertzag, J. Each defendant appealed by leave granted, and the appeals were consolidated.

The Court of Appeals *held:*

1. The trial court did not err in admitting into evidence for the purpose of impeaching the defendants' trial testimony the results of preliminary breath tests administered by the police shortly after the defendants were arrested. Such results may be admitted as impeachment evidence. Because those results were offered as rebuttal, the prosecution had no duty to offer them in its case in chief.

2. The defendants failed to preserve for appellate review the question whether the preliminary breath test results met the strict standards for the admission of scientific evidence.

3. The defendants' failure to request a cautionary instruction regarding the use of rebuttal evidence and their right to resist an unlawful arrest and their failure to object to the trial court's use of the statutory presumption of intoxication, when coupled with their failure to show any prejudice, resulted in a waiver of appellate review of these claims of instructions error.

4. Because the Knights of Columbus Hall at which the wedding reception at which the altercation that led to these

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REFERENCES

Am Jur 2d, Evidence §§ 321, 1021; Intoxicating Liquors § 36; Witnesses §§ 958, 977.

Location of offense as "public" within requirement of enactments against drunkenness. 8 ALR3d 930.

convictions was held can be rented by the general public, and accordingly was a building where members of the public go for entertainment, it was a public place within the meaning of the Westland disorderly conduct ordinance under which the defendants were prosecuted, even though at the time of the altercation it was being used for a private function.

5. The trial court did not abuse its discretion in admitting a tape recording of the 911 telephone call that resulted in the police being dispatched to the wedding reception. Because the recording was admitted to show why the police were sent to the wedding reception rather than to establish the truth of the matters asserted in the telephone call, it did not constitute hearsay. Even if the recording had been admitted to prove the truth of the matters asserted in it, it would have been admissible under the present sense impression exception of MRE 803(1). In any event, error in the admission of the recording, if any, was harmless.

6. The offenses under the Westland Code of interfering with a police officer and assault and battery of a police officer are different crimes with different elements, and conviction of and sentencing for both does not constitute double jeopardy.

7. The comments made by the trial court at the sentencing were appropriate and do not support the claim that resentencing is required.

Affirmed.

1. CRIMINAL LAW — EVIDENCE — INTOXICATION — PRELIMINARY BREATH TESTS — IMPEACHMENT.

The results of a preliminary breath test administered shortly after a defendant's arrest may be admitted as impeachment evidence in a trial of a charge of being a disorderly person where the defendant has testified to not being intoxicated.

2. WORDS AND PHRASES — PUBLIC PLACE — SOCIAL HALLS.

A social hall that can be rented by the general public, and thus is a building where the members of the public can go for entertainment, is a public place for the purpose of an ordinance prohibiting intoxication in a public place, even when the hall is being used for a private function that is not open to the general public.

Law Offices of Angelo A. Plakas, P.C. (by *C. Brian James*), for the plaintiff.

Law Offices of Berger & Rabaut (by *Seymour Berger*), for Jon L. Okopski.

Burgess & Burgess, P.C. (by *Laurence C. Burgess*), for Lavern Okopski.

Before: HOOD, P.J., and TAYLOR and D. A. SERVITTO,* JJ.

HOOD, P.J. Defendant Lavern Okopski was convicted by a jury in the 18th District Court of being a disorderly person (Westland Code, § 22.79) and of committing an assault and battery on a police officer (Westland Code, § 22.17). He was sentenced to eighty-nine days for each conviction, to run concurrently, and assessed $700 in fines and costs.

Defendant Jon Lyle Okopski, the son of Lavern, was convicted by the same district court jury of interfering with police (Westland Code, § 22.252), being a disorderly person (Westland Code, § 22.79), and committing an assault and battery on a police officer (Westland Code, § 22.17). He was sentenced to eighty-nine days for each conviction, to run concurrently, and also assessed $600 in fines and costs for each conviction, for a total of $1,800.

Both defendants appealed their convictions to the Wayne Circuit Court, which affirmed, but which stayed the sentences pending appeal to this Court. We granted leave to consider the issues raised by defendants and now affirm.

The events leading to defendants' arrest and conviction arose as the result of what can be described charitably as a gala celebratory event run amok, or can be described less charitably as a miniriot.

On October 6, 1990, the Okopski family and approximately two hundred of their friends and relatives gathered at the Knights of Columbus Hall in Westland to celebrate the wedding of Lavern Okopski, Jr. What began as a joyous occa-

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

sion, ended in the arrest of three of the Okopski family: Lavern (the groom's father), Jon (the best man and codefendant here), and Annette Freeman (a bridesmaid and apparently Lavern's daughter and Jon's sister). Additionally, the groom's mother, Judith Okopski, required hospitalization after she slipped on some ice and broke her ankle.

The problem apparently started when the disk jockey hired for the occasion failed to follow orders. Both defendants had warned the disk jockey that he should not play any "black" music, but to play only country and western music. The disk jockey nevertheless played several hit tunes by "rap" performer M. C. Hammer. Lavern Okopski took great exception to this, and an altercation ensued, which escalated to numerous physical confrontations and resulted in twenty-three police officers from three jurisdictions eventually arriving at the scene. At that point, confrontations developed between the celebrants and the police and resulted in the eventual subduing and arrest of defendants.

The police administered preliminary breath tests (PBT) to Lavern and Jon after they were taken to the police station. According to the testimony of one of the officers, Lavern showed a blood alcohol level of 0.15 percent and Jon a level of 0.06 percent. The police had not obtained a search warrant before conducting the tests.

As a result of the incident, Lavern was charged with violation of two city ordinances, one prohibiting assault and battery and the other prohibiting being drunk and disorderly in a public place. Jon was charged with the same offenses, as well as obstructing and hindering a police officer in the performance of his duty. In addition Annette Freeman was charged with assault and battery and with being drunk and disorderly.

A consolidated trial of all three individuals was held on August 2, 5, and 6, 1991. After deliberating a little less than four hours, the jury found Lavern and Jon guilty as charged, but found Annette not guilty with respect to the charges against her.

At a sentencing hearing held on October 24, 1991, the district court expressed its extreme displeasure with the sort of behavior exhibited by defendants at what should have been a joyous celebration of a wedding. The court also noted that defendants refused to admit any wrongdoing and appeared to believe that their actions were quite proper and understandable. After hearing disagreements regarding the contents of a Probation Department report, the court imposed sentence, and these appeals followed.

Both defendants claim that the trial court committed error requiring reversal in admitting the PBT results. We disagree. At trial, both defendants denied that they were intoxicated. Lavern testified that he consumed only a couple of beers, and Jon testified that he had consumed only a champagne glass of beer. The trial court then allowed the prosecutor to admit the PBT test results to impeach defendants.

A blood alcohol test administered pursuant to statutory law is not admissible in a criminal prosecution other than a prosecution for a drinking and driving offense as enumerated in the statute. MCL 257.625a(1); MSA 9.2325(1)(1); *People v Keen,* 396 Mich 573, 575; 242 NW2d 405 (1976); *Manko v Root,* 190 Mich App 702, 704; 476 NW2d 776 (1991). In this case, we are presented with an issue of first impression: whether PBT results are admissible to impeach a defendant in a criminal case.[1]

[1] We note that the test administered in this case was a Breatha-

Evidence that is admissible for one purpose is not inadmissible because its use for a different purpose is precluded. *People v VanderVliet,* 444 Mich 52, 73; 508 NW2d 114 (1993). Likewise, otherwise constitutionally inadmissible evidence may be admissible for the purpose of rebutting a defendant's false assertions at trial. *People v Sutton (After Remand),* 436 Mich 575, 592; 464 NW2d 276 (1990), reh den 437 Mich 1208 (1990), citing *Harris v New York,* 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971).

In this case, defendants' testimony about not being intoxicated caused the prosecutor to present rebuttal evidence of defendants' blood alcohol content. The evidence was not used to prove substantively that defendants were intoxicated; rather, the test results were used to impeach defendants' testimony on that point. We find that this procedure was permissible.

Lavern also argues that the prosecutor should have presented the evidence in his case in chief, citing *People v McGillen No 1,* 392 Mich 251, 266; 220 NW2d 677 (1974). In addition to the excerpt quoted by him, however, the *McGillen* Court, adopting the language of *People v Quick,* 58 Mich 321, 323; 25 NW 302 (1885), that is applicable to both defendants, also stated:

> Cases may sometimes arise where testimony which could not be had in the opening may be let in upon good cause shown thereafter. [*Id.* at 266.]

Likewise, our Supreme Court in *People v Losey,* 413 Mich 346, 351, n 3; 320 NW2d 49 (1982), added:

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lyzer test rather than a blood or urine test. However, the statutory provision involved is one and the same, and we see no reason that this distinction would alter the result.

> We recognize that there may be occasional cases in which evidence that might have been admissible in the prosecutor's case in chief could be admitted in rebuttal. . . . [E]vidence that would have been repetitive on a point thought not to be seriously contested might be allowed in rebuttal if the prosecutor is genuinely surprised by the defendant's focusing on the point in defense.

When rebuttal evidence is permitted, it must relate to a substantive matter rather than a collateral one. *McGillen, supra* at 266. Generally, contradictory evidence is admissible only when it directly tends to disprove a witness' exact testimony. *Id.* at 268.

In this case, the prosecutor presented evidence in his case in chief that defendants were intoxicated. During the defendants' case, however, defendants denied that they were intoxicated. Lavern said he consumed only a couple of beers, and Jon said that he consumed only a few ounces of beer. Defendants thus opened the door for the prosecutor to rebut that evidence. Defendants' intoxication was a substantive issue—the disorderly person ordinance requires that a person be intoxicated. Here, defendants testified that they had some beer, but they were not intoxicated. The PBT results directly tended to disprove that exact testimony. The rationale for the prohibition of test results in any but the statutorily specified prosecution is simply inapplicable in a situation such as the present, where a defendant specifically has denied intoxication.

Defendants also argue that the PBT did not meet the strict standards for the admission of scientific evidence. Defendants did not make this objection at the trial court level. An appeal based on one ground is not preserved where the objection at trial was on a different ground. *People v Stimage,*

202 Mich App 28, 30; 507 NW2d 778 (1993). Additionally, even if we found that the trial court erred in admitting the PBT results without scientific foundation, the error would be harmless because other evidence established that defendants were intoxicated. See, generally, *People v Hempstead,* 144 Mich App 348, 353-354; 375 NW2d 445 (1985).

Finally, defendants argue that the judge should have given a cautionary instruction regarding the rebuttal evidence. Defendants did not request such an instruction. Relief will not be granted where a defendant did not request a limiting instruction at trial and where the likelihood of prejudice resulting from the instruction's absence was not shown. *People v Stanton,* 190 Mich App 558, 562-563; 476 NW2d 477 (1991). We find no prejudice. Even without the PBT results, the evidence supports a finding that defendants were intoxicated.

Moreover, the case that Lavern relies on, *People v Cox,* 61 Mich App 37, 40; 232 NW2d 188 (1975), says that prejudice resulting from an instruction's absence is rare. In this case, the jury requested further instructions regarding intoxication in the context of the disorderly person ordinance. The jury did not express confusion concerning Lavern's PBT result or his intoxication. Accordingly, reliance upon *Cox* is misplaced.

We conclude that the trial court did not err in admitting the PBT results to impeach defendants.

Defendants also claim that the trial court erred in ruling that the Knights of Columbus Hall was a public place within the meaning of that term as used in the Westland ordinance and that the ordinance is unconstitutional. We disagree in both instances.

Defendants were convicted of disorderly conduct under Westland Code, § 22.79(5), which states in part:

> A person who is intoxicated *in a public place* and who is either endangering directly the safety of another person or of property or is acting in a manner that causes a public disturbance. . . . [Emphasis added.]

The above language is identical to the Michigan statutory law regarding disorderly conduct, MCL 750.167(1)(e); MSA 28.364(1)(e). Thus, case law regarding the Michigan statute is helpful to us in interpreting the Westland ordinance.

Under general principles of constitutional law, statutory language must be sufficiently clear and definite to provide fair warning of prohibited conduct. *Blue Cross & Blue Shield of Michigan v Governor,* 422 Mich 1, 92-93; 367 NW2d 1 (1985). A statute is void for vagueness where people of common intelligence must guess at the statute's meaning and differ with regard to how it applies. *Allison v Southfield,* 172 Mich App 592, 595-596; 432 NW2d 369 (1988).

Defendants state that the Michigan disorderly conduct statute was found unconstitutional in *People v Gagnon,* 129 Mich App 678; 341 NW2d 867 (1983). Defendants are only partially correct, because the Court found only a portion of the statute void for vagueness under the facts of that case. In *Gagnon,* the defendant was a passenger in a car stopped by a police officer because of a suspicion of drunk driving. The defendant refused to follow the officer's instructions and then argued and fought with the officer. *Id.* at 681-682. The Court found that the "public disturbance" language of the statute was unconstitutionally vague given the facts. *Id.* at 683-684. However, the Court did not hold that the entire statute was unconstitutional. Instead, it interpreted the public disturbances provision to require an endangering of the safety of a

person or property. *Id.* at 684. Therefore, *Gagnon* does not apply to the issue presently before this Court, because it did not address the "public place" provision, nor did it find the statute unconstitutional.

The Michigan statute and the Westland ordinance do not define the term "public place." The Michigan Supreme Court considered the definition of a public place in *People, ex rel Allegan Prosecuting Attorney v Harding,* 343 Mich 41; 72 NW2d 33 (1955). The establishment at issue in *Harding* was a dance hall with an adjacent restaurant and sleeping rooms. Patrons, estimated to be between two hundred and fifteen hundred nightly, frequented the hall after 2:00 A.M., when the bars closed. *Id.* at 44-45. The Court found that the hall was a public place within the meaning of the statute. The Court relied on the following definition of a public place:

> "As applied to an inclosure, room, or building, a 'public place' must be considered as one wherein, by general invitation, members of the public attend for reasons of business, entertainment, instruction, or the like, and are welcome as long as they conform to what is customarily done there. . . . The term has been applied to a variety of places, as, a public cafe, a public dance hall, a hotel." [*Id.* at 46, quoting 70 CJS, Place, pp 1095, 1096.]

The Knights of Columbus Hall in this case meets the above definition. The hall was available for rental by the general public and, accordingly, is a building where members of the public go for entertainment. Defendants argue that the wedding reception was not open to the general public and that this changes the character of the hall so that it was not a public place. Defendants seek to tailor

the definition of a public place to suit their purposes. The above definition of public place is broader than defendants would allow—it does not require a particular function on a particular occasion. The question here is not whether the Okopski wedding reception was a public place, but whether the Knights of Columbus Hall was a public place. The answer, under the above definition, is yes.

Both defendants cite *Jads, Inc v Detroit,* 41 Mich App 693; 200 NW2d 715 (1972), as supporting their contention that the reception was not a public place. In *Jads,* a topless dancer was convicted of indecent exposure under a city ordinance that prohibited such behavior in "the streets, lanes, alleys, markets or public places of the city." *Id.* at 695. The Court found that the Sip' n Chat Bar, where the defendant danced, was not a public place within the ordinance. The Court stated:

> Without in any way attempting to define the exact limits of the term "public places" we simply conclude that a cabaret does not fit within the class of specific examples in this ordinance: streets, lanes, alleys and markets. [*Id.* at 697.]

It is not proper to analogize *Jads* and the instant case. First, that case was decided under a different statute. Second, the Court itself stated that it would not define the term "public place." Third, the *Jads* statute enumerated specific locations—streets, lanes, alleys, and market—followed by the general phrase "public places." The Court thus was obliged to interpret the statute under the doctrine *ejusdem generis,* which calls for courts to interpret a general term following specific terms to be of the same kind. *Id.* at 696. In this case, the statute is broad—it includes all public places without specifying any particular kind of place. *Jads* is

distinguishable from this case for those enumerated reasons.

Moreover, we believe the Westland ordinance was designed to prevent just the type of conduct exhibited at the Okopski reception. Lavern attacked the disk jockey, acting so irrationally that wedding guests streamed out of the hall into the parking lot. Defendants were verbally abusive to the police and tried to hit them, forcing them to call for backup units. The circumstances could have easily escalated into a true riot. The reception was not a small party at a private home. Here, some two hundred people were gathered at a hall, drinking and dancing. The hall fits within the definition of a public place, and the trial court was correct in so holding.

We find no merit in any of defendants' other claims of error and address them only briefly.

The trial court did not abuse its discretion in admitting the tape recording of the 911 telephone call that resulted in the police responding to the disturbance at the hall. First, the 911 tape recording was not hearsay, because it was not introduced to prove the truth of the matter asserted therein, but rather to show why the police responded. MRE 801(c); *People v Jackson,* 113 Mich App 620; 318 NW2d 495 (1982). Second, even if the tape recording were offered to prove the truth of the statements therein, it would fall within the present sense impression exception of MRE 803(1). *People v Cross,* 202 Mich App 138, 142; 508 NW2d 144 (1993). Finally, even if there were error in the admission of the 911 tape recording, such error would be harmless beyond any doubt, because the same facts were shown by other, competent evidence. The prosecutor presented the tape recording at the close of his case, after witnesses already had established the facts at issue. The disk jockey

had testified that he had been attacked. The bartenders already had testified that a large number of people had been fighting and that Judith Okopski had been injured. See *People v Slaton,* 135 Mich App 328, 338; 354 NW2d 326 (1984).

The trial court did not commit error requiring reversal in failing to instruct sua sponte the jury concerning the defendants' right to resist an unlawful arrest. Defendants' did not raise any objection at trial to the failure to give such an instruction, and the issue is waived absent manifest injustice. *People v Vaughn,* 200 Mich App 32, 39-40; 504 NW2d 2 (1993). We find no manifest injustice, because our review of the record convinces us that the facts do not support defendants' theory that the arrests were unlawful. *People v Dembinski,* 62 Mich App 583, 589; 233 NW2d 662 (1975).

We also must reject Lavern's claims that the trial court abused its discretion in admitting the statutory presumption of intoxication. We first note that Lavern failed to preserve this issue because he did not object at trial. *People v Considine,* 196 Mich App 160, 162; 492 NW2d 465 (1992). We also would note that the presumption was admitted for the limited purpose of impeaching defendant's testimony that he had had only a couple of beers. Therefore, use of the presumption was permissible.

Jon was not, as he claims, placed in double jeopardy or sentenced improperly as the result of being charged and convicted both of assault and battery and of interfering with a police officer. The crimes involved are different crimes with different elements. See *People v Gleisner,* 115 Mich App 196, 200; 320 NW2d 340 (1982).

Finally, we find no error in the trial court's sentencing of either defendant. The trial court

articulated several factors in its decisions regarding defendants' sentences, indicating that the jury's verdict was "absolutely appropriate" on the basis of evidence, that defendants' conduct not only violated the law but also brought "great shame on the family," and that defendants expressed no regret or remorse. The trial court also expressed its belief that some testimony was perjurious and an affront to the oaths taken. Our review of the record supports the sentences imposed by the trial court. Because we find no sentencing error, defendants' requests that they be resentenced by a different judge are moot.

Defendants' convictions and sentences are affirmed.

SAMONEK v NORVELL TOWNSHIP

Docket No. 147724. Submitted April 21, 1994, at Grand Rapids. Decided December 19, 1994, at 9:15 A.M.

Sara and James Samonek petitioned the Tax Tribunal for review of property tax assessments for 1988, 1989, and 1990 by Norvell Township on parcels of farmland owned separately by the petitioners. In determining the true cash value of the parcels, the Tax Tribunal refused to consider the sale prices of similar parcels conveyed by quitclaim deed, acquired from the Federal Land Bank, or sold at auction. Sara Samonek appealed with respect to the assessments for all three tax years, and James Samonek appealed with respect to the assessments for 1988 and 1989.

The Court of Appeals *held:*

1. The sales-comparison or market approach to valuation, as used in this case, should indicate true cash value through an analysis of recent sales of comparable properties, a comparison with the subject property, and an adjustment of the sale prices of comparable properties to reflect differences from the subject property. Here, the Tax Tribunal erred in rejecting evidence of the transaction involving the conveyance by quitclaim deed. The fact that the transaction involved a quitclaim deed is relevant to the persuasiveness of such evidence, not to its admissibility.

2. The Tax Tribunal also erred in rejecting evidence of the Federal Land Bank and auction sales. Pursuant to MCL 211.27(1); MSA 7.27(1), an assessor may not consider forced sales, but may consider sales at auction when those sales have become a common method of acquisition in the jurisdiction for the class of property being valued, provided that the auctions are not part of a liquidation of the sellers' assets in bankruptcy and the sellers are able to use common marketing techniques to obtain the usual selling prices for the properties. The Tax Tribunal failed to determine whether the Federal Land Bank transaction was a forced sale and whether the auction sales were a common method of acquisition in the township.

Affirmed in part, reversed in part, and remanded.

Thomas K. Ellis, for the petitioners.

Brian E. Thiede, for the respondent.

Before: CORRIGAN, P.J., and GRIFFIN and M. W. DRAKE,* JJ.

GRIFFIN, J. Petitioners appeal as of right from a judgment of the Michigan Tax Tribunal affirming the property tax assessments on petitioners' respective parcels of farmland for 1988, 1989, and 1990. We affirm in part and reverse in part. In doing so, we hold that the Tax Tribunal must consider the sales prices of comparable parcels of property not sold at auction or forced sale in determining the true cash value of a subject property.

I

The property consists of 385.727 acres of farmland divided into four separate parcels. Petitioner Sara Samonek owns parcels 20-10-251-001-00 (45.2 acres), 20-10-276-001-00 (78.12 acres), and 20-10-400-001-00 (158.65 acres). Petitioner James Samonek, Sara's father, owns parcel 20-01-251-003-00 (103.76 acres). Sara Samonek's property is located approximately four miles from her father's property.

The Tax Tribunal found the true cash value of parcel 20-10-251-001-00 to be $38,000 for 1988, $39,000 for 1989, and $34,000 in 1990. The true cash value of parcel 20-10-276-001-00 was found to be $68,000 for 1988, $68,000 in 1989, and $62,000 in 1990. Finally, the true cash value of parcel 20-10-400-001-00 was found to be $176,000 for 1988, $176,000 for 1989, and $162,000 for 1990. Petitioner James Samonek only challenges the true cash value determination of his parcel for 1988

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

and 1989. The Tax Tribunal found the true cash value of parcel 20-01-251-003-00 to be $60,000 for 1988 and $62,000 for 1989.

The true cash value of the property was initially determined by respondent's assessor in reliance on the county equalization land value grids for 1988, 1989, and 1990. The grids were based on studies done by the Jackson County Equalization Department of land sales within each township from 1986 to 1989. At the Tax Tribunal hearing, petitioners attempted to challenge their assessments by introducing evidence of the sales prices of a number of comparable properties in the area that were not considered by the equalization department.

Petitioners' proofs established that James Samonek purchased a large tract of nearby farmland from the Federal Land Bank for $500 an acre in 1986. The property had been acquired from its previous owners through foreclosure or repossession and had been purchased pursuant to a land contract. The property was advertised for sale for over one year before being purchased by James Samonek. James Samonek also testified that his attorney purchased two hundred acres of nearby farmland for $100,000, or $500 an acre in 1987.

Similarly, James Samonek noted that farmland located approximately five miles west of Sara Samonek's property sold for less than $500 an acre in 1987. The property was sold at an auction after being listed on the market for several months. James Samonek also noted that the property was located on a highway, while Sara Samonek's property was situated on a two-lane county road. Further, the property was much more suitable for development purposes.

James Samonek stated that, more recently, an auction of approximately three thousand acres of

farmland was held in the Grass Lake/Norvell Township area. The land was divided into twenty-five parcels and sold at auction after the owners declared bankruptcy. The parcels sold for an average price of approximately $619 an acre. James Samonek also indicated that he purchased approximately 179.7 acres at the same auction in 1990. The property was located six miles from Sara Samonek's property and sold for approximately $500 an acre.

At the close of petitioners' proofs, respondent's assessor, Wayne Russler, attempted to explain why these transactions were not considered by the county equalization office. Regarding the 1987 purchase of two hundred acres by James Samonek's counsel, Russler noted that the purchase was effectuated by a quitclaim deed. Russler testified that the equalization department often ignores quitclaim deed sales because such transactions often do not reflect true market value. Similarly, Russler indicated that James Samonek's 1986 Federal Land Bank purchase was not considered because property bought at these sales are often purchased for less than true market value. Russler could not explain why the other transactions were not considered.

Following the hearing, the Tax Tribunal affirmed respondent's assessments of petitioners' property in a proposed opinion and judgment entered on November 18, 1991. The Tax Tribunal disregarded the comparable land sales offered by petitioners as questionable "arm's length" transactions. Further, the Tax Tribunal found that the assessor's method was a more credible and better indicator of value in the present case. On December 20, 1991, the Tax Tribunal adopted the proposed opinion and judgment as its final decision.

II

This Court reviews decisions of the Tax Tribunal to determine whether the tribunal made an error of law or adopted a wrong legal principle. *Daguanno v Dep't of Treasury,* 203 Mich App 130, 133; 512 NW2d 32 (1993); *Kivela v Dep't of Treasury,* 200 Mich App 545, 547; 505 NW2d 11 (1993). The factual findings of the tribunal will be upheld if they are supported by competent, material, and substantial evidence on the entire record. Const 1963, art 6, § 28; *Daguanno, supra.*

The taxpayer has the burden of proof to establish the true cash value of the property. MCL 205.737(3); MSA 7.650(37)(3). True cash value is synonymous with fair market value and is commonly determined by three different approaches: (1) cost less depreciation, (2) sales comparison, and (3) capitalization of income. *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland,* 437 Mich 473, 484-485; 473 NW2d 636 (1991); *Jones & Laughlin Steel Corp v City of Warren,* 193 Mich App 348, 352; 483 NW2d 416 (1992). Regardless of the approach, the value determined must represent the usual price for which the property would sell. *Meadowlanes, supra* at 485; *Jones & Laughlin, supra* at 353.

III

On appeal, petitioners first claim that the Tax Tribunal erred in disregarding the sales price of a similar parcel of property sold by quitclaim deed in 1987 because it was a questionable "arm's length" transaction. In determining the true cash value of petitioners' property, the sales-comparison or market approach was utilized in the present case. The market approach "indicates true cash

value by analyzing recent sales of similar properties, comparing them with the subject property, and adjusting the sales price of the comparable properties to reflect differences between the two properties." *Meadowlanes, supra* at 485, n 19; *Antisdale v City of Galesburg,* 420 Mich 265, 276, n 1; 362 NW2d 632 (1984). However, MCL 211.27(1); MSA 7.27(1) provides that an assessor may not consider a forced sale or most sales at public auction:

> As used in this act, "cash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. The usual selling price may include sales at public auction held by a nongovernmental agency or person when those sales have become a common method of acquisition in the jurisdiction for the class of property being valued. The usual selling price does not include sales at public auction where the sale is part of a liquidation of the seller's assets in a bankruptcy proceeding or where the seller is unable to use common marketing techniques to obtain the usual selling price for the property. . . .

After applying these principles in the present case, we hold that the Tax Tribunal erred as a matter of law in rejecting the evidence. In Michigan, like many other jurisdictions, the selling price of a particular piece of property is evidence of the value of that property. *Antisdale, supra* at 278. Although not conclusive, such evidence is nevertheless relevant in determining the "usual selling price" of similar properties and must be considered by the tribunal in the absence of an auction or forced sale. See *Jones & Laughlin, supra* at 354;

MCL 211.27(1); MSA 7.27(1). Further, while the 1987 sale occurred as the result of a quitclaim deed sale, such circumstances are important only to the weight of the evidence, not its admissibility.

The Tax Tribunal also erred in summarily rejecting the Federal Land Bank and auction sales offered by petitioners without first determining whether such evidence could be considered under MCL 211.27(1); MSA 7.27(1). On remand, the tribunal is instructed to determine whether the auction sales occurred as "part of a liquidation of the seller's assets in a bankruptcy proceeding" or were a "common method of acquisition" for large parcels of farmland in the area. The tribunal is further instructed to determine whether the Federal Land Bank sale was a "forced sale."

Finally, we decline to review petitioners' remaining challenges to the valuation of their property because they have failed to cite any supporting authority for their claims. It is well settled that this Court will not search for authority to support a party's position. *Winiemko v Valenti,* 203 Mich App 411, 419; 513 NW2d 181 (1994); *Patterson v Allegan Co Sheriff,* 199 Mich App 638, 640; 502 NW2d 368 (1993).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

JERRY v SECOND NATIONAL BANK OF SAGINAW

Docket No. 160068. Submitted October 4, 1994, at Lansing. Decided December 19, 1994, at 9:20 A.M.

Lynn Jerry brought an action in the Leelanau Circuit Court against Second National Bank of Saginaw, Leelanau Marine, Inc., and others, seeking in part a declaration concerning the validity of a retail installment contract governing the financing of a boat and accessories purchased by the plaintiff from Leelanau Marine, who assigned the contract to Second National. Second National filed a counterclaim seeking enforcement of the contract. After executing the retail installment contract, the plaintiff did not receive from Leelanau Marine a certificate of title to the watercraft and left the boat with Leelanau Marine for winter storage. When the plaintiff eventually requested delivery of the boat, Leelanau Marine was unable to do so, and the plaintiff stopped paying the installments due under the contract. The court, Charles M. Forster, J., granted summary disposition for Second National with respect to the plaintiff's claims and Second National's counterclaim, rejecting the plaintiff's contention that any claims and defenses she could raise against Leelanau Marine also could be raised against Second National as the holder of the retail installment contract.

The Court of Appeals *held:*

1. The trial court erred in determining that, even though title to the boat was not delivered to the plaintiff, under the entrustment provision of the Uniform Commercial Code, MCL 440.2403(2); MSA 19.2403(2), she nonetheless acquired the right of ownership from the person or entity that had entrusted the boat to Leelanau Marine before its sale. The entrustment provision states that any entrusting of possession of goods to a merchant who deals in goods of that kind gives the merchant the power to transfer all rights of the entruster to a buyer in the ordinary course of business. However, the entrustment

REFERENCES

Am Jur 2d, Boats and Boating §§ 7, 21; Sales §§ 449, 456.

Construction and effect of UCC Art 2, dealing with sales. 17 ALR3d 1010.

provision is preempted by a more specific provision of the watercraft certificates of title act, MCL 281.1204(1); MSA 18.1288(4)(1), which states that a person acquiring a watercraft does not acquire any right, title, claim, or interest in the watercraft unless, among other things, that person is issued a certificate of title.

2. The trial court erred in determining that the plaintiff's claims and defenses against Leelanau Marine arose out of an agreement for the storage of the boat during winter. Such claims and defenses arose out of Leelanau Marine's failure to perform its obligations under the retail installment contract.

3. Under § 15(d) of the Retail Installment Sales Act, MCL 445.865(d); MSA 19.416(115)(d), Second National, as holder of the retail installment contract in this case, is subject to all the claims and defenses of the plaintiff arising out of the retail installment transaction.

Reversed and remanded.

SALES — WATERCRAFT — WATERCRAFT CERTIFICATES OF TITLE ACT — UNIFORM COMMERCIAL CODE — ENTRUSTMENT PROVISION.

The entrustment provision of the Uniform Commercial Code, under which any entrusting of possession of goods to a merchant who deals in goods of that kind gives the merchant the power to transfer all rights of the entruster to a buyer in the ordinary course of business, is preempted by the watercraft certificates of title act to the extent the entrustment provision conflicts with the act, which provides that a person acquiring a watercraft from its owner does not acquire any right, title, claim, or interest in the watercraft until, among other things, the person is issued a certificate of title to the watercraft (MCL 440.2403[2], 281.1204[1]; MSA 19.2403[2], 18.1288[4][1]).

Stewart A. Christian, for the plaintiff.

Braun Kendrick Finkbeiner (by *Craig W. Horn* and *Scott C. Strattard*), for the defendant.

Before: REILLY, P.J., and CORRIGAN and R. J. JASON,* JJ.

REILLY, P.J. Plaintiff-counterdefendant Lynn Jerry (hereafter referred to as plaintiff) appeals as

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

of right a circuit court judgment in favor of defendant-counterplaintiff Second National Bank of Saginaw (hereafter referred to as defendant) with respect to plaintiff's claims and count I of defendant's countercomplaint.[1] Defendant is the holder of a retail installment contract executed by plaintiff to finance the purchase of a boat and accessories from Leelanau Marine, Inc. In this case, we must determine whether the claims and defenses asserted by plaintiff may be raised against defendant under § 15 of the Retail Installment Sales Act (RISA). MCL 445.865(d); MSA 19.416(115)(d). To resolve that issue, we must also decide whether the watercraft certificates of title act (WCTA), MCL 281.1201 *et seq.*; MSA 18.1288(1) *et seq.* preempts provisions of the Uniform Commercial Code (UCC), MCL 440.1101 *et seq.*; MSA 19.1101 *et seq.*, regarding the transfer of title to watercraft. The trial court concluded that there was no preemption, that defendant was not subject to plaintiff's claims and defenses, and granted defendant's motion for summary disposition. We reverse and remand.

On or about September 21, 1990, plaintiff entered into an agreement with Leelanau for the purchase of a Baja Sport Cruiser boat and accessories that plaintiff had seen earlier on Leelanau's premises.[2] Plaintiff and Leelanau executed a retail installment contract to finance the sale. According to the contract, the price was $23,816, with a $3,500 down payment. The installment contract contained the following language required by 16 CFR 433.2:

[1] Plaintiff's claims against the individual defendants and count II of defendant's countercomplaint were dismissed without prejudice pursuant to a stipulation of the parties.

[2] The individual defendants, Carl Duckwall and Timothy Jacques, are the president and a salesperson, respectively, of Leelanau. Because their liability as individuals is not at issue, we will refer to their actions simply as those of Leelanau.

> NOTICE: Any holder of this Consumer Credit Contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.

The down payment was not made at the time the contract was executed, but, according to plaintiff, it was to be made in the spring when she received the boat. According to defendant's brief, Leelanau also promised to deliver the certificate of title in the spring. Leelanau assigned the installment contract to defendant.

At no additional cost, Leelanau agreed to store and winterize the boat for plaintiff and her husband. Leelanau told them that they could take the boat out for a ride if they returned to Traverse City later in the fall. In October 1990, plaintiff and her husband "gained permission" to take the boat for a ride in Grand Traverse Bay. After a few hours, the boat was returned to Leelanau.

In April 1991, plaintiff's husband contacted Leelanau to make arrangements for the delivery of the boat. After various delays, plaintiff and her husband discovered that Leelanau was closed and that many of the boats, but not the one purchased by plaintiff, had been repossessed. Plaintiff never received the boat she purchased or a replacement. She discontinued making the monthly payments required by the installment contract in June 1991.

Plaintiff filed this action on October 30, 1991. Count I alleged breach of contract for failure to deliver the boat and accessories. Count II appears to be a claim of fraud or misrepresentation based on statements made by Leelanau that they had title to the boat and accessories. Count III alleges

violations of the Michigan Consumer Protection Act, MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*[3] Count IV was labeled "Declaratory Action for Determination of invalidity of Retail Installment Contract that was Assigned to Defendant, Second National Bank."

Defendant answered the complaint and filed a countercomplaint. In count I, defendant alleged that plaintiff defaulted in her payment obligations and that on November 5, 1991, $21,227.50 was due. Count II alleged fraud on the part of plaintiff because the installment contract reflected a cash down payment that was "fictitious" and "placed on the contract for the sole purpose of misleading Second National into agreeing to finance this purchase."

The trial court granted defendant's motion for summary disposition of plaintiff's claims and partial summary disposition with respect to defendant's counterclaims pursuant to MCR 2.116(C)(10). The court's decision relied on the following provision (the entrustment provision) from the UCC, MCL 440.2403(2); MSA 19.2403(2):

> Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him the power to transfer all rights of the entruster to a buyer in ordinary course of business.

The court first reasoned that the boat had been entrusted to Leelanau before and at the time plaintiff entered into the contract. Pursuant to the entrustment provision, the court concluded that, even though Leelanau did not have title at the time the installment contract was executed, plain-

[3] Plaintiff's complaint specifically referred to MCL 445.903(3)(a), (b), (o), (q), (s), (y), (bb), and (cc); MSA 19.418(3)(a), (b), (o), (q), (s), (y), (bb), and (cc).

tiff, as a buyer in the ordinary course of business, acquired the rights of the entruster.[4]

The court then implicitly accepted defendant's argument that plaintiff's claims and defenses did not arise out of the installment transaction, but rather plaintiff's ill-considered decision to allow Leelanau to retain possession. The court reasoned:

> Therefore, it was not the inability of Leelanau Marine to transfer certificates of title at the time of the September, 1990 sale or in the spring of 1991 which resulted in Leelanau's lack of possession in the spring of 1991. Jerry entrusted the boat, motor and trailer to Leelanau Marine for winter storage and accepted the risk that they would be available to her in the spring. The Bank cannot be charged or held responsible under the retail installment contract for Jerry's failure to take and retain physical possession of the boat, motor and trailer or Leelanau's lack of possession in the spring.

We agree with plaintiff that the court erred in determining that her claims and defenses did not arise out of the retail installment transaction. Contrary to the holding of the trial court, plaintiff did not acquire any right, title, claim, or interest in the boat because Leelanau never delivered to her a certificate of title for the boat. The retail installment transaction was never completed, and plaintiff's claims arise from that transaction.

The premise of the court's decision was that "irrespective of Leelanau Marine's ability to de-

[4] The record is unclear with regard to who entrusted the boat to Leelanau. Defendant's briefs in the lower court and on appeal indicate that the boat was entrusted by ITT Commercial Finance Corporation to Leelanau pursuant to a floor plan arrangement. At oral argument, plaintiff asserted that the boat was not part of the floor plan arrangement and was titled to individuals from Ohio. However, there is no affidavit or other evidence in the lower court record to support either of these assertions.

liver certificates of title, Jerry became owner of the boat, motor and trailer," by virtue of the entrustment provision quoted above. This conclusion contradicts the WCTA, which provides in pertinent part:

> A person acquiring a watercraft from the owner thereof, whether the owner is a manufacturer, importer, dealer, or otherwise, *shall not acquire any right, title, claim or interest in or to the watercraft until that person has issued to him a certificate of title to the watercraft,* or delivered a manufacturer's or importer's certificate for it. A waiver or estoppel shall not operate in favor of that person against a person having possession of the certificate of title, or manufacturer's or importer's certificate for the watercraft, for a valuable consideration. [Emphasis added. MCL 281.1204(1); MSA 18.1288(4)(1).]

Although the UCC governs the sale of goods, its provisions must be reconciled with the more specific provisions of the WCTA. Just as provisions of the Michigan Vehicle Code regarding the transfer of automobile ownership preempt the UCC, *Whitcraft v Wolfe,* 148 Mich App 40; 384 NW2d 400 (1985), so do the provisions of the WCTA preempt the UCC in regard to the transfer of any right, title, claim, or interest in a watercraft, as that term is defined in the act. MCL 281.1201(1); MSA 18.1288(1)(1).[5]

The entrustment provision of the UCC cannot be reconciled with the above-quoted provision of the WCTA. Defendant does not contest that the WCTA applies to the transfer of the boat, but argues that because the WCTA is silent regarding entrustment,

[5] We recognize that the accessories that were purchased with the boat are not "watercraft" as defined in the WCTA. However, neither the parties nor the trial court attempted to draw a distinction in their analysis between the boat and the accessories.

the UCC entrustment provision, MCL 440.2403(2); MSA 19.2403(2), is not preempted. We disagree. According to the entrustment provision, a merchant has the power to transfer the rights of an entruster to a buyer in the ordinary course of business. To the extent that provision implies that the transfer of rights to the buyer may occur without delivery of the certificate of title, it conflicts with the plain meaning of MCL 281.1204(1); MSA 18.1288(4)(1). Similarly, MCL 440.2401(2); MSA 19.2401(2)[6] is preempted with respect to the transfer of title to watercraft to the extent that it conflicts with the provisions of the WCTA.

Therefore, the premise of the court's decision was erroneous. Plaintiff acquired no right, title, claim, or interest in the boat because the certificate of title was not delivered.

We next consider whether the court's conclusion that plaintiff's claims and defenses are not "chargeable" to defendant was also erroneous. We conclude that it was.

Pursuant to the RISA, defendant is subject to plaintiff's claims and defenses if they arise out of the retail installment transaction. MCL 445.865(d); MSA 19.416(115)(d) provides:

> A holder of a retail installment contract of the buyer is subject to all the claims and defenses of the buyer *arising out of the retail installment transaction,* but the buyer's recovery shall not exceed the amount paid to the holder thereunder. [Emphasis supplied.]

[6] MCL 440.2401(2); MSA 19.2401(2) provides:

> "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place . . . ."

Plaintiff's claims and her defense against the breach of contract counterclaim all arise from Leelanau's failure to complete its obligations under the retail installment transaction to deliver the certificate of title to the boat. Defendant argued, and the trial court agreed, that plaintiff's claims and defenses arose solely from a separate agreement by Leelanau to store and winterize the boat. According to defendant's argument, the retail installment transaction was completed when plaintiff briefly took possession of the boat for a single outing in October 1991. We disagree. Regardless of whether the storage agreement was separate from the sale, and whether plaintiff took possession of the boat, the retail installment transaction[7] was not completed because Leelanau did not deliver the certificate of title. Plaintiff's claims and her defense to defendant's counterclaim for breach of contract, arise from Leelanau's failure to fulfill its obligations pursuant to the retail installment transaction. The fact that Leelanau also agreed to store and winterize the boat and that plaintiff took temporary possession of the boat is immaterial to the analysis.

In conclusion, the trial court erred in granting defendant's motion for summary disposition under MCR 2.116(C)(10). Under the WCTA, the plaintiff could not become the owner of the boat purchased under the retail installment contract until she obtained the certificate of title. The claims and defenses asserted by plaintiff arose from Leelanau's failure to carry out its obligations under the retail installment contract to provide possession and a certificate of title. Therefore, defendant, as

[7] "Retail installment transaction" is defined as "any transaction in which a retail buyer purchases goods or services from a retail seller pursuant to a retail installment contract . . . ." MCL 445.852(f); MSA 19.416(102)(f).

the holder of the retail installment contract, is subject to those claims and defenses. The order granting defendant's motion for summary disposition is therefore reversed and the case is remanded for further proceedings.

In light of our resolution of this issue, it is unnecessary to resolve whether plaintiff's motion for reconsideration was timely under MCR 2.119.

Reversed and remanded for further proceedings.

McCARTHY v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 152272. Submitted August 1, 1994, at Grand Rapids. Decided December 19, 1994, at 9:25 A.M. Leave to appeal sought.

Gwen M. McCarthy brought an action in the 10th District Court against Auto Club Insurance Association, seeking medical, work loss, and replacement services expenses, as well as $4,950 as an allowable expense for future plastic surgery, for injuries sustained in an automobile accident. The claim, except with regard to the expense for future plastic surgery, was submitted to mediation. The plaintiff accepted the mediation evaluation and the defendant rejected it. Following a jury trial where the jury awarded the plaintiff nothing with regard to her claims for medical, work loss, and replacement services expenses, but awarded her $4,950 as an allowable expense for future plastic surgery, when incurred, the court, Franklin K. Line, Jr., J., awarded costs and attorney fees to the plaintiff. The defendant appealed and the Calhoun Circuit Court, Conrad J. Sindt, J., affirmed. The defendant appealed by leave granted.

The Court of Appeals *held:*

1. The trial court erred in awarding attorney fees under MCR 2.403(0). Because the jury awarded the plaintiff nothing with regard to her claims that had been submitted to mediation, the plaintiff was not entitled under MCR 2.403(0) to mediation sanctions for prevailing in the trial court on the claim that was not submitted to mediation. The court also erred in awarding costs and attorney fees under the court rule because the court, in determining whether the judgment was more than ten percent more than the mediation award, improperly considered the award of $4,950 for future plastic surgery expenses, expenses that have not yet been incurred and do not constitute a money judgment.

2. The trial court clearly erred in awarding costs and attorney fees under § 3148(1) of the no-fault insurance act, MCL

REFERENCES

Am Jur 2d, Costs § 24.

See ALR Index under Costs of Actions; Insurance and Insurance Companies.

500.3148(1); MSA 24.13148(1). A legitimate and bona fide question of factual uncertainty existed with regard to the necessity of a given medical expense, the plastic surgery. The defendant reasonably was entitled to rely on the plaintiff's own treating physician in concluding that plastic surgery was not reasonably necessary, thus giving rise to a legitimate or bona fide question of factual uncertainty regarding the necessity of such surgery.

Reversed.

MARILYN KELLY, J., dissenting, stated that the award of costs and attorney fees should be affirmed. The trial court's finding that the defendant's refusal to pay the requested no-fault insurance benefits was unreasonable under MCL 500.3148(1); MSA 24.13148(1) was not clearly erroneous. There was evidence on the record to support the trial court's decision to award attorney fees, and MCR 2.613(C) and the clearly erroneous standard of review require deference to the trial court's decision.

1. JUDGMENTS — MEDIATION — COSTS — ATTORNEY FEES.

A party who rejects a mediation award must pay the opposing party's actual costs, including attorney fees, unless the rejecting party improves its position at trial by receiving a jury award that exceeds the mediation award by more than ten percent; a rejecting party that does not improve its position at trial with regard to the issues submitted to arbitration but succeeds at trial by receiving an award that exceeds the mediation award by more than ten percent with regard to an issue that was not submitted to mediation is not entitled to mediation sanctions (MCR 2.403[0]).

2. JUDGMENTS — MEDIATION — AWARDS FOR FUTURE EXPENSES.

A court determining whether a party who rejected a mediation award has improved its position at trial by receiving a jury award that exceeds the mediation award by more than ten percent, therefore entitling the rejecting party to an award of actual costs, including attorney fees, may not consider any part of the jury award that is an award for expenses that have not yet been incurred because such an award does not constitute a money judgment (MCR 2.403[0]).

3. INSURANCE — NO-FAULT — DELAY IN PAYMENT — COSTS — ATTORNEY FEES.

A no-fault insurer's unreasonable refusal or delay in the payment of personal or property insurance benefits may provide the basis for an award of costs, including reasonable attorney fees, to the insured; a refusal or delay in payment by an insurer is

not unreasonable where it is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty; a trial court's finding of unreasonable refusal or delay will not be reversed on appeal unless it is clearly erroneous (MCL 500.3148[1]; MSA 24.13148[1]).

Louis A. Prigioniero and *Curtis F. Hicks,* for the plaintiff.

Sullivan, Hamilton, Schulz, Kreter & Toth (by *Bert W. Schulz*) (*Gross & Nemeth,* by *James G. Gross* and *Paul L. Kaliszewski,* of Counsel), for the defendant.

Before: Hood, P.J., and Marilyn Kelly and J. L. Martlew,* JJ.

Hood, P.J. Defendant appeals by leave granted from a circuit court decision affirming a district court's award to plaintiff of costs and attorney fees of $13,317.39, both as mediation sanctions, MCR 2.403(O), and as a penalty for unreasonably refusing to pay no-fault insurance benefits, MCL 500.3148; MSA 24.13148. We reverse.

This case arose from injuries sustained by plaintiff while she was a passenger in an automobile involved in a collision. Her head and face struck the side passenger window, breaking the window and causing multiple lacerations to her face.

Plaintiff eventually sued defendant, claiming medical, work loss, and replacement services expenses, as well as $4,950 as an allowable expense for future plastic surgery. Evidence at trial showed that defendant had paid medical bills for plaintiff in the amount of $3,310.91, but had not paid some bills because plaintiff never submitted required documentation.

The testimony at trial also showed that Dr.

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

Chauncey Hipps, a plastic surgeon to whom plaintiff was referred by her attorney, examined plaintiff once and opined that reconstructive surgery could be performed for approximately $4,900. Testimony also indicated that following the automobile accident, plaintiff treated regularly with Dr. Margaret Skiles, the plastic surgeon who originally had sutured her facial lacerations. On February 9, 1988, five days after the accident, Dr. Skiles observed some swelling of plaintiff's lower eyelid, which was not unusual. On February 11 and February 15, 1988, Dr. Skiles removed plaintiff's sutures, at which point plaintiff was healing "very nicely," according to Dr. Skiles. On March 7, 1988, Dr. Skiles discussed the possibility of future reconstructive or plastic surgery, but told plaintiff that any determination regarding whether such surgery would be of any benefit would have to wait from nine months to a year to see how plaintiff healed. During visits on April 21, 1988, April 28, 1988, and July 18, 1988, Dr. Skiles removed small slivers of glass from the area of plaintiff's eye, as well as a variety of inclusion cysts. In August 1988, Dr. Skiles indicated that plaintiff was "healing very nicely with no problems." Dr. Skiles saw plaintiff again for visits in February and March 1989; she removed a piece of glass during the February visit. After that, Dr. Skiles did not see plaintiff again until September 11, 1989, at which point there was a lump in plaintiff's eyelid. On October 3, 1989, Dr. Skiles removed a small cyst that was causing the lump. Plaintiff saw Dr. Skiles for two follow-up visits on October 12 and October 26, 1989. Plaintiff thereafter missed an appointment for March 1, 1990, and Dr. Skiles did not see her again.

Dr. Skiles testified at trial that reconstructive or plastic surgery can alter or camouflage scarring

caused by lacerations, but cannot erase the scarring totally. She further stated that it is necessary to wait and see how the healing process goes, which takes from nine months to a year, before determining whether reconstructive or plastic surgery will be successful in reducing any scarring. Although Dr. Skiles stated that plaintiff had healed a little faster than normal, she also stated that any determination regarding the necessity of reconstructive or plastic surgery would have been premature in August 1988. It was Dr. Skiles' opinion that, in plaintiff's case, plaintiff had healed as well as she could hope for and that reconstructive or plastic surgery would not offer "any measure of significant improvement of any of [plaintiff's] facial scars." According to Dr. Skiles, plaintiff initially appeared interested in the prospect of plastic surgery, but became disinterested thereafter, apparently because she realized it would not change her appearance that much.

Following a jury trial, a district court jury, using a special verdict form, awarded plaintiff nothing with regard to her claims for allowable medical, work loss, and replacement services expenses, but awarded her $4,950 as an allowable expense for future plastic surgery. Upon motion by plaintiff, the trial court awarded costs and attorney fees to plaintiff. The court stated:

> This Court finds that Defendant unreasonably failed to make proper investigation into Plaintiff's medical needs and Defendant unreasonably refused to pay Plaintiff's claim to have corrective plastic surgery.

Defendant appealed, the circuit court affirmed, and this appeal followed.

Generally, attorney fees are not recoverable as

an element of costs or damages unless expressly allowed by statute, court rule, or judicial exception. *Brooks v Rose,* 191 Mich App 565, 574-575; 478 NW2d 731 (1991). Here, the trial court awarded attorney fees under both MCR 2.403(O) (mediation sanctions) and MCL 500.3148(1); MSA 24.13148(1) (the no-fault act's attorney fees provision). Both awards were erroneous.

Under MCR 2.403(O), a rejecting party must pay the opposing party's actual costs, which includes attorney fees, unless the rejecting party improves its position with regard to the mediation award by more than ten percent. Here, the jury awarded plaintiff nothing with regard to each of her claims that had been submitted to mediation. The only claim on which plaintiff prevailed at trial was that involving future plastic surgery, and that claim was never submitted to mediation. It necessarily follows that plaintiff was not entitled to mediation sanctions for prevailing in the trial court on the claims submitted to mediation, because she did not prevail on those claims in the trial court.

More importantly, the $4,950 awarded to plaintiff for future plastic surgery was in the nature of a declaratory judgment, which provided that defendant would be liable for that amount "when the same have been incurred by plaintiff." In a similar case, this Court stated in *Kondratek v Auto Club Ins Ass'n,* 163 Mich App 634, 639; 414 NW2d 903 (1987):

> A rejecting defendant may be assessed attorney fees and costs under MCR 2.403(O), unless he improves his position on the mediation award by more than ten percent. Here, in calculating the amount of the judgment recovered by plaintiff, the trial court included the $6,490 future expenses contained in its declaratory judgment. We find such an inclusion to be improper. These expenses

> have not yet been incurred, do not constitute a money judgment, and may vary in amount when and if they are actually incurred. Absent inclusion of the $6,490, the judgment is more than ten percent below the mediation award. Therefore, the trial court erred in awarding plaintiff attorney fees under the mediation court rule.

Here, absent inclusion of the $4,950 for future plastic surgery, the judgment is less than the mediation award. Therefore, the trial court erred in awarding costs and attorney fees under the mediation court rule.

The trial court also erred in awarding costs under the no-fault act. MCL 500.3148(1); MSA 24.13148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, *if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.*

A refusal or delay in payment by an insurer will not be found unreasonable within the meaning of § 3148(1) where the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty. *Gobler v Auto-Owners Ins Co,* 428 Mich 51, 66; 404 NW2d 199 (1987); *United Southern Assurance Co v Aetna Life & Casualty Ins Co,* 189 Mich App 485; 474 NW2d 131 (1991). A trial court's finding of unreasonable refusal or delay will not be reversed on appeal unless it is clearly erroneous. *Id.*

Plaintiff argued in the trial court that defen-

dant's refusal to pay for the cost of plastic surgery was unreasonable because, following Dr. Hipps' report, which indicated that plastic surgery could improve the appearance of some of plaintiff's scars, defendant never sought either a second opinion or an evaluation by an independent medical examiner. We disagree.

In *Thomson v DAIIE,* 133 Mich App 375; 350 NW2d 261 (1984), the plaintiff, following treatment by an orthopedic surgeon, began treating with a chiropractor. After several treatments, the defendant had the plaintiff examined by another orthopedic surgeon, who concluded that the plaintiff had no objective symptomatology. The defendant thereafter declined to pay for further chiropractic treatment. The trial court found that the defendant's refusal to pay for further chiropractic treatment was unreasonable, reasoning that the defendant should have obtained the opinion of another chiropractor before terminating benefits. This Court reversed, finding that "a legitimate or bona fide question of factual uncertainty" existed, *id.,* p 383, given that the orthopedic surgeon, who was qualified to render an opinion regarding the need for further chiropractic treatment, had contraindicated the need for further chiropractic treatment.

We find that this case presents an even stronger situation for finding that a legitimate or bona fide question of factual uncertainty existed with regard to the necessity of a given medical expense. Although defendant acknowledges that it did not obtain the opinion of an independent medical examiner after Dr. Hipps issued his report indicating possible benefits from plastic surgery, this was because plaintiff's own treating physician, Dr. Skiles, was of the opinion that plaintiff's scars would not be improved by plastic surgery. Indeed, whereas Dr. Hipps examined plaintiff only once,

Dr. Skiles treated plaintiff on a regular basis, both before Dr. Hipps' examination and then for more than a year thereafter. Moreover, Dr. Hipps' examination occurred just six months after the automobile accident, which, according to Dr. Skiles, was too early to adequately evaluate the necessity or likelihood of success of any plastic surgery.

Here, in awarding attorney fees under § 3148, the trial court noted that the jury had determined that defendant should be responsible for the cost of plastic surgery. However, the scope of inquiry under § 3148 is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable. Defendant reasonably was entitled to rely on plaintiff's own treating physician in concluding that plastic surgery was not reasonably necessary, thus giving rise to a legitimate or bona fide question of factual uncertainty. This is especially so because the record indicates that an evaluation regarding the necessity of plastic surgery must ordinarily be made after observing a patient's healing process over a period of time. Dr. Skiles, being plaintiff's treating physician, was in a superior position to make such an assessment, whereas Dr. Hipps examined plaintiff only once, just six months after the accident.

We therefore conclude that a legitimate or bona fide question of factual uncertainty existed and, therefore, the trial court also clearly erred in awarding attorney fees under § 3148 of the no-fault act.

Reversed.

J. L. Martlew, J., concurred.

Marilyn Kelly, J. *(dissenting).* I respectfully dissent. I would affirm the trial court's decision to

award plaintiff costs and attorney fees. MCL 500.3148(1); MSA 24.13148(1).

Our Supreme Court has ruled that an insurer's refusal to pay is reasonable under § 3148(1) when caused by a legitimate question of statutory construction, constitutional law or bona fide factual uncertainty. *Gobler v Auto-Owners Ins Co,* 428 Mich 51, 66; 404 NW2d 199 (1987). However, our Court has also concluded that we will not reverse on appeal a trial court's finding of unreasonable refusal unless it is clearly erroneous. MCR 2.613(C); *United Southern Assurance Co v Aetna Life & Casualty Ins Co,* 189 Mich App 485; 474 NW2d 131 (1991).

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. *Townsend v Brown Corp of Ionia, Inc,* 206 Mich App 257, 263; 521 NW2d 16 (1994). In conducting a review under this standard, our Court affords great deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *Id.,* p 264.

Before 1991, when faced with the question of whether a factual dispute permitted an insurance defendant to avoid paying for medical care, various panels of our Court reached different results. *Thomson v DAIIE,*[1] cited in the majority opinion, represents a possible outcome of such disputes. It is not controlling authority, although the majority treats it as such. Moreover, I would postulate that, in *Thomson,* the Court engaged in de novo review rather than review under the clearly erroneous standard. The analysis ignores the proper degree of deference which should have been given to the trial judge's determination.

[1] *Thomson v DAIIE,* 133 Mich App 375; 350 NW2d 261 (1984).

Other cases from the same period more accurately represent review under the clearly erroneous standard. For example, in *Liddell v DAIIE*,[2] one physician concluded that the plaintiff was fit to return to work while two others indicated he could not. Testimony of a claims adjustor indicated that the defendant did not attempt to ascertain the true situation in the face of contradictory reports. Our Court concluded that the trial court's finding that defendant's conduct was unreasonable was not "clearly erroneous" and upheld the award of attorney fees.

In a second case, decided after *Thomson,* our Court again decided that the trial court's determination that plaintiff was entitled to attorney fees was not "clearly erroneous." *Nelson v DAIIE,* 137 Mich App 226, 232-233; 359 NW2d 536 (1984). There, the insurer stopped payment for medical treatment when the plaintiff changed physicians. When the former learned that the latter planned to change physicians, but before the change occurred, it asked her to make a final visit to the first physician. She made a final appointment. The physician summarized her condition but did not comment on the reasonableness of further treatment. The insurer made no further inquiries in this regard. Our Court concluded that the trial court's finding that the delay was unreasonable was supported by evidence on the record and not clearly erroneous. It upheld the award of attorney fees. *Id.,* p 233.

In the case before us, it was uncontested that plaintiff received serious facial injuries in an auto accident. They required approximately fifty stitches. Two physicians, plaintiff's regular plastic surgeon and a plastic surgeon whom plaintiff con-

[2] *Liddell v DAIIE,* 102 Mich App 636; 302 NW2d 260 (1981).

sulted, held differing views on whether further plastic surgery would improve her appearance. Defendant did not seek a second medical opinion but adopted the one more favorable to it. Defendant then asserted that a question of fact existed which legitimized its refusal to pay.

I believe that defendant's decision to deny payment for medical benefits without ascertaining the true situation, given contradictory reports, makes this case similar to *Nelson, supra,* and *Liddell, supra.* Defendant's assertion that a legitimate factual dispute made its refusal to pay reasonable simply is not persuasive. Under the majority's holding, whenever one of several physicians concludes that additional treatment is not required, the insurer will be entitled to refuse further payment and await the courts' resolution. Such a result is contrary to the underlying purpose and policy of no-fault auto insurance.

Moreover, I am unable to conclude that there was no evidence in the record to support the trial judge's decision to award attorney fees. The judge was better able to view plaintiff's injuries and evaluate the credibility of the witnesses. Such evaluations should and must play a critical role in determining whether an insurer's refusal to pay legitimate medical expenses is reasonable. I believe MCR 2.613(C) and the definition of the clearly erroneous standard of review set out above require us to defer to his decision.

I would affirm the award of attorney fees and costs.

GENTRY v ALLSTATE INSURANCE COMPANY

Docket No. 162917. Submitted October 18, 1994, at Grand Rapids. Decided December 19, 1994, at 9:30 A.M.

Ernest J. Gentry and Esther B. Watkins brought an action in the Berrien Circuit Court against Allstate Insurance Company, seeking uninsured motorist benefits and no-fault personal injury protection benefits under a policy issued by the defendant. The plaintiffs, neither of whom were insured, were using with permission of the owner a vehicle insured by defendant when the vehicle slid off the road and into a ditch. The plaintiffs arranged to have the vehicle towed out of the ditch and were still waiting near the vehicle some ten to fifteen minutes later when an uninsured vehicle driven by an uninsured driver slid off the road and struck the insured vehicle, pushing it on top of the plaintiffs and causing them serious injury. The defendant denied coverage on the basis that the plaintiffs were not occupying the vehicle at the time of the accident causing their injuries. The court, Ronald J. Taylor, J., granted summary disposition for the plaintiffs, holding that they were entitled both to benefits under the uninsured motorist coverage of the policy issued by the defendant and to no-fault personal injury protection benefits. The defendant appealed.

The Court of Appeals *held:*

1. Because uninsured motorist benefits are not required by statute, the availability of uninsured motorist coverage is dictated by the language of the insurance policy. It is undisputed that the plaintiffs are entitled to uninsured motorist coverage if they were occupying the insured vehicle at the time of the accident. The policy defines "occupying" as "in or upon entering into or alighting from." In a case involving a policy that used nearly identical language, the Supreme Court held that a person is occupying a vehicle if the person had been occupying the insured vehicle immediately before the accident and the subsequent injury arose out of the use or repair of that vehicle.

REFERENCES

Am Jur 2d, Automobile Insurance §§ 314, 354.

What constitutes occupancy of motor vehicle for purposes of no-fault automobile insurance coverage. 35 ALR4th 364.

Because the language of an insurance policy is to be strictly construed against the insurer, the plaintiffs must be deemed under the circumstances of this case to have been occupying the insured vehicle within the meaning of the uninsured motorist coverage of the policy.

2. Under the facts of this case, whether plaintiffs were "occupants" of the vehicle is irrelevant to the plaintiffs' recovery of no-fault benefits. Accordingly, it was error for the trial court to hold that the plaintiffs were entitled to those benefits because they were occupants of the insured vehicle at the time of the accident causing their injuries. However, the trial court did reach the right result. The plaintiffs are entitled to no-fault benefits because their injuries clearly arose out of the maintenance of the insured vehicle, the anticipated towing of the insured vehicle out of the ditch into which it had slid.

Affirmed.

1. INSURANCE — AUTOMOBILES — UNINSURED MOTORIST COVERAGE — OCCUPYING A VEHICLE.

The term "occupying" as used in the uninsured motorist coverage of an automobile insurance policy is to be interpreted broadly so as to include not only those who are actually inside or in contact with the vehicle but also those who had been occupying the insured vehicle immediately before an injury arising out of the use or repair of the same vehicle; a person standing near a disabled vehicle parked off the roadway and who had been within the vehicle ten or fifteen minutes earlier may be occupying the vehicle for the purpose of the uninsured motorist coverage of an insurance policy that limits such coverage to those who are occupying the insured vehicle and that defines "occupying" as meaning "in or upon or entering into or alighting from."

2. INSURANCE — AUTOMOBILES — NO-FAULT — PERSONAL INJURY PROTECTION BENEFITS — OCCUPANTS.

It is irrelevant for the purpose of recovery of no-fault personal injury protection benefits whether an injured person was an occupant of a motor vehicle where the injury occurred when, while stuck off the roadway, the vehicle in which the person previously had been a passenger is struck by another vehicle, causing the stuck vehicle to slide into the injured person while that person was standing near the stuck vehicle awaiting the arrival of a tow vehicle.

Kosick & Rochau (by *Peter H. Kosick*), for the plaintiffs.

Straub, Seaman & Allen, P.C. (by *Drew F. Seaman* and *William B. Flory*), for the defendant.

Before: MURPHY, P.J., and G.S. ALLEN* and H. A. BEACH,** JJ.

MURPHY, P.J. Defendant appeals as of right from a circuit court order granting summary disposition for plaintiffs pursuant to MCR 2.116(C)(10). By granting plaintiffs' motion, the court, in effect, held that plaintiffs were entitled to recover no-fault personal injury protection (PIP) benefits because they were "occupants" of the vehicle under the no-fault act and that they were entitled to recover uninsured motorist benefits under the insurance policy issued by defendant because they were "occupying" the vehicle within the meaning of the policy. We affirm.

On December 20, 1991, plaintiffs were riding in a borrowed automobile on Pipestone Road in Berrien County when plaintiff Ernest Gentry lost control of the car. The car slid off the road and went into a ditch. Plaintiffs got out of the vehicle and went across the street to seek help in removing the car from the ditch. Plaintiffs spoke to a farmer, who evidently indicated that he had towing equipment and would be willing to tow the vehicle out of the ditch. After speaking to the farmer, plaintiffs went back to the automobile and waited for the farmer to tow the vehicle. Plaintiffs had been standing and waiting by the right passenger side of the vehicle for ten to fifteen minutes when a second vehicle slid out of control, went off the road, and struck the driver's side of plaintiffs' vehicle. The impact of the accident pushed plain-

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1994-7.

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

tiffs' vehicle on top of plaintiffs, and plaintiffs were seriously injured.

The car that plaintiffs were driving was owned by Eddie Norwood and was insured by defendant. Plaintiffs were using the car with Norwood's permission. Plaintiffs and the driver of the second vehicle were all uninsured.

Plaintiffs filed suit to recover uninsured motorist benefits and no-fault PIP benefits from defendant. Both parties moved for summary disposition. Relying on our Supreme Court's holding in *Nickerson v Citizens Mutual Ins Co,* 393 Mich 324; 224 NW2d 896 (1975), and this Court's holding in *Rohlman v Hawkeye Security Ins Co,* 190 Mich App 540; 476 NW2d 461 (1991), rev'd 442 Mich 520; 502 NW2d 310 (1993), the trial court granted plaintiffs' motion for summary disposition. The trial court did not make explicit rulings regarding whether plaintiffs were "occupying" the vehicle or were "occupants" of the vehicle, but those conclusions were implicit in the court's order and opinion granting plaintiffs' motion for summary disposition.

This Court reviews de novo a trial court's grant of summary disposition. *Michigan Mutual Ins Co v Dowell,* 204 Mich App 81, 86; 514 NW2d 185 (1994). The record must be reviewed to determine whether the successful party was entitled to judgment as a matter of law. *Id.*

Defendant raises two arguments on appeal. First, defendant contends that plaintiffs are not entitled to recover uninsured motorist benefits under the insurance policy issued to Eddie Norwood, because plaintiffs were not "occupying" the automobile as defined by the policy. We disagree.

Uninsured motorist benefits are not required by statute; therefore, the policy language dictates when uninsured motorist benefits will be awarded. *Rohlman v Hawkeye-Security Ins Co,* 442 Mich

520, 525; 502 NW2d 310 (1993). Here, the policy provides as follows:

> Allstate will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile . . . .

The policy definition of "insured" includes any person who was "occupying an insured automobile." The policy defines the term "occupying" as "in or upon entering into or alighting from."

Here, it is undisputed that there was an accident, that the accident arose out of the ownership, maintenance, or use of an uninsured automobile, and that plaintiffs suffered bodily injury as a result of the accident. The issue is whether plaintiffs were "occupying" the vehicle and therefore were "insureds" under the insurance policy.

In *Nickerson, supra,* our Supreme Court interpreted the term "occupying" in a private insurance contract. The term "occupying" was defined nearly identically to the definition in the instant case. The plaintiff was a passenger in an insured automobile that stalled. He assisted in pushing the car to the side of the road. As a passing motorist turned around to help, the plaintiff got out of the car on the driver's side and walked around to the front of the car. At this point, a third automobile, driven by an uninsured motorist, struck the vehicle from the rear. The vehicle was pushed into the plaintiff, and the plaintiff suffered serious injury.

The plaintiff sought compensation from the insurer of the automobile. The policy provided unin-

sured motorist coverage to the plaintiff only if he was "occupying" the insured vehicle. The policy defined "occupying" as "in or upon or entering into or alighting from." *Id.,* 328. The Supreme Court held that the plaintiff was "occupying" the vehicle "due to his immediate prior 'occupying' of the insured vehicle and his subsequent injury arising out of the use or repair of the same vehicle." *Id.,* 331.

In *Nickerson,* our Supreme Court interpreted "occupying" broadly to include persons not actually inside or in contact with the vehicle. *Nickerson* did not define the term "immediate," but in light of *Nickerson's* expansive interpretation of the term "occupying" and the fact that language in an insurance policy is to be strictly construed against the insurer, we find that plaintiffs' occupation of the vehicle was immediately prior as required by *Nickerson.* Therefore, we follow *Nickerson's* expansive interpretation of the term "occupying" and find that plaintiffs were "occupying" the car within the policy definition of that term. Because plaintiffs were "occupying" the car, they were "insureds" under the policy and are entitled to uninsured motorist benefits.

Defendant next argues that plaintiffs are not entitled to recover no-fault PIP benefits under the policy because plaintiffs were not "occupants" of the automobile and that this status is required by the no-fault act. The trial court did not cite under which specific section of the no-fault statute plaintiffs were entitled to recover PIP benefits. Furthermore, it is unclear from the record why plaintiffs and defendant are arguing over plaintiffs' status as "occupants," and neither party's brief suggests why plaintiffs' status as "occupants" governs whether plaintiffs are entitled to PIP benefits. The cases that the parties rely on in support of their

respective arguments regarding plaintiffs' status as "occupants" interpret the term "occupant" as used in the sections of the no-fault act dealing with priority disputes, MCL 500.3114, 500.3115; MSA 24.13114, 24.13115, and out-of-state accidents, MCL 500.3111; MSA 24.13111. See *Rohlman, supra,* 442 Mich 520; *Royal Globe Ins Cos v Frankenmuth Mutual Ins Co,* 419 Mich 565; 357 NW2d 652 (1984); *Auto Club Ins Ass'n v Michigan Mutual Ins Co,* 197 Mich App 275; 494 NW2d 822 (1992); *Rosner v Michigan Mutual Ins Co,* 189 Mich App 229; 471 NW2d 923 (1991); *Lankford v Citizens Ins Co of America,* 171 Mich App 413; 431 NW2d 59 (1988); *Hackley v State Farm Mutual Automobile Ins Co,* 147 Mich App 115; 383 NW2d 108 (1985). However, this is not a priority dispute, and the accident did not occur out of state. Whether plaintiffs were "occupants" is irrelevant to plaintiffs' recovery of no-fault PIP benefits under the facts in this case.[1]

Although plaintiffs' status as "occupants" does not govern their recovery of PIP benefits in this case, we believe that the trial court reached the correct result for the wrong reason. The trial court properly allowed plaintiffs to recover PIP benefits not because plaintiffs were "occupants" of the vehicle, but because plaintiffs suffered "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." MCL 500.3105(1); MSA 24.13105(1).

[1] Whether plaintiffs were "occupying" the vehicle would be relevant to their recovery of PIP benefits under the parked vehicle exception, MCL 500.3106(1)(c); MSA 24.13106(1)(c). However, the parties did not address the applicability of the parked vehicle exception in their briefs, and because plaintiffs' injuries arose out of the maintenance of a motor vehicle as a motor vehicle, MCL 500.3105(1); MSA 24.13105(1), they are entitled to recover PIP benefits without regard to whether the vehicle was "parked" at the time they were injured, see *Miller v Auto-Owners Ins Co,* 411 Mich 633; 309 NW2d 544 (1981), or whether they were "occupying" the vehicle within the meaning of MCL 500.3106(1)(c); MSA 24.13106(1)(c).

This Court has adopted a broad definition of the term "maintenance of a motor vehicle." *Wagner v Michigan Mutual Liability Ins Co,* 135 Mich App 767, 773; 356 NW2d 262 (1984). Plaintiffs' injuries were sustained while plaintiffs were waiting to have their vehicle towed. The act of preparing to tow a disabled or stuck vehicle constitutes maintenance of a motor vehicle. *Yates v Hawkeye-Security Ins Co,* 157 Mich App 711, 714; 403 NW2d 208 (1987). Moreover, we believe that the necessary causal connection exists to satisfy the "arising out of" requirement of § 3105(1). *Thornton v Allstate Ins Co,* 425 Mich 643, 659-660; 391 NW2d 320 (1986). Therefore, plaintiffs' injuries came within the provisions of the no-fault act, and plaintiffs are entitled to PIP benefits under MCL 500.3105(1); MSA 24.13105(1). See *Yates, supra.*

In sum, the trial court properly determined that plaintiffs were "occupying" the vehicle as defined by the insurance policy and, therefore, were entitled to uninsured motorist benefits. *Nickerson, supra.* In addition, the trial court properly allowed plaintiffs to recover no-fault PIP benefits from defendant, not because plaintiffs were "occupants" of their disabled vehicle, but because they suffered accidental bodily injury arising out of the maintenance of a motor vehicle. MCL 500.3105(1); MSA 24.13105(1).

Affirmed.

CRAWFORD v STATE OF MICHIGAN

Docket No. 153827. Submitted September 13, 1994, at Detroit. Decided December 19, 1994, at 9:35 A.M. Leave to appeal sought.

Alan O. and Acquilla Crawford and Academy Bus Tours, Inc., brought an action in the Macomb Circuit Court against the State of Michigan, seeking to quiet title to certain real property that had been deeded to the state following a tax sale. The court, John B. Bruff, J., granted the defendant's motion for summary disposition. The court found that certain checks sent to the county treasurer's office by the Crawfords as alleged full payment for the delinquent taxes were untimely because they were received on the actual day of the tax sale, not before the day of the sale as required by statute, MCL 211.106; MSA 7.160. The plaintiffs appealed, alleging that they timely redeemed their property and that they were denied due process of law.

The Court of Appeals *held:*

1. The trial court properly concluded that the plaintiffs did not provide sufficient evidence of their payment of all delinquent taxes on or before the deadline for such payment. The evidence shows that the checks arrived at the treasurer's office on May 2, 1989, one day after the deadline. Thus, the plaintiffs' attempt to exercise their right of redemption before the tax sale was untimely. The alleged payment of back taxes was delinquent and ineffective, and the subsequent tax sale was proper.

2. The order granting summary disposition was not premature.

3. The plaintiffs were not denied due process. The tax sale was authorized.

Affirmed.

1. EVIDENCE — LETTERS — MAILING PRESUMPTION.

Items properly addressed and placed in the mail are presumed to reach their destination.

REFERENCES

Am Jur 2d, Evidence §§ 261-266; State and Local Taxation §§ 712, 842, 873, 904, 1004; Summary Judgment §§ 12, 26.

See ALR Index under Mail and Mailing; Summary Judgment; Taxes.

2. TAXATION — DELINQUENT TAXES — PAYMENT.
The payment of back taxes is not effective until the payment is received by the treasurer's office (MCL 21.153; MSA 3.661).

3. PRETRIAL PROCEDURE — DISCOVERY — SUMMARY DISPOSITION.
Summary disposition may be appropriate before the expiration of a discovery deadline where further discovery does not stand a fair chance of uncovering factual support for the opposing party's position.

4. TAXATION — SALE FOR DELINQUENCY — HARMLESS ERROR.
A harmless-error-type analysis applies to claims regarding nonprejudicial irregularities in form or substance with regard to a tax assessed upon any property or the sale therefor (MCL 211.99; MSA 7.153).

5. TAXATION — DELINQUENT TAXES — REDEMPTION.
The General Property Tax Act provides that the taxes on any lands returned as delinquent may be paid to the county treasurer at any time before the day of the tax sale (MCL 211.106; MSA 7.160).

Barry Fayne, for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Thomas J. Emery* and *Roland Hwang,* Assistant Attorneys General, for the defendant.

Before: MICHAEL J. KELLY, P.J., and BRENNAN and J. A. FULLERTON,* JJ.

MICHAEL J. KELLY, P.J. Plaintiffs appeal as of right a circuit court order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

In 1988, plaintiffs[1] owned business property in New Haven for which they owed $12,900 in prop-

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

[1] Throughout this opinion we will use "plaintiffs" to refer to Alan and Acquilla Crawford, the former owners of the property at issue. Coplaintiff Academy Bus Tours, Inc., is the mortgagee of the property by virtue of an April 1991 mortgage agreement with plaintiffs.

erty taxes for the tax year 1985. In March 1988, the circuit court ordered the property to be sold at a tax sale scheduled for May 2, 1989. Pursuant to MCL 211.106; MSA 7.160, plaintiffs had the right to redeem the property by paying all delinquent taxes "to the county treasurer at any time prior to the day of sale"—in this case, on or before May 1, 1989. On April 29, 1989, plaintiffs mailed three personal checks totaling $12,900 in full payment of the 1985 taxes to the Macomb County Treasurer's Office. On that same day, plaintiffs' checking account contained only $17. However, plaintiffs deposited approximately $9,000 on May 3, 1989. The April 29 checks were received by Marilyn Baunoch, a clerk in the treasurer's office, on May 2, 1989. Baunoch requested the bookkeeping department to inquire whether there were sufficient funds to cover the checks. Plaintiffs' bank informed the treasurer's office that there were not. Baunoch then stamped the checks "void," wrote across the front of each check "per bank, no funds available 5-2-89," and returned the checks to plaintiffs on May 3, 1989. On May 2, 1989, plaintiffs' property was offered for sale as planned but, for want of other bidders, it was bid and deeded to the state.

The record reveals no attempt by plaintiffs to redeem their property after May 2, 1989.

Pursuant to MCL 211.131e(1); MSA 7.190(3)(1), plaintiffs were served with notice of a show cause hearing scheduled with the Department of Treasury on January 14, 1991, and of their thirty-day right of redemption following the hearing. The purpose of the hearing was to provide plaintiffs an opportunity to present evidence regarding why the state's deed should be set aside. MCL 211.131e(2); MSA 7.190(3)(2). Pursuant to a telephone conversation with Thomas Willard, a manager employed by

the Department of Treasury, plaintiffs' attorney filed a written request for relief in lieu of appearing at the hearing. The request stated that the tax sale was improper because plaintiffs had submitted personal checks in payment of all delinquent taxes in a timely manner. Apparently, the Department of Treasury never issued a written response to the request.

On August 23, 1991, plaintiffs filed this action to quiet title. Plaintiffs alleged that they had met all the requirements of MCL 211.106; MSA 7.160 for redeeming their property before the tax sale. In support of their claim, they filed an affidavit of Frederick Brown, a former branch manager at their bank. Brown averred that, if the treasurer's office had presented plaintiffs' three checks for payment, "they may have been honored by the bank based on the relationship of the parties and their prior custom and practice despite an overdrawn account." In November 1988, plaintiffs' account had been moved to a bank branch office not managed by Brown, but Brown "continued to approve on behalf of the bank, checking transactions based upon my knowledge of Mr. Crawford's honesty and integrity." No explanation regarding how, why, or when such inquiries or interbranch activities were initiated or implemented was offered.

Upon the filing of defendant's motion for summary disposition, plaintiffs filed additional affidavits. Plaintiff Alan Crawford averred that his bank, through its manager, Nancy Saari, agreed to notify him in the event of an overdraft and to pay the three checks submitted to the treasurer's office. The affidavit of Diana Colley, an administrative assistant in plaintiffs' business, corroborated Crawford's story.

Defendant countered with its own affidavits. Nancy Saari (now Teise), a branch manager at the

bank, averred that she was on medical leave during the time at issue but that she "would not have and did not at that time promise to contact Mr. Alan Crawford in the event of an overdraft, nor promise an accommodation by the bank for an overdraft." Bonnie Foronato, acting branch manager for the bank, averred the same. Frederick Brown clarified his earlier affidavit, stating that he no longer had authority over plaintiffs' relationship with the bank after plaintiffs' accounts were moved to another branch in November 1988.

The trial court granted defendant's motion for summary disposition on May 15, 1992. A judgment reflecting the court's order was entered on June 4, 1992.

The principal issues on appeal are whether plaintiffs timely redeemed their property under the General Property Tax Act (GPTA), MCL 211.1 *et seq.*; MSA 7.1 *et seq.*, and whether they were afforded due process of law.

Plaintiffs argue that the trial court erred in concluding that they had not provided sufficient evidence of payment of all delinquent taxes on or before the deadline of May 1, 1989. We find no error. Plaintiffs' argument rests on the applicability of their version of the "mailbox rule," which provides that items placed in the mail are presumed to arrive at their destination on the next business day. In this case, plaintiffs assert that the mailing of their checks to the treasurer's office on Saturday, April 29, 1989, warrants the presumption that the checks arrived on Monday, May 1, 1989. However, while there is authority for the presumption that items properly addressed and placed in the mail reach their destination, *Stacey v Sankovich,* 19 Mich App 688, 694; 173 NW2d 225 (1969), plaintiffs cite no authority for the presumption that such items arrive *on the next business*

day. There is no dispute *whether* the treasurer's office received the checks, only *when.* In this case, the only evidence addressing this issue came from defendant. Marilyn Baunoch's affidavit shows that the checks did not arrive at the treasurer's office until May 2, 1989, one day after the deadline. Payment of back taxes is not effective until received by the treasurer's office. MCL 21.153; MSA 3.661. Plaintiffs provide no evidence to show that the checks arrived at the treasurer's office before May 2, 1989. Accordingly, the trial court properly concluded that plaintiffs' attempt to exercise their right of redemption before the tax sale was untimely. Regardless of plaintiffs' alleged arrangement with their bank for overdraft checks, their payment of back taxes was delinquent and, thus, ineffective. Therefore, we need not reach the personal banking arrangements alleged by plaintiffs nor the failure to proffer "presentation" by the treasurer. MCL 21.153; MSA 3.661. The subsequent tax sale of plaintiffs' property was proper.

Plaintiffs also argue that, because Baunoch's affidavit was not presented until defendant filed its motion for summary disposition, and because discovery was incomplete at that time, the order granting defendant's motion was premature.[2] Plaintiffs contend that, given an opportunity to depose Baunoch, they might have produced evidence that their checks arrived at the treasurer's office before May 2, 1989. However, summary disposition may be appropriate before the expiration

[2] Defendant filed its motion for summary disposition on February 19, 1992, along with a notice of hearing set for March 16, 1992. Plaintiffs filed their response on March 11, 1992. Defendant submitted a supplemental brief and additional affidavits on March 24, 1992. Plaintiffs filed their response to the supplemental brief the following day. According to the October 30, 1991, discovery and mediation order, the discovery deadline was set for April 30, 1992. The trial court issued its order and opinion with regard to defendant's motion on May 15, 1992, and entered judgment on June 4, 1992.

of a discovery deadline if further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Neumann v State Farm Mutual Automobile Ins Co,* 180 Mich App 479, 485; 447 NW2d 786 (1989). In order to avoid summary disposition, plaintiffs needed hard evidence that their checks arrived on or before May 1, 1989. We do not believe there was a fair chance that plaintiffs could persuade the affiant to make an admission clearly in their favor by flatly contradicting her prior statement regarding the date of the checks' receipt. We also note that there were at least four weeks of discovery remaining after plaintiffs received Baunoch's affidavit and raised the discovery issue. The trial court did not issue its opinion until another two weeks later. Yet, plaintiffs apparently made no effort to depose Baunoch during this period.

We also reject plaintiffs' due process argument. Plaintiffs failed to exercise their multiple rights of redemption following the sale. Regardless of the alleged procedural defects in connection with the show cause hearing on January 14, 1991, the expiration dates for plaintiffs' rights of redemption were clearly established. Under MCL 211.74; MSA 7.120, plaintiffs had until April 30, 1990 ("before the first Tuesday of May in the year following the sale") to redeem their property, at which time title vested in the state. This right of redemption was extended to November 4, 1990, pursuant to MCL 211.131c(1); MSA 7.190(1)(1) ("before the first Tuesday in November following the vesting of title in the state"). Under MCL 211.131e(1); MSA 7.190(3)(1), the redemption period was extended even further to the date on which plaintiffs were notified of the show cause hearing and, under MCL 211.131e(3); MSA 7.190(3)(3), to February 13, 1992 ("30 days following the date of hearing"). Although

plaintiffs contend that the failure of the Department of Treasury to issue its response to their request for relief at the show cause hearing tolled the running of the thirty-day redemption period following the hearing, their position is not supported by the plain language of the statute ("30 days following the date of hearing," not the date of defendant's response). Nor is their position supported by any other authority in their brief. Plaintiffs' brief is also devoid of legal support for the argument that the Department of Treasury is estopped from denying that the redemption period is tolled because the notice of the hearing set the period at thirty days following the denial of plaintiffs' request for relief. Accordingly, we deem these arguments waived. *Winiemko v Valenti,* 203 Mich App 411, 415; 513 NW2d 181 (1994).

In addition, the failure of the Department of Treasury to issue a response to plaintiffs' request for relief is also rendered harmless by virtue of our holding regarding the timeliness and effectiveness of plaintiffs' attempt to redeem before the tax sale. The arguments made in plaintiffs' written request for relief were the same as those made before the trial court and on appeal. We have determined as a matter of law that plaintiffs' attempt to redeem was ineffective. Under MCL 211.99; MSA 7.153, a harmless-error-type analysis applies to nonprejudicial irregularities in form or substance:

> No tax assessed upon any property, or sale therefor, shall be held invalid by any court of this state on account of any . . . irregularity, informality, or omission, or want of any matter of form or substance in any proceeding that does not prejudice the property rights of the person whose property is taxed . . . . The absence of any record of any proceeding or proceedings, or the omission of

> any mention in any record of any vote or proceeding, or of mention of any matter in any statement or certificate that should appear therein under the provisions of any law of this state, shall not affect the validity of any proceeding, tax, or title depending thereon, provided the fact that such vote or proceeding was had or tax authorized is shown by any other record, statement or certificate made evidence by the terms of this act or any other law of this state.

In this case, the evidence clearly showed that the tax sale was authorized. Courts have no authority to turn back the clock more than five years so that plaintiffs can redeem property that they had ample opportunity to redeem under the GPTA.

Affirmed.

PEOPLE v WHITE

Docket No. 154378. Submitted July 8, 1994, at Lansing. Decided December 19, 1994, at 9:40 A.M.

Prentis M. White was convicted by a jury in the Washtenaw Circuit Court, Patrick J. Conlin, J., of possession of less than twenty-five grams of cocaine. He then pleaded guilty of being a second-time controlled substance offender and was sentenced to two to eight years' imprisonment. He appealed, claiming error both in the admission of the cocaine as evidence at the trial and in the sentence.

The Court of Appeals *held:*

1. A sufficient foundation was laid for the admission of the cocaine. A perfect chain of custody is not required for the admission of cocaine and other relatively indistinguishable items of real evidence. Any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims. The admission of relatively indistinguishable evidence requires a chain of custody only sufficiently complete to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with.

2. The trial court did not err in denying the defendant's motion to quash because of prearraignment delay. The defendant did not show substantial prejudice to his right to a fair trial or intent by the prosecutor to gain a tactical advantage.

3. The sentence does not violate the principle of proportionality. However, the case must be remanded to the trial court for an explanation of its sentence under the procedures set forth in *People v Triplett,* 432 Mich 568 (1989).

Affirmed and remanded.

1. EVIDENCE — ADMISSIBILITY — INDISTINGUISHABLE ITEMS OF REAL EVIDENCE — CHAIN OF CUSTODY.

A perfect chain of custody is not required for the admission of

REFERENCES

Am Jur 2d, Criminal Law §§ 654, 655, 663, 856, 863, 868, 873; Evidence §§ 946, 947; Indictments and Informations §§ 13, 284.

Delay between filing of complaint or other charge and arrest of accused as violation of right to speedy trial. 85 ALR2d 980.

cocaine and other relatively indistinguishable items of real evidence; such evidence may be admitted where the absence of a mistaken exchange, contamination, or tampering has been established to a reasonable degree of probability or certainty; once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility.

2. CRIMINAL LAW — PREINDICTMENT AND PREARREST DELAY — DISMISSAL.

Dismissal of criminal charges is warranted as a result of unjustified preindictment or prearrest delay where the defendant shows substantial prejudice to the defendant's right to a fair trial and intent by the prosecution to gain a tactical advantage.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Brian L. Mackie,* Prosecuting Attorney, and *David A. King,* First Assistant Prosecuting Attorney, for the people.

Michael J. Steinberg, for the defendant on appeal.

Before: GRIFFIN, P.J., and MACKENZIE and F. X. O'BRIEN,* JJ.

GRIFFIN, P.J. Following a jury trial, defendant was convicted of one count of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). He was sentenced as a second controlled substances offender, MCL 333.7413(2); MSA 14.15(7413)(2), to two to eight years' imprisonment. Defendant appeals as of right. We affirm defendant's conviction and hold that a perfect chain of custody is not required for the admission of cocaine and other relatively indistinguishable items of real evidence.

I

On October 10, 1991, Ypsilanti police officer

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

Eugene Rush spotted defendant while eating in a local restaurant. Officer Rush immediately recognized defendant as the subject of three outstanding warrants for his arrest. As Officer Rush and another officer approached defendant to effectuate an arrest, defendant stated, "[W]hy are you coming close to me?" Defendant then put his left hand in his pants pocket and attempted to flee from the restaurant.

Before defendant reached the front door of the restaurant, Officer Rush grabbed defendant in the alcove. As Officer Rush struggled to restrain defendant from leaving the restaurant, he was joined by several other officers who arrived at the scene. After the officers succeeded in handcuffing defendant, a clear cellophane wrapper was taken from defendant's clenched left hand by Officer Joseph Braunschneider. The wrapper contained approximately four small rocks of suspected crack cocaine. Officer Rush, who was given custody of the evidence at the police station by Officer Braunschneider, placed the evidence in an evidence envelope, which he sealed, stapled, and placed in the evidence room safe.

At trial, the focus of the defense strategy was to attack the chain of custody of the seized contraband after it was placed in the safe by Officer Rush. Ypsilanti police officer Malcolm Winn testified that he transported the sealed evidence envelope from the police station to the Michigan State Police Crime Laboratory evidence locker on October 14, 1991. Further, crime lab scientist Jurgen Switalski testified that he removed the sealed envelope from the locked evidence locker and conducted two tests for the presence of cocaine on the following day.

However, Officer Winn admitted on cross-examination that he personally did not witness the

removal of the evidence from the safe at the police station. Instead, he testified that he received the evidence from Sergeant Yek, the officer in charge of the property room, when he arrived to transport the evidence. Sergeant Yek did not testify at trial.

Following the prosecutor's motion for the admission of the cocaine, defendant objected on the basis that there was a break in the chain of custody. Defendant argued that the evidence was inadmissible because there was no testimony concerning the transfer of the cocaine from the evidence safe. The trial court overruled defendant's objection after concluding that a break in the chain of custody goes to the weight of the evidence rather than its admissibility. Further, the trial court ruled that it was "arguable" whether, in fact, there was a break in the chain.

II

Defendant first argues on appeal that the trial court erred in admitting the cocaine into evidence because there was a vital link missing in the chain of custody. Specifically, defendant contends that unlike other types of real evidence, a strict chain of custody is required for the admissibility of relatively indistinguishable or fungible items that have been examined or tested by an expert. We disagree.

The foundation requirements for the admission of real evidence were summarized by Professor McCormick in his authoritative treatise on evidence:

> Again, demonstrative evidence may be classified as to whether the item offered did or did not play an actual and direct part in the incident or transaction giving rise to the trial. Objects offered as

> having played such a direct role, e.g., the alleged weapon in a murder prosecution, are commonly called "real" or "original" evidence and are to be distinguished from evidence which played no such part but is offered for illustrative or other purposes. It will be readily apparent that when real evidence is offered an adequate foundation for admission will require testimony first that the object offered is the object which was involved in the incident, and further that the condition of the object is substantially unchanged. If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimonially tracing the "chain of custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with. [2 McCormick, Evidence (4th ed), § 212, pp 7-8.]

Consistent with these requirements, the majority of our panels have concluded that the admission of real evidence does not require a perfect chain of custody. See, e.g., *People v Prast (On Rehearing),* 114 Mich App 469, 490; 319 NW2d 627 (1982); *People v Stevens,* 88 Mich App 421, 424; 276 NW2d 910 (1979); *People v Kremko,* 52 Mich App 565, 573, 218 NW2d 112 (1974). But see *People v Curry,* 39 Mich App 412, 417-418; 197 NW2d 837 (1972). In this line of cases, we held that any deficiency in the chain of custody goes to the

weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims. See, e.g., *People v Jennings,* 118 Mich App 318, 324; 324 NW2d 625 (1982); *Stevens, supra; Kremko, supra.*

On appeal, defendant attempts to distinguish these cases because they dealt with fairly unique or readily identifiable evidence. Defendant asserts that because cocaine is a relatively indistinguishable substance, a strict chain of custody is necessary to avoid "a mistaken exchange, tampering and contamination." In contrast, the people argue that a "prosecutor must merely lay a foundation identifying articles as what they are purported to be and showing that they are connected with the crime or the accused."

In resolving this question, we find dispositive the foundation requirements for the admission of real evidence summarized in Professor McCormick's treatise on evidence.[1] According to Professor McCormick, the admission of relatively indistinguishable evidence requires a chain of custody only sufficiently complete to "render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with."[2]

We find further support for this position among the circuits of the United States Court of Appeals.[3] See, e.g., *United States v Lott,* 854 F2d 244 (CA 7,

[1] We recognize that in *People v Hintz,* 62 Mich App 196, 203; 233 NW2d 228 (1975), a panel of this Court upheld the lower court's admission of the people's evidence of cocaine despite the defendant's contention of a break in the chain of custody. However, in *Hintz,* unlike in the present case, our decision was based on our belief that there were no deficiencies in the chain of custody.

[2] McCormick, *supra,* § 212, p 8.

[3] MRE 901, like its federal counterpart, FRE 901, governs the foundation or authentication requirements for the admission of real evidence. Because the relevant portions of MRE 901 are identical to

1988); *United States v Mora,* 845 F2d 233, 237 (CA 10, 1988); *United States v Jones,* 687 F2d 1265 (CA 8, 1982). Representative of these views, is the Seventh Circuit Court of Appeals decision in *Lott, supra.* There, the Seventh Circuit upheld the lower court's decision to admit the government's liquid phencyclidine (PCP) evidence despite the government's failure to show a complete chain of custody:

> In any case, the government need not prove a perfect chain of custody for evidence to be admitted at trial; gaps in the chain normally go to the weight of the evidence rather than its admissibility. *United States v Jefferson,* 714 F2d 689, 696 (CA 7, 1983); *United States v Lampson,* 627 F2d 62, 65 (CA 7, 1980). Moreover, the government need only show that it took reasonable precautions to preserve the original condition of the evidence, it does not have to exclude all possibilities of tampering with the evidence. [*United States v Aviles,* 623 F2d 1192, 1198 (CA 7, 1980)]. In addition, a presumption of regularity exists with respect to official acts of public officers and, absent any evidence to the contrary, the court presumes that their official duties have been discharged properly. *Id.*
>
> The district court was satisfied that the government established a sufficient foundation for each of the above items for physical evidence. On this record, we cannot conclude that it abused its discretion in reaching that conclusion. In our view, the chains of custody for the exhibits were substantially complete and the trial court could properly conclude, taking into account the lack of evidence of any government wrongdoing along with the presumption that the government's agents properly performed their duties, that the evidence was admissible. [*Lott, supra* at 250-251.]

In light of these principles, we hold that a

the corresponding provisions of FRE 901, the circuits of the United States Court of Appeals provide substantial guidance on this point.

perfect chain of custody is not required for the admission of cocaine and other relatively indistinguishable items of real evidence. Rather, such evidence may be admitted where the absence of a mistaken exchange, contamination, or tampering has been established to a reasonable degree of probability or certainty.

Although we recognize that a break or gap in the chain of custody may be relevant to this determination, nevertheless, it does not require automatic exclusion of the evidence. The threshold question remains whether an adequate foundation for admission of the evidence has been laid under all the facts and circumstances of each individual case. Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility.

After applying this standard in the present case, we conclude that a sufficient foundation was laid for the admission of the cocaine. First, we note that the chain of custody for the cocaine was substantially complete. Although there was no testimony concerning the transfer of the cocaine from the evidence room safe, it can be inferred reasonably from Officer Winn's testimony that Sergeant Yek removed the evidence envelope. Further, the testimony at trial established that reasonable precautions were taken to preserve the original condition of the evidence and prevent its misidentification.

The evidence was sealed in an evidence envelope and placed in a locked safe at the police station. An Ypsilanti Police Department property receipt along with a laboratory sheet were placed on the envelope identifying the evidence. Officer Winn received the sealed envelope from Sergeant Yek and transported it to a locked evidence locker at

the Michigan State Police Crime Laboratory. The sealed envelope was removed by crime lab scientist Jurgen Switalski, who wrote his signature and the complaint number on the envelope. Under these circumstances, the trial court did not abuse its discretion in admitting the evidence at trial.

III

Defendant further argues that the trial court erred in denying his motion to quash because he was denied his right to due process by an unexplained prearraignment delay of nearly four months. Defendant asserts that the delay caused him to suffer severe prejudice because it prevented an attorney from being appointed who could have investigated and secured exculpatory evidence from missing res gestae witnesses. This argument is without merit.

In a related factual context, the United States Supreme Court has recognized that the Due Process Clause plays a limited role in preventing unjustified preindictment or prearrest delay. *United States v Marion,* 404 US 307, 324-326; 92 S Ct 455; 30 L Ed 2d 468 (1971); *United States v Lovasco,* 431 US 783, 789; 97 S Ct 2044; 52 L Ed 2d 752 (1977); *United States v Brown,* 959 F2d 63, 65 (CA 6, 1992); *People v Nuss,* 405 Mich 437, 453; 276 NW2d 448 (1979). In determining whether dismissal is warranted by a delay, a defendant must show substantial prejudice to his right to a fair trial and intent by the prosecution to gain a tactical advantage. *Marion, supra* at 324; *United States v Lash,* 937 F2d 1077, 1088 (CA 6, 1991).

In this case, defendant has failed to meet either prong of the above test. Although defendant claims that the delay has prevented him from obtaining exculpatory information from missing res gestae

witnesses, he has failed to identify the witnesses or the substance of the information. Similarly, defendant has offered no evidence showing that the delay was intended to secure a tactical advantage on the part of the prosecution. Accordingly, the trial court did not err in denying defendant's motion to quash.

IV

Defendant's remaining arguments concern the validity of his sentence. Defendant first argues that his sentence violates the principle of proportionality. Just as with habitual offender sentences, the sentencing guidelines are not applicable to a defendant whose sentence was enhanced under the subsequent-offender provision of the controlled substances act, MCL 333.7413(2); MSA 14.15(7413)(2). *People v Williams,* 205 Mich App 229, 231-234; 517 NW2d 315 (1994). Nevertheless, we use the guidelines as a "starting point" in reviewing the proportionality of defendant's sentence. *Id.* at 234.

Under MCL 333.7413(2); MSA 14.15(7413)(2), a defendant "may be imprisoned for a term not more than twice the term otherwise authorized." Defendant was sentenced to a prison term of two to eight years. In comparison, the recommended guidelines' range for defendant's underlying conviction of possession of cocaine was zero to twelve months. Thus, defendant's minimum sentence was a twofold departure from the upper end of the guidelines' range. Given defendant's criminal history, his longstanding substance abuse problem, and the degree of departure from the guidelines' range, we conclude that defendant's sentence does not violate the principle of proportionality. *People v Milbourn,* 435 Mich 630, 635-636; 461 NW2d 1 (1990); *Williams, supra.*

However, because of the trial court's complete failure to articulate any reason for defendant's sentence, we remand for further articulation under the procedures set forth in *People v Triplett,* 432 Mich 568, 573; 442 NW2d 622 (1989). On remand, the trial court should address whether it mistakenly believed that, in imposing defendant's sentence, enhancement was mandatory under § 7413(2). See *People v Green,* 205 Mich App 342, 346-347; 517 NW2d 782 (1994).

Affirmed. However, we remand this case to the circuit court for an explanation of its sentence. We do not retain jurisdiction.

PEOPLE v JOHNSON (ON REHEARING)

Docket No. 134312. Submitted December 14, 1993, at Detroit. Decided August 31, 1994. Submitted on rehearing October 25, 1994. Decided on rehearing December 20, 1994, at 9:00 A.M. Leave to appeal sought.

Gary C. Johnson was convicted in the Recorder's Court of Detroit, M. John Shamo, J., of second-degree murder and possession of a firearm during the commission of a felony. By stipulation, the matter was tried without a jury with the sole evidence being the statement and preliminary examination testimony of a witness, who had been murdered before the trial, and the medical examiner's report. The statement and testimony of the witness indicated that the defendant and another person entered the home of James Bowen and that, while the defendant was taking money and food stamps from the witness at gunpoint, the person accompanying the defendant shot Bowen. Bowen subsequently died as a result of having been shot. The court found that the defendant's companion murdered Bowen, that the murder was neither premeditated nor in the course of a felony, thus being second-degree murder, and that the defendant had aided and abetted his companion. The defendant appealed. The Court of Appeals, MARILYN KELLY, P.J., and WHITE and D. F. BRECK, JJ., affirmed. Unpublished opinion per curiam of the Court of Appeals, decided August 31, 1994 (Docket No. 134312). The Court of Appeals granted the defendant's motion for rehearing and issued an amended opinion.

On rehearing, the Court of Appeals *held:*

1. Administrative Order No. 1994-4 makes binding the decision in *People v Spearman,* 195 Mich App 434 (1992), which requires a finding that the evidence in this case is sufficient to support the conviction of second-degree murder.

2. Because it is manifest that the trial court was aware of the factual issues and resolved them, review by the Court of Appeals would not be facilitated by a remand to the circuit court for further explication of the path it took to reach its result.

3. The defendant was not denied a fair trial as a result of the prosecution's references to the murder of the witness, it being

clear that the trial court was aware that the defendant was not responsible for the death of the witness.

4. The record fails to support the claim that the defendant was denied effective assistance of counsel at trial.

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 *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Ralph C. Simpson* and *Michael J. Steinberg*), and Gary C. Johnson, in propria persona, for the defendant on appeal.

ON REHEARING

Before: MARILYN KELLY, P.J., and WHITE and D. F. BRECK,* JJ.

PER CURIAM. Defendant appeals as of right his bench trial convictions 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). We affirm.

On December 2, 1989, James Bowen was shot in the abdomen while lying on his living room couch. Bowen later succumbed to the wound. Defendant was arrested and charged with first-degree murder, armed robbery, and felony-firearm, after a witness, Charles Moore, identified defendant as one of the two men who had entered Bowen's house with drawn weapons and as the man who had robbed Moore just before Bowen was shot by the second intruder.

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

Moore gave two statements to the police. In his second statement, given the day after Bowen died, Moore told police that on the day of the shooting he was visiting Bowen's house, sitting in the dining room with an acquaintance while Bowen slept on the couch. Two armed men entered the house. One, wielding a long gun, grabbed Moore, made him get down on the floor, and took $40 or $50 and some food stamps from his pockets. Moore heard a gunshot in the living room. The second man, who carried a snub-nosed revolver, came into the dining room from the living room. Moore's assailant told his companion, "Don't shoot him, man, we friends." The second man raised his gun and responded, "I like to kill." After Moore's assailant said, "Come on man, let's go, let's go," the two men left the house. Bowen called to Moore to get an ambulance because he had been shot. Moore's statement contained a description of both men and indicated that while he did not know the man who had been in the living room with Bowen, he had seen his own assailant before in the neighborhood, or in Bowen's company.

Moore was the sole witness at the preliminary examination. He identified defendant as his assailant and, except for omitting reference to the conversation between the two assailants, testified in accord with his statement to the police. His testimony indicated that defendant's companion had followed defendant into the house and that previously he had seen defendant with Bowen.

By the time of trial, Moore was himself murdered. Defendant waived his right to a jury trial and stipulated that, in light of Moore's death and the circumstances of other res gestae witnesses,[1]

[1] One witness, who had been present elsewhere in the house, had not witnessed the actual events. Another was unwilling to testify and had made himself hard to locate.

Moore's statement and his testimony at defendant's preliminary examination would suffice for trial. Defendant also stipulated to the admission of the medical examiner's report. Thus, because defendant did not present any witnesses, there was no live testimony, and the trial court relied exclusively on the stipulated evidence. The court found that Bowen was shot and killed by defendant's companion, but that the murder was not first-degree premeditated murder or felony murder in the course of an armed robbery. However, because both men had carried weapons, the court found that defendant was guilty of aiding and abetting his companion in the shooting and, thus, was guilty of second-degree murder and felony-firearm. The court found defendant not guilty of armed robbery. Defendant appeals this ruling, raising issues both through counsel and in propria persona. The prosecution has not filed a cross appeal.

Defendant, through counsel, first argues that the evidence was insufficient to support his conviction as an aider and abettor of second-degree murder, because there was no evidence that defendant intended, assisted, or encouraged the shooting and the undisputed evidence indicates that he told his companion not to shoot. However, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the prosecutor, we are compelled to conclude that the evidence was sufficient to enable a rational trier of fact to find defendant guilty.

The elements of murder are (1) the killing of a human being (2) with the intent to kill, or to do great bodily harm, or with wilful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm. *People v Kelly,* 423 Mich 261,

273; 378 NW2d 365 (1985); *People v Spearman,* 195 Mich App 434; 491 NW2d 606 (1992).

We would have been inclined to find defendant not guilty of murder, but guilty of armed robbery. However, under *Spearman, supra,* which is binding authority under Administrative Order No. 1994-4, the evidence was sufficient to support a conviction of second-degree murder. The evidence indicates that defendant entered the home of a friend, or acquaintance, armed and intending to commit a robbery, in the company of a man who was also armed and who "like[d] to kill." The evidence that defendant's companion followed him in, did not participate in the robbery, and followed defendant's directive to leave after defendant had completed the robbery suggests that defendant was the leader in the operation. As a whole, the evidence gives rise to the same inference of wilful and wanton disregard of the possibility that death or great bodily harm would result from a planned robbery involving weapons that was permitted in *Spearman, supra,* pp 439-440.

Defendant, through counsel, secondly argues that the trial court failed to make sufficient findings of fact because there were no explicit findings concerning intent and that the court did not address the evidence that suggested that defendant did not intend the shooting.

By court rule, a trial court sitting without a jury must make separate findings of fact and conclusions of law. MCR 2.517(A)(1). The purpose of articulation is to facilitate appellate review. *People v Armstrong,* 175 Mich App 181, 184; 437 NW2d 343 (1989). Remand for additional articulation is unnecessary where it is manifest that the court was aware of the factual issues and resolved them and it would not facilitate appellate review to require further explication of the path the court

followed in reaching the result. *Id.* That is the case here.

Defendant, on his own behalf, also argues that the prosecutor's references to Moore's death at the time of trial were prejudicial and inflammatory. We disagree. The prosecutor was required to show why Moore was unavailable to testify. MRE 804(b)(1). As the court's later comments indicate, it was aware that defendant was not responsible for Moore's death because defendant was in custody at the time. The prosecutor's statements thus did not deny defendant a fair and impartial trial. *People v Foster,* 175 Mich App 311, 317; 437 NW2d 395 (1989).

Finally, defendant argues that he was denied effective assistance of counsel because his counsel did not investigate the case, waived opening and closing arguments, failed to discuss strategy with him, waived his right to a jury trial, waived witnesses and reports, did not object to the prosecutor's remarks, and did not move to suppress the preliminary examination testimony.

In the absence of an evidentiary record regarding defendant's claims, our review is limited to deficiencies apparent on the record. *People v Armendarez,* 188 Mich App 61, 74; 468 NW2d 893 (1991). Thus, we are unable to address counsel's alleged failures to investigate the case and discuss strategy with defendant.

However, the record indicates that defendant himself waived his right to a jury, and stipulated to the admission of Moore's preliminary examination testimony and statement to the police and of the medical report. The remaining "failures" do not constitute necessarily a deficient performance or a serious error, and we will not assume that they were the product of ineffectiveness rather than counsel's trial strategy: counsel's waiver of

opening and closing arguments resulted in the prosecutor's forgoing argument as well. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991).

Affirmed.

DEAN v DEPARTMENT OF CORRECTIONS

Docket Nos. 154882, 166024. Submitted March 16, 1994, at Lansing. Decided December 20, 1994, at 9:05 A.M.

Freddy S. Dean and others brought an action in the Ingham Circuit Court against the Department of Corrections, seeking a declaration that MCL 333.7401(3); MSA 14.15(7401)(3) did not prevent the plaintiffs, prison inmates sentenced to less than the statutorily required mandatory minimum sentence because the respective trial courts found substantial and compelling reasons to support the departures, from receiving disciplinary credits against those sentences. The court, James R. Giddings, J., granted summary disposition for the plaintiffs. Three additional groups of similarly situated inmates then brought motions to intervene as plaintiffs. The original parties stipulated the first group's intervention and the trial court granted the motion with regard to the second group. The court then granted summary disposition for the first two groups. The motion to intervene as plaintiffs by the third group, William Newton and others, was granted and the court also granted the Wayne County Prosecutor's motion to intervene as a defendant. The court then granted summary disposition for the third group. The Department of Corrections appealed from the order granting summary disposition for Dean and the other original plaintiffs (Docket No. 154882). The Wayne County Prosecutor appealed from the orders granting permissive intervention and summary disposition to the third group of intervening inmates, William Newton and others (Docket No. 166024). The appeals were consolidated.

The Court of Appeals *held:*

1. The trial court erred in its interpretation of the interaction between MCL 333.7401(2)(a)(ii)-(iv) and (3); MSA

REFERENCES

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 27.13, 48, 48.6; Parties §§ 142, 155, 161, 167, 168.

Time within which right to intervene may be exercised. 37 ALR2d 1306.

Validity of state statute imposing mandatory sentence or prohibiting granting of probation or suspension of sentence for narcotics offenses. 81 ALR3d 1192.

14.15(7401)(2)(a)(ii)-(iv) and (3), and MCL 333.7403(2)(a)(i)-(iv); MSA 14.15(7403)(2)(a)(i)-(iv). Except for the allowance of lifetime probation, a defendant convicted of violating § 7401(2)(a) or 7403(2)(a) of the controlled substances act is subject to a mandatory term of imprisonment, regardless of the length of the minimum and maximum sentence imposed, and may not receive a reduction in the term of imprisonment imposed as a result of disciplinary credits or any other type of sentence credit reduction. The orders granting summary disposition for the plaintiffs and intervening plaintiffs must be reversed and the matter must be remanded for the entry of orders granting summary disposition for the defendants.

2. The intervening plaintiffs' motions to intervene were granted inappropriately. The intervening plaintiffs had a claim that was common in law and fact to the claim of the original plaintiffs. However, their postjudgment application was untimely and the trial court abused its discretion in granting it. The routine granting of motions to intervene in a case in which a judgment favorable to the intervenors has already been entered, without questioning the timeliness of such motions, constitutes an abuse of discretion. A timely application for permissive intervention, as required by MCR 2.209(B), must be an application that is made before an adjudication of the case on the merits. That was not done in this case.

Reversed and remanded.

1. SENTENCES — CONTROLLED SUBSTANCES — MANDATORY TERM OF IMPRISONMENT — DISCIPLINARY CREDITS.

Except for the allowance of lifetime probation, a defendant convicted of violating §§ 7401(2)(a) or 7403(2)(a) of the controlled substances act is subject to a mandatory term of imprisonment, regardless of the length of the minimum and maximum sentence imposed; the sentencing court may deviate downwardly from the mandatory sentences if it finds there are substantial and compelling reasons; an individual subject to such a mandatory term of imprisonment may not receive a reduction in the term of imprisonment imposed as a result of disciplinary credits or any other type of sentence credit reduction (MCL 333.7401[2][a][i]-[iv], [3], [4], 333.7403[2][a][i]-[iv]; MSA 14.15[7401][2][a][i]-[iv], [3], [4], 14.15[7403][2][a][i]-[iv]).

2. MOTIONS AND ORDERS — PARTIES — PERMISSIVE INTERVENTION — TIMELY APPLICATION.

A trial court may grant permissive intervention where a timely application is made, the applicant's claim or defense and the main action have a common question of law or fact, and no

prejudice or delay to the original parties will result; the routine granting of motions to intervene in a case in which a judgment favorable to the intervenors has already been entered, without questioning the timeliness of such motions, constitutes an abuse of discretion; a timely application is an application that is made before an adjudication of the case on the merits (MCR 2.209[B]).

Patrick K. Ehlmann, for the plaintiffs and intervening plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Chester S. Sugierski, Jr.,* Assistant Attorney General, for the Department of Corrections.

John D. O'Hair, Prosecuting Attorney, and *George E. Ward,* Chief Assistant Prosecutor, for the Wayne County Prosecutor.

Before: TAYLOR, P.J., and WEAVER and M. R. SMOLENSKI,* JJ.

PER CURIAM. In Docket No. 154882, defendant, Department of Corrections (DOC), appeals as of right from the circuit court's order granting summary disposition for plaintiffs Freddy Dean, George Scandalis, and Paul McCormick. William Newton, Herman Ridgell, Jr., and Miguel Hermosillo (the intervening plaintiffs) permissively intervened after the circuit court's decision in the original matter, seeking identical relief. The circuit court granted the intervening plaintiffs' motion for summary disposition. In Docket No. 166024, intervening defendant Wayne County Prosecutor (the prosecutor) appeals as of right from the circuit court's order granting summary disposition for the intervening plaintiffs and challenges the court's grant of permissive intervention

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

to them. Docket No. 166024 was consolidated with Docket No. 154882 for purposes of appeal. We reverse.

Pursuant to MCL 333.7401(4); MSA 14.15(7401)(4), plaintiffs Dean, Scandalis, and McCormick were sentenced to less than the statutorily required mandatory minimum sentence because the respective trial courts found substantial and compelling reasons to support the departures. Plaintiffs subsequently filed this declaratory judgment action against the DOC seeking a judgment that MCL 333.7401(3); MSA 14.15(7401)(3) did not prohibit them from receiving disciplinary credits against those sentences. Both parties moved for summary disposition. The trial court denied the DOC's motion, granted summary disposition for plaintiff's, and entered a declaratory ruling that stated:

> Plaintiffs' eligibility for disciplinary credits is not affected by the provision in MCL 333.7401(3) which precludes "reduction in that mandatory term of imprisonment by disciplinary credits" for those individuals sentenced under MCL 333.7401(2)(a)(i) through (iv) and MCL 333.7403(2)(a)(i) through (iv), who are sentenced to a minimum term below the mandatory minimums contained in those statutory provisions, such departures being pursuant to MCL 333.7401(4).

After that order, three additional groups of similarly situated inmates moved for permissive intervention.

The original parties stipulated the first group's intervention and the trial court granted the second group intervention. Both groups moved for summary disposition on the same grounds as the original plaintiffs, and the trial court granted the motions. The third group, Newton, Ridgell, and

Hermosillo, also moved to intervene and the motion was granted. The prosecutor then moved to intervene and the trial court granted that motion. Newton, Ridgell, and Hermosillo subsequently moved for summary disposition on the same grounds as the original plaintiffs, which the trial court also granted. Defendant DOC moved for a stay of the trial court's declaratory order, which this Court granted in an order entered on July 7, 1993.

Defendants argue that the trial court erred in its interpretation of the interaction between certain sections of the controlled substances act, MCL 333.7401(2)(a)(ii)-(iv) and (3); MSA 14.15(7401)(2)(a)(ii)-(iv) and (3), and MCL 333.7403(2)(a) (i)-(iv); MSA 14.15(7403)(2)(a)(i)-(iv). We agree.

Section 7401(3) provides:

> A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. An individual subject to a mandatory term of imprisonment under subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall not be eligible for probation, suspension of that sentence, or parole during that mandatory term, except and only to the extent that those provisions permit probation for life, and shall not receive a reduction in that mandatory term of imprisonment by disciplinary credits or any other type of sentence credit reduction.

Pursuant to § 7401(4), a sentencing court may downwardly deviate from the mandatory sentences if it finds there are substantial and compelling reasons to do so. Plaintiffs argued below, and the circuit court agreed, that a lesser sentence is no longer a mandatory sentence, and thus, the prohi-

bition against disciplinary credits is inapplicable to such sentences. In interpreting § 7401(3), the circuit court determined that a defendant who is given a lesser sentence is eligible to receive disciplinary credits because he is no longer "subject to" the mandatory sentence.

A review of the statutory provisions in their entirety indicates that, except for the allowance of lifetime probation pursuant to § 7401(2)(a)(iv), a defendant convicted of violating §§ 7401(2)(a) or 7403(2)(a) is subject to a mandatory term of imprisonment. Regardless of the length of the minimum and maximum sentence imposed, both being ultimately subject to the sentencing court's discretion, *People v Perez,* 417 Mich 1100.21 (1983), the sentence is "mandatory" because, except where lifetime probation is an option, imprisonment is the only available sanction. In a situation where lifetime probation could have been imposed and the court rejected that option, a term of imprisonment is mandatory. The clear and unambiguous language of the statutes governing controlled substances offenses manifests the Legislature's intent to give trial courts two sentencing options: lifetime probation or a term of imprisonment. *People v Story,* 191 Mich App 476; 478 NW2d 710 (1991).

Plaintiffs' argument, which depends on interpolating the limiting adjective "minimum" into § 7401(3), is without merit. The Legislature was careful to use that adjective only in § 7401(4), which was part of the same public act. Inclusion of the qualifying adjective only in § 7401(4), and its omission from § 7401(3), indicates that the language in § 7401(3) was not inadvertently or inartfully chosen by the Legislature.

Accordingly, the trial court's orders granting summary disposition for plaintiffs and intervening plaintiffs are reversed, and this matter is re-

manded for the entry of orders granting summary disposition for defendants.

Furthermore, we hold that intervening plaintiffs' motions to intervene were inappropriately granted. Pursuant to MCR 2.209(B), the trial court may grant permissive intervention if timely application is made, if the applicant's claim or defense and the main action have a common question of law or fact, and if no prejudice or delay to the original parties will result. Intervening plaintiffs clearly had a claim that was common in law and fact to the claim of the original plaintiffs. However, their postjudgment application was untimely and the trial court abused its discretion in granting it.

There should be considerable reluctance on the part of the courts to allow intervention after an action has gone to judgment and a strong showing must be made by the applicant. See 7C Wright, Miller & Kane, Federal Practice & Procedure: Civil (2d ed), § 1916, p 444. "It must be very obvious that a great distinction must be observed between an intervention occurring before judgment is rendered . . . and another case in which intervention is sought, as in the instant case, after judgment has been rendered." *Czajkowski v Lount,* 333 Mich 156, 164; 52 NW2d 642 (1952). Further, we note that the "[p]rovision . . . authorizing intervention . . . 'at any time' relates to time actions are pending in court." *Id.*

In the instant case, intervening plaintiffs made a less-than-strong showing that intervention was appropriate. They merely claimed that their action and the main action had a question of law in common and that intervention would not unduly delay or prejudice the adjudication of the original parties' rights. Nowhere in their motion do intervening plaintiffs explain why they failed to move

for intervention while the main action was pending. And, rather than exercising considerable reluctance, the trial court expressed a great willingness to grant the motion without questioning its timeliness. Although we recognize the trial court's discretion in such matters, we conclude that routinely granting motions to intervene in a case in which judgment favorable to the intervenors has already been entered, without questioning the timeliness of such motions, constitutes an abuse of discretion.

Allowing intervening plaintiffs to intervene after a judgment is entered promotes a bad public policy: intervening plaintiffs reap the benefits of a favorable judgment but would not be bound by an adverse judgment. In 1966, FR Civ P 23 was amended to preclude such "one-way" intervention by adopting the opt-out procedure for class actions. See Jelsema, *The work of the Michigan Supreme Court and the Court of Appeals during the survey period: A statistical analysis,* 16 Wayne L Rev 477, 518-522 (1970). Because Michigan's court rules were modeled after the federal rules, we look to the federal rules for guidance in this case.

Before 1966, the procedure for class actions was to allow parties to opt in. Under this approach, potential members of a class would wait to see if the adjudication was favorable to the class before deciding whether to enter the action. In contrast, the opt-out procedure required the potential class members to take affirmative action to avoid being included in the class and bound by the judgment, effectively prohibiting one-way intervention.

We note that, like their federal counterparts, MCR 2.209(B) and MCR 3.501 (class actions) are complementary. Like its federal counterpart, FR Civ P 23, MCR 3.501 contains the opt-out procedure. With our holding in this case, we apply a

similar rationale to permissive intervention because the same public policy considerations are at issue. Accordingly, we hold that a timely application, as required by MCR 2.209(B), must be an application before an adjudication of the case on the merits. That having not been done here, the grant of intervening plaintiffs' motion was an abuse of discretion by the trial court and is hereby reversed.

Reversed and remanded.

NBD BANK, NA v TIMBERJACK, INC

Docket No. 154691. Submitted August 2, 1994, at Grand Rapids. Decided December 20, 1994, at 9:10 A.M.

NBD Bank, N.A., brought an action in the Kent Circuit Court against Cedar Springs Tractor & Equipment Company, Timberjack, Inc., and others, seeking possession of collateral to satisfy the indebtedness of Cedar Springs Tractor. The court, Robert A. Benson, J., issued a restraining order prohibiting Cedar Springs Tractor, a dealer of logging equipment manufactured by Timberjack, from disposing of farm and logging equipment in its inventory. Despite the restraining order, Cedar Springs Tractor voluntarily returned some inventory to Timberjack. The plaintiff added a count of claim and delivery against Timberjack. Timberjack filed a counterclaim alleging that it had a valid prior perfected security interest in the collateral and proceeds. Timberjack perfected a security interest in the products it supplied to Cedar Springs Tractor by filing a financing statement with the office of the Secretary of State on December 27, 1971. Timberjack's first continuation statement was filed six months and five days before the expiration of the five-year term of the financing statement. Subsequent continuation statements referred back to the original financing statement. The plaintiff's financing statement covering all of the assets of Cedar Springs Tractor was recorded on June 4, 1984, and a continuation statement was filed on April 19, 1989. The court granted summary disposition for the plaintiff, holding that Timberjack lost its status as a perfected secured creditor because it filed its first continuation statement six months and five days before the five-year period of the original financing statement was due to expire, rather than within six months before the expiration of the five-year period of the original financing statement as set forth in MCL 440.9403(3); MSA 19.9403(3). Timberjack appealed.

The Court of Appeals *held:*

1. The use of the word "may" in the requirement of § 9403(3) that a "continuation statement may be filed by the secured party" within six months before the five-year period of a financing statement is to expire makes permissive the continuation by a secured creditor of its interest in the collateral

covered by a financing statement. However, it is clear that the Legislature did not intend the time limits for filing a continuation statement to be permissive if a secured party decides to file a continuation statement. Furthermore, § 9403 is part of the Uniform Commercial Code and, thus, should be construed to ensure consistency among the various states. Courts of other jurisdictions uniformly have held that a continuation statement filed before the six-month period preceding the date on which the five-year period of a financing statement is to expire is not timely and cannot have the effect of continuing the original financing statement.

2. Substantial compliance with the filing requirement of continuation statements is not sufficient to permit continuation of a financing statement in the absence of a showing that the filing officer who accepted the filing affirmatively induced the secured party to believe that the filing satisfied the filing requirement. Because Timberjack has not alleged that any policy or action of the office of the Secretary of State caused it to believe that its filing of its first continuation statement was in compliance with the statutory requirements, it is not entitled to equitable relief from the results of its noncompliance with that filing requirement. Accordingly, the trial court was correct in finding that Timberjack's premature filing of the continuation statement invalidated its status as a perfected secured creditor.

3. The fact that the plaintiff's 1989 continuation statement was filed in plaintiff's present name rather than in its former name, Union Bank & Trust, under which the financing statement had been filed does not make the continuation statement deficient. A secured party that changes its name is not required to file a new or amended financing statement to reflect the name change. Accordingly, a secured party is not required to file with its continuation statement made in its new name a written statement showing an assignment of the interest in the collateral covered by the financing statement from its former name to its current name. The plaintiff's 1989 continuation statement in its present name without any statement of assignment was sufficient.

Affirmed.

Clary, Nantz, Wood, Hoffius, Rankin & Cooper (by *Daniel R. Kubiak*), for the plaintiff.

Butzel Long (by *Edward M. Kalinka*), for Timberjack, Inc.

Before: HOOD, P.J., and MARILYN KELLY and J. L. MARTLEW,* JJ.

PER CURIAM. This case involves a priority battle between two secured creditors' interest in the same collateral. Defendant Timberjack, Inc., appeals the trial court's order granting partial summary disposition in favor of plaintiff, NBD Bank, N.A., pursuant to MCR 2.116(C)(10). The trial court determined that Timberjack lost its status as a perfected secured creditor when it filed a premature continuation statement concerning the subject collateral. We affirm.

Timberjack, formerly Eaton-Yale, Ltd., is a Canadian corporation that manufactures logging and forestry equipment. In 1971, Cedar Springs Tractor & Equipment Company became a dealer of Timberjack products. Pursuant to the dealership agreement, Timberjack was granted a security interest in the products it delivered to Cedar Springs and the proceeds of the sales of those products. On December 27, 1971, Timberjack perfected its security interest by filing a financing statement with the office of the Secretary of State. The financing statement was due to expire five years from the date of filing. Timberjack filed its first continuation statement six months and five days before the expiration of the term of the financing statement. Subsequent continuation statements that referenced the original financing statement were also filed by Timberjack through 1986.

Subsequently, Cedar Springs entered into a loan agreement with NBD Bank, N.A., then known as Union Bank & Trust Company. The financing statement accompanying the loan granted the bank a blanket security interest in all of Cedar

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

Springs' assets. The bank recorded its financing statement on June 4, 1984. A timely continuation statement was filed by the bank on April 19, 1989. Cedar Springs ultimately failed to satisfy its obligation to the bank, and the bank instituted an action seeking possession of the collateral to satisfy the indebtedness. The circuit court issued a restraining order prohibiting Cedar Springs from disposing of any farm implements and logging equipment in its inventory. Despite the restraining order, Cedar Springs voluntarily returned certain inventory to Timberjack. The bank then amended its complaint to add a count of claim and delivery against Timberjack.

Timberjack filed a counterclaim alleging that the bank improperly sought to seize the collateral and proceeds from Cedar Springs. Timberjack alleged that it had a valid prior perfected security interest in the collateral and proceeds. Competing motions for summary disposition were filed. The trial court determined that Timberjack lost its status as a perfected secured creditor because it filed the first continuation statement six months and five days before the five-year period of the original financing statement was due to expire.

Timberjack first argues that its status as a perfected secured creditor of Cedar Springs was not defeated because it filed the first continuation statement six months and five days before the five-year period of the original financing statement was due to expire. We disagree.

It is well settled that the Uniform Commercial Code must be liberally construed and applied to promote the code's underlying purposes and policies. MCL 440.1102(1); MSA 19.1102(1); *NBD-Sandusky Bank v Ritter,* 437 Mich 354, 360; 471 NW2d 340 (1991). The purpose of the various Uniform Codes is to promote consistency among

the various states and to further coherence in the business law of this nation. *Citizens Bank v Ansley,* 467 F Supp 51, 55 (MD Ga, 1979), aff'd 604 F2d 669 (CA 5, 1979).

In 1976, when Timberjack's first continuation statement was filed, MCL 440.9403; MSA 19.9403, provided in relevant part:

> (2) A filed financing statement which states a maturity date of the obligation secured of 5 years or less is effective until the maturity date and thereafter for a period of 60 days. Any other filed financing statement is effective for a period of 5 years after the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the 60-day period after a stated maturity date or on the expiration of the 5-year period, unless a continuation statement is filed before the lapse. Upon lapse the security interest becomes unperfected. A filed financing statement which states that the obligation secured is payable on demand is effective for 5 years after the date of filing.
>
> (3) *A continuation statement may be filed by the secured party (i) within 6 months before and 60 days after a stated maturity date of 5 years or less, and (ii) otherwise within 6 months before the expiration of the 5-year period specified in subsection (2). . . . Upon timely filing of the continuation statement, the effectiveness of the financing statement is continued for 5 years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in section (2)* unless another continuation statement is filed before the lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the financing statement.

Timberjack claims that the word "may" as employed in the statute is permissive, and it was therefore entitled to file the continuation statement before the six-month period referenced

above. According to Timberjack, at the very least it "substantially complied" with the requisites of the statute because the bank was put on notice of its security interest in the collateral at issue.

We first note that there is no ambiguity in the word "may" as employed in the phrase "may be filed . . . within 6 months before the expiration of the 5-year period." To the contrary, this usage indicates that a secured party may, if it so desires, elect to continue its status as a perfected secured creditor by filing a continuation statement. On the other hand, if the secured party, because of satisfaction of indebtedness or for other reason, elects not to continue its status as a perfected secured party, it may choose not to file a continuation statement. In this context the word "may" provides a secured creditor with the option to continue its interest in collateral covered by a financing statement. If, as suggested by Timberjack, the Legislature had utilized the phrase "*shall* file a continuation statement within 6 months," the provision at issue would be misleading in that secured parties who have filed financing statements seemingly would be *obligated* to file continuation statements, despite the fact that they might not be interested in retaining their status as perfected secured creditors. Clearly, the Legislature did not intend such a result. Further, Timberjack's urged interpretation would render meaningless the "6 months" language employed by the Legislature. This Court will avoid a construction that would render a statute, or any part of it, surplusage or nugatory. *Altman v Meridian Twp,* 439 Mich 623, 635; 487 NW2d 155 (1992).

Additionally, the courts of various states have been called on to construe statutory language identical or substantially similar in all material respects to the language of the provision at issue

here. These courts have uniformly held that a continuation statement filed *before* the six-month period is not timely and cannot have the effect of continuing the effectiveness of the original financing statement. See *Banque Worms v Davis Construction Co, Inc,* 831 SW2d 921, 922-924 (Ky App, 1992); *Lorain Music Co v Allied Investment Credit Corp,* 41 Ohio App 3d 235, 236; 535 NE2d 345 (1987); *In re Callahan Motors, Inc,* 396 F Supp 785, 788-789 (D NJ, 1975), rev'd on other grounds 538 F2d 76 (CA 3, 1976). We take guidance from these decisions so as to ensure consistency among the various states and to further coherence in the business law of this nation. *Ritter, supra,* 437 Mich 360; *Ansley, supra,* 467 F Supp 55. Therefore, we conclude that the trial court was correct in finding that Timberjack's premature filing of the continuation statement invalidated its status as a perfected secured creditor.

For the same reasons, we reject Timberjack's claim that it "substantially complied" with the requirements of the statute because the continuation statement was filed a mere five days prematurely. We note that Timberjack has failed to cite any legal authority for the proposition that the principle of substantial compliance cures an untimely filing of a continuation statement. Moreover, it is clear that the filing error was not minor, despite the fact that the bank may have had actual notice of Timberjack's secured interest. As stated in *Bostwick-Braun Co v Owens,* 634 F Supp 839, 841 (ED Wis, 1986):

> All courts which have decided the issue agree that, since the purpose of statutory filing requirements is, in most instances, to resolve notice disputes consistently and predictably by reference to constructive or statutory notice alone, U.C.C. § 9-403(3) precludes consideration of a junior creditor's

> actual notice of a now lapsed prior filing by a competing senior creditor.

The statute at issue provides that a continuation statement may be filed *within 6 months before and 60 days after the stated maturity date of a financing statement.* The statute is clear concerning the time frame for filing a continuation statement, and, thus, strict compliance is necessary. To hold otherwise would undercut the goals of consistency and predictability sought to be achieved by the Legislature in enacting this provision, which seeks to resolve notice disputes similar to the instant one.

We also reject Timberjack's equity-based argument, which relies on *In re Callahan Motors, Inc,* 538 F2d 76 (CA 3, 1976). Timberjack's reliance on *Callahan Motors* is misplaced for the following reasons: First, the decision in *Callahan Motors* is limited to the facts of that case. *Id.* at 80. Second, the court in *Callahan Motors* expressly declined to adopt a general rule that the acceptance of a continuation statement by a filing officer cures an untimely presentation. *Id.* at 79. Third, and perhaps most importantly, the court in *Callahan Motors* concluded that equity would provide relief for the bank in that case, not because the filing officer had engaged in a simple acceptance of the continuation statement and filing fee, but because an affirmative course of conduct on the part of the filing officer caused the imperfection in filing. *Id.*

In this case, both in the lower court and in its appellate brief, Timberjack only alleged facts that establish a mere acceptance of its filing and its filing fee. Timberjack did not allege that in 1976 it was the policy of the office of the Michigan Secretary of State to refuse to accept for filing and to return as unfiled continuation statements that

were determined to be premature. Timberjack also did not allege any conduct on the part of the Secretary of State that could be determined to constitute an affirmative course of conduct, within the meaning of *Callahan Motors,* upon which Timberjack reasonably could rely. Finally, Timberjack failed to provide any legal authority from which it could be inferred that the Secretary of State was under a legal obligation to determine whether Timberjack's filing was timely.

For these reasons, the trial court correctly granted the bank's motion for summary disposition pursuant to MCR 2.116(C)(10) with respect to the issue whether Timberjack's premature filing of its 1976 continuation statement effectively continued the perfected status attending the 1971 financing statement.

We also find unpersuasive Timberjack's contention that the bank's 1989 continuation statement was deficient because the bank failed to attach a written statement of assignment to the filing. Timberjack correctly points out that the bank's original financing statement listed Union Bank & Trust as the secured party. Likewise, Timberjack also correctly points out that the bank's 1989 continuation statement listed the bank (NBD Bank, N.A.), and not Union Bank & Trust, as the secured party. Timberjack argues that pursuant to MCL 440.9403(3); MSA 19.9403(3), the bank was required to attach a written statement of assignment to its continuation statement, because it was a person other than the secured party of record, Union Bank & Trust.

It is clear from the record that Union Bank & Trust and NBD Grand Rapids, N.A., were not entities operating in separate and legally distinct capacities. To the contrary, NBD Grand Rapids, N.A., was actually Union Bank & Trust operating

under a new name. A secured party that changes its name is not required to file either a new financing statement or an amended financing statement to reflect the name change. See *In re Wilco Forest Machinery, Inc,* 491 F2d 1041 (CA 5, 1974). Thus, we believe that if the code does not require a secured party operating under a new name to amend or refile a financing statement to reflect the name change, it would also not be necessary to require the newly renamed secured party to file a written statement of assignment with its continuation statement. Accordingly, we conclude that the bank was not required to file a written statement of assignment with its 1989 continuation statement.

The trial court's order granting summary disposition in favor of the bank is affirmed.

PEOPLE v BOOKER (AFTER REMAND)

Docket Nos. 117973, 147466. Submitted September 15, 1994, at Detroit. Decided December 20, 1994, at 9:15 A.M. Leave to appeal denied, 448 Mich 909.

Albert Booker, Jr., was convicted in the Macomb Circuit Court, Frank E. Jeanette, J., of voluntary manslaughter, possession of a firearm during the commission of a felony, and possession of a short-barreled shotgun and was sentenced to concurrent prison terms of seven to fifteen years for voluntary manslaughter and two to five years for possession of a short-barreled shotgun, and to a consecutive term of two years for felony-firearm. The defendant, originally charged with first-degree murder, felony-firearm, and possession of a short-barreled shotgun, appealed, claiming that the trial court erred in accepting the jury's verdict after the foreperson, when polled, expressed personal indecision over whether the manslaughter was voluntary or involuntary. The defendant also challenged his sentences and the constitutionality of having Judge Jeanette, a retired seventy-nine-year old judge, preside over the trial. The Court of Appeals remanded for resentencing. On remand, the trial court imposed the same sentences. The defendant filed a separate appeal based on the resentencing. The appeals have been consolidated.

After remand, the Court of Appeals *held:*

1. The trial court erred in failing to order further deliberations by the jury when the foreperson expressed doubt concerning the category of the manslaughter conviction.

2. A general verdict of manslaughter could not be accepted in

REFERENCES

Am Jur 2d, Criminal Law §§ 256, 264, 277; Judges §§ 248, 251; Trial §§ 1743, 1772, 1826; Weapons and Firearms §§ 7, 7.5.

Juror's reluctant, equivocal, or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case. 25 ALR3d 1149.

Double jeopardy: various acts of weapons violations as separate or continuing offense. 80 ALR4th 631.

Supreme Court's views as to application, in state criminal prosecutions, of double jeopardy clause of Federal Constitution's Fifth Amendment. 95 L Ed 2d 924.

this case because, even though MCL 750.321; MSA 28.553 provides for one degree of manslaughter and permits the same punishment for voluntary or involuntary manslaughter, the offenses are separate and distinct, are provable by substantially different evidence, and involve different degrees of culpability and severity of punishment.

3. Double jeopardy precludes retrial of the defendant on charges of first- and second-degree murder because the verdict of guilty of voluntary manslaughter represented acquittal of murder. Retrial on the charges of voluntary manslaughter and felony-firearm is not precluded by double jeopardy in view of the manifest necessity of a declaration by the Court of Appeals of a mistrial because the jury lacked unanimity on the verdict of voluntary manslaughter.

4. The trial court did not err in denying a request for a jury instruction on duress as a defense to the charge of possession of a short-barreled shotgun. The defendant failed to present sufficient evidence to support such an instruction.

5. Convictions of both possession of a short-barreled shotgun and felony-firearm do not violate the constitutional prohibition against double jeopardy where, as here, the possession offense does not serve as the underlying felony for the felony-firearm conviction.

6. The assignment of Judge Jeannette did not violate the state constitution. Although Const 1963, art 6, § 19 provides that no person may be elected or appointed to a judicial office after reaching the age of seventy years, Const 1963, art 6, § 23, which governs the assignment of former judges to judicial duties for limited periods or specific assignments, does not contain an age restriction.

Affirmed in part, reversed in part, and remanded.

1. CRIMINAL LAW — JURY — POLLING OF JURY.

If a juror expresses disagreement with a verdict when polled, the trial court may discontinue the poll and order further deliberations by the jury or declare a mistrial and discharge the jury with the consent of the defendant or after determining that the jury is deadlocked or that manifest necessity exists for declaring a mistrial (MCR 2.512[B][3], 6.420[C]).

2. HOMICIDE — MANSLAUGHTER — JURY — VERDICTS.

A jury, in returning a verdict of manslaughter, must specify whether the conviction is for voluntary or involuntary manslaughter because the offenses are separate and distinct, are provable by substantially different evidence, and involve different degrees of culpability and severity of punishment.

3. CONSTITUTIONAL LAW — DOUBLE JEOPARDY.

Double jeopardy does not preclude retrial after discharge of a jury for inability to agree or for some other overruling necessity.

4. WEAPONS — DOUBLE JEOPARDY — FELONY-FIREARM — POSSESSION OF SHORT-BARRELED SHOTGUN — CRIMINAL LAW.

The Legislature intended to authorize multiple convictions for felony-firearm and possession of a short-barreled shotgun where a different offense is used as the underlying felony for the felony-firearm conviction (MCL 750.224b, 750.227b; MSA 28.421[2], 28.424[2]).

5. JUDGES — ASSIGNMENT OF FORMER JUDGES.

Former judges, regardless of age, may be assigned by the Supreme Court to perform judicial duties for limited periods or specific assignments; the age limit of no more than seventy years that applies to the election or appointment of judges does not apply to the assignment of former judges (Const 1963, art 6, §§ 19, 23).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Carl J. Marlinga,* Prosecuting Attorney, *Robert J. Berlin,* Chief Appellate Lawyer, and *Edward L. Graham,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Anne Yantus*), and *Madelaine P. Lyda,* for the defendant on appeal.

AFTER REMAND

Before: SAWYER, P.J., and FITZGERALD and T. S. EVELAND,* JJ.

PER CURIAM. Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and possession of a short-barreled shotgun, MCL 750.224b; MSA 28.421(2). Defendant

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

was sentenced to concurrent prison terms of seven to fifteen years for voluntary manslaughter and two to five years for possession of a short-barreled shotgun, and to a consecutive prison term of two years for the felony-firearm conviction. Following a remand by this Court for resentencing, defendant was resentenced to identical terms. The cases were consolidated on appeal. Defendant appeals as of right.

Defendant was originally charged with first-degree, premeditated murder, MCL 750.316; MSA 28.548, felony-firearm, and possession of a short-barreled shotgun as a result of the shooting death of Eddie Calvert. Following six days of trial, the jury returned guilty verdicts of voluntary manslaughter, possession of a short-barreled shotgun, and felony-firearm after five hours of deliberation. When the jury was polled, the foreperson expressed doubt regarding whether the verdict should be voluntary or involuntary manslaughter.[1] After concluding the polling, the trial court excused the jury and later questioned the juror regarding the nature of her doubt. Defense counsel objected to the trial court's conduct and requested a mistrial based on the lack of a unanimous jury. The trial court denied the motion, accepted the verdict, and discharged the jury on January 27, 1989.

[1] Juror No. 254, the foreperson, stated: "I have doubt" [regarding the voluntary manslaughter verdict] because "I think it could possibly be involuntary manslaughter." Juror No. 254 stated that her doubt was "whether it was a voluntary action or an involuntary action." In response to the trial court's question whether she had any doubt that she voted for manslaughter, the jury foreperson stated: "I did vote for manslaughter." The trial court then asked: "But the verdict said voluntary manslaughter. Was this not unanimous?" Juror No. 254 responded: "I did vote for that. Yes, I did." When the trial court again asked her whether her verdict was guilty on all three counts, Juror No. 254 stated "Yes. I did vote that way." The trial court then sent the jury back to the jury room, whereupon defense counsel asked for a mistrial because there was not a unanimous verdict.

On February 8, 1989, defendant moved for dismissal. On February 12, 1989, the foreperson wrote to the trial court and indicated that she might have reached a verdict of not guilty of voluntary manslaughter had she deliberated further. According to the juror, the jury compromised because the jurors were tired and were uncertain whether the trial court would have required them to deliberate during the evening and throughout the weekend to reach a verdict.

Defendant was sentenced on March 3, 1989. On March 6, 1989, a hearing was held on defendant's motion for dismissal or for a new trial. In an order dated August 4, 1989, the trial court denied defendant's motion.

I

Defendant first claims that the trial court erred in failing to order further deliberations by the jury when the foreperson expressed her doubts and that he is entitled to reversal of his voluntary manslaughter conviction.

MCR 6.420(C), which governs the acceptance of a verdict in a criminal case, provides:

> Before the jury is discharged, the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury.

The comment prepared by the staff of the Supreme Court for Rule 6.420 notes:

Subrule (C) is consistent with the jury polling procedure set forth in MCR 2.512, but is modified to address constitutional concerns applicable in criminal jury trials. See *People v Hall,* 396 Mich 650, 654-655 [242 NW2d 377] (1976).

The option in subrule (C) permitting the court to "discontinue the poll and order the jury to retire for further deliberations" requires the court to cut off the polling as soon as disagreement is disclosed. The court should not allow the polling to continue because of its potentially coercive effect. Nor, for the same reason, should the court question the jury to determine where the jury stands numerically. See *People v Wilson,* 390 Mich 689 [213 NW2d 193] (1973).

If, when a jury is polled, one juror expresses disagreement with the verdict, the jury must be sent out for further deliberations. *People v Bufkin,* 168 Mich App 615, 617; 425 NW2d 201 (1988); *Wayne Co Prosecutor v Detroit Recorder's Court Judge,* 64 Mich App 408; 235 NW2d 799 (1975).

In *Bufkin, supra,* a juror responded, upon a poll of the jury that returned a verdict of not guilty, that the verdict was not her verdict. Defense counsel requested further deliberations, while the prosecutor argued that the court was required to declare a mistrial on the ground that the jury had revealed the state of its deliberations. The trial court did not accept the verdict and granted the mistrial. This Court reversed, holding that MCR 2.512(B)(3) expressly provides that the jury must be sent out for further deliberation and because there was no manifest necessity for the granting of a mistrial. The panel remanded for entry of an unconditional dismissal because the prohibition against double jeopardy barred retrial.

In *Wayne Co Prosecutor, supra,* a juror stated that she did not agree with the verdict upon the poll of the jury, which returned a verdict of not

guilty by reason of insanity. There, the trial court, over the prosecutor's objection, bound the juror to her previous vote, accepted the verdict, and discharged the jury. This Court reversed, finding that the trial court should have instructed the jury to deliberate further. In addition, the panel sua sponte declared a mistrial because the jury was unable to reach a verdict and remanded the case for a new trial.[2]

In the present case, the trial court clearly erred in accepting a verdict that was not unanimous. The trial court also erred in inquiring into the nature of the juror's doubt. Such an inquiry is impermissibly coercive. Cf. *People v Wilson,* 390 Mich 689; 213 NW2d 193 (1973) (trial court's inquiry into the numerical division of the jury is impermissibly coercive). The trial court should have instructed the jury to deliberate further upon the jury foreperson's expressed indecision with respect to the category of manslaughter. MCR 2.512(B)(3).

The prosecutor contends that a general verdict of manslaughter could properly be accepted because the manslaughter statute, MCL 750.321; MSA 28.553, provides for but one degree of manslaughter, and permits the same punishment for a conviction of voluntary or involuntary manslaughter. The prosecutor relies on *People v Fullwood,* 51 Mich App 476, 481; 215 NW2d 594 (1974), in support of his argument. In *Fullwood,* the Court stated:

> A general verdict of guilty is erroneous when the offenses charged are separate and distinct in character, provable by substantially different evi-

[2] In dissent, Judge MAHER stated that double jeopardy barred retrial because the discharge of the jury before the defendant's guilt or innocence was determined was equivalent to an acquittal.

dence, and punishable by different penalties. [51 Mich App 481.]

The Court held that a general verdict of first-degree murder was not erroneous because, even though the jury did not specify whether the defendant committed premeditated murder or felony murder, the evidence was sufficient to sustain a conviction under either theory. See also *People v Embree,* 68 Mich App 40; 241 NW2d 753 (1976).

In contrast to *Fullwood* and *Embree,* which were both first-degree murder cases, a general verdict of manslaughter would have been erroneous in this case. Although both voluntary and involuntary manslaughter involve the killing without malice of another, the offenses are separate and distinct, *People v Townes,* 391 Mich 578, 589; 218 NW2d 136 (1974), and, as stated in *People v Daniels,* 172 Mich App 374, 379-380; 431 NW2d 846 (1988), are provable by substantially different evidence:

> The manslaughter statute, MCL 750.321; MSA 28.553, incorporates two common-law categories of manslaughter, involuntary and voluntary. *People v Richardson,* 409 Mich 126, 134, n 8; 292 NW2d 332 (1980). These categories are distinguishable, each defining crimes originating out of circumstances often quite different from the other. *Id.,* p 136.
>
> On the one hand, involuntary manslaughter has been defined as
>
> "the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty." [*People v Scott,* 29 Mich App 549, 551; 185 NW2d 576 (1971), quoting *People v Ryczek,* 224 Mich 106, 110; 194 NW 609 (1923).]

> The usual situations in which involuntary manslaughter arises are either when death results from a direct act not intended to produce serious bodily harm or when death results from criminal negligence. *Richardson, supra,* p 136. By contrast, voluntary manslaughter shares all the elements of murder except malice. Proof of provocation or other mitigating circumstances is necessary to return a verdict of voluntary manslaughter when there has been an intentional homicide. [Citations omitted.]

Clearly, voluntary manslaughter is an intentional killing (mitigated by heat of passion), whereas involuntary manslaughter is an unintentional killing. According to the prosecution's theory, the shooting was intentional and premeditated, whereas under the defense theory the shooting was unintentional and accidental.

Further, even though the maximum penalty for the two offenses is the same, the offenses are different with respect to the degree of culpability and the relative severity of the sentence. See *People v Abbett,* 199 Mich App 334, 340-341; 501 NW2d 177 (1993), rev'd on other grounds 443 Mich 863 (1993). Therefore, even if the evidence was sufficient to support either theory, it was error for the trial court to accept the verdict of voluntary manslaughter because the jury could have returned a verdict on either theory.

This case is distinguishable from *People v Johnson,* 187 Mich App 621; 468 NW2d 307 (1991), where the Court held that a trial court did not deny the defendant the right to a unanimous verdict by instructing a jury in a case involving second-degree murder that the jury need not unanimously decide whether the defendant acted with an intent to kill, an intent to inflict great bodily harm, or wanton and wilful disregard that the

natural tendency of his behavior was to cause death or great bodily harm. The Court noted:

> The alternate theories of a defendant's state of mind relate to a single element of a single offense. When a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory. [187 Mich App 629-630.]

In the present case, jury unanimity is required because voluntary and involuntary manslaughter have different elements and must be considered separate and distinct offenses. Moreover, unlike the statute defining second-degree murder, the manslaughter statute does not list alternative means of committing the offense.

II

Having concluded that the trial court erred in accepting the verdict of voluntary manslaughter, we must determine whether retrial of the charges is barred by the Double Jeopardy Clauses of the United States and Michigan Constitutions, US Const, Ams V, XIV; Const 1963, art 1, § 15, which prohibit a defendant from being placed twice in jeopardy. *People v Dawson,* 431 Mich 234, 250; 427 NW2d 886 (1988). An accused is placed in jeopardy as soon as the jury is selected and sworn. *Id.* at 251. If the trial court declares a mistrial after jeopardy has attached, the state is precluded from bringing the defendant to trial a second time, unless the defendant consented to the mistrial or the mistrial was of manifest necessity. *Id.* at 252-253. Manifest necessity is not a precisely defined concept, but is usually determined case by case

with reference to various factors, such as the failure to agree upon a verdict. *Id.*

Double jeopardy does not preclude retrial after discharge of a jury "for inability to agree, or for some other overruling necessity." *People v Duncan,* 373 Mich 650, 660; 130 NW2d 385 (1964); *People v Hall,* 396 Mich 650, 654-655; 242 NW2d 377 (1976). In *Hall,* the defendant claimed that his second trial violated the prohibition against double jeopardy because the first trial ended with a hung jury. There, the Court held that retrial was not barred because the trial court concluded that the jury was unable to agree on a verdict.

Here, even though the trial court erred in accepting the verdict of voluntary manslaughter, the jury did return unanimous partial verdicts of acquittal of first- and second-degree murder. Because a jury verdict of a lesser included offense represents an acquittal of the higher charge, *Green v United States,* 355 US 184; 78 S Ct 221; 2 L Ed 2d 199 (1957), retrial is barred on the charge of either first- or second-degree murder.

The next inquiry is whether retrial is also barred on the charge of voluntary manslaughter. The present case is similar to *Wayne Co Prosecutor, supra.* In both cases, the trial courts accepted the verdict and discharged the jury over the express disagreement of one of the jurors with the verdict upon being polled. In both cases, the trial courts should have instructed the jury to deliberate further or, in the alternative, determined whether there was a hung jury because the jury was unable to reach a verdict. In *Wayne Co Prosecutor,* the panel fashioned the following remedy:

> It is obvious that we cannot instruct the jury to deliberate further. However, we can determine

> that the jury could not reach a verdict and order a mistrial.
>
> The Court hereby sua sponte declares a mistrial because the jury was unable to reach a verdict. The cause will be remanded to the trial court for a new trial. [64 Mich App 410.]

In this case, there is "manifest necessity" to declare a mistrial because the jury, which was not ordered to undertake further deliberations, was unable to reach a unanimous verdict. Further, defendant, in requesting a mistrial based on a lack of unanimity on the voluntary manslaughter verdict, consented to the remedy of a mistrial and remand for a new trial on the voluntary manslaughter charge. Cf. MCR 6.420(C), which provides that a trial court, with the defendant's consent, may declare a mistrial and discharge a jury if the jurors are not in agreement on the verdict. Hence, we sua sponte declare a mistrial and remand for a new trial on the charges of voluntary manslaughter and felony-firearm.[3]

We reject the prosecutor's contention that the verdict is void and that the proper remedy is to order a new trial on the original charge of first-degree murder. A void verdict is the same as if the jury returned no verdict at all. *People v Young*, 20 Mich App 211, 216; 173 NW2d 793 (1969). In this case, a unanimous jury concluded that defendant was guilty of manslaughter. The only question remaining was whether defendant was guilty of voluntary manslaughter or involuntary manslaughter. Although the verdict was improperly accepted as voluntary manslaughter, it was properly accepted as partial acquittals of the charges of first- and second-degree murder and as a guilty

[3] Although the jury returned a unanimous verdict of guilty of the felony-firearm charge, this conviction must be reversed because it was based on the underlying voluntary manslaughter conviction.

verdict of possession of a short-barreled shotgun. Because retrial on the murder charges is barred by double jeopardy, defendant may only be retried on the charges of voluntary manslaughter and felony-firearm.

III

Defendant also claims, with respect to his conviction of possession of a short-barreled shotgun, that the trial court erred in failing to give the requested instruction on duress. We disagree. Defendant possessed the gun before the decedent's threatening conduct. Hence, defendant failed to present sufficient evidence establishing the defense of duress relative to the charge of possession of a short-barreled shotgun. *People v Reed,* 393 Mich 342, 349-350; 224 NW2d 867 (1975).

IV

Defendant next contends that convictions of both felony-firearm and possession of a short-barreled shotgun violate the right to be free of double jeopardy.[4] We disagree. The Legislature intended to authorize multiple convictions for felony-firearm and possession of a short-barreled shotgun where the possession offense did not serve as the underlying felony for the felony-firearm conviction. *People v Walker,* 167 Mich App 377, 384-385; 422 NW2d 8 (1988).

V

Defendant also claims that Judge Frank E.

[4] We need not address this issue in light of our reversal of defendant's conviction of felony-firearm. See n 2. However, inasmuch as the issue is likely to recur if defendant is again convicted of felony-firearm on remand, we are addressing the issue in the interest of judicial economy.

Jeanette, who presided over the trial, was not competent under the state constitution to preside because he was over the age of seventy at the time he was assigned to the case. We disagree.

This case was originally assigned to duly elected Macomb Circuit Judge Michael D. Schwartz. Because Judge Schwartz was conducting another trial, the case was assigned by the State Court Administrative Office to Judge Jeanette, who was seventy-nine years old at the time and was retired from the Macomb Circuit Court.

Defendant argues that the age limitation contained in Const 1963, art 6, § 19 should also apply to retired judges who perform specific assignments pursuant to Const 1963, art 6, § 23. We disagree.

Const 1963, art 6, § 19 provides:

> The supreme court, the court of appeals, the circuit court, the probate court and other courts designated as such by the legislature shall be courts of record and each shall have a common seal. Justices and judges of courts of record must be persons who are licensed to practice law in this state. No person shall be *elected* or *appointed* to a judicial office after reaching the age of 70 years. [Emphasis added.]

As originally enacted, Const 1963, art 6, § 23 stated:

> A vacancy in the elective office of a judge of any court of record shall be filled at a general or special election as provided by law. The supreme court may authorize persons who have served as judges and who have retired, to perform judicial duties for the limited period of time from the occurrence of the vacancy until the successor is elected and qualified. Such persons shall be ineligible for election to fill the vacancy.

Under this constitutional provision, a judicial vacancy could only be filled by election. See *Attorney General v Riley,* 417 Mich 119, 132-133; 332 NW2d 353 (1983). Further, this provision limited the Supreme Court, in the event of a vacancy, to "authorize" retired judges to assume temporary judicial duties until an elected successor took office.

Const 1963, art 6, § 23 was amended, effective September 21, 1968, to provide:

> A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law. *The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.* [Emphasis added.]

Unlike the original version, the amended provision does not limit the Supreme Court to authorize a retired judge to perform judicial duties only where a judicial vacancy occurs. Rather, the amended version provides a broader (and different) mandate to the Supreme Court that is not tied to judicial vacancies but rather allows the Court to designate retired judges for limited judicial duties or specific assignments. Under the amended version, such vacancies may only be filled by appointment by the Governor. See also MCL 600.226;

MSA 27A.226, as amended by 1987 PA 225, effective December 28, 1987, which parallels the change in Const 1963, art 6, § 23 to allow the Supreme Court to authorize retired judges to perform judicial duties in the absence of a judicial vacancy. See also MCL 600.557, 600.557a, 600.557b; MSA 27A.557, 27A.557(1); 27A.557(2).

Defendant contends that the words "appoint" and "assign" as used in § 19 and § 23, respectively, are interchangeable. *The Random House College Dictionary, Revised Edition* defines "appoint" to mean "to name or assign to a position, office, or the like; designate: *to appoint a judge to the bench.*" "Assign" is defined as: 1. "to designate, give, or reserve (something) for a specific person or purpose." 2. "to appoint, as to a post or duty: *Assign him to guard duty.*" Although both terms generally mean the same thing, they are normally not used interchangeably. Whereas "appoint" is used to refer to designations to positions or offices, "assign" generally refers to designations to perform certain or specific tasks.

Further, there is support for a difference in meaning between these two terms in light of the fact that neither the original nor the amended version of § 23 permits the Supreme Court to appoint judges. Rather, § 23 only allows the Supreme Court to "authorize" former (elected) judges to perform temporary judicial duties.

Given the varying ways in which one may achieve judicial power in Michigan, there is no compelling reason for the age limitation set forth in § 19 to apply equally to § 23. Section 23 does not contain an age restriction similar to that contained in § 19. Moreover, contrary to defendant's argument, to hold that the age limitation does not apply to § 23 does not render meaningless the age limitation provision in § 19. The two constitutional

provisions address different exercises of judicial power. In addition, the Supreme Court's longstanding practice of designating retired judges for temporary judicial duties or specific assignments argues against an extension of the decision in *Ball v Trenton City Clerk*,[5] 1 Mich App 1; 133 NW2d 218 (1965), to judicial assignments under § 23.

Given the foregoing analysis, we conclude that the age limitation in art 6, § 19 is applicable only to election or appointment to judicial positions under § 19, and not to assignments by the Supreme Court under § 23. Hence, Judge Jeanette was qualified under the constitution to preside over defendant's trial.

VI

In light of our resolution of this matter, we need not address defendant's issues that are unique to his first trial.

Defendant's conviction of possession of a short-barreled shotgun is affirmed. Defendant's convictions of voluntary manslaughter and felony-firearm are reversed. The matter is remanded for a new trial on the charges of voluntary manslaughter and felony-firearm.

[5] In *Ball v Trenton City Clerk*, on which defendant relies, this Court held that this constitutional provision clearly and unambiguously stated that judges of courts of record must be licensed to practice law within the state and that no person shall be *elected* or *appointed* to judicial office after reaching the age of seventy years. This Court further held that the age limitation applies to all judicial positions, including the office of municipal judge.

In re COTTON

Docket No. 165813. Submitted July 7, 1994, at Detroit. Decided October 12, 1994; approved for publication December 27, 1994, at 9:00 A.M.

Robert W. and Patricia A. Franks petitioned the juvenile division of the Wayne County Probate Court for the adoption of Samantha A. Cotton, a minor. The child had been in the foster care of the petitioners until their foster care license had been revoked after they had declined to cooperate with the foster care licensing authorities following an investigation of a complaint that they were guilty of child neglect and abuse. The superintendent of the Michigan Children's Institute, acting on the recommendation of an adoption specialist, denied consent to the adoption. The petitioners moved for an order to compel consent to the adoption. The court, Francis Pitts, J., denied the motion. The petitioners appealed.

The Court of Appeals *held:*

1. Because the matter at issue is a decision by the probate court with respect to a motion, the court was not required to make findings of fact and conclusions of law in compliance with MCR 2.517. In any event, even if the rule did apply, the court's findings were sufficient to comply with the requirements of the court rule.

2. The Legislature, in enacting MCL 710.45; MSA 27.3178(555.45), clearly limited the scope of a probate court's review of the denial of a consent to an adoption to a determination, supported by clear and convincing evidence, whether the withholding of the consent was arbitrary and capricious. Only after a determination that the withholding of the consent was arbitrary and capricious may the court grant any further relief. Accordingly, the probate court properly limited the scope of the evidentiary hearing to the question whether the withholding of consent by the superintendent of the Michigan Children's Institute was arbitrary and capricious.

3. The evidence failed to establish that the withholding of the consent to the adoption was arbitrary and capricious.

4. The probate court properly considered the revocation of the petitioners' foster care license following the investigation of

the allegations of child neglect and abuse as proof of those allegations, in view of the fact that the petitioners failed to proceed with an administrative review of the license revocation.

5. Although it would appear that the evidentiary hearing was held without any unreasonable delay, even if there had been undue delay it is unclear what relief could be granted by the Court of Appeals. Certainly, relief would not take the form of requiring the probate court to grant the adoption.

Affirmed.

John P. Brady, for the petitioners.

Neil A. McQuarrie, Guardian Ad Litem for Samantha A. Cotton.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Richard T. O'Neill,* Assistant Attorney General, for the respondent.

Before: SAWYER, P.J., and WEAVER and S. A. TURNER,* JJ.

PER CURIAM. Petitioners appeal from an order of the probate court denying their motion to compel consent to the adoption of Samantha A. Cotton, a minor child. We affirm.

The child was removed from her natural parents shortly after birth and placed in foster care with petitioners. She remained with petitioners for approximately fifteen months, and petitioners did express an interest in adopting the child during that time. However, the child was not yet then available for adoption, because parental rights had not yet been terminated. While the child remained in foster care with petitioners, protective services received complaints regarding petitioners' alleged neglect or abuse of one or more of their other

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

minor children.[1] Protective services and foster care licensing authorities conducted separate but concurrent investigations into the complaints. Protective services terminated their investigation as being unsubstantiated. The licensing authorities concluded that petitioners were out of compliance with several rules, requested medical and psychiatric evaluations, and required that petitioners attend classes in child discipline.

Petitioners declined to cooperate and were notified of the department's intent to revoke petitioners' foster care license. Petitioners requested an administrative hearing, but later withdrew that request, allowing their foster care license to lapse. As a result, the minor child and one other foster child then in petitioners' household were removed from petitioners' home. Petitioners, nevertheless, pursued their desire to adopt the child. Home studies were conducted, and the adoption specialist who conducted them recommended against granting consent to petitioners to adopt the child. The specialist testified that he recommended withholding consent because of Mrs. Franks' mood swings, Mr. Franks' heart attack, petitioners' failure to comply with requests of licensing authorities, and alleged verbal abuse of the other children. The superintendent of the Michigan Children's Institute, Susan Leahy, denied consent for the adoption. Petitioners then brought the current action in probate court to compel the granting of consent.

Petitioners first argue that the trial court failed to set forth sufficient findings of fact and conclusions of law in its opinion as required by MCR 2.517. We disagree. First, the court technically was

[1] Petitioners were married in 1952 and had six children born of the marriage, all of whom are now adults. Additionally, petitioners have adopted four children, all minors, as well as having served as foster parents for approximately twenty-five years.

not required to make findings of fact and conclusions of law under the court rule, because that obligation does not apply to decisions on motions. MCR 2.517(A)(4). In any event, a trial court's findings are sufficient under MCR 2.517(A) if it appears that the trial court was aware of the factual issues and has applied the law correctly. *People v Vaughn,* 186 Mich App 376, 384; 465 NW2d 365 (1990). To the extent that the court rule does apply to this case, we are satisfied that the trial court's findings complied with the rule.

Petitioners next complain that the probate court improperly limited the scope of the evidentiary hearing to evidence related to the decision of the superintendent of the Michigan Children's Institute. We disagree. First, petitioners fail to identify any specific evidence that the trial court excluded that they believe should have been admitted. In any event, petitioners appear to argue the more general question whether the focus of the hearing should have been the reason why consent to the adoption was withheld rather than opening the hearing to any evidence that might be relevant to the question why the consent should have been granted.

Judicial review of the withholding of consent to an adoption is governed by MCL 710.45; MSA 27.3178(555.45). Under subsection 1, a person who has filed a petition to adopt may move in the court for a determination whether the withholding of consent to adopt is arbitrary and capricious. Under subsection 2, the court may terminate the rights of the representative who must give consent and enter a final order of adoption if the court finds by clear and convincing evidence that the consent was withheld arbitrarily and capriciously. Petitioners suggest that the intent of the Legislature in drafting the statute was not to narrow the review

to the question why consent was withheld, but to "empower the Court to review the collective conscious [sic—consciousness?] of [the Department of Social Services] in order to make the appropriate determination under Section 45." We disagree.

The fact that the Legislature in drafting the statute limited judicial review to a determination whether consent was withheld arbitrarily and capriciously, and further required that such a finding be based upon clear and convincing evidence, clearly indicates that it did not intend to allow the probate court to decide the adoption issue de novo and substitute its judgment for that of the representative of the agency that must consent to the adoption. Rather, the clear and unambiguous language terms of the statute indicate that the decision of the representative of the agency to withhold consent to an adoption must be upheld unless there is clear and convincing evidence that the representative acted arbitrarily and capriciously. Thus, the focus is not whether the representative made the "correct" decision or whether the probate judge would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in making the decision. Accordingly, the hearing under § 45 is not, as petitioners seem to suggest, an opportunity for a petitioner to make a case relative to why the consent should have been granted, but rather is an opportunity to show that the representative acted arbitrarily and capriciously in withholding that consent. It is only after the petitioner has sustained the burden of showing by clear and convincing evidence that the representative acted arbitrarily and capriciously that the proceedings may then proceed to convincing the probate court that it should go ahead and enter a final order of adoption.

Because the initial focus is whether the representative acted arbitrarily and capriciously, the focus of such a hearing is not what reasons existed to authorize the adoption, but the reasons given by the representative for withholding the consent to the adoption. That is, if there exist good reasons why consent should be granted and good reasons why consent should be withheld, it cannot be said that the representative acted arbitrarily and capriciously in withholding that consent even though another individual, such as the probate judge, might have decided the matter in favor of the petitioner. Rather, it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates that the representative was acting in an arbitrary and capricious manner.

For the above reasons, we reject petitioners' argument that the trial court erred in focusing the hearing on the reason for the withholding of the consent.

Petitioners next argue that the probate court improperly assumed that the adverse action taken by the foster care licensing authorities was sufficient proof of the allegations of child abuse or neglect. However, the trial court did not err in its observations in this respect. First, the licensing authorities, in fact, did proceed to revoke petitioners' foster care license for the various reasons stated in the trial court's opinion. Petitioners initially did request an administrative hearing concerning the revocation, but thereafter withdrew the request for that hearing. The fact that the hearing was never held does not change the fact that the licensing authorities did proceed to revoke petitioners' foster care license. Moreover, the record amply supports any conclusion by the trial court that the reason the licensing authorities

moved to revoke the foster care license was in fact true.

Next, petitioners argue that the probate court abused its discretion by denying the relief requested by petitioners and in dismissing the adoption petition. We disagree. First, petitioners point to no authority that it is, in fact, within the probate court's discretion to grant an adoption where consent to that adoption has been withheld by the representative of the agency involved. As discussed above, because Superintendent Leahy did withhold respondent's consent to the adoption, the burden was on petitioners to show by clear and convincing evidence that Superintendent Leahy acted arbitrarily and capriciously in withholding that consent. We are not persuaded that the trial court erred in concluding that petitioners had failed in their burden. We again wish to underscore the fact that the scope of judicial review in this case is not to determine whether Superintendent Leahy reached the "correct" decision. Rather, the limit of judicial review is to determine whether Superintendent Leahy acted arbitrarily and capriciously in reaching her decision. The record reflects that there was, in fact, an investigation of the situation and that Superintendent Leahy's decision to withhold consent was based upon the results of that investigation and the recommendation of the staff members involved. While petitioners may be able to marshal evidence against the conclusions of those investigators, clearly the allegations are not frivolous or fanciful or without factual support. That being the case, it cannot be said that Superintendent Leahy acted arbitrarily and capriciously in withholding respondent's consent to the adoption.

Finally, petitioners argue that the probate court unreasonably delayed the evidentiary hearing in

this matter. We disagree. Petitioners filed their adoption proposal on June 3, 1992, and filed their motion under § 45 to commence these proceedings on October 23, 1992. A hearing was set for February 18, 1993, but that was subsequently adjourned to April 14, 1993, in order to accommodate a substitution of counsel for petitioners. This, in our opinion, does not constitute undue delay, particularly in light of the fact that at least part of the delay is attributable to petitioners themselves and their substitution of counsel. In any event, even if we were persuaded that there was undue delay, we are at a loss to determine what relief we could afford petitioners. Certainly if there were an undue delay, it would not compel the probate court to conclude that the consent to the adoption was arbitrarily and capriciously withheld and obligate the court to grant the adoption petition. Regardless of any delay in these proceedings, the issue remains the same: Was the consent to adopt arbitrarily and capriciously withheld? Any delay in holding the hearing to answer that question does not, however, change the answer to the question. Accordingly, even if we were to agree with petitioners that there was an undue delay, we are unclear on what relief we now could afford petitioners, and certainly any relief would not take the form of requiring the probate court to grant the adoption.

Affirmed.

S. A. TURNER, J., did not participate.

VISCOGLIOSI v MONTGOMERY ELEVATOR COMPANY

Docket No. 164344. Submitted September 15, 1994, at Detroit. Decided September 30, 1994; approved for publication December 27, 1994, at 9:05 A.M.

Anna T. Viscogliosi brought an action in the Wayne Circuit Court against Montgomery Elevator Company and others, seeking damages for personal injury sustained while she was on a moving walkway. The court, Roland L. Olzark, J., granted summary disposition for the defendants. The plaintiff appealed.

The Court of Appeals *held:*

The trial court did not err in determining that there was no duty to warn with respect to the walkway because reasonable minds could not disagree that the walkway, a simple tool, did not place users in obvious danger if used as intended.

Affirmed.

Dib & Fagan, P.C. (by *Michael J. Littleworth*), for Anna T. Viscogliosi.

James R. Fletcher, for Montgomery Elevator Company.

Paskin, Nagi & Baxter, P.C. (by *Mona-Lisa T. Cichosz*), for Northwest Airlines, Inc.

Before: SAWYER, P.J., and FITZGERALD and T. S. EVELAND,* JJ.

PER CURIAM. Plaintiff appeals as of right from the trial court order that granted summary disposition to defendants and dismissed plaintiff's claim for damages for personal injury. We affirm.

The condition that allegedly caused plaintiff's injury was the fact that the moving walkway at

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

Detroit Metropolitan Airport eventually came to an end. That one had to step off at the end of the moving walkway should have been obvious to a reasonable person and was, in fact, known to plaintiff. *Glittenberg v Doughboy Recreational Industries (On Rehearing),* 441 Mich 379, 396; 491 NW2d 208 (1992); *Novotney v Burger King Corp (On Remand),* 198 Mich App 470; 499 NW2d 379 (1993). We agree with the trial court that reasonable minds could not disagree that the walkway, if used as intended, did not place users in obvious danger. Consequently, the walkway was a simple tool, and so there was no duty to warn. See *Raines v Colt Industries, Inc,* 757 F Supp 819, 825 (ED Mich, 1991).

Plaintiff's claim that the walkway was a mechanically complicated machine is unpersuasive because only one of the two *Raines* tests needs to be met in order to qualify the product as a simple tool. Here, the record indicates that the walkway did not place users in obviously dangerous positions. Furthermore, case law involving complicated machinery focuses on the way the product is used rather than on its underlying mechanical parts. See *Adams v Perry Furniture Co (On Remand),* 198 Mich App 1, 12; 497 NW2d 514 (1993); *Coger v Mackinaw Products Co,* 48 Mich App 113, 121-122; 210 NW2d 124 (1973); *Byrnes v Economic Machinery Co,* 41 Mich App 192, 198; 200 NW2d 104 (1972). Because reasonable minds could not differ that a walkway is very easy to use, there was no duty to warn.

The trial court properly dismissed plaintiff's complaint for failure to state a claim and because there was no genuine issue of material fact concerning the existence of a duty to warn. MCR 2.116(C)(8) and (10).

Affirmed.

MILLS v PESETSKY

Docket No. 157395. Submitted September 21, 1994, at Grand Rapids. Decided December 29, 1994, at 9:00 A.M.

William H. Mills brought an action in the Muskegon Circuit Court against Anna Z. Pesetsky, seeking foreclosure on a land contract. No terms of repayment and rate of interest had been set in the $65,000 land contract. However, an addendum adopted by reference in the land contract provided that $45,000 was to be paid in monthly installments of at least $482, with interest at twelve percent a year and the balance and accrued interest due on or before May 1, 1995. The addendum also provided that the remaining $20,000 and interest accrued thereon at eight percent a year, compounded monthly, was to be due on or before May 1, 1995. The defendant had also executed a promissory note in favor of the plaintiff for $20,000, which was to be paid at the same terms as those for the $20,000 under the land contract. The defendant filed a counterclaim alleging that the land contract was usurious and seeking an injunction against the plaintiff's exercise of the acceleration provision of the land contract. The trial court, R. Max Daniels, J., stayed enforcement of the land contract and subsequently declared that the land contract was usurious. The parties then stipulated the amount of the outstanding balance on the land contract and the plaintiff's right to appeal the usury determination. The defendant paid the balance, the promissory note was canceled, and the plaintiff delivered a warranty deed to the defendant. The plaintiff appealed.

The Court of Appeals *held:*

The land contract and the addendum must be read together to determine the terms under which the $65,000 was to have been paid. The total interest on the land contract did not exceed the eleven percent a year maximum rate allowed for land contracts under MCL 438.31c(6); MSA 19.15(1c)(6). Because the land contract was not usurious, the plaintiff is entitled to interest as provided in the addendum until the date of the

REFERENCES

Am Jur 2d, Interest and Usury §§ 166, 167.

See ALR Index under Interest on Money; Usury.

delivery of the warranty deed and to reimbursement of amounts paid as defendant's attorney fees pursuant to MCL 438.32; MSA 19.15(2).

Reversed and remanded.

M.E. KOBZA, J., dissenting, stated that the land contract must be deemed usurious because a usurious rate of interest was effective for a portion of the land contract and that no case law, statute, or public policy supports the majority's determination that a land contract with a usurious rate of interest operative for a portion of the land contract is not illegal if the overall interest rate for the entire land contract is not usurious.

VENDOR AND PURCHASER — LAND CONTRACTS — USURY.

A land contract with a rate of interest that exceeds the maximum allowed by statute for a portion of the land contract is not usurious if the combined interest rates yield an effective rate that does not exceed the statutory maximum (MCL 438.31c[6]; MSA 19.15[1c][6]).

Landman, Latimer, Clink & Robb (by *Edward A. Grafton*), for the plaintiff.

Cunningham Dalman, P.C. (by *Ronald J. Vander Veen*), for the defendant.

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

REILLY, P.J. Plaintiff appeals as of right a circuit court order granting defendant's motion to stay enforcement of the acceleration provisions contained in a land contract between plaintiff and defendant and stating that the land contract was usurious. We reverse and remand for further proceedings.

Pursuant to the land contract, defendant purchased a home from plaintiff for $65,000. The land contract did not provide any terms for the payment of the $65,000, nor did it state the interest to be paid. According to an addendum, which was

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

incorporated by reference in the land contract, $45,000 was to be paid in monthly payments of $482 or more, "including principal and annual interest of 12% of the unpaid balance." The balance of principal and interest on that amount was due on or before May 1, 1995. The remaining $20,000, together with interest of eight percent per annum, compounded monthly, was also due on or before May 1, 1995. Defendant and Andrew L. Fugate, who later became defendant's husband, also executed a promissory note in favor of plaintiff for $20,000. The payment terms of the promissory note were the same as those for the $20,000 referred to in the addendum to the land contract, although the promissory note does not refer to the land contract or the addendum, and vice versa.

Plaintiff initiated this action to foreclose on the land contract after defendant failed to make three payments. Defendant filed an answer and a countercomplaint in which she contended that the interest rate being charged in the land contract was usurious and, therefore, that the interest was forfeited. MCL 438.32; MSA 19.15(2). Defendant also requested injunctive relief pursuant to MCL 438.31c(10); MSA 19.15(1c)(10) to prevent plaintiff from enforcing the acceleration provisions of the land contract. The trial court's order granting defendant's motion to stay enforcement of the land contract stated that the "land contract in question is deemed usurious."

On the basis of the court's ruling, the parties entered into a stipulation. They agreed on the principal balance remaining on the contract. That amount was paid and, pursuant to the agreement, the warranty deed for the property was executed and delivered to the defendant, and the promissory note was canceled. The stipulation preserved plaintiff's right to appeal the usury issue. The trial

court certified its order approving the stipulations and the transaction as a final order for purposes of MCR 7.203(A)(1).

We agree with plaintiff that the land contract and the addendum must be read together in order to determine the terms under which the $65,000 should be paid. We conclude that the total interest on the $65,000 amount of the land contract did not exceed the eleven percent per annum maximum rate allowed for land contracts under MCL 438.31c(6); MSA 19.15(1c)(6).[1] The trial court's ruling, based in part on *Bebee v Grettenberger,* 82 Mich App 416; 266 NW2d 829 (1978), was erroneous. That case is factually distinguishable inasmuch as it concerned a second mortgage that was substituted for a land contract. Second mortgages are treated differently than land contracts and first mortgages, and are subject to a lower maximum interest rate under the statute.

Because the land contract was not usurious, plaintiff is entitled to the interest as provided in the addendum to the land contract. Plaintiff's acceptance of payment, delivery of the warranty deed to defendant, and cancellation of the promissory note ended any further obligation by defendant to make payments under the land contract. However, because defendant agreed by stipulation to accept the deed with the understanding that

[1] Neither party has suggested that the promissory note is evidence of an obligation to pay an additional $20,000 over and above the $65,000 stated in the land contract, and we have no reason to do so. The maximum interest rate that could be charged on the $65,000 land contract was eleven percent per annum, or $7,150. The parties agreed that defendant would be obligated to pay twelve percent per annum on $45,000 of the amount due, or $5,400. They also agreed that the remaining $20,000 of the debt would be paid at the rate of eight percent per annum, compounded monthly, or an effective annual rate of 8.3 percent. Assuming no part of the $20,000 was paid by the end of the first year, $1,659.98 in interest would be owing on that portion of the debt. Interest owed under the two rates equals $7,059.98, or 10.86 percent of $65,000.

plaintiff reserved his rights to pursue the "usury issue" on appeal, defendant is obligated to pay the interest owing on any outstanding balance until the date the deed was delivered. Plaintiff is also entitled to reimbursement for the amounts paid for defendant's attorney fees, which plaintiff paid pursuant to the trial court's ruling that the contract was usurious. MCL 438.32; MSA 19.15(2).

Accordingly, the order granting defendant's motion for a stay and stating that the land contract is usurious is reversed. We remand for determination of the amount of interest owing for the period from the date the land contract was executed to the date the warranty deed was delivered.

Reversed and remanded.

TAYLOR, J., concurred.

M. E. KOBZA, J. *(dissenting).* I oppose the view of the majority. There is no legal citation to support the decision, which takes liberties with the statute that prohibits usurious interest rates. I would affirm the judgment of the trial court.

The facts are simple and not in dispute. They are accurately set forth in the majority opinion. Plaintiff claimed that the trial court ignored the fact that all three contracts emanated from one transaction and that all three should be considered as one. Then, in a fanciful flight, followed by my brother and sister of this Court, plaintiff requests us to "merge" the interest rates of two of the three documents, one rate admitted by all to be usurious, twelve percent, and the other legal, eight percent.

Plaintiff urges this by analogy to other cases integrating different contracts on the basis that the contracts were related, connected, and intertwined. There was nothing in any of those cases

suggesting the path selected here, that if the terms of one contract are illegal and the terms of another legal, we can mesh them to make them both legal. It is this suggestion that distinguishes this case from those cases. Plaintiff's request to merge legal and illegal contract terms to come up with a "legal" rate of interest is not supported by case law, and such merger should not be allowed.

One case, *Bebee v Grettenberger,* 82 Mich App 416; 266 NW2d 829 (1978), spoke of a situation that was factually different but analogous to our situation. A legal contract with an eight percent (legal) rate of interest was replaced with a second mortgage with an eight percent interest rate, *illegal* for second mortgages. The *Bebee* Court held that it was not a lawful rate.

First, the trial court did consider all three contracts. No one disputes the remainder of the purchase price, $20,000, was replaced by the note, although nothing says so in the note, and neither the land contract nor the addendum refers specifically to that fact. Even one of the co-signers, William Fugate, is not a signatory of the land contract or the addendum.

However, to not consider that replacement as a part of the transaction could lead to an inequitable result, that is, a remaining balance due on or before May 1, 1995, as provided in the addendum, and an *additional* $20,000 due under the promissory note. Not only would that lead to an inequitable result, but no one is disputing that the $20,000 obligation was, in fact, the balance of the purchase price, after the first part of the purchase price, with its usurious rate, was paid. Even if we consider all three documents as part of one transaction, we still are not required to merge the interest rates of two of those documents to make the transaction legal. The documents themselves do

not even refer to the process engaged in by plaintiff and the majority.

Second, the trial court not only granted the stay requested by defendant, but it also denied the plaintiff's two motions for summary disposition. Such action is similar in effect to the operation of MCR 2.116(I)(2), where, if the moving party is not entitled to relief but the nonmoving party is, the court may grant the relief to the nonmoving party. Here, the award of relief to defendant, by its mutual exclusivity, resulted in denial of the opposite form of relief. In essence, only one side can be right on the issue.

Third, I subscribe to the reasoning of the trial court in its dispositive opinion, but I would add that it is unnecessary to consider the three documents as separate transactions to reach the same conclusion. Each document should stand the test of a lawful contract with respect to its terms when they are clear and unambiguous and should be given their plain meaning. The plain meaning and effect of the words of the addendum is that, while payments are being made during that period of time, the rate will be usurious. Suppose we follow the course of the majority, in a hypothetical setting, where a default occurs in the first stage. The majority opinion could be used to require a trial court to enforce the usurious rate of the first portion of the contract and terminate the entire transaction, with the potential in a summary proceeding to have the purchase returned or a foreclosure with a deficiency determined, in part, on the basis of an illegal interest rate. In fact, contracts could deliberately set an extremely high usurious rate of say twenty-two percent on the first half of the money, with no interest on the second half. Fraud potentially would be easier, requiring par-

ties to understand the total effect of different rates on different balances paid over different periods.

Fourth, the last point leads to separate consideration of the basic purposes of usury statutes. The Legislature has determined it to be public policy that people not be free to set any rate they want. Nor does the statute allow a rate higher than that allowed on one portion with a lower rate on a different portion. Many people and financial institutions follow the allowed rate without exception. Now, the majority opinion does violence to the spirit and letter of our usury laws, and it represents a singular precedential departure from our body of case law interpreting those statutes, a rogue if you will. Certainty and clarity are required to insure the smooth flow of debt instruments of this nature in the stream of commerce. The waters may become roiled now that exceptions of this nature are allowed.

Fifth, no other case in Michigan history deals specifically with the issue in this case. Any conclusion by this Court, therefore, should attempt to adhere closely to the letter of the statute when interpreting contracts, so as to give the statute its intended effect and accomplish its public purpose. This is especially true when the language of the addendum contract clearly states a usurious rate.

Therefore, I know of no authority to support any conclusion to invalidate the illegal interest provision; no case, statute, or public policy justifies this Court's reformation of the two separately enforceable legal documents involved in the transaction in this case. Each document should contain valid terms for each period to which each rate applies, because the contract terms may require enforcement without reference to the other document. The trial court in its opinion, accurately and correctly stated the law of this state. I would affirm.

PEOPLE v RUTHERFORD

Docket Nos. 144458, 144459. Submitted April 21, 1994, at Grand Rapids. Decided December 29, 1994, at 9:05 A.M. Leave to appeal denied, 448 Mich 909.

Michael W. Rutherford was convicted in the Midland Circuit Court, Paul J. Clulo, J., of breaking and entering an occupied building with intent to commit larceny and conspiracy to commit a breaking and entering. The defendant later pleaded guilty of being a third-offense habitual offender. The convictions resulted from a retrial of the charges after the original trial ended in a mistrial declared by the trial court. In a separate proceeding, the defendant pleaded guilty in the Midland Circuit Court, Paul J. Clulo, J., of resisting and obstructing an officer, the plea being offered in exchange for dismissal of the prior conspiracy conviction. Following sentencing for the separate convictions, the defendant filed separate appeals, and the appeals were consolidated.

The Court of Appeals *held:*

1. In the original trial, the trial court sua sponte declared a mistrial on the basis that the jury's submission of written questions to the court before the case had been sent to the jury indicated that the jury had started its deliberations, necessitating a mistrial. While no double jeopardy considerations occur upon retrial where a mistrial is granted because of manifest necessity, the mere submission of questions by the jury before the case has been sent to the jury is not sufficient to establish that the jury engaged in improper deliberations such as would provide the manifest necessity for declaring a mistrial. Therefore, the mistrial should not have been granted, retrial of those charges violated the defendant's constitutional rights against double jeopardy, and the convictions of breaking and entering and being an habitual offender must be reversed.

2. Because the defendant has already served his minimum sentence for the conviction of resisting and obstructing an officer, the question whether his minimum sentence for that

REFERENCES

Am Jur 2d, Trial §§ 1577, 1708.

See ALR Index under Jury and Jury Trial; Mistrial.

offense violates the principle of proportionality is moot, the Court of Appeals being unable to fashion any remedy at this point.

Affirmed in part and reversed in part.

CORRIGAN, P.J., concurring in part and dissenting in part, agreed that the issue relating to the sentence for resisting and obstructing an officer is moot, but stated that the breaking and entering and habitual offender convictions should be affirmed, because the defendant cannot complain that a mistrial was granted in the first trial in view of the fact that he had sought a mistrial, albeit for a reason other than that relied upon by the trial court in ordering the mistrial.

CRIMINAL LAW — JURY QUESTIONS — MISTRIAL — DOUBLE JEOPARDY — MANIFEST NECESSITY.

A jury's submission to a court of questions relating to evidentiary matters before a case has been sent to the jury is not sufficient to establish that the jury has engaged in improper deliberations such that there exists a manifest necessity that the court sua sponte order a mistrial.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Norman W. Donker,* Prosecuting Attorney, and *Geoffrey K. Rettig,* Assistant Prosecuting Attorney, for the people.

Hubbell & Hubbell, P.C. (by *Daniel A. Hubbell*), for the defendant.

Before: CORRIGAN, P.J., and GRIFFIN and M. W. DRAKE,* JJ.

GRIFFIN, J. Following a jury trial, defendant was convicted of one count of breaking and entering an occupied building with the intent to commit larceny, MCL 750.110; MSA 28.305, and one count of conspiracy to commit a breaking and entering, MCL 750.157a; MSA 28.354(1) and MCL 750.110; MSA 28.305. Defendant later pleaded guilty of being an habitual offender, third offense, MCL

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

769.11; MSA 28.1083. In a separate proceeding, defendant pleaded guilty of resisting and obstructing an officer, MCL 750.479; MSA 28.747, arising out of an altercation with several correction officers that occurred while defendant was in jail awaiting sentencing for his earlier convictions. In exchange for the plea, the prosecutor agreed to the dismissal of defendant's prior conspiracy conviction. The defendant was sentenced to six to fifteen years' imprisonment for the breaking and entering conviction and sixteen to twenty-four months' imprisonment for the resisting and obstructing conviction. Defendant now appeals as of right. We affirm in part and reverse in part.

I

On July 9, 1991, a jury trial was commenced with respect to defendant's breaking and entering and conspiracy charges. On the second day of trial, following testimony by a rebuttal witness, the trial court declared a recess and excused the jury for a "morning break." During the recess, the trial court received a note from the jury room. On the note, four questions were written regarding evidentiary matters. From the handwriting on the note, it appears that the four questions were written by three different jurors. Questions A and B appear to be in the same handwriting. A second juror appears to have written question C, while a third juror appears to have written question D. The following questions were written on the note:

(A) Fingerprints on stereo equipment[?]
(B) If so whose[?]
(C) Who woke up Mr. Rutherford shortly before Officer Brooks spoke to him? Did anyone?
(D) Did anyone ever talk to Angela Slocum's aunt

to confirm the time Angela visited & dropped off her child.

After receiving the note, the trial court immediately summoned the jury to the courtroom and sua sponte declared a mistrial.[1] Without consulting the attorneys or the parties, the trial court ruled that the note evidenced the start of the jury's deliberations, thereby necessitating a mistrial.

Following reinstatement of the charges, defendant moved to dismiss the case on the ground that a retrial would violate his constitutional rights against double jeopardy.[2] Defendant argued that the trial court's declaration of a mistrial was not prompted by manifest necessity. In denying defendant's motion, the trial court ruled that there was no reasonable alternative to granting a mistrial. The lower court concluded that it was clear from the jurors' note that the jury had discussed the case among themselves. Subsequently, defendant was retried and convicted on the charges.

II

Defendant argues on appeal that the trial court's declaration of a mistrial was not prompted by manifest necessity. We agree. Jeopardy attaches in a jury trial once the jury is empaneled

[1] The dissent has raised an issue that is not argued by the parties. Although the dissent is "not persuaded that the judge sua sponte declared a mistrial," *post* at 204 the prosecution concedes otherwise in its counterstatement of facts in its brief: "The court sua sponte declared a mistrial."

Further, although defendant made a motion for a mistrial based upon misconduct by the prosecutor and a Fifth Amendment violation, it is unclear whether a retrial could have occurred had the motion been granted. See *People v Dawson,* 431 Mich 234, 253; 427 NW2d 886 (1988).

[2] Both the United States and Michigan Constitutions prohibit a defendant from being placed twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15.

and sworn. *Critz v Bretz,* 437 US 28, 38; 98 S Ct 2156; 57 L Ed 2d 24 (1978); *People v Brower,* 164 Mich App 242, 245; 416 NW2d 397 (1987), lv den 430 Mich 864 (1988), cert den 488 US 933 (1988). Because double jeopardy protection attaches before the end of a trial, a trial court's declaration sua sponte of a mistrial bars retrial of a defendant unless the mistrial was prompted by manifest necessity. *People v Dawson,* 431 Mich 234, 252; 427 NW2d 886 (1988). Therefore, a trial court should avoid declaring a mistrial sua sponte without first holding a hearing on the record and making explicit findings that no reasonable alternative exists, *People v Benton,* 402 Mich 47, 61; 260 NW2d 77 (1977) (opinion by LEVIN, J.).

Although there is no precise test concerning what constitutes "manifest necessity," it appears to refer to the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible.[3] Accordingly, " 'A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction . . . would have to be reversed on appeal due to an obvious procedural error in the trial.' " *Benton, supra* at 57, quoting *Illinois v*

[3] See, e.g., *Commonwealth v Gains,* 383 Pa Super 208; 556 A2d 870 (1989) (manifest necessity found where one of the juror's exposed jury to prejudicial information concerning the defendant's wife); *Bailey v State,* 521 A2d 1069 (Del, 1987) (manifest necessity found where prosecution witnesses improperly referred to the defendant's prior trial and conviction in the matter); *State v Pierce,* 459 A2d 148 (Me, 1983) (manifest necessity found where the trial court determined in a bench trial that it could not impartially assess the credibility of a prosecution witness); *Fuller v State,* 420 So 2d 650 (Fla App, 1982) (manifest necessity found where juror indicated during trial he could not be impartial and there was no alternate juror to replace him); *People v Harvey,* 121 Mich App 681; 329 NW2d 456 (1982) (manifest necessity found where jury was deadlocked); *People v Hamm,* 79 Mich App 281; 261 NW2d 288 (1977) (manifest necessity found where the defendant was declared incompetent during trial).

Somerville, 410 US 458, 464; 93 S Ct 1066; 35 L Ed 2d 425 (1973).

Absent evidence that the jurors had discussed the case or that defendant was otherwise prejudiced, a defendant's right to an impartial trial is not compromised by written questions submitted by the jury before closing arguments. *People v White,* 144 Mich App 698, 700-701; 376 NW2d 184 (1985); *Clapham v Yanga,* 102 Mich App 47; 300 NW2d 727 (1980); *People v Scott,* 55 Mich App 739; 223 NW2d 330 (1974). In *White,* the trial judge gave the members of the jury preliminary instructions that they were not to discuss the case among themselves until after the conclusion of the trial. 144 Mich App 700. Further, the trial judge also instructed the members of the jury to submit any questions they had, in writing, to the trial judge and not to discuss the case with the other members of the jury. *Id.* Before closing arguments, ten questions were submitted in writing by the jurors. *Id.* In affirming the defendant's conviction, this Court held that an inference that the jury had begun deliberations could not be drawn solely from the evidence of the questions submitted by the jury.

In light of *White,* we are convinced that there was not manifest necessity for the declaration of the mistrial. The actions of the jury would not have required reversal had defendant been convicted at the first trial. Here, the trial judge improperly assumed that the jury had begun its deliberations on the basis of the jurors' questions. Moreover, the trial judge failed to hold a hearing to discuss alternatives or to obtain consent before declaring a mistrial. Under these circumstances, the retrial violated defendant's rights against double jeopardy as guaranteed by the United States and Michigan Constitutions. Defendant's convic-

tions of breaking and entering and being an habitual offender, third offense, are hereby reversed.

III

Defendant next argues that his sixteen- to twenty-four-month sentence for his resisting and obstructing conviction violates the principle of proportionality in *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). However, because defendant has already served his minimum sentence, we decline to review this issue. Where a subsequent event renders it impossible for this Court to fashion a remedy, an issue becomes moot. See, e.g., *People v Greenberg,* 176 Mich App 296, 302; 439 NW2d 336 (1989); *Crawford Co v Secretary of State,* 160 Mich App 88, 93; 408 NW2d 112 (1987).

Affirmed in part and reversed in part.

M. W. DRAKE, J., concurred.

CORRIGAN, P.J., *(concurring in part and dissenting in part).* I join Part III of the majority opinion. I agree that defendant's challenge to his sentence for resisting and obstructing an officer, MCL 750.479; MSA 28.747, is moot because defendant has served that sentence.

I dissent from the holding that defendant's retrial on charges of breaking and entering, MCL 750.110; MSA 28.305, and conspiracy to break and enter, MCL 750.157a; MSA 28.354(1) and MCL 750.110; MSA 28.305, offended the protection against double jeopardy, US Const, Am V; Const 1963, art 1, § 15. First, I am not persuaded that the judge sua sponte declared a mistrial. *Ante* at 201, n 1. Defendant sought a mistrial on grounds of prosecutorial misconduct in the rebuttal argument. The court declared a mistrial on grounds

different from the ground identified by defendant. It found juror misconduct for violation of previous instructions. However, the court ruled *after* the defendant had first moved for a mistrial. A defendant who moves for or consents to a mistrial waives double jeopardy claims, whether or not a manifest necessity for mistrial exists. *People v Benton,* 402 Mich 42; 260 NW2d 77 (1977) (opinion by LEVIN, J.).

The transcript reflects:

> *Mr. Evans:* Yes your Honor, *I am making a motion for mistrial* on the basis of the prosecutor's —at least two questions to Deputy Brooks on—in rebuttal, in the rebuttal portion of the prosecutor's trial case. . . . That's improperly using the defendant's silence against him and the jury should not have heard that and it is—and *on that basis I am moving for a mistrial.*
>
> *Mr. Rettig:* Ah, your Honor, in the first place, in perspective, that was on rebuttal, as I believe you will recall, after Mr. Rutherford stated that he had never seen Mr. Brooks until yesterday at trial. Rebuttal testimony—
>
> *The Court:* I am going to stop you. We have a serious problem. This jury is in here deliberating. They asked a question earlier, could we hear Mrs. Slocum's testimony because she was very inaudible yesterday, and I think she was. The court officer was instructed to tell them not to discuss the case, that we would deal with their questions later.

The trial court later questioned whether the defendant objected to the mistrial and accepted responsibility for the decision to mistry the case, stating it was the court's decision sua sponte. Defendant did not stipulate to mistrial in response to the court's inquiry whether he objected. Despite the court's characterization, I am unwilling to overlook the procedural posture, i.e., that defen-

dant moved for a mistrial. The rationale for the granting of the mistrial was the court's; the motion originated with defendant. Because defendant moved for a mistrial, he waived the double jeopardy protection. Defendant's initial willingness to abort the trial distinguishes this case from *People v White,* 144 Mich App 698, 700-701; 376 NW2d 184 (1985).

For this reason, I would affirm all defendant's convictions.

LEE v AUTO-OWNERS INSURANCE COMPANY (ON REMAND)

Docket No. 175571. Submitted May 27, 1994, at Lansing. Decided December 29, 1994, at 9:10 A.M. Leave to appeal sought.

Blake Lee brought an action in the Ingham Circuit Court against Auto-Owners Insurance Company, his automobile insurer, after the defendant refused his claim for underinsured motorist benefits for an injury he sustained as a passenger in an automobile involved in an accident. The plaintiff, in contravention of the terms of the defendant's policy, had settled a claim against the driver and the driver's insurer and had signed a release that extinguished the defendant's rights of subrogation. The trial court, James R. Giddings, J., denied summary disposition for the defendant, rejecting the defendant's claim of release and striking several affirmative defenses based on the plaintiff's failure to abide by the terms of the defendant's policy. The defendant appealed. The Court of Appeals, MICHAEL J. KELLY, P.J., and MARILYN KELLY and CONNOR, JJ., affirmed the trial court's ruling with regard to the claim of release, but reversed the striking of the affirmative defenses and the denial of the defendant's motion for summary disposition. 201 Mich App 39 (1993). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals as on rehearing granted, directing the Court of Appeals to consider also what parts, if any, of the defendant's policy are affected by MCL 500.2254; MSA 24.12254. 445 Mich 906 (1994).

On remand, the Court of Appeals *held:*

1. The trial court's refusal to make the release effective with respect to the defendant must again be affirmed.

2. The trial court's denial of summary disposition for the defendant must again be reversed.

3. Upon reconsideration, the plaintiff does not have a right to arbitration of his claim against the defendant in light of his failure to comply with the terms of the defendant's policy.

4. MCL 500.2254; MSA 24.12254 has no effect on the defendant's policy.

Affirmed in part and reversed in part.

Jan Paul Benedict, for Blake Lee.

Fraser Trebilcock Davis & Foster, P.C. (by *C. Mark Hoover, Kathleen E. Kane,* and *Brian D. Herrington*), for Auto-Owners Insurance Company.

Willingham & Coté, P.C. (by *Ray Foresman, Anthony S. Kogut,* and *Curtis R. Hadley*), for Abood, Abood & Rheaume, P.C., and David P. Pasichnyk.

ON REMAND

Before: MICHAEL J. KELLY, P.J., and MARILYN KELLY and CONNOR, JJ.

CONNOR, J. This case is before us for the second time. Previously, we affirmed the trial court's dismissal of defendant insurance company's claim of release. We also reversed the trial court's denial of defendant insurance company's motion for summary disposition; we found that the trial court erred in striking the affirmative defenses related to plaintiff's failure to comply with the policy's conditions. We remanded the case to the trial court for entry of an order of dismissal with respect to defendant insurance company. See *Lee v Auto-Owners Ins Co,* 201 Mich App 39, 43; 505 NW2d 866 (1993).

In an order dated May 24, 1994, the Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court as on rehearing granted. The Supreme Court directed this Court to specify what parts of the insurance contract are affected by MCL 500.2254; MSA 24.12254 and explain that relationship in detail. 455 Mich 906 (1994). We again affirm the trial court's refusal to give effect to the release executed by plaintiff. In addition, we again reverse the trial court's denial

of defendant insurance company's motion for summary disposition. However, upon reconsideration, we rule that plaintiff does not have a right to arbitration of his claim against defendant insurance company.

As we indicated in our prior opinion, plaintiff was injured while riding in an automobile that was involved in an accident. Contrary to the terms of plaintiff's underinsured motorist policy, plaintiff sued the driver of the vehicle and subsequently settled with that individual. Part of the settlement included a release that eliminated defendant insurance company's rights of subrogation against the driver. Defendant insurance company was unaware of the lawsuit, settlement, and release.

In our original opinion, we stated that while plaintiff's failure to abide by the conditions of his insurance policy prevents him from suing defendant insurance company, he still has a right to compel arbitration of his claim. We now depart from that conclusion. Upon reconsideration, no public policy argument having been urged by the parties, we conclude that MCL 500.2254; MSA 24.12254 has no effect on the insurance contract. Further, we conclude that plaintiff is not entitled to arbitration in light of the fact that he failed to abide by the terms of his insurance contract; specifically, he initiated a lawsuit and settlement with the third-party tortfeasor without the knowledge or approval of defendant insurance company. Moreover, at no time did plaintiff assert a right to arbitration. Where, as here, the language of the policy is clear and unambiguous, a clause in the insurance contract that does not otherwise violate public policy must be enforced as written. *Raska v Farm Bureau Mutual Ins Co,* 412 Mich 355, 361-362; 314 NW2d 440 (1982).

Affirmed in part and reversed in part.

MURDOCK v HIGGINS

Docket No. 143235. Submitted August 2, 1994, at Grand Rapids. Decided December 29, 1994, at 9:15 A.M. Leave to appeal sought.

Christopher Murdock brought an action in the Kalamazoo Circuit Court against Charles Higgins, Donna Jarvis, and Mark Kelley, alleging that Higgins and Jarvis, supervisors for the Missaukee County Department of Social Services and the Kalamazoo County Department of Social Services, respectively, breached their duties to hire a competent individual and to prevent Kelley, a volunteer services coordinator who transferred from the Missaukee County DSS to the Kalamazoo County DSS, from engaging in acts of misconduct. The action was brought after Kelley sexually assaulted the plaintiff, a volunteer worker for the Kalamazoo County DSS. The jury found no cause of action with regard to Jarvis and that the plaintiff had sustained damages for which Kelley and Higgins were liable. The court, William G. Schma, J., entered a judgment consistent with the jury's verdict and denied Higgins' motions for a new trial or a judgment notwithstanding the verdict. Higgins appealed.

The Court of Appeals *held:*

1. The trial court erred in finding that Higgins had a special duty to protect the plaintiff from the harm inflicted by Kelley. No special relationship existed between the plaintiff and Higgins. The plaintiff neither entrusted himself to the protection and control of Higgins nor lost the ability to protect himself as a result of a special relationship with Higgins.

2. If a special relationship existed between Higgins and Kelley during the course of Kelley's employment in Missaukee County, the special relationship ceased when Kelley transferred

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REFERENCES

Am Jur 2d, Infants § 16; Master and Servant § 121; Negligence §§ 100, 104, 105, 108, 109; Trial §§ 1183, 1184.

Comment Note.—Private person's duty and liability for failure to protect another against criminal attack by third person. 10 ALR3d 619.

Validity, construction, and application of state statute requiring doctor or other person to report child abuse. 73 ALR4th 782.

to Kalamazoo County. The evidence shows that Higgins could not have foreseen the eventual harm done to the plaintiff after Kelley transferred.

3. Although Higgins may have had a social or moral responsibility to convey his suspicions regarding Kelley's sexual preference to Jarvis, Kelley's supervisor in Kalamazoo County, he did not have a legal duty to do so. Higgins' failure to apprise Jarvis of his suspicions regarding Kelley was not gross negligence.

4. The trial court erred in instructing the jury with regard to the Child Protection Law, MCL 722.621 *et seq.*; MSA 25.248(1) *et seq.*, because that law has no application to the facts of this case.

5. The plaintiff presented insufficient evidence to support the finding that Higgins' failure to convey his suspicions to the Kalamazoo County office was a proximate cause of the plaintiff's injuries.

6. The denial of the motions for a new trial and a judgment notwithstanding the verdict must be reversed and the case must be remanded for entry of a judgment for Higgins.

Reversed and remanded.

1. NEGLIGENCE — DUTY — THIRD PARTIES — SPECIAL RELATIONSHIPS.

An individual generally has no duty to protect another who is endangered by a third person's conduct; however, a duty of reasonable care may arise where the individual stands in a special relationship with either the victim or the third party; the determination whether a duty-imposing special relationship exists in a particular case involves ascertaining whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control over self-protection.

2. MASTER AND SERVANT — DUTY TO DISCLOSE INFORMATION — FORMER EMPLOYEES — CONDITIONAL PRIVILEGE TO DIVULGE INFORMATION.

Michigan law recognizes an employer's qualified privilege to divulge information about a former employee to a prospective employer; the conditional privilege is not a legal obligation requiring employers to disclose adverse information concerning a former employee but, rather, is an imperfect obligation of a moral or social character.

3. TRIAL — JURY INSTRUCTIONS.

It is error for a trial court to instruct a jury with regard to an issue that is not sustained by the evidence or established by the pleadings.

4. STATUTES — CHILD PROTECTION ACT — CHILD ABUSE — DUTY TO REPORT.

The section of the Child Protection Act regarding the duty of certain individuals to report suspected child abuse or neglect applies only to persons responsible for a child's health or welfare who know of abuse of that specific child (MCL 722.623[1]; MSA 25.248[3][1]).

Ford & Kriekard, P.C. (by *Michael C. Bingen*), for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Thomas R. Wheeker,* Assistant Attorney General, for Charles Higgins.

Before: HOOD, P.J., and MARILYN KELLY and J. L. MARTLEW,* JJ.

PER CURIAM. Plaintiff, then eighteen years old, was sexually assaulted by his supervisor, Mark Kelley, while plaintiff was serving as a volunteer at the Kalamazoo County Department of Social Services. Plaintiff brought suit alleging that defendants breached their duties to hire a competent individual and prevent Kelley from engaging in acts of misconduct. The jury returned a verdict in favor of plaintiff against defendants Mark Kelley and Charles Higgins, but found no cause of action with regard to defendant Donna Jarvis. Damages in the amount of $120,774 were awarded to plaintiff. The trial court denied defendant Higgins' (hereafter defendant) motions for a new trial and a judgment notwithstanding the verdict. Defendant appeals as of right and we reverse.

Defendant was the Director of the Missaukee County Department of Social Services and Kelley's supervisor. He hired Kelley as the volunteer services coordinator for that county in 1985. In 1986,

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

Higgins received reports that Kelley had been seen in a local park in the company of young men. Higgins, who suspected that Kelley might be homosexual, had several discussions with Kelley regarding the matter. During one of the conversations, Kelley told Higgins that he was not sure that all of his "contacts" were over eighteen years of age. Kelley assured Higgins that he would be more discreet. According to Higgins, Kelley never told him that there had been any sexual involvement with the young men. By way of follow up, Higgins asked the local sheriff to investigate the activities in the park. The Missaukee County Sheriff informed Higgins that he had no reported or noted acts by Kelley. Eventually, Higgins suggested that Kelley consider transferring to a larger community that might be more tolerant of his sexual orientation.

Later in 1986, Kelley transferred to the Kalamazoo County Department of Social Services as a volunteer services coordinator. Unlike his job responsibilities in Missaukee County, Kelley's job in Kalamazoo County involved some contact with children. Higgins claims to have attempted to contact Kelley's new supervisor, Donna Jarvis, to convey his suspicions about Kelley. However, the record is clear that Jarvis was never so informed. Plaintiff, who was performing volunteer work at the agency as part of a juvenile court order to provide community service, was "befriended" by Kelley. Kelley was plaintiff's supervisor.

On the occasion in question, Kelley took plaintiff out for dinner. After dinner, plaintiff went with Kelley to Kelley's residence; Kelley and plaintiff shared two marijuana cigarettes. During the visit, Kelley stroked plaintiff's leg, licked his ear, called him "baby," and repeatedly attempted to push him onto the bed. Attempting to buy time, plaintiff

suggested that they go visit the hot tubs, a suggestion that Kelley had made earlier in the evening. While driving to the hot tubs, Kelley told plaintiff that he had everything they needed in his little black bag, including soap, condoms, and petroleum jelly. Upon arriving at the hot tubs, plaintiff ran away to a friend's home and the police were summoned.

Defendant first claims that the trial court erred as a matter of law in finding that he had a special duty to protect plaintiff from the harm inflicted by Kelley and that he had a duty to transmit adverse employment information concerning Kelley to the Kalamazoo County Department of Social Services. More specifically, Higgins contends that he was a public official whose duties were owed to the public at large and not to any particular individual. We agree that the trial court erred in finding that Higgins had a special duty to protect plaintiff from the harm inflicted by Kelley.

In a negligence action, the question whether a duty exists is one of law to be decided by the trial court. *Schneider v Nectarine Ballroom, Inc (On Remand),* 204 Mich App 1, 4; 514 NW2d 486 (1994). Generally, an individual has no duty to protect another who is endangered by a third person's conduct. *Marcelletti v Bathani,* 198 Mich App 655, 664; 500 NW2d 124 (1993). The duty to protect others against harm from third persons is based on a relationship between the parties. *Id.* A duty of reasonable care may arise where one stands in a special relationship with either the victim or the person causing the injury. *Id.* The requisite special relationship must exist between the defendant and the victim or the defendant and the third party. *Id.* Michigan courts have defined as protected third parties only "those persons

readily identifiable as foreseeably endangered." *Id.* at 665.

The determination whether a duty-imposing special relationship exists in a particular case involves ascertaining whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself. *Dykema v Gus Macker Enterprises, Inc,* 196 Mich App 6, 9; 492 NW2d 472 (1992). In order to determine whether a "special relationship" giving rise to a legal duty to act exists in a particular case, this Court has held that it is necessary to

> "balance the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, and the relationship between the parties. . . . Other factors which may give rise to a duty include the foreseeability of the [harm], the defendant's ability to comply with the proposed duty, the victim's inability to protect himself from the [harm], the costs of providing protection, and whether the plaintiff had bestowed some economic benefit on the defendant." [*Id.*, quoting *Roberts v Pinkins,* 171 Mich App 648, 652-653; 430 NW2d 808 (1988).]

The thrust of plaintiff's argument is that if Higgins had conveyed the information regarding Kelley's sexuality to Jarvis before Kelley's transfer to Kalamazoo County, the incident could have or would have been avoided. We first note that there is no indication in the record that a "special relationship" existed between plaintiff and defendant Higgins. To the contrary, Higgins was a supervisor in the Missaukee County Department of Social Services, while plaintiff was a DSS volunteer in Kalamazoo County. Thus, it appears that Higgins did not even know plaintiff. Therefore, no "special relationship" existed between Higgins and

plaintiff because plaintiff had not entrusted himself to the protection and control of Higgins. *Gus Macker, supra.* Further, there is no indication that, pursuant to his nonrelationship with Higgins, plaintiff lost the ability to protect himself. *Gus Macker, supra.*

Similarly, Higgins' relationship with Kelley ended when Kelley transferred from the Missaukee County office to Kalamazoo County. Therefore, even if the relationship between Higgins and Kelley during the course of Kelley's employment in Missaukee County could be deemed as "special," this designation ceased when Kelley transferred to Kalamazoo County. Further, when Kelley worked at the Missaukee County office, his job responsibilities did not require him to come in contact with young males. Therefore, Higgins had no reasonable basis to foresee that Kelley would harm plaintiff or any other volunteer in another county's Department of Social Services because Kelley had not done so while in Missaukee County. The fact that Higgins could not have foreseen the eventual harm done to plaintiff in this case is especially true given the fact that Higgins did not even know plaintiff.

Again, the record reveals that, although Higgins had generalized suspicions regarding Kelley's sexual preference, he had no reason to suspect that Kelley posed a threat to persons in the care or employ of the DSS. Though Higgins may have had reason to believe that Kelley might be an active homosexual in the community at large, he never had reason to suspect that Kelley sought to do the same at the DSS. To his credit, Higgins did attempt to ascertain through the Missaukee County Sheriff's Department whether Kelley had made "contacts" with minors in a public park. However, the

sheriff's department informed Higgins that it had no such information relating to Kelley.

Plaintiff urges this Court to uphold the trial court's determination that Higgins had a duty to inform Kelley's new supervisor about suspicions and unsubstantiated innuendoes relating to Kelley's conduct *outside of and unrelated to the performance of his duties at the* DSS. As stated in *Moore v St Joseph Nursing Home, Inc,* 184 Mich App 766, 768-769; 459 NW2d 100 (1990):

> We agree that Michigan law recognizes an employer's qualified privilege to divulge information about a former employee to a prospective employer. *There is, however, nothing about the conditional privilege which magically transposes it into a legal obligation requiring employers to disclose adverse information concerning a former employee.* Rather, it is quite clear that in Michigan a former employer's duty to release information about a past employee is an imperfect obligation of a moral or social character.
>
> *There is a great societal interest in insuring that employment records are kept confidential.* It is all too easy to envision a career destroyed by malefic information released by a disgruntled former employer. *To expand the qualified privilege presently enjoyed by employers to require the release of deleterious information without fear of a defamation suit represents a major change in the law.* We note that, at present, Michigan has no less than nine statutory provisions addressing libel and slander. In light of this clearly demonstrated legislative intent to regulate defamation law, *we feel the position urged upon this Court by plaintiffs is the type of substantive change in the law which is best left to the Legislature.* [Emphasis added, citations omitted.]

Having reviewed the record de novo we conclude that the trial court erred as a matter of law in

finding that defendant Higgins had a special duty to protect plaintiff from the harm inflicted by Kelley. *In re Lafayette Towers,* 200 Mich App 269, 273; 503 NW2d 740 (1993); *Marcelletti, supra; Gus Macker, supra; Moore, supra.* Though Higgins arguably may have had a social or moral responsibility to convey his suspicions to Jarvis, *Moore* makes it clear that he did not have a legal duty to do so. Finally, contrary to plaintiff's position, we note that defendant's conduct in failing to apprise Jarvis of his suspicions regarding Kelley's sexuality does not amount to gross negligence as set forth in *Patterson v Kleiman,* 199 Mich App 191; 500 NW2d 761 (1993).

Defendant next argues that the trial court erred in instructing the jury with regard to the Child Protection Law, MCL 722.621 *et seq.*; MSA 25.248(1) *et seq.* We agree. It is error to give a jury instruction on an issue that is not sustained by the evidence or made out by the pleadings. *Mills v White Castle Systems, Inc,* 199 Mich App 588, 591; 502 NW2d 331 (1993). When this case arose, the Child Protection Law provided in relevant part:

> A physician, . . . social worker, social work technician . . . who has reasonable cause to suspect child abuse or neglect immediately, by telephone or otherwise, shall make an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department. . . . [MCL 722.623(1); MSA 25.248(3)(1).]

The plain language of the above-quoted provision makes it clear that the Child Protection Law applies to the known abuse of a specific child and requires that a person responsible for the child's health or welfare who has knowledge of such abuse report it.

It is clear that defendant Higgins was not a

person responsible for the care or welfare of plaintiff because plaintiff was unknown to him. Additionally, Higgins had no names of specific children with whom Kelley allegedly met in the park. Most importantly, plaintiff was not the child whom the statute was designed to protect. *Marcelletti, supra.* This Court held in *Marcelletti* that the Legislature intended that liability under the Child Protection Law be limited to claims for damages by an identified abused child about whom no report was made. *Id.* at 659. As stated above, plaintiff was not a child that Higgins thought Kelley might have abused. Accordingly, because the Child Protection Law had no application to the facts of this case, the trial court erred in providing the jury instruction. *Mills, supra.*

Finally, defendant argues that plaintiff presented insufficient evidence to find that he was a proximate cause of plaintiff's injuries. Again, we agree. From the record, it is clear that Higgins was possessed with at best speculative information concerning Kelley's sexual orientation. The Missaukee County Sheriff could not substantiate Higgins' concerns. As is the case in the majority of employment contexts, Kelley could not have been disciplined on the basis of unsubstantiated rumors. In fact, a DSS labor relations representative testified that the DSS could not take any adverse action against an employee who, like Kelley, was seen with teenage boys in a public place. To the contrary, the representative testified that in the screening process the DSS can consider information that an applicant had homosexual contact with a minor only if the information was related to the applicant's job activity. Additionally, the record does not support plaintiff's contention that Higgins could have learned from Kelley's former employer that Kelley preferred sexual relations with young

boys. Kelley's former employer testified that the employer only would have divulged public information such as Kelley's name, years of service, current relationship to the employer, and whether Kelley voluntarily resigned.

Under these circumstances, Higgins lacked sufficient reliable information to take those steps deemed appropriate by plaintiff—namely, to warn the Kalamazoo County office that Kelley favored sex with young boys. Given the limits of Higgins' authority and DSS policy, it is clear that Higgins could not have taken meaningful and effective actions to prevent Kelley's abuse of plaintiff. Accordingly, Higgins' failure to convey his suspicions to the Kalamazoo County office was not the proximate cause of plaintiff's injuries.

For these reasons, the trial court's denial of defendant's motion for a new trial and a judgment notwithstanding the verdict is reversed and this cause is remanded for entry of a judgment in favor of defendant. We do not retain jurisdiction.

PEOPLE v BENDER

Docket No. 162477. Submitted February 17, 1994, at Lansing. Decided December 29, 1994, at 9:20 A.M.

Jamieson T. Bender and Scott A. Zeigler were each charged in the Oakland Circuit Court with three counts of breaking and entering. The court, John N. O'Brien, J., suppressed evidence of the defendants' postarrest statements to the police because the police failed to inform the defendants before taking their statements that counsel retained for each of them had attempted to contact them. The prosecution appealed by leave granted.

The Court of Appeals *held:*

1. Although the trial court failed to make specific factual findings regarding the voluntariness of the defendants' statements, the record supports the trial court's finding that, under the totality of the circumstances, the statements were made freely and voluntarily.

2. The right against compelled self-incrimination, as protected by Const 1963, art 1, § 17, includes the right to remain silent and the right to be represented by an attorney. Waiver of these rights must be knowing, intelligent, and voluntary. A suspect's knowledge of the presence of retained counsel is relevant to the voluntariness of a waiver. Failure by the police to inform a suspect of the presence of retained counsel and attempts by counsel to contact the suspect renders any subsequent waiver of the right to remain silent and the right to counsel unknowing, unintelligent, and involuntary.

Affirmed.

CRIMINAL LAW — RIGHT AGAINST SELF-INCRIMINATION — RIGHT TO COUNSEL.

The right against compelled self-incrimination includes the right

REFERENCES

Am Jur 2d, Criminal Law §§ 703, 710, 737, 759, 761, 937, 941, 970, 989, 990.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney. 5 ALR3d 1360.

Denial of, or interference with, accused's right to have attorney initially contact accused. 18 ALR4th 669.

to be informed by the police of attempted contacts by retained counsel; failure by the police to so inform a suspect renders invalid any subsequent waiver of the right to remain silent and the right to counsel (Const 1963, art 1, § 17).

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

Condit, McGarry & Schloff, P.C. (by *Alexander B. McGarry*), for Jamieson T. Bender.

Benjamin & Goldfine (by *Allan Z. Goldfine*), for Scott A. Zeigler.

Before: WEAVER, P.J., and JANSEN and E. SOSNICK,* JJ.

JANSEN, J. The people appeal by leave granted from a March 1, 1993, order of the Oakland Circuit Court suppressing defendants' postarrest statements. We affirm.

I

Following a preliminary examination in September 1991, defendants were bound over to the circuit court for trial on three counts of breaking and entering a building, MCL 750.110; MSA 28.305. Defendants moved to have their postarrest statements made to Bloomfield Township police suppressed on the grounds that the statements were involuntary and were taken in violation of their right to counsel. Following an evidentiary hearing, the trial court found that the statements had been voluntarily made, but that the statements must be

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

suppressed because defendants had not been apprised that their parents had retained attorneys for them and that the attorneys had contacted the police station before defendants waived their right to counsel. The people appeal by leave granted. We affirm the trial court's decision, but for further reasons as explained below.

The facts of this case are taken from the evidentiary hearing held on three separate days. The incident in question occurred during the early morning hours of August 2, 1991. Both defendants had been drinking beer during the evening and they allegedly had taken bicycles from two separate residences and removed a sink from a house that was under construction. Bloomfield Township Police Officer Steven Currie was dispatched at 3:29 A.M. and arrived at the scene of one of the breaking and enterings at 3:33 A.M. Shortly thereafter, a canine unit arrived and defendant Bender was apprehended by a canine handler. Bender was arrested at approximately 4:00 A.M. and was placed in a holding cell at approximately 4:30 A.M.

Sometime between 6:30 A.M. and 7:30 A.M., Currie and Sergeant DeWolfe went to defendant Zeigler's house. Zeigler allowed the officers into the house. Zeigler told the officers that he had loaned his car to Bender, that he knew where his car was located, that he and Bender had taken a couple of bicycles, and that they had taken a sink from a house that was under construction. After Zeigler agreed to show (and did show) Currie where the bicycles and sink were, Zeigler was arrested.

Currie stated that he took Zeigler into custody at approximately 8:00 A.M. or 8:30 A.M. However, Zeigler's mother, Ruth, who was at the house at the time that Zeigler was arrested, stated that she had called attorney Allan Goldfine at 6:45 A.M. Goldfine had told her to go to the police station

and tell Zeigler not to talk to anyone until he first talked to Goldfine. She went to the police station at 7:15 A.M., talked to Currie, and asked to see Zeigler. She also told Currie that she had a message for Zeigler from their lawyer. Currie, however, told Ruth that she could not see her son, that she could not get a message to him, and that she could not stay and talk to the detective. Currie recalled that he spoke to an older woman in the station and that she identified herself as one of the defendants' mothers. Currie stated that she wanted to see her son, but he told her that he was with the detectives and she could see them when they were finished.

Bender's mother, Kathleen, was called by a police officer concerning Bender's arrest at about 5:30 A.M. She then contacted Bender's father, Phillip, who was residing in Iowa at the time. Phillip called the police station at 7:00 A.M. and asked to speak with his son. Phillip told the police officer that he was going to get counsel for his son immediately. Phillip called attorney Elizabeth Pezzetti after speaking with the police officer. Pezzetti agreed to represent Bender.

Pezzetti called the police station at approximately 9:00 A.M. and asked to speak with Bender and the detective in charge as soon as possible. The officer who answered the telephone told Pezzetti that Bender's paperwork had not yet come up, that Bender was being held, and that she would let the detective know that Pezzetti wished to speak with the detective and Bender. Pezzetti again called the station at 10:00 A.M. because her call was not returned. It was not until 11:00 or 11:30 A.M. that Detective Ronald Genereaux called Pezzetti. Genereaux stated that he had talked to both defendants, that the defendants had been cooperative, and that the defendants would be

released without bond to their parents. Pezzetti stated that had she been given the opportunity to speak to Bender, she would have told him not to talk to anyone and that she would be at the station.

Genereaux was the interrogating officer. Zeigler was interrogated first. Zeigler signed his *Miranda*[1] warnings form and read it aloud at 9:08 A.M. Zeigler gave his statement, and the interview lasted about thirty to forty minutes. Bender was interviewed at 9:50 A.M. and likewise signed his *Miranda* warnings form and read it aloud. Bender's statement also lasted between thirty and forty minutes.

It is undisputed that Bender was never informed by the police that Pezzetti had attempted to call him and had been retained for him. It is also undisputed that Zeigler's mother was not permitted to see her son and that no message was given to Zeigler that she had retained an attorney for him. Both defendants stated that they understood the *Miranda* warnings form, and neither requested counsel before or during the interviews.

Both defendants testified regarding their statements. Zeigler was twenty years old, had no prior contacts with the police, and was attending Eastern Michigan University and Schoolcraft College to become a teacher. He had been drinking beer that night, but Genereaux stated that he showed no signs of intoxication. Zeigler stated that no one offered him the opportunity to make a telephone call and he did not ask if he could make a call. He was not offered food or water, and he had been awake continuously for approximately twenty-six hours. He was not told that there was a message for him from his attorney. Zeigler did state that he

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

understood his *Miranda* rights form and he understood that if he wanted an attorney, one could have been retained or appointed for him.

Bender was also twenty years old and had no prior contacts with the police. He was attending the University of Michigan-Dearborn. He had also been drinking that night. Bender was not given food or water and had not slept for about twenty-five hours. Bender was told, when he was being fingerprinted, that he could make a telephone call later, but he never made a telephone call. Bender understood the *Miranda* rights form when he read it, but he was unsure if he had to remain in a holding cell if he requested an attorney. Bender was never informed that an attorney had attempted to contact him at the police station.

On the basis of this evidence, the trial court ruled that the conduct of the police had not been reprehensible and that each defendant had made a voluntary statement with full knowledge of his *Miranda* rights. However, the trial court ruled that the post-arrest statements had to be suppressed because the defendants were not informed that counsel had been retained for them before the statements were given and that the statements were, therefore, made without a knowing waiver of the right to counsel. The trial court made this ruling on the basis of *People v Wright,* 441 Mich 140; 490 NW2d 351 (1992).

II

The people first argue that the statements were voluntarily made. The issue of voluntariness is a question of law for the court's determination. *People v Walker (On Rehearing),* 374 Mich 331, 338; 132 NW2d 87 (1965). The prosecution has the burden of proving voluntariness by a preponder-

ance of the evidence. *People v Etheridge,* 196 Mich App 43, 57; 492 NW2d 490 (1992). In reviewing the trial court's findings, this Court examines the entire record and makes an independent determination of voluntariness. However, this Court gives deference to the trial court's superior ability to judge the credibility of the witnesses, and will not reverse the trial court's factual findings unless they are clearly erroneous. *Id.*

This issue merits little consideration because the trial court ruled that defendants made voluntary statements with full knowledge of their *Miranda* rights. Although the trial court failed to make specific factual findings regarding voluntariness, the record supports the trial court's finding that, under the totality of the circumstances, the statements were made freely and voluntarily. *People v Cipriano,* 431 Mich 315, 334; 429 NW2d 781 (1988).

III

A

The real issue facing us is whether the trial court erred in finding that defendants did not knowingly waive their right to counsel because they were not informed by the police that attorneys had been retained for them and the attorneys had contacted the police before they gave their statements. We conclude that the trial court did not err in so ruling.

This case implicates the rights afforded by the Fifth Amendment to the United States Constitution and by Const 1963, art 1, § 17. A defendant's rights under these provisions include the right to remain silent and the right to be represented by an attorney. However, a defendant may waive these rights provided that the waiver is made voluntarily, knowingly, and intelligently. *Miranda*

v Arizona, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). It is clear that the trial court's ruling would have been in error under federal law. The United States Supreme Court has held that a defendant's knowledge of the presence of an attorney retained for the defendant is irrelevant to the voluntariness of the waiver of the right to counsel under the Fifth Amendment. *Moran v Burbine,* 475 US 412; 106 S Ct 1135; 89 L Ed 2d 410 (1986).

The question whether a defendant can knowingly and voluntarily waive his right to counsel, as guaranteed by the Michigan Constitution, without the knowledge that an attorney has been retained for him and is attempting to contact him has not been definitively decided. In *Wright,* four justices concurred in suppressing the defendant's statement, but gave three separate legal bases for doing so. Thus, the plurality decision in *Wright* is not an authoritative interpretation under the doctrine of stare decisis. *Negri v Slotkin,* 397 Mich 105, 109-110; 244 NW2d 98 (1976).

Recently, this Court, GRIBBS, P.J., and SHEPHERD and P. E. DEEGAN, JJ., considered the issue in *People v Brown,* 206 Mich App 535; 522 NW2d 888 (1994). Judge DEEGAN ruled that the police officers' failure to inform the defendant 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. However, *Brown* is not binding pursuant to Administrative Order No. 1994-4 because Judge GRIBBS concurred with Judge DEEGAN in result only and Judge SHEPHERD dissented. Administrative Order 1994-4 makes binding upon this Court "the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990." *Brown* is not binding because a majority of judges reached a decision but did not agree on the under-

lying reasoning, and no point of law is established by the decision. *Fogarty v Dep't of Transportation,* 200 Mich App 572, 574-575; 504 NW2d 710 (1993).

We agree with the analyses employed by Justice MALLETT in *Wright* and Judge SHEPHERD in *Brown* and we adopt those analyses in this case. Therefore, we hold that Const 1963, art 1, § 17 may and should be extended to require the police to disclose counsel's attempts to contact the suspect. See *Wright, supra,* p 154; *Brown, supra,* p 551 (SHEPHERD, J., dissenting). The failure of the police to notify defendants of counsel's attempts to contact defendants rendered defendant's waiver of their *Miranda* rights unknowing and involuntary, and the statements were, therefore, properly suppressed by the trial court.

B

A number of other jurisdictions have also recognized that it is necessary for a suspect to be informed of an attorney's attempted contacts. *State v Haynes,* 288 Or 59; 602 P2d 272 (1979); *Wisconsin v Middleton,* 135 Wis App 2d 297; 399 NW2d 917 (1986); *Haliburton v State,* 514 So 2d 1088 (Fla, 1987); *Roeder v State,* 768 SW2d 745 (Tex App, 1988); *State v Stoddard,* 206 Conn 157; 537 A2d 446 (1988); *Bryan v Delaware,* 571 A2d 170 (Del, 1990); *People v McCauley,* 228 Ill App 3d; 595 NE2d 583 (1992); *State v Reed,* 133 NJ 237; 627 A2d 630 (1993). "[S]tates are free to adopt more protective standards under state law." *Wright, supra,* p 154.

As Justice MALLETT stressed, it is crucial that a defendant make a knowing, intelligent, as well as a voluntary, choice regarding the waiver of counsel. *Wright, supra,* p 151. Thus, the "critical inquiry is whether the information withheld by the

police would have changed the defendant's appraisal and understanding of the circumstances of the waiver." *Id.* Contrary to Judge DEEGAN's assertion that requiring the police to inform the suspect of an attorney's attempted contact "would create in Michigan a Gordian knot concerning *Miranda* rights," *Brown, supra,* p 539, the courts would focus on this "critical inquiry" and look to other relevant factors such as the relationship between the attorney and the defendant, the nature of counsel's request, the conduct of the suspect, and the extent to which the police had reasonable notice of counsel's request. *Wright, supra,* pp 151-152.

IV

Applying those factors to this case, we find that defendant Bender's father, Phillip, telephoned the police station at approximately 7:00 A.M. and informed an officer that he was going to retain an attorney for his son. Phillip then telephoned attorney Elizabeth Pezzetti and she agreed to represent Bender. Pezzetti telephoned the police station at approximately 9:00 A.M. and said that she wished to speak with Bender and the detective in charge. Her telephone call was not returned and she did not speak with Bender. She again called the police station at 10:00 A.M. and asked to speak with Bender and the detective in charge, but she was only told that the detective would call her back. It was not until 11:00 or 11:30 A.M. that Genereaux called Pezzetti. This was well after the completion of the interrogation, which began at 9:50 A.M. Therefore, the police had ample notice that an attorney had been retained for Bender and the attorney had specifically asked to speak with the suspect.

Additionally, Bender stated that he requested to make a telephone call when he was being fingerprinted and that the request was denied and he was told that he could make a call later. It is undisputed that Bender was never informed by the police that an attorney had been retained for him and that the attorney had attempted to contact him at the police station. Bender testified that had Pezzetti contacted him, he would have followed her advice. Thus, under Justice MALLETT's analysis, had Bender been informed that an attorney had been retained for him and attempted to contact him, he would not have waived his right to counsel or the right to remain silent. *Wright, supra,* pp 153-154.

Regarding Zeigler, his mother, Ruth, called attorney Allan Goldfine at approximately 6:45 A.M., shortly after Zeigler was taken by the police. Goldfine told Ruth to go to the station and tell Zeigler not to speak with anyone until he first spoke with Goldfine. Ruth went to the police station at 7:15 A.M. and spoke with Officer Currie. She asked to see Zeigler and she told Currie that she had a message for Zeigler from his attorney. Currie told Ruth that she could not see Zeigler, that she could not get a message to him, and that she could not stay at the station and talk to the detective. Thus, the police had adequate notice of the fact that an attorney had been retained for Zeigler and that there had been a message for Zeigler from the attorney.

It is undisputed that the police did not inform Zeigler that an attorney had been retained for him and that his mother had been at the station with a message for him. Zeigler testified that had he received his attorney's message, he would have heeded it. Under these circumstances, we must again conclude that had Zeigler been informed

that an attorney had been retained for him and had a message for him, he would not have waived his right to counsel or the right to remain silent. *Id.*

V

Accordingly, we extend the rights afforded under Const 1963, art 1, § 17 to include information of retained counsel's efforts to contact a suspect. We believe that such a protection is necessary to allow suspects in custody to make a knowing, intelligent, and voluntary waiver of their right to counsel and right to remain silent. Therefore, the trial court did not err in suppressing defendants' postarrest statements where the police failed to inform them that counsel had been retained and of counsel's attempts to contact them.

Affirmed.

WEAVER, P.J., did not participate.

PEOPLE v BRAKE

Docket No. 160075. Submitted May 18, 1994, at Detroit. Decided December 29, 1994, at 9:25 A.M.

John H. Brake pleaded guilty in the Oakland Circuit Court, Steven N. Andrews, J., of delivery of 50 or more but less than 225 grams of a mixture containing cocaine and possession with intent to deliver marijuana, reserving the right to appeal the court's rulings concerning pretrial motions. The defendant was sentenced to prison terms of ten to twenty years and one to four years respectively. The defendant had moved to suppress evidence seized during the search of his residence on the basis that the search warrant was defective. The hearing of the motion to suppress established that an express mail package arrived at the Detroit airmail facility without an address label on it. A postal employee at the airmail facility opened the package to look for information concerning the addressee, found no such information, but noticed that the two boxes designed to hold computer floppy disks that were contained in the package emitted a white powdery substance. A postal inspector secured a federal search warrant, opened the boxes, and found eighty-six grams of cocaine. An address label addressed to the defendant arrived at the post office in Highland. The Highland postmaster told the postal inspector that a person purporting to be John Brake had called to inquire about an express mail package that was to be delivered to him, had given the same information that was found on the loose label, and had left a telephone number where he could be reached. The postal inspector had the postmaster call the telephone number, explain to the person who answered the phone that the label had been found, and ask the person to describe the contents of the package. The person described the contents of the package as being two boxes of computer floppy disks. The postal inspector sought a warrant to search the defendant's residence for drugs, drug paraphernalia, weapons, records, and drug proceeds, stating that he had probable cause to believe

REFERENCES

Am Jur 2d, Searches and Seizures §§ 118, 123, 125.

See ALR Index under Search and Seizure.

that the listed items were then at the defendant's residence and that arrangements had been made to deliver the package containing the cocaine to the defendant at his residence. The magistrate issued a search warrant, the package was delivered to the defendant at his residence, the defendant was arrested, and the residence was searched, yielding the evidence that the defendant sought to suppress. The defendant appealed.

The Court of Appeals *held:*

1. Because the question whether the original opening of the package by the postal employee at the airmail facility was a violation of the defendant's right against unreasonable searches was not ruled upon by the trial court, it was not preserved for appellate review.

2. It is unnecessary to decide whether Michigan recognizes anticipatory warrants, i.e., warrants issued before the events necessary to establish probable cause have occurred, because probable cause to search the defendant's residence already existed at the time the warrant was issued. Because the connection between the defendant, his residence, and the cocaine was established by the address label coupled with the telephone calls, actual delivery of the package was not necessary to establish the nexus between the package, the defendant, and the defendant's residence. The totality of the circumstances described in the affidavit supporting the request for the warrant gave the magistrate reasonable grounds to believe that the defendant was engaged in illegal drug-related activities and that there was probable cause to believe that the described items would be found at the defendant's residence. Therefore, the warrant was not defective, and the defendant's motion to suppress properly was denied.

3. The trial court did not err in finding that the defendant had failed to show substantial and compelling reasons for departing from the mandatory minimum sentence; accordingly, the court did not abuse its discretion in refusing to deviate from that mandatory minimum sentence.

Affirmed.

WAHLS, J., concurring in part and dissenting in part, stated that the motion to suppress should have been granted, because probable cause to search the defendant's residence rested on delivery of the package to him at his residence, making the warrant an anticipatory warrant, and, being an anticipatory warrant, it was invalid because it did not detail the circumstances under which its execution could occur.

1. SEARCHES AND SEIZURES — SEARCH WARRANTS — PROBABLE CAUSE.

Where an affidavit in support of a search warrant shows that an

identified individual has received, or anticipates receiving, specific contraband through the mail at a particular location, there is probable cause to believe that other contraband or evidence of the crime will be found at that location.

2. SEARCHES AND SEIZURES — SEARCH WARRANTS — PROBABLE CAUSE.

A magistrate, in considering whether there is a substantial basis for issuance of a search warrant, must examine the totality of the circumstances to determine whether a fair probability exists that specific evidence of a crime will be found in a particular place.

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

Pritchard & Thomas, P.C. (by *Clyde B. Pritchard* and *Edith S. Thomas*), for the defendant.

Before: REILLY, P.J., and WAHLS and M. A. CHRZANOWSKI,* JJ.

REILLY, P.J. Defendant conditionally pleaded guilty, as charged, of delivery of 50 grams or more, but less than 225 grams, of a mixture containing cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). Defendant reserved the right to appeal "the pretrial motions that have been filed in this case and which this Court has ruled on." Defendant was sentenced to ten to twenty years of imprisonment for the cocaine conviction and one to four years of imprisonment for the marijuana conviction. We affirm.

The facts in this case are essentially undisputed. On August 23, 1991, an express mail "2-pound Pak" was placed in the United States mail from a

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

post office in Miami, Florida. In transit, the address label became detached from the package. The package arrived at the Detroit airmail facility in Romulus, Michigan. The label, addressed to defendant, arrived at the post office in Highland, Michigan. Andrew Pietrzyk, the express mail coordinator in Romulus, was informed about the detached label. On August 28, 1991, Mr. Pietrzyk opened the unidentified package to determine if any information regarding the addressee was contained inside. Pietrzyk did not find any such information, but noticed that the two computer floppy disk boxes found inside emitted a white powdery substance. Pietrzyk contacted the Postal Inspection Service.

Gregg Fiorina, a postal inspector, went to the Romulus facility on the same day to inspect the package. Fiorina obtained a federal search warrant to open and inspect the contents of the package, which was found to hold three plastic bags containing a total of approximately eighty-six grams of cocaine.

Rick Ferrarra, the postmaster of the Highland post office told Fiorina that a person purporting to be "John Brake" had telephoned Ferrarra in the past two days inquiring about an express mail package that was to have been delivered to him. The caller described the same express mail label number and address information as that on the label found loose in the mail. The individual also gave Ferrarra a telephone number where he could be reached.

On August 29, 1991, Ferrarra advised Fiorina that Ferrarra called the telephone number he had been given and explained to the individual who answered that the label had been located. He asked the individual what the package contained.

The individual responded that the package contained two boxes of computer floppy disks.

Later, on the same day, Fiorina sought a search warrant for defendant's residence. The affidavit stated that "the following property constitutes evidence of criminal conduct" and "is located" at defendant's residence:[1]

> Cocaine and any other illegally possessed substances; drug paraphernalia for cutting, packaging[,] processing, storage, used for weighing of any controlled substance, weapons used for the protection of; [sic] proof of residency, such as but not limited to the utility bills, correspondences, rent receipts, money order receipts, and keys to the premises and safe deposit boxes; illegal drug proceeds; any weapons used for the protections [sic] of illegal drugs.

Fiorina averred that he "has probable cause to believe that the above-listed property to be searched for and seized is now located upon said described premises, based upon" the facts as described above. The affidavit also stated that Fiorina "has made arrangements to have the package delivered to [defendant's residence] pursuant to its mailing instructions on August 29, 1991."

The Oakland County magistrate issued the

[1] We note that in defendant's motion to suppress filed on February 23, 1992, he challenged the veracity of the statements in the affidavit that the listed property "is located" at his residence because at the time the affidavit was signed, the affiant was aware that the package containing the floppy discs and cocaine had not been delivered. Accordingly, citing *Franks v Delaware*, 438 US 154; 98 S Ct 2647; 57 L Ed 2d 667 (1978), defendant argued that the statements should be stricken and the affidavit reviewed to determine whether the remaining portions supported a finding of probable cause. Defendant has not raised this issue on appeal, and, in any event, we find no merit in the argument, because the items described did not specify that the package containing cocaine "is located," but rather that the affiant had probable cause to believe that cocaine, paraphernalia, weapons, and so forth, generally, would be found at defendant's residence.

search warrant for defendant's residence on the same day. The warrant stated that "probable cause having been found," defendant's residence was to be searched for property and things identical to that described on the affidavit.

Later that day, another postal inspector, posing as a letter carrier, delivered the express mail package to defendant at his residence. A short time later, defendant left the residence, was stopped, and was arrested. The search warrant for the residence was then executed.

Defendant contends that the original opening of the express mail package by Pietrzyk without a search warrant was without probable cause and was a violation of his Fourth Amendment right against unreasonable searches. Because the trial court did not rule on this aspect of defendant's motion to suppress evidence, and because defendant never presented any evidence or argument in support of suppression on this basis, this issue was not preserved by his conditional guilty plea. *People v New,* 427 Mich 482, 485; 398 NW2d 358 (1986).

Defendant next contends that evidence obtained during the search of his residence should have been suppressed because the warrant was defective. Defendant argues that the search warrant was an "anticipatory search warrant," because the warrant was obtained before the controlled delivery giving rise to probable cause occurred. Defendant correctly notes that Michigan has not recognized yet the validity of such warrants and argues that even in jurisdictions that have upheld warrants of this type, this warrant would be invalid because the warrant failed to provide explicit, clear, and narrowly drawn conditions governing its execution.

An anticipatory warrant is one that is issued

before the events necessary for probable cause have occurred. *United States v Garcia,* 882 F2d 699, 702 (CA 2, 1989). In cases in which anticipatory warrants have been recognized, courts have held that the fact that the evidence presently is not located at the place to be searched is immaterial as long as there is probable cause to believe that the evidence will be there when the warrant is executed. *Id.* However, to assure that the warrant is not executed prematurely, that is, before the events necessary for probable cause have occurred, some courts have required that the conditions upon which the anticipatory warrants become effective be "explicit, clear, and narrowly drawn." See *United States v Gendron,* 18 F3d 955, 965 (CA 1, 1994), but see *United States v Rey,* 923 F2d 1217, 1221 (CA 6, 1991) ("Although it may be preferable" to include a statement that the search could only be executed after the controlled delivery occurred, "the warrant's silence on this point does not render it void.").

We need not determine whether the magistrate's determination of probable cause was predicated on the occurrence of the controlled delivery, whether anticipatory warrants are valid in Michigan, or whether this particular warrant was defective for failing to include specific prerequisites for effectiveness. Because probable cause to search defendant's residence existed at the time the warrant was issued, it was not an anticipatory warrant.

An individual's receipt of a package of contraband establishes probable cause to search the residence for other contraband and items associated with drug trafficking. In *People v Landt,* 188 Mich App 234; 469 NW2d 37 (1991), rev'd 439 Mich 870 (1991), a package addressed to the defendant was opened by authorities and found to contain packages of marijuana inside a gray jacket. The pack-

age was subsequently delivered to the defendant, and he signed for it. On the same day, authorities obtained and executed a warrant to search the defendant's residence for marijuana, drug paraphernalia, and records pertaining to drug trafficking. This Court held that there was probable cause to search for the items in the package, but not to search for other narcotics or evidence of drug trafficking. The Supreme Court disagreed:

> Inasmuch as the affidavit underlying the search warrant in this case established probable cause as to the contraband that was delivered to the defendant at the address where the search warrant was executed, the magistrate did not err in finding probable cause as to other items incident to drug trafficking. [*People v Landt,* 439 Mich 870 (1991).]

Thus, the receipt of the package containing contraband at a particular location establishes a connection between the recipient, the contraband, and the address where the contraband is delivered and supports a finding of probable cause to believe that other evidence of drug trafficking would be at that location.

In this case, the connection between defendant, the contraband, and the defendant's residence was established before the delivery took place. In this case, as in *Landt,* contraband, concealed in an attempt to avoid detection, was sent to defendant. Unlike in *Landt,* however, the facts recited in the affidavit strongly indicated that defendant expected this particular package and was aware of its contents. An individual purporting to be defendant telephoned the post office, inquired about the package, and was able to provide information concerning the express mail label number, the destination, and the return address. That person provided a telephone number where he could be

reached. When that number was called, an individual correctly identified the package's contents (two boxes designed to hold computer floppy disks). Under these circumstances, the connection between defendant, his residence, and the package containing contraband was established not only because defendant was the named addressee on the package, but also because the actions of the defendant, who identified himself as the addressee, clearly indicated that he anticipated receiving this particular package.

Because the connection between defendant, his residence, and the contraband was established by the facts set forth in the affidavit, there was probable cause to search defendant's residence for other contraband and items associated with drug trafficking, even before the controlled delivery occurred. In *Landt,* the necessary connection was established by the defendant's accepting of the package. However, we find no reason why receipt of the package is necessary where the nexus between defendant and the package is established by other facts. The reasoning in both instances is the same. When the affidavit shows that an identified individual has received, or anticipates receiving, specific contraband through the mail at a particular location, there is probable cause to believe that other contraband or evidence of the crime will be found at that location.

As a reviewing court, we are to ensure that there is a substantial basis for the magistrate's conclusion that there is a "fair probability that contraband or evidence of a crime will be found in a particular place." *People v Russo,* 439 Mich 584, 604; 487 NW2d 698 (1992). The totality of the circumstances described in the affidavit in this case gave the magistrate reasonable grounds to believe that defendant was engaged in illegal drug-

related activity and that a search of his residence probably would uncover evidence of such conduct. We find that probable cause existed at the time the warrant was issued, whether or not the magistrate believed the warrant would be executed after the package had been delivered. Therefore, the warrant was not defective, and defendant's motion to suppress was properly denied.[2]

Lastly, defendant argues that the trial court abused its discretion in refusing to deviate from the mandatory minimum sentence of ten years for the conviction of possession with intent to deliver 50 to 225 grams of cocaine. Defendant contends that his post-conviction behavior justified a reduced sentence. We disagree. Although defendant had no prior offenses, the information in the presentence investigation report, which defendant did not challenge, indicates that defendant was part of an ongoing criminal enterprise involving several shipments both to and from the sender of the package involved in this case. The trial court did not err in finding no substantial and compelling reasons to depart from the mandatory minimum sentence. *People v Lawrence,* 206 Mich App 378; 522 NW2d 654 (1994).

Affirmed.

M. A. CHRZANOWSKI, J., concurred.

WAHLS, J. *(concurring in part and dissenting in part).* I concur in the majority's resolution of the issue regarding whether the original opening of the express mail package without a search warrant was a violation of defendant's Fourth Amend-

[2] The trial court denied defendant's motion to suppress on the basis that the warrant was a valid anticipatory warrant. Where the trial court reaches the right result for the wrong reason, this Court will not reverse. *Bonner v Chicago Title Ins Co,* 194 Mich App 462, 472; 487 NW2d 807 (1992).

ment rights. As pointed out by the majority, the issue was not preserved by virtue of defendant's plea. I also concur with regard to the sentencing issue.

However, I respectfully dissent from the majority's position that there was probable cause at the time the warrant was issued to search defendant's residence. Both the United States and Michigan Constitutions guarantee a person's right against unreasonable searches and seizures of the person, houses, papers, and effects. US Const, Am IV; Const 1963, art 1, § 11. Probable cause to search must exist at the time the search warrant is issued. Probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched. *Illinois v Gates,* 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983); *People v Russo,* 439 Mich 584, 606-607; 487 NW2d 698 (1992).

I disagree with the majority's conclusion that there was probable cause to believe that contraband or other evidence of drug trafficking would be found at defendant's residence at the time the warrant was issued. The affidavit provided the following facts. A man purporting to be defendant telephoned the post office in Highland, Michigan, inquiring about a package that he was expecting. Defendant provided the express mail label number. At this point, there was no connection between the express mail label and the package at the Detroit Express Mail manager's office. Defendant left a telephone number where he could be reached. A day or so later, a post office employee telephoned the number and "told an individual there, that he had located the express label, but not the parcel." In response to the employee's question, the "individual" stated that the parcel

contained two boxes of computer floppy disks. Given the totality of these actions, I would not find reasonable grounds to conclude that defendant actually was engaged in illegal drug trafficking and that a search of his home probably would uncover evidence of such conduct. Rather, I believe that probable cause to search defendant's residence was conditional upon his acceptance of the package at his residence. Thus, I believe the warrant should be analyzed as an anticipatory warrant.

An anticipatory search warrant is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place. 2 LaFave, Search and Seizure (2d ed), § 3.7(c), p 94. Like traditional search warrants in which there exists the expectation that the contraband will remain at the designated location until the warrant is executed, anticipatory warrants are premised on the expectation that the contraband sought will be at the designated location when the search commences. *United States v Ricciardelli,* 998 F2d 8, 10-11 (CA 1, 1993); *United States v Garcia,* 882 F2d 699, 702 (CA 2, 1989). It is believed that the objectives of the Fourth Amendment are served better by allowing government agents to obtain warrants in advance of a controlled delivery rather than by forcing the agents to proceed without a warrant under the constraints of exigent circumstances and subject to suppression at a subsequent date. *Ricciardelli, supra* at 10. An anticipatory warrant also alleviates the risk that the drugs will be removed or destroyed before execution of the warrant if the agents were to obtain a warrant only after the controlled delivery had been made.

Thus, several federal and state jurisdictions

have concluded that anticipatory search warrants are not unconstitutional per se. *Ricciardelli, supra* at 11; *Garcia, supra* at 702-703, and cases cited therein. See also *People v Sousa,* 18 Cal App 4th 549; 22 Cal Rptr 2d 264 (1993); *State v Ulrich,* 265 NJ Super 569; 628 A2d 368 (1993); *State v Engel,* 465 NW2d 787 (SD, 1991); *Commonwealth v Reviera,* 387 Pa Super 196; 563 A2d 1252 (1989); *State v Wright,* 115 Idaho App 1043; 772 P2d 250 (1989); *State v Coker,* 746 SW2d 167 (Tenn, 1987); *Johnson v State,* 617 P2d 1117 (Alas, 1980); *People v Glen,* 30 NY2d 252; 331 NYS2d 656; 282 NE2d 614 (1972). See also *State v Lee,* 93 Md App 408; 613 A2d 395 (1992) (declining to address whether the state of Maryland will approve the use of anticipatory search warrants). Most of these decisions recognize that anticipatory warrants present greater potential for abuse than routine warrants based on past events. These risks include the risk of premature issuance, the risk of judicial abdication of the probable cause determination, and the risk of premature execution. *Wright, supra* at 1049; *Lee, supra* at 416.

To protect against the first two abuses, the courts have required a particularized showing that the items to be seized will be in the place to be searched at a specified time. Requiring such a showing before the warrant is issued ensures that the magistrate (not the officers in the field) will determine when, and whether, there should be a search. Often, the requisite probable cause is established by showing that the contraband is "on a sure and irreversible course to its destination." *Ricciardelli, supra* at 12; *Garcia, supra.* The supporting affidavit should illustrate that the agent believes the delivery is going to occur, how the agent has obtained this belief, the reliability of the source of that information, and what part govern-

ment agents will play in the delivery. *Garcia, supra* at 703. In this case, the affidavit of the postal inspector, Gregg Fiorina, provided, in relevant part:

> Affiant further states that Affiant has made arrangements to have the package delivered to the above described residence pursuant to its mailing instructions on August 29, 1991.

No specifics were provided concerning how the controlled delivery was to occur or what role the government agents would play in the controlled delivery. By failing to provide such detail, the affidavit did not establish that the contraband in the express mail package was on a sure and irreversible course to defendant's residence. Therefore, I would hold that the warrant was invalid.

The third risk inherent in anticipatory warrants is that overzealous government agents will carry out the search and seizure in advance of the controlled delivery. Therefore, several decisions also have held that the search warrant must express clearly the precise circumstances under which the warrant may be executed. One particular condition should be that execution is contingent upon arrival of the contraband. *Garcia, supra; Ricciardelli, supra.* See also *Johnson, supra.*[1] Conditioning the warrant upon delivery establishes a nexus between the criminal act, the evidence to be seized, and the place to be searched. *Ricciardelli, supra* at 13. In this case, the warrant did not

[1] Other decisions have held that the failure to condition the search upon the occurrence of the controlled delivery is not necessarily fatal. *United States v Tagbering,* 985 F2d 946, 950 (CA 8, 1993), and *State v Engel,* 465 NW2d 787, 790 (SD, 1991). In *Tagbering,* the critical factor to the court's holding was the representation in the affidavit that the warrant would not be executed until the package had been delivered. In *Engel,* the issuing judge orally admonished the officer not to execute the warrant until the controlled delivery occurred.

detail the precise circumstances under which it was to be executed. In fact, the only condition was that the warrant was to be executed on or before August 20, 1991. Because the warrant in this case failed to authorize a search only after the controlled delivery had occurred, the warrant was invalid.

Of course, the majority's holding has rendered it unnecessary to analyze whether this jurisdiction should adopt and uphold the constitutional validity of anticipatory search warrants and whether this particular warrant was a valid anticipatory warrant. As previously stated, my disagreement with the majority is that probable cause to search defendant's residence for evidence of drug trafficking had not been established at the time the warrant was issued. Therefore, I believe that the warrant was an anticipatory warrant, and should be analyzed as such. Additionally, I would recognize the validity of anticipatory warrants subject to the safeguards adopted by other jurisdictions. Because the affidavit did not establish that the contraband was on a sure and irreversible course to defendant's residence, and because the warrant did not detail the circumstances under which the execution could occur, I also would find that the anticipatory warrant was invalid. Accordingly, I would reverse the lower court's ruling and remand for entry of an order suppressing the evidence.

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY v PUBLIC SERVICE COMMISSION

Docket Nos. 141277, 141284, 142119, 142493. Submitted October 19, 1994, at Lansing. Decided December 29, 1994, at 9:30 A.M. Leave to appeal sought.

Consumers Power Company filed an application for an electric rate increase on November 18, 1983, seeking to recover costs related to the development and construction of a nuclear power plant at Midland, Michigan. The project was canceled on July 16, 1984, when it was about eight-five percent complete and after Consumers had invested about $4.2 billion. The Public Service Commission found that Consumers' decision on July 2, 1980, to go forward with construction of both units at the facility with the expectation that fuel would be loaded in 1983 was so unrealistic that Consumers had acted imprudently at that time. The PSC concluded that all expenditures after July 2, 1980, were imprudent and, therefore, recovery of those expenditures was disallowed. The PSC found that Consumers was entitled to about $760 million of rate relief and, after certain offsets, awarded rate relief of about $346 million, to be collected over ten years and without interest. The Association of Businesses Advocating Tariff Equity, Consumers Power Company, and the Attorney General filed appeals from that decision and a subsequent decision denying petitions for rehearing. The appeals were consolidated.

The Court of Appeals *held:*

1. The PSC's use of the prudent investment test was lawful and reasonable. Once the commission's ratemaking authority is invoked, the commission may look to all relevant factors in exercising its broad discretion to determine a just and reasonable rate.

2. 1982 PA 212, which amended MCL 460.6a(2); MSA 22.13(6a)(2), and the enactment of 1982 ballot proposals D and H did not eliminate the PSC's ability to rely on the "all lawful

REFERENCES

Am Jur 2d, Public Utilities §§ 135, 188, 190.

Public utility's right to recover cost of nuclear power plants abandoned before completion. 83 ALR4th 183.

elements" language in MCL 460.557; MSA 22.157 in setting rates.

3. There was no retroactive ratemaking in this case.

4. Consumers' rates may be based on the prudent cost of doing business, even if that cost includes unsuccessful investments.

5. The PSC did not err in finding that Consumers investors had not been compensated for the risk that the plant would never be completed or that the plant would never be put into use.

6. The evidence supports the PSC's finding that from July 2, 1980, it was not prudent to maintain the strategy of completing both nuclear units at the plant in time to meet the target date set by Consumers and Dow Chemical Company, Consumers' partner in the joint venture. The PSC's decision to disallow all costs associated with the project incurred after the date of imprudence, July 2, 1980, was sound and was consistent with the prudent investment test.

7. The rate relief provided in this case was reasonable. The commission's refusal to offset that relief with construction costs recognized in previous rates was reasonable.

8. The PSC did not change ratemaking methods in this case. The relief that was granted was not so insubstantial as to be confiscatory, unjust, or unreasonable.

Affirmed.

1. PUBLIC UTILITIES — RATES — PRUDENT INVESTMENT TEST.

The prudent investment test may be used in determining utility rates; the test provides that a utility may be compensated for prudent investments at their actual cost when made, regardless of whether the investments, in hindsight, prove to be necessary or beneficial.

2. PUBLIC UTILITIES — RATES — PUBLIC SERVICE COMMISSION.

The Public Service Commission is not bound by any particular method or formula in exercising its legislative function of determining just and reasonable rates; the commission may consider all lawful elements in determining rates (MCL 460.557; MSA 22.157).

3. PUBLIC UTILITIES — RATES.

A public utility has a right to a just and reasonable rate of return on its investment and may not be limited to rates that are so insubstantial as to be confiscatory.

Hill Lewis (by *Roderick S. Coy, Timothy P.*

Collins, and *Joseph R. Assenzo*), for the Association of Businesses Advocating Tariff Equity.

David A. Mikelonis, James E. Brunner, and *H. Richard Chambers,* and *Loomis, Ewert, Ederer, Parsley, Davis & Gotting, P.C.* (by *Michael G. Oliva* and *Ronald W. Bloomberg*), for Consumers Power Company.

Don L. Keskey, Henry J. Boynton, Philip J. Rosewarne, and *Patricia S. Barone,* Assistant Attorneys General, for the Public Service Commission.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Luis F. Fernandez* and *Paul E. Novak,* Assistant Attorneys General, for the Attorney General.

Before: NEFF, P.J., and MARILYN KELLY and P. R. JOSLYN,* JJ.

PER CURIAM. These four consolidated appeals as of right, MCL 462.26; MSA 22.45, are from a May 7, 1991, decision of the Public Service Commission (PSC) and a July 1, 1991, PSC decision denying petitions for rehearing. The PSC case, No. U-7830 Step 3B, involved a request by Consumers Power Company for rate relief of over $2 billion. The PSC found that Consumers was entitled to about $760 million of rate relief. After certain offsets, the net award was about $346 million, to be collected over ten years and without interest. We affirm.

I

Consumers filed an application for an electric

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

rate increase on November 18, 1983, No. U-7830, seeking to recover costs related to the development and construction of a two-unit, 1,300 megawatt, nuclear power plant at Midland, Michigan. Plans for the plant were announced in 1967. Consumers canceled the project on July 16, 1984. According to Consumers, the plant was then eighty-five percent complete and Consumers had invested approximately $4.2 billion in the project.

Construction of the nuclear facility was fraught with difficulties and delay. One witness characterized the cost to remedy a problem of improperly compacted soil as equivalent to paying for a third reactor. The Atomic Energy Commission and subsequently the Nuclear Regulatory Commission (NRC) maintained oversight of the project. The NRC found serious quality assurance and quality control problems. In the aftermath of the accident at Three Mile Island in Pennsylvania on March 19, 1979, federal authorities increased their regulatory vigilance.

At its inception, the Midland project was a joint venture of Consumers and Dow Chemical Company. Dow's eventual financial stake in the project amounted to about $500 million. Consumers and Dow negotiated a contract in June 1978 that permitted Dow to walk away from the project without liability unless both nuclear units were in commercial operation by December 31, 1984. This date became known as the "drop dead" date.

The architect, engineer, and primary contractor for the project, Bechtel Power Corporation, prepared analyses known as "forecasts" regarding the course of the project to completion. In late 1979 or early 1980, Bechtel developed "Forecast 6." It forecast the "most probable fuel load dates" for Unit 2 to be in April 1984 and for Unit 1 to be in September 1984. It was highly unlikely that these

load dates would permit commercial operation of both the reactors by the drop dead date.

In February 1980, Consumers and Bechtel tried to improve the construction schedule in order to allow for a November 1983 load date. However, a review team made up of Consumers' personnel did not seriously question the conclusions in Forecast 6, but concluded that a November 1983 load date was as "aggressive" a plan as could be realistically pursued.

At a March 5, 1980, meeting of Consumers' directors, management presented Forecast 6 as well as a "breakeven study" and a study regarding alternatives for the project known as the "Midland Alternatives Study." A virtual doubling in the expected cost of the plant was explained to the directors in March 1980. The directors approved a resolution authorizing the company to proceed with construction of both units in accordance with the Forecast 6 estimates.

A revised version of Forecast 6 was issued by Consumers' review team on May 5, 1980. The report characterized a November 1983 fuel load date as "very optimistic." A "schedule analysis" prepared by June 1980 gave a ten percent probability of loading fuel by November 1983 (given favorable assumptions), a fifty percent probability of loading fuel by February 1984, and a ninety percent probability of loading fuel by April 1984.

At a board meeting on July 2, 1980, Consumers' directors considered revised Forecast 6 and the review team's analyses. There was also discussion of potential problems with federal regulatory approval. Management recommended adopting a schedule that anticipated loading fuel in July and December 1983. The directors adopted the recommendation.

After July 1980, the project continued to experi-

ence difficulties, some regulatory and some financial. In December 1982, federal authorities ordered a partial halt to construction because of quality assurance problems. Apparently no further significant construction occurred. Dow withdrew from the project in July 1983. On July 16, 1984, Consumers' directors halted construction completely.

II

Shortly after Consumers ceased construction on the plant, it filed an amendment to its pending electric rate application in No. U-7830 seeking to recover its entire investment in the Midland project. Although Consumers claimed a cost of over $4 billion, its request was eventually reduced to about $2.1 billion, for various reasons. Consumers sought relief in three steps. Step 3 initially sought several hundred million dollars for the cost of the project. Step 3 was subsequently divided into Steps 3A and 3B, with Step 3A being a request for several hundred million dollars of immediate rate relief known as "financial stabilization" relief because of Consumers' precarious financial situation. This appeal deals with Step 3B, in which Consumers sought relief for the balance of its investment in the Midland project.

This Court previously affirmed the PSC's decision in Step 2, *Consumers Power Co v Public Service Comm No 1,* unpublished opinion per curiam of the Court of Appeals, decided January 14, 1991 (Docket Nos. 102652, 103983, 105990, and 117930). The PSC's decision in Step 3A was also affirmed. *Attorney General v Public Service Comm,* 189 Mich App 138; 472 NW2d 53 (1991) [*Attorney General I*].

The proceeding in this case, Step 3B, involved three hundred days of hearings and resulted in a

record of about 39,000 pages of testimony and 2,400 accepted exhibits. The hearing referee recommended rate relief of $1.3 billion based on project costs incurred until December 2, 1982. This recommendation was consistent with the position of the PSC staff.

The PSC found that Consumers' decision on July 2, 1980, to go forward with construction of both units with the expectation that fuel would be loaded in 1983 was so unrealistic that Consumers acted imprudently at that time. The PSC concluded that all expenditures after July 2, 1980, were imprudent and, therefore, the PSC disallowed recovery of those expenditures. The PSC permitted Consumers to recover about $760 million, which was then reduced by certain amounts including the amount of financial stabilization rate relief granted in Step 3A.

In its opinion, at 199-202, the PSC explained that from July 2, 1980, Consumers adopted a path that was virtually certain to fail and was unduly influenced by its relationship with Dow at the expense of its obligations to ratepayers.

> By early 1980, Consumers' management and Board of Directors knew or should have known that construction of the Midland plant was not going well. They knew or should have known as they faced critical decisions in 1980 that the probability of success was unacceptably low. Although the Commission recognizes the company's duty to its shareholders, it also had a duty to its ratepayers. Consequently, prudence would have required Consumers' management to recommend and the Board of Directors to approve at the July 2, 1980 meeting a decision to alter their strategy of continuing at all costs to try to meet the Dow drop-dead date without adequate consideration of the company's duty to its ratepayers. The path chosen by the company was so risky that it had by then become

clear that it was virtually certain to fail at enormous cost to the company's ratepayers or investors or both.

* * *

As the project strove to maintain progress against this background of ongoing problems, Consumers commenced a period of planning and decision-making in late 1979 that culminated in the July 2, 1980 decision of its Board of Directors to continue the project on the basis of Adjusted Forecast 6, which estimated project costs of $3.1 billion and projected a July 1983 Unit 2 fuel load date. In adopting this schedule, Consumers' management and Board of Directors ignored the recommendations of both the primary contractor and the company's own internal review team and disregarded several schedule evaluations of the work remaining to complete the project. They were fully aware of the previous history of construction deficiencies, quality assurance breakdowns, and unmet regulatory expectations, which, if not resolved, would continue to hinder progress and pose a threat of even greater cost increases and schedule delays than those experienced as of mid-1980. Further, the company was aware that resolving these problems would be increasingly difficult, given the NRC's implementation of heightened safety standards after the Three Mile Island accident.

Consumers' approach to planning placed a high priority on retaining Dow's participation in the project, a priority that distorted the company's ability to fairly and objectively analyze the implications of its decisions relative to its duty to serve its ratepayers. . . .

* * *

The Commission finds that a full acknowledgment of the risks of continuing the project, evaluated in light of the best interests of the company's ratepayers, would have compelled the conclusion that maintaining the strategy of completing both units to meet the Dow target date was no longer a prudent course of action.

The PSC, at 210-211, found that Consumers was imprudent in accepting the fuel load dates projected in the final version of Forecast 6.

> In light of the insubstantial reasons for the company's optimism about improving upon the schedule recommended by Bechtel in Preliminary Forecast 6, the risks of adverse scheduling effects that the project faced in 1980, and the company's motivation to create an outward appearance that the Dow contract would be met, it is difficult to believe that the schedule adopted in June 1980 was even then regarded by Consumers as realistic and achievable. It is not apparent that the company took reasonable measures to verify that its forecasts were realistic and provided a reliable basis for planning. The company's approach to forecasting, planning, and decision-making, viewed in a most favorable light, reflects willful indifference to known circumstances and indicators of risk. Viewed less favorably, it is certainly plausible, if not likely, that the company deliberately engaged in a policy of obfuscation, distortion, concealment, and deception. Regardless of which explanation best characterizes the subjective deliberations of the company's management and Board of Directors, it is objectively evident that their decisions in mid-1980 were completely divorced from the reality of the project's circumstances. The Commission finds no merit in Consumers' insistence upon the reasonableness and correctness of its decision to continue the project pursuant to a schedule based upon a July 1983 Unit 2 fuel load date. The Commission further finds that the decisions made by Consumers' management in June 1980 and ratified by its Board of Directors on July 2, 1980 were unreasonable and imprudent.

III

The PSC applied the "prudent investment" test

to determine the extent of Consumers' recovery of its investment in the canceled nuclear plant. The prudent investment test has been recognized as a valid basis for determining utility rates. The United States Supreme Court recognized the test in its discussion in *Duquesne Light Co v Barasch,* 488 US 299, 309; 109 S Ct 609; 102 L Ed 2d 646 (1989). The Court traced the test to a 1923 decision, *Missouri ex rel Southwestern Bell Telephone Co v Public Service Comm of Missouri,* 262 US 276, 291; 43 S Ct 544; 67 L Ed 981 (1923). As described in *Duquesne,* under the prudent investment test a utility is compensated for prudent investments at their actual cost when made, regardless of whether the investments proved to be necessary or beneficial in hindsight.

A

The prudent investment test has been accepted in several states. For example, *Violet v Federal Energy Regulatory Comm,* 800 F2d 280 (CA 1, 1986), discussed application of the prudent investment test in Rhode Island and mentioned the application of the test in Massachusetts. Many cases in which the prudent investment test has been applied are collected in anno: *Public utility's right to recover cost of nuclear power plants abandoned before completion,* 83 ALR4th 183.

The prudent investment test has been used in Michigan. *Re Detroit Edison Co,* 52 PUR4th 318 (1983) [*Detroit Edison I*], see 83 ALR4th, *supra* at 211, dealt with losses associated with the canceled Greenwood nuclear power plant project. The PSC there mentioned having previously applied the prudent investment test in at least two similar cases, one in 1975 and one in 1976. In addition, the PSC applied the test to Consumers' Marysville syn-

thetic gas plant when it was "mothballed." That PSC decision was affirmed by this Court in *ABATE v Consumers Power Co,* unpublished opinion per curiam of the Court of Appeals, decided November 2, 1988 (Docket Nos. 102080 and 102068).

B

Appellants, the Association of Businesses Advocating Tariff Equity (ABATE) and the Attorney General, argue that the PSC was without authority to apply the prudent investment test. But the test is well recognized and appellants' argument is contrary to the principle that the PSC is not bound by any particular method or formula in exercising its legislative function to determine just and reasonable rates. *Building Owners & Managers Ass'n of Metropolitan Detroit v Public Service Comm,* 424 Mich 494, 510; 383 NW2d 72 (1986); *Michigan Bell Telephone Co v Public Service Comm,* 332 Mich 7, 36-37; 50 NW2d 826 (1952) [*Michigan Bell I*]. Appellants have failed to show that using the prudent investment test was unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8); *CMS Energy Corp v Attorney General,* 190 Mich App 220, 228; 475 NW2d 451 (1991).

ABATE and the Attorney General contend that the PSC has no authority to apply anything other than the "used and useful" test in setting rates. They contend that, under that test, rates must be based on a utility's cost of providing service and that a plant that is not used and useful is never part of the cost of providing service. These appellants rely in part on MCL 460.6a(2); MSA 22.13(6a)(2), which defines a "general rate case" as a proceeding to increase rates on the basis of "the utility's total cost of providing service."

The PSC may consider "all lawful elements" in

determining rates. MCL 460.557; MSA 22.157. This section of the transmission of electricity act provides a nonexclusive list of factors that the PSC may consider in determining rates, including cost, fair value of property used, obsolescence, and risks of business. Here, the PSC properly looked to the "all lawful elements" language of § 7 for guidance when it determined it had the authority to apply the prudent investment test. The PSC is vested with all the power to regulate utilities granted in the numerous acts governing utilities. MCL 460.6; MSA 22.13(6).

The argument that the PSC could not rely on § 7 was rejected by this Court in *Attorney General I, supra* at 144-149, a case dealing with Step 3A of this same PSC case. Once the PSC's ratemaking authority is invoked—as it has been in this case—the PSC may look at all relevant factors in exercising its broad discretion to determine a just and reasonable rate.

Appellants argue that our Supreme Court has indicated that Consumers may not recover its investment in the Midland plant if it is never used, citing *Attorney General v Michigan Public Service Comm,* 412 Mich 385; 316 NW2d 187 (1982) [*Attorney General II*]. That case dealt with statutes governing the issuance of financial securities by a public utility, MCL 460.301 *et seq.*; MSA 22.101 *et seq.*, and involved securities being sold by Consumers to finance the Midland nuclear project. At one point, the Court indicated that a utility proceeding with a construction project without PSC approval did so at the risk that the project costs might not be reflected in future rates. The Court, at 418, stated that utilities "may indeed be betting the company on the wisdom of their decisions to build nuclear generating plants . . . ." But as explained in *Attorney General I, supra* at 143, our

Supreme Court did not mean that all costs associated with an abandoned plant are unreasonable or that a utility may not recover its reasonable and prudent investment in an unused plant.

The PSC explained that prudent expenditures were part of the total cost of providing service. The Attorney General argues that this is not logical because the Midland plant never provided service. The Attorney General's argument is inconsistent with the prudent investment test under which the end result of a utility's efforts do not determine how much is recoverable. Rather, utilities are compensated for prudent investments at their actual costs when made regardless of whether the investments are deemed necessary or beneficial in hindsight.

The Attorney General argues that 1982 PA 212, which amended MCL 460.6a(2); MSA 22.13(6a)(2), and 1982 ballot proposals D and H eliminated the PSC's ability to rely on the "all lawful elements" language in MCL 460.557; MSA 22.157. These arguments are meritless. The changes in 1982 were not concerned with what standards to use in general rate cases. The legislation and the ballot proposals were concerned with automatic purchase power adjustment clauses. See *ABATE v Public Service Comm,* 430 Mich 33; 420 NW2d 81 (1988); *In re Proposals D & H,* 417 Mich 409; 339 NW2d 848 (1983).

It is argued that the PSC's decision, based on the prudent investment test, is unlawful because it constitutes retroactive ratemaking. Retroactive ratemaking in utility cases is prohibited. *Bd of Public Utility Comm'rs v New York Telephone Co,* 271 US 23; 46 S Ct 363; 70 L Ed 808 (1926); *Detroit Edison Co v Public Service Comm,* 416 Mich 510, 523; 331 NW2d 159 (1982) [*Detroit Edison II*]; *Michigan Bell Telephone Co v Public Service*

Comm, 315 Mich 533, 547, 554-555; 24 NW2d 200 (1946) [*Michigan Bell II*].

> [T]he essential principle of the rule against retroactive ratemaking is that when the estimates prove inaccurate and costs are higher or lower than predicted, the previously set rates cannot be changed to correct for the error; the only step that the MPSC can take is to prospectively revise rates in an effort to set more appropriate ones. *Detroit Edison II, supra* at 523.

There was no retroactive ratemaking in this case. As explained by the PSC, it followed accepted regulatory and accounting practices. Construction costs were capitalized and then amortized as a current expense. As explained by the PSC in its opinion at 247:

> [C]onsistent with past ratemaking practice, when capitalized expenditures are amortized, the amortization becomes a current expense even though it reflects expenditures that were capitalized in the past. As such, recognition of the amortization does not constitute retroactive ratemaking.

Conceptually, ratepayers are charged for the amortization expense when it occurs and, therefore, rates coincide with the expense and are not retroactive. Essentially the same accounting treatment was used for Consumers' Marysville plant and for Detroit Edison's Greenwood plant in PSC Case No. U-6474. *Detroit Edison I, supra.* According to the PSC in No. U-6474, the majority of state commissions that have addressed the issue of recovery of costs following the abandonment of a nuclear plant project have allowed recovery through amortization.

ABATE argues that the effect of the PSC's order

was to unlawfully charge ratepayers for past capital losses or, in effect, to force ratepayers to make capital contributions. This argument also fails to recognize that rates may be based on the prudent cost of doing business, even if that cost includes unsuccessful investments.

The reasoning of ABATE and the Attorney General essentially eliminates the prudent investment test, because either rates would have to cover all expenses as they were incurred or no rates could ever be charged for an unsuccessful plant investment. This is contrary to the rationale of the prudent investment test that provides for compensation for prudent investments irrespective of whether they are deemed necessary or beneficial in hindsight. *Duquesne, supra* at 309.

Finally, ABATE argues that even if the prudent investment test may be applied in Michigan, it was unreasonably and arbitrarily applied in this case. It is contended that throughout the construction period Consumers' investors received a high return on their Consumers' securities because of the risk that they might not recover any of their investment and that therefore the investors were fully compensated for the risk of total disallowance of the nuclear project. However, the PSC found otherwise. The PSC found that investors had not been compensated for the risk that the plant would never be completed or that the plant would never be put into use. The PSC reached its conclusion on the basis of its finding that when the Midland project commenced, investors reasonably perceived that it would be completed and their investment would be recovered as long as it was prudent. In its opinion, at 260, the PSC found that investors had not been compensated for a risk associated with a "complete disallowance of the

Midland plant investment based upon the application of the used and useful standard."

The PSC essentially made a factual finding regarding the knowledge and intent of investors. Factual findings of the PSC are to be sustained unless they are not supported by competent, material, and substantial evidence. Const 1963, art 6, § 28; *Attorney General I, supra* at 142. The PSC's findings were sufficiently supported by the fact that the PSC had treated similarly other investments of which Consumers' investors were probably aware.

IV

Consumers argues that the PSC acted unlawfully and unreasonably when it concluded that Consumers' decision on July 2, 1980, to proceed with an aggressive construction schedule was imprudent. Consumers argues that the PSC impermissibly judged Consumers' action through hindsight and substituted its judgment for that of Consumers. Consumers further argues that its decision to proceed with the project was reasonable in light of anticipated public demand for power, the availability of financing, and the limited alternatives available. Consumers contends that reasonable persons, including the PSC chairman, agreed that Consumers proceeded reasonably from July 2, 1980.

It is this Court's role to determine whether the PSC's decision was reasonable and lawful. MCL 462.26(8); MSA 22.45(8); *Attorney General I, supra* at 142. Consumers has the burden to prove by clear and satisfactory evidence that the PSC's order was unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). Consumers must meet this burden in the face of a presumption that the PSC's rate decision was lawful and reasonable. MCL 462.25;

MSA 22.44. In challenging the PSC's determination that Consumers acted imprudently in deciding to proceed as it did on July 2, 1980, Consumers is essentially challenging a factual finding of the PSC. The PSC's factual findings must be supported by competent, material, and substantial evidence. Const 1963, art 6, § 28. This Court will not substitute its judgment for that of the PSC with regard to a factual matter. *Attorney General I, supra* at 142.

There was ample evidence supporting the PSC's determination that from July 2, 1980, the risk of continuing the project compelled the conclusion that "maintaining the strategy of completing both units to meet the Dow target date was no longer a prudent course of action." The PSC reasonably inferred that Consumers' decision was unduly influenced by a desire to develop a schedule that would permit commercial operation before Dow's drop dead date. As pointed out by the PSC, Consumers' decision was made in the face of recommendations by both its primary contractor and its internal review team that it was improbable that the load dates adopted on July 2, 1980, could be achieved. One analysis gave the "aggressive schedule" only a 1.1 percent probability of success. In early 1980, there were also indications of continuing quality assurance and quality control problems. The likelihood of increased federal oversight in the aftermath of the Three Mile Island accident and in light of the previous problems with the Midland project was significant. The construction problems in the past gave little reason to believe that there would be few or no problems in the future, a necessary circumstance for success under the schedule adopted by Consumers. All of these facts and circumstances were known to Consumers in July 1980. The PSC's decision was not based on hindsight.

While it is true that some reasonable persons did not find that Consumers' decision on July 2, 1980, was imprudent (for example the PSC Chairman would not have found Consumers' actions to be imprudent until February 11, 1981, and the hearing referee found an imprudence date of December 2, 1982), this Court's review is of the reasonableness of the PSC's determination. The test is not whether there is any reasonable person who would have concluded that Consumers acted prudently. The determination of prudence is for the PSC. Each individual member of the PSC does not have veto power; nor does the hearing referee. Regardless of the view of reasonable individuals, and regardless of the existence of some evidence to support the views of those reasonable individuals, there was sufficient evidence to support the PSC's finding of imprudence from July 2, 1980.

V

All parties quarrel with the PSC's decision to "disallow" all costs associated with the Midland project incurred after the date of imprudence, July 2, 1980. Consumers argues that some type of power plant was needed to satisfy growing energy demand and that the PSC should have disallowed only those costs that were imprudent or that would not otherwise have been incurred if Consumers had acted prudently. ABATE and the Attorney General argue that because the PSC found that the entire project became worthless because of Consumers' imprudence, it was unreasonable to allow Consumers to recover for any part of the project. All parties at least partly frame their arguments in terms of a "proximate cause" analysis.

The PSC explained that the purpose of its deci-

sion was to allow Consumers to recover its prudent investment intended to benefit ratepayers even though later imprudence rendered the investment unusable. The commission explained that it was not its function to determine what Consumers should have done, but, rather, to assess the prudence of the course chosen by Consumers. In this regard, the PSC found that Consumers' continued efforts to complete both nuclear units as scheduled had "virtually no chance of success" and therefore any expenditures incurred on the project after the date of the decision to continue as scheduled should be disallowed.

The PSC's reasoning was sound and was consistent with the prudent investment test. There was no need for the PSC to determine what Consumers should have done. The PSC made a rate determination based on what Consumers did. The reality was that Consumers proceeded on an imprudent course and not on some other course that might have been prudent. The PSC disallowed costs incurred after July 2, 1980, because those costs were incurred in an imprudent attempt to complete the project. The PSC logically and reasonably disallowed costs associated with the imprudent course that Consumers in fact followed.

The PSC was not bound to follow or adopt a proximate cause analysis, as would be used in a negligence case. In determining rates, the PSC may rely on its expertise and is not required to apply a particular method or process. *Building Owners, supra* at 510; *Ishpeming v Public Service Comm,* 370 Mich 293, 315; 121 NW2d 462 (1963). What is important is whether the result reached is just and reasonable. *Building Owners, supra* at 510. The method employed by the PSC may contain infirmities, but that is not necessarily important. *Id.* The PSC may "make the pragmatic adjustments

which may be called for by particular circumstances." *Michigan Bell I, supra* at 36.

The ratemaking process involves a balancing of investor and consumer interests. *Building Owners, supra* at 510; *Detroit v Michigan Public Service Comm,* 308 Mich 706, 716; 14 NW2d 784 (1944). The PSC permitted Consumers to recover costs it had incurred before acting imprudently and the recovery was spread over a ten-year period without interest. Given that the plant was intended to meet reasonably predicted energy demands of the public, the PSC reasonably balanced the interest of investors and the consuming public.

The PSC merely permitted Consumers to recover its prudent investment, and that investment was not made imprudent by Consumers' subsequent decisions. Under the prudent investment test, the end result does not dictate what can be recovered. The utility is compensated for prudent investments when made, irrespective of whether the investments are deemed necessary or beneficial in hindsight. *Duquesne, supra* at 309.

VI

The PSC recognized that previous PSC decisions related to the Midland project provided Consumers with roughly $1 billion of benefits. ABATE considers it arbitrary and unreasonable on the part of the PSC not to credit ratepayers in the present case with those benefits. More specifically, ABATE points to about $436 million of construction costs that were recognized in Consumers' rate base as construction work in progress (CWIP), an estimated $500 million in increased financing costs that ABATE attributes to the Midland project, and $102 million in "phantom" operating and maintenance (O & M) expenses that were permitted in the Step 3A proceeding (financial stabilization relief).

The PSC rejected ABATE's arguments. The PSC noted that it had knowingly not fully offset CWIP costs in the past. In other words, the PSC concluded in prior rate cases that some portion of the Midland project should be included in Consumers' rate base and should be paid for by ratepayers during the course of construction. The PSC rejected the argument about increased financing costs because of a lack of persuasive evidence to support a finding regarding the extent of the increase in financing costs due to the Midland project. With regard to the O & M expenses, the PSC recognized that Consumers' actual expenses were less than estimated budget levels on which rates were based, but the PSC viewed the "benefit" as part of the financial stabilization effort.

ABATE must prove that the rate relief resulting from the PSC's analysis is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). What items comprise a utility's investment capital is a factual matter for the PSC. *Attorney General v Public Service Comm #2,* 136 Mich App 515, 520; 358 NW2d 351 (1984).

This Court is not persuaded that the rate relief provided in this case was unreasonable or that refusing to offset that relief with construction costs recognized in previous rates was unreasonable. The PSC reasonably exercised its judgment in declining to offset rates by previously granted rate relief that was based on prudent investment. To some extent, this Court has already considered and rejected arguments similar to ABATE's in *Consumers Power Co v Public Service Comm, supra.* The challenge to the "phantom" O & M expenses was there expressly rejected as was an argument that the PSC should remove the effects of the Midland plant from Consumers' capital structure.

We cannot fault the PSC's refusal to offset rates

based on increased financial costs. There was simply insufficient evidence to determine how much Consumers' financing costs were increased due to the Midland project. The PSC recognized that even without the Midland project Consumers would have prudently attempted to construct a power plant of some sort or to obtain power from some source, efforts that would have required some financing.

With regard to the O & M expenses, the PSC permitted rates to be based on those expenses in a prior case as part of the PSC's overall rate decision in that case. There is no reason to grant an offset in this case based on rates that were lawfully and reasonably determined in a prior case. The prior rate relief was granted for a need existing at that time without any intention that there be a subsequent recovery of the relief granted.

Finally, the PSC recognized that it is virtually impossible to separate individual aspects of rate relief from the overall case. For example, if construction costs had not been passed through to ratepayers in CWIP costs in the past, the rate relief now granted might well have been greater.

VII

Consumers claims that the PSC granted it so little relief that its right to a just and reasonable return on its investment was violated. A public utility has a right to a just and reasonable rate of return on its investment. *ABATE v Public Service Comm, supra* at 39. Utilities are protected from being limited to rates that are confiscatory. *Duquesne, supra; Michigan Bell I, supra* at 26. Arbitrarily switching back and forth between methods in a way that results in investors bearing the risk of a bad investment while denying them the ben-

efit of a good investment raises "serious constitutional questions." *Duquesne, supra* at 315.

The PSC, however, did not change ratemaking methods in this case. It consistently applied the prudent investment method. Nor was the $760 million in rate relief so low as to be confiscatory or unjust and unreasonable. Consumers argues that the hearing referee's decision awarding $500 million more in rate relief should be reinstated. While $500 million is a substantial sum, Consumers is a large entity and, according to Consumers, the sum is equivalent to about twenty percent of Consumers' rate base excluding its Midland investment. Under the circumstances of this case, we do not find that the failure to obtain an additional $500 million of rate relief makes the PSC's decision confiscatory or unjust and unreasonable.

VIII

The PSC fairly balanced the interests of ratepayers, Consumers, and its investors.

Affirmed.

AKYAN v AUTO CLUB INSURANCE ASSOCIATION (ON REHEARING)

Docket No. 155501. Submitted April 20, 1994, at Detroit. Decided September 20, 1994, at 9:35 A.M. Submitted on rehearing November 1, 1994. Decided on rehearing December 29, 1994, at 9:35 A.M. Leave to appeal sought.

Aghavanie Akyan brought an action in the Wayne Circuit Court against Auto Club Insurance Association, alleging breach of a contract of automobile insurance after the defendant refused to pay the plaintiff's claim for the theft and arson of her minivan. At a jury trial in which the court, James J. Rashid, J., ruled that evidence of the plaintiff's plea of no contest to a criminal charge of fraud concerning the alleged theft and arson was admissible, but not conclusive, evidence of material misrepresentation by the plaintiff, the court directed a verdict and entered a judgment of no cause of action after determining that the plaintiff had failed to establish damages by not presenting sufficient proof at trial of the fair market value of the van on the date of the alleged loss. On appeal by the plaintiff, the Court of Appeals, NEFF, P.J., and WHITE and M. L. STACEY, JJ., reversed the grant of the directed verdict and judgment of no cause of action and remanded for a new trial, holding that the plaintiff had sufficiently established the value of the van. The Court of Appeals affirmed the trial court's ruling regarding the no-contest plea, holding that the plea did not act as an automatic and conclusive ban to the plaintiff's claim against the defendant. 207 Mich App 92 (1994). The Court of Appeals subsequently granted the defendant a rehearing.

On rehearing, the Court of Appeals *held:*

Evidence of the plaintiff's prior plea of no contest to the criminal charge is admissible pursuant to MRE 410(2) and 803(22) against her in this action but does not act as an automatic and conclusive ban to her claim. *Lichon v American Universal Ins Co,* 435 Mich 408 (1990), does not dictate that the plaintiff's no-contest plea to a charge of fraud judicially estops her from pursuing this civil action against the defendant. The Court of Appeals, in its prior opinion in this case, correctly relied on analogous federal rules of evidence and *Connecticut Fire Ins Co v Ferrara,* 277 F2d 388 (CA 8, 1960).

Affirmed in part, reversed in part, and remanded.

Law Offices of Salem F. Samaan, P.C. (by *Salem F. Samaan* and *M. Michael Koroi*), for the plaintiff.

Hanlon, Becker, Lanctot, McCutcheon, Schoolmaster & Taylor (by *Onjel L. Benson*) (*John A. Lydick,* of Counsel), for the defendant.

ON REHEARING

Before: NEFF, P.J., and WHITE and M. L. STACEY,* JJ.

PER CURIAM. Defendant moved for and was granted rehearing of Issue II of the Court's opinion in *Akyan v Auto Club Ins Ass'n,* 207 Mich App 92; 523 NW2d 838 (1994), addressing the effect in this civil action for breach of an insurance contract of plaintiff's plea of nolo contendere to a criminal charge. That opinion is herein adopted with regard to Issue I, and clarified and expanded with regard to Issue II.

Plaintiff owned a 1990 Oldsmobile Silhouette minivan insured by defendant. According to plaintiff, she drove the van to work on a morning in early June 1990, found it missing that afternoon when she attempted to leave work, and, with her brother's assistance, reported it stolen to the police within thirty minutes. The police report indicated that plaintiff made her report on June 6, 1990. However, the vehicle had been found burning at approximately 11:00 P.M. on June 5, 1990, the previous evening. Plaintiff subsequently pleaded no contest to a criminal charge of fraud. However, when defendant refused to pay for the loss of the car, citing material misrepresentation, plaintiff sued for breach of contract.

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

At trial, plaintiff testified that she is a jeweler, and that she used the van to transport her merchandise, as did other jewelers with shops in the same building. Plaintiff, an immigrant who required an interpreter at trial, also repeatedly stated that she does not understand English, and testified that she relied on her brother in making the police report and simply signed it when it was completed. She also stated that she pleaded no contest to the criminal charge because she did not understand that she was charged with a crime, did not understand what was going on, and "[w]hatever my lawyer told me, I did." However, plaintiff acknowledged that she was accompanied throughout the proceedings by her daughter, who was educated in this country and acted as her interpreter.

Defendant moved for a directed verdict on three grounds: (1) that plaintiff had not offered any evidence that the car found on June 5, 1990, was not plaintiff's or that the police report referred to an incorrect date; (2) that plaintiff had not offered any evidence of the van's fair market value on the date of loss; and (3) that plaintiff's no-contest plea was similar to a guilty plea, and, for civil purposes, conclusive evidence of her alleged material misrepresentation to defendant, thus barring her claim.

In our original opinion we entertained defendant's third argument, although no cross appeal was filed, and held that plaintiff's no-contest plea was admissible but not conclusive evidence of misrepresentation. We explained:

> Defendant next contends that the trial court should have dismissed plaintiff's action on the basis of her no-contest plea. Because defendant did not file a cross appeal, it would normally be pre-

cluded from addressing issues not raised by plaintiff. *Barnell v Taubman Co, Inc,* 203 Mich App 110, 123; 512 NW2d 13 (1993); *People v Gallego,* 199 Mich App 566, 575-576; 502 NW2d 358 (1993); MCR 7.207. However, because defendant proposes this argument as an alternate ground for sustaining the judgment of dismissal, we will address the issue. *ABATE v Public Service Comm,* 192 Mich App 19, 23; 480 NW2d 585 (1991). The trial court did not err in ruling that the no-contest plea was admissible but not conclusive.

MRE 410, as amended, permits the admission of evidence of a claimant's plea of no contest to a criminal charge in a later civil suit by the claimant "to the extent that evidence of a guilty plea would be admissible." MRE 410(2). Similarly, MRE 803(22) indicates that a no-contest plea admissible under MRE 410 is admissible as evidence of a final judgment "to prove any fact essential to sustain the judgment." The question raised by defendant, however, is whether such evidence, when admitted, should also be regarded as conclusive.

We agree with the trial court that the evidentiary support for a finding of guilt required by MCR 6.302 before a court may accept a no-contest plea is not tantamount to a conclusive factual finding for civil purposes. Rather, evidence of the plea is to be weighed by the jury in conjunction with all other evidence presented. Under the Federal Rules of Evidence, evidence of a no-contest plea is not admissible against a claimant in a subsequent suit. FRE 410. The Michigan Rules of Evidence, however, were amended to render a plea of no contest admissible to the extent that a guilty plea would be admissible. The question then is the effect of such pleas when admitted. Under FRE 410, even evidence of a guilty conviction, which is admissible, does not generally act as an automatic and conclusive ban to subsequent claims. Advisory Committee's Note to FRE 803(22), 2 Moore's Federal Practice (1994 Rules Pamphlet), p 419, citing *Connecticut Fire Ins Co v Ferrara,* 277 F2d 388, 392 (CA 8, 1960); *New York & Cuba Mail SS Co v*

> *Continental Casualty Co,* 117 F2d 404, 407-408 (CA 2, 1941); *North River Ins Co v Militello,* 104 Colo 28; 88 P2d 567 (1939); anno: *Conviction or acquittal as evidence of the facts on which it was based in civil action,* 18 ALR2d 1287.
>
> Thus, we approve the trial court's ruling regarding the no-contest plea but reverse the court's grant of a directed verdict and dismissal, and remand for a new trial. [207 Mich App 97-99.]

On rehearing, defendant asserts that *Lichon v American Universal Ins Co,* 435 Mich 408; 459 NW2d 288 (1990), dictates that plaintiff's no-contest plea to a charge of fraud judicially estops her from pursuing this civil action against defendant. Defendant further challenges this Court's reliance on the Federal Rules of Evidence, which differ from the Michigan rules, and its reliance on *Connecticut Fire Ins Co v Ferrara,* 277 F2d 388, 392 (CA 8, 1960), for the proposition that even a guilty plea does not act as a conclusive bar to subsequent civil claims. Defendant also offers an array of authority not previously presented by it, and asserts that the "modern view" is that a criminal conviction conclusively bars a subsequent civil suit.

The *Lichon* Court did, indeed, consider the doctrine of judicial estoppel, discussing the nature of a nolo contendere plea and its treatment under the rules of evidence. In concluding that there was no judicial estoppel, the Court relied on the Michigan Rules of Evidence (now modified to permit evidence of a nolo contendere plea for the same purposes as evidence of a guilty plea), but also recognized that guilty pleas, while admissible under the federal rule, are not conclusive. *Lichon, supra* at 419. Although the *Lichon* Court did state in a later discussion that it did not address the preclusive effect of a conviction based on a guilty

plea, *id.* at 431, in that same discussion the Court expressed reservations regarding *Imperial Kosher Catering v Travelers Indemnity Co,* 73 Mich App 543; 252 NW2d 509 (1977), relied on by defendant in its motion for rehearing, pointing out that the *Imperial* Court disregarded the requirement of mutuality of estoppel, and distinguishing *Imperial* on the basis that it involved a conviction based on a jury verdict, rather than a nolo contendere plea. Further, the Court refers to 1 Restatement Judgments, 2d, § 27, comment e, pp 256-257, which explains that issues not actually litigated are not accorded preclusive effect in subsequent litigation. Also, while MRE 410 now permits the admission of evidence of a nolo contendere plea, the rule does not change the character or purpose of the plea, as discussed by the *Lichon* Court. 435 Mich 420-422.

As for defendant's assertion that *Ferrara, supra,* supports the opposite proposition for which it was cited, we observe that while the *Ferrara* court would have preferred a contrary rule, it acknowledged that the majority of jurisdictions allowing evidence of a criminal conviction hold that the conviction is merely additional evidence and is not a conclusive bar. *Ferrara, supra* at 392. Further, the *Ferrara* court found the reasoning of other cases persuasive, explaining that "if public policy demands that a criminal be not allowed to profit by his crime and considering the fact that the criminal judgment was based upon a burden of proof requiring guilt beyond a reasonable doubt, there seems little justification for allowing the civil tribunal to reach a conclusion inconsistent with that policy." *Id.* In deciding the case before it, the *Ferrara* court relied on the fact that the criminal conviction resulted from proceedings "fully as complete as that presented in this action"

and that "any conclusion of the finder of fact, having been appraised of this conviction, that this fire was not due to the act and design of the insured would be unsupported by substantial evidence and would demand reversal by us." *Id.* In the instant case, the conviction was not based on proceedings "as fully complete" as that presented in this action, but, rather, resulted from a decision not to contest the prosecutor's charge.

Further, we note that the cases cited by defendant as expressing the "modern view" all preceded *Lichon,* most by many years.

Finally, we observe that the Michigan Supreme Court has not yet abandoned the requirement of mutuality of estoppel when considering the collateral estoppel effect of prior litigation. *Lichon, supra* at 431.

We are satisfied that our original decision in this case was sound.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

HANAWAY v HANAWAY

Docket No. 152338. Submitted April 19, 1994, at Detroit. Decided January 17, 1995, at 9:00 A.M.

Rosemary Hanaway brought an action in the Oakland Circuit Court, seeking a divorce from John P. Hanaway. The court, Steven N. Andrews, J., granted the divorce and awarded the plaintiff a share of the marital estate, but denied her request for alimony, attorney fees, and costs. The plaintiff appealed, and the defendant cross appealed.

The Court of Appeals *held:*

1. The trial court erred in excluding from the divisible marital estate the defendant's interest in Steel Tex Corporation, a business that was started by the defendant's father and most of whose stock is held by the defendant and his brother. The plaintiff is entitled to an equitable share of the business because the plaintiff, in running the household and caring for the children while the defendant worked long hours at the business during the parties' twenty-four-year marriage, contributed to the acquisition, improvement, or accumulation of the business, and because the business appreciated in value during the marriage. The case must be remanded for an award to the plaintiff of an equitable share of the business.

2. The trial court must decide whether alimony should be awarded to the plaintiff after she receives an equitable share of the family business.

3. The trial court's property division was not rendered inequitable by its consideration of the plaintiff's fault in the breakdown of the marriage.

4. The trial court did not err in refusing to penalize the

REFERENCES

Am Jur 2d, Appeal and Error §§ 839, 868; Divorce and Separation §§ 565, 567, 591, 602, 606, 639, 643, 747, 915-918, 920, 927.

Fault as consideration in alimony, spousal support, or property division awards pursuant to no-fault divorce. 86 ALR3d 1116.

Divorce: excessiveness or adequacy of combined property division and spousal support awards—modern cases. 55 ALR4th 14.

Divorce: excessiveness or adequacy of trial court's property award—modern cases. 56 ALR4th 12.

defendant for his attempt to deflate the value of his stock holdings in the family business.

5. The trial court, after it awards an equitable share of the family business to the plaintiff, must decide whether the plaintiff should be awarded costs and attorney fees.

6. The trial court erred in treating funds taken by the plaintiff from an account in the name of one of the parties' children as an advance against her share of the marital property, given that the plaintiff received no interim alimony or support after filing for divorce, the plaintiff's earnings were inadequate, the defendant's income was substantial, and some of the money taken was used for debts and expenses for which the defendant was jointly liable.

7. The trial court did not err in valuing the defendant's stock holdings in JAR Corporation without regard for tax consequences inasmuch as no sale or other taxable event was planned or contemplated.

Affirmed in part, reversed in part, and remanded.

M.L. STACEY, J., concurring in part and dissenting in part, stated that the trial court properly valued the assets and determined what constituted marital property, but that the case should be remanded for an award of alimony and attorney fees and for an abatement of the trial court's order relating to the plaintiff's return of funds to the marital estate.

1. DIVORCE — PROPERTY DIVISION — APPEAL.

The Court of Appeals, in an appeal from a circuit court's division of marital property in a divorce action, reviews the findings of fact for clear error and decides whether the division was fair and equitable in light of the facts; property disposition rulings will be affirmed unless the Court of Appeals is left with a firm conviction that the division was inequitable.

2. DIVORCE — PROPERTY DIVISION.

Factors to be considered by a circuit court in dividing marital property in a divorce action include: the source of the property; the parties' contribution toward its acquisition, as well as to the general marital estate; the duration of the marriage; the needs and circumstances of the parties; the parties' ages, health, life status, and earning abilities; the cause of the divorce, as well as past relations and conduct between the parties; and general principles of equity; in addition, the court may consider the interruption of the personal career or education of either party.

3. DIVORCE — ALIMONY.

A circuit court deciding whether alimony should be awarded

considers principles similar to those that govern property divisions; the main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party.

4. DIVORCE — PROPERTY DIVISION — FAULT.

The value to be given to fault in deciding the division of property in a divorce case and the extent to which particular actions are to be regarded as fault contributing to the breakdown of a marriage are matters left to the trial court's discretion, subject to the requirement that the division not be inequitable.

5. DIVORCE — PROPERTY DIVISION — CONCEALMENT OF ASSETS.

A party's attempt to conceal assets is only one of many facts a circuit court must weigh in considering an equitable division of marital property, and it does not give rise to any automatic sanction.

6. DIVORCE — ATTORNEY FEES.

Attorney fees in a divorce action, generally awarded only as necessary to enable a party to prosecute or defend the action, may be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of the litigation; furthermore, a party should not be required to satisfy attorney fees out of assets relied on for support.

Chiamp & Associates, P.C. (by *Carole L. Chiamp* and *Charlene Snow*), for the plaintiff.

Hyman & Lippitt (by *Norman L. Lippitt* and *Paul J. Fischer*), for the defendant.

Before: NEFF, P.J., and WHITE and M. L. STACEY,* JJ.

WHITE, J. In her appeal as of right of a divorce judgment, plaintiff contests the circuit court's division of property and claims that she should have been awarded alimony, attorney fees, and costs. Defendant cross appeals the court's valuation of his stock in a business. We affirm in part, reverse in part, and remand.

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

The parties were divorced after twenty-four years of marriage. According to plaintiff's trial testimony, when the parties married in June 1967, she was a twenty-year-old high school graduate who had attended one year of college and was employed. She quit school and work to become a housewife, administering the household physically and financially until late in the marriage. The parties had three children: Caroline, age twenty-three; Christine, twenty-one; and John, Jr., seventeen. Plaintiff testified that she was not satisfied with her life with defendant, mentioning in particular a lack of mutual interests, defendant's emotional distance, defendant's criticisms regarding their sexual relationship, her feeling that defendant did not always have her best interests or those of the children at heart, and a feeling of being manipulated by defendant.

Plaintiff testified that in the first years of their marriage, defendant worked seven days a week and many late hours. She considered him a good provider but not necessarily a good father. She was aware that defendant's father annually had given him shares of stock in Steel Tex, the family business, beginning in 1968, and that their children would also receive stock, though it was her understanding that they were required to work there in order to receive it. Plaintiff testified that some two years earlier, defendant had discussed with her the possibility of selling the company to one of its competitors, indicating that he would be willing to do so for the right price.

In the mid-1980s, one of the daughters required professional counseling. Plaintiff initially merely accompanied her, but eventually sought counseling for herself as well. At the time of trial, December 1991, plaintiff still attended therapy up to three times a week. Plaintiff admitted engaging in an

extramarital sexual relationship that apparently started in 1989. She asserted that this relationship was her only infidelity. However, plaintiff identified the "turning point" in her marriage as occurring earlier: the aftermath of an automobile accident that took place in October 1988, during which time defendant's behavior left her convinced that she could not depend on him and would be better off on her own.[1]

Plaintiff moved out of the bedroom she had shared with defendant and into her daughter's unoccupied bedroom in January 1990, and subsequently moved into a basement bedroom. She filed for divorce on June 19, 1990, but remained in the house. Defendant filed a countercomplaint for divorce on September 12, 1990. The following year, in May 1991, because of escalating family tensions, plaintiff moved out of the house and into her own apartment.

Until she began considering divorce, plaintiff did not work outside the home. She had attended community college in 1987 and 1988, taking general courses for the purpose of getting a degree. However, after her accident, she apparently did not resume her schooling. In October 1989, plaintiff began working at Kitchen Studio in Birmingham, and accepted the position of general manager with the company some months later. At the time of trial, plaintiff was still employed there and earned $13 an hour, or approximately $27,000 a year. Plaintiff admitted using money that she and defendant had placed in an account in their

[1] Plaintiff testified that she was seriously injured in the accident and needed to have her spleen removed. Defendant would not, or could not, provide the necessary authorization for the surgery and it became necessary for another family member to intervene. She also testified that defendant was very late picking her up from the hospital and did not show up until she called him, and that he forgot her clothes although she had reminded him to bring them. He also was unhelpful in having the necessary prescriptions filled.

daughter Christine's name to pay debts that defendant refused to pay after she filed for divorce, including bills for therapy, car insurance, Christmas presents, utilities, and the expenses of establishing a new residence.[2]

Defendant testified that he is the president of Steel Tex Corporation, a family-owned corporation started by his father, Elmer Hanaway. At the time of trial, he owned 41.23 percent of the company, with the remainder belonging largely to his brother, Ron, a vice president. The stock had been given to them by their father over the years with the understanding that they would eventually give it to their children. Defendant intended to honor his father's wishes and had already conveyed some of the stock. He also had involved his children in the family business from the time they were very young, and he encouraged their participation in the business. Caroline was an employee and John, Jr., had also expressed an interest in working in the business. However, defendant also admitted that he had "talked to somebody" about selling the company.

In addition to his Steel Tex holdings, defendant also owned 38.6 percent of a related real estate holding company, the JAR Corporation.

Regarding the marriage, defendant conceded that there was no chance of reconciliation and that divorce should be awarded. Defendant stated that he felt betrayed and deceived by plaintiff's actions and that their marriage began suffering a communication breakdown in the early to mid 1980s. Defendant observed that even before then, plaintiff had been an anxious, excitable, unhappy person with a "bad self-concept," unable to re-

[2] Both parties acknowledged that the account was created and placed in Christine's name in order to take advantage of the tax benefits inuring therefrom.

spond to his compliments and encouragements. From the outset, their sex life "never did work very well," and although he generally supported her interest in obtaining counseling, their sexual relationship worsened while plaintiff was in therapy and ceased altogether in 1989. Defendant noted that after plaintiff began working, she chose to pay the therapy bills herself. Defendant was surprised when plaintiff moved out of the bedroom, because he had already accepted her refusal to have sexual relations with him.

Defendant assessed plaintiff as a good mother—involved in family life, doing some of the housework, cooking and dining with the children, and going on family vacations—until 1985, when she developed outside interests and left the home to socialize with her friends. As her involvement increased, plaintiff spent more and more time away from home, leaving defendant feeling neglected and their children disturbed by her absences.

Ron Hanaway testified that in 1984, he and defendant executed a stock purchase agreement requiring Steel Tex to buy back stock of a departing shareholder so as to keep the stock in the family. The stock was to be purchased at book value. The agreement was amended in November 1991, a month before trial, to change the stock valuation from book to fair market value. Although the change had been considered as early as 1985, and had been drawn up in a proposed amendment in June 1990, Ron delayed signing the modification, along with a related trust agreement, because of concerns about his son. However, Ron admitted that defendant's impending divorce provided an added incentive to execute the modified agreement. Ron acknowledged that he and defendant had discussed a sale of the business with a

competitor who indicated an interest in buying part of the company. However, Ron denied that he and defendant would have sold the company without first seeking their father's approval.

Concerning the value of defendant's businesses, John Stockdale, plaintiff's expert, testified that Steel Tex, which owns two subsidiary companies and employs approximately eighty people, had $10 million in sales in 1990. The book value of Steel Tex common stock on September 30, 1990, was $5,199,697, with defendant's share of the company being worth $2,040,000.[3] Stockdale's analysis of the company's fair market value was $4,177,000; with defendant's share valued at $1,527,000.[4] Stockdale viewed as inflated the executive salaries paid by the company, and adjusted their value downward and the company's value upward to compensate. He also used what he acknowledged was an unusually low figure of five percent in assessing the appropriate discount for marketing difficulties in light of defendant's status as a "control group" shareholder and the stock purchase agreement.

Edward Phillips, the Hanaway family accountant, testified that the marital estate's net worth was $1,697,331, including defendant's 41.23 percent share of Steel Tex, worth $480,000. Phillips testified that defendant earned $371,094 from Steel Tex in 1989, $331,097 in 1988, $324,890 in 1987, $246,200 in 1986, and $258,800 in 1985. A figure for 1984 was not available, but tax returns indicated that defendant earned $153,380 in 1983, $113,360 in 1982, $116,220 in 1981, and $110,144 in 1980. Phillips acknowledged that the approxi-

[3] Stockdale computed the value of defendant's share on the basis of a 41.31 percentage figure that he obtained from defendant's answers to interrogatories. It appears that the correct percentage is 41.23.

[4] See n 3, *supra*. While Stockdale began recomputing his figures using the correct percentage of 41.23, no final figures for the value of defendant's share were presented.

mate tripling of defendant's income in the last decade signified vigorous corporate growth during that period, but felt that the company had reached its peak and would not continue to grow unless it diversified. Phillips used a higher discount factor than did Stockdale, considered tax implications, and did not adjust the officers' compensation figures, which he considered reasonable in light of their contribution to the company.

Phillips was aware of both the original stock purchase agreement and the amendment that provided for repurchase at fair market value. He testified that the amendment was not executed in 1990, when it had been prepared, because Ron Hanaway did not transfer shares to his children as he had planned. In November 1991, Ron called Phillips, indicating that he wanted to make the transfers to his children, and that he was concerned that the book value of the company was greater than fair market value. The amended agreement was then signed. Phillips admitted that, when Ron raised the subject, he was also concerned about defendant's health and impending divorce; subsequently, the financial effect on the corporation of enforcing the buy-sell agreement at book value was also discussed.

Defendant, his brother Ron, and Phillips all testified that a provision in the agreement allowing defendant and Ron to assign an interest in Steel Tex stock to a spouse or to transfer stock to a trust created for their own benefit was inconsistent with the express wishes of Elmer Hanaway. Defendant and Phillips postulated that the provision was a drafting error.

The parties stipulated that the value of JAR Corporation was $1,349,000.

The trial court found that the marriage was "less than successful from the start" and failed to

adequately meet the parties' emotional and physical needs. The court found plaintiff at fault for the ultimate breakdown because she had taken a lover, ceased sexual relations with defendant, and later moved into a separate bedroom and then into the basement, finally leaving the marital home altogether. The court found that there was no reasonable likelihood the marriage could be preserved.

The court reviewed the parties' respective employment, incomes, and assets, averaging defendant's income from 1980 through 1989 at $230,696 and from 1985 through 1989 at $311,528. It summarized the parties' marital assets, which included the marital home, valued by the court at $312,500,[5] with a net equity of $148,500; furniture and furnishings, the division of which the parties had already agreed on; various vehicles; gold Krugerrands with a stipulated value of $15,000; jewelry; a joint investment account worth $663,956.50 on October 27, 1991; an annuity account belonging to defendant worth $45,831.45 on September 30, 1991; a money market account belonging to plaintiff worth $9,948.80 on October 11, 1991; a checking account belonging to defendant with a balance of $4,000; individual retirement accounts with a net value of $29,762.24 (plaintiff's) and $54,220.58 (defendant's), both on October 27, 1991; investment property with a net value of $138,000; and an outstanding debt of $50,000 incurred by defendant. The court also found that the parties had $39,000 in their daughter Christine's name, most of which plaintiff spent after filing for divorce. The court noted that the funds in plaintiff's money market account included what was left from Christine's account.

[5] The court relied on the testimony of defendant's appraiser, comparing his thirty-five-year experience as an appraiser to that of plaintiff's appraiser, two years in real estate sales.

The court addressed separately defendant's interests in Steel Tex and JAR Corporation. Concerning Steel Tex, it found that defendant's father, originally the sole shareholder, had given defendant and his brother Ron most of the company's common stock with the wish that they eventually give it to their children, and that defendant and his brother had transferred a portion of the stock to trust funds for their children.

In so finding, however, the court rejected defendant's claim that he had a contractual obligation to transfer the stock to his children, inasmuch as the 1984 stock purchase agreement expressly permitted a stock transfer to a spouse, and also because defendant and his brother had at one time "negotiated" with a third party for a sale of the company. The court also described the November 1991 amendment of the stock purchase agreement as "a deliberate attempt to deflate the value of the stock," which the court "could not let . . . pass unnoticed." Nonetheless, while summarizing the figures for the net value of defendant's Steel Tex interest offered by both Stockdale and Phillips, the court did not itself determine the value of that interest.

The court determined that the fair market value of defendant's interest in JAR Corporation was $359,720.[6] In making that determination, the court rejected the 32.6 percent reduction in value proposed by Phillips to account for tax consequences in the event of a sale, noting that there was no evidence that a sale or other taxable event was planned or contemplated.

In dividing the property, the court stated that, although defendant's income and earning capacity

[6] Although this was the figure set forth at trial by plaintiff's expert, Stockdale, defendant's expert, Phillips, accepted that figure as well after discovering that he had relied on an erroneous figure.

were far greater than plaintiff's, both parties were employed and able to support themselves. The court also stated that all of the parties' marital assets had been acquired during their twenty-four-year marriage. Considering those circumstances, as well as its assessment of fault, the court found that a 60/40 split would be reasonable and equitable. It awarded plaintiff these assets:

(1) Furniture and furnishings as stipulated;

(2) Her car(s), value unspecified;

(3) Her money market account ($9,948);

(4) Her IRA account ($29,762);

(5) The investment property ($138,000);

(6) A 1956 Ferguson tractor (estimated value $1,000)

as stipulated;

(7) Her clothing, jewelry, and other personal property in her possession;

(8) Any pension, profit-sharing, or retirement benefits in her own name.

Defendant was awarded:

(1) The marital home, by stipulation ($148,500);

(2) Furniture and furnishings as stipulated;

(3) His car(s), value unspecified;

(4) His boats ($15,500);

(5) The gold Krugerrands ($15,000);

(6) The joint investment account ($663,957);

(7) His annuity account ($45,831);

(8) His checking account ($4,000);

(9) His IRA account ($54,221);

(10) His interest in JAR Corporation ($359,720);

(11) His clothing, jewelry, and other personal property in his possession;

(12) Any pension, profit-sharing, or retirement benefits in his own name.

Recognizing that the awards represented a 88/12 split of assets whose monetary value had been

placed in evidence (excluding the Steel Tex stock), the court required defendant to pay an additional $415,465, representing twenty-eight percent of the total assessed value. That figure was then reduced by $30,613, representing the amount that the court found plaintiff had taken from the marital estate for her own use from the account in Christine's name,[7] to $384,852.

The court ruled that defendant was to bear sole responsibility for his $50,000 debt to his father, and any joint indebtedness incurred during the marriage for family maintenance. However, the parties were to be responsible for their own individual debts. Pursuant to the parties' stipulation, defendant would also provide plaintiff with medical coverage for a period of three years.

The court ruled that it would not distribute defendant's stock in Steel Tex as part of the marital estate, regarding it as a personal gift to defendant from his father, and stated:

> There is no evidence that plaintiff contributed to its acquisition, improvement or accumulation, and, in light of the fact that plaintiff is to receive over $560,000 in cash and other assets, the exclusion of the stock from the estate will not result in an award which is insufficient to maintain her. Accordingly, defendant shall receive his Steel Tex stock as his sole and separate property.

The court also declined to award either party alimony. The court stated that, although plaintiff had requested alimony, she had presented little evidence regarding her monthly living expenses and none regarding her maintenance require-

[7] The court noted that plaintiff had actually spent $32,317, but that this sum included $3,408 for past-due debts for which each party was to bear equal responsibility. The court thus subtracted defendant's share of the debts, $1,704.

ments. Stating that plaintiff was in good health, working, and earning an "above-average wage," and reiterating that plaintiff would receive over $560,000 in cash and other assets, the court found no basis for awarding alimony.

Regarding attorney fees, although plaintiff had requested contribution from defendant, the court did not award them, stating, "[S]he has presented no evidence as to the amount of those fees or, more important, that she has been and is unable to bear the cost alone."

Finally, the court ruled that the parties would have joint legal custody of John, Jr., with defendant having physical custody. Pursuant to the parties' stipulations, John could choose to live with plaintiff, but would, in any event, be supported entirely by defendant, barring a change in circumstances.

Plaintiff subsequently moved for a new trial on the issues of alimony and attorney fees, submitting her monthly living expenses and maintenance requirements,[8] as well as figures for professional fees, including expert witness fees of $23,349 and attorney fees of $53,712, incurred in this litigation. The trial court denied the motion. Concerning the issue of alimony, it stated that the parties' former standard of living is but one factor to be considered, and that on the basis of the evidence, the

[8] Plaintiff's motion focused on the disparity between the parties' incomes, as well as that between her monthly income and expenses. While acknowledging that the court's disposition awarded plaintiff additional cash and assets, the pleadings also asserted that under the terms of the court's ruling, the cash and assets would be unavailable to plaintiff until six months after the judgment was final, and afforded defendant the additional latitude of postponing payment thereafter with only a "minor interest charge of 7.5%" as a penalty. However, on October 21, 1992, the court issued an order garnishing defendant's investment account for the amount of $402,407.76, representing the amount owed plaintiff, plus $17,555.76 in interest. It appears that the matter was resolved within two days (on October 23, 1992) though in an unspecified fashion.

court found that plaintiff was able to maintain a reasonable standard of living without defendant's assistance. Concerning attorney fees, it stated that plaintiff had not submitted evidence relevant to the issue, other than that she, her attorney, and her experts put considerable time into discovery. Because plaintiff had not demonstrated either that she was financially unable to bear the costs of litigation or that defendant's conduct had exacerbated her fees, the court found no basis for amending its prior order.

I

Plaintiff first argues that the Steel Tex stock, and its appreciation, should have been included as marital assets because plaintiff contributed to the company's development and improvement by remaining at home to care for the house and children while defendant applied himself to the company. Plaintiff contends that the court's failure to include Steel Tex stock in its calculations yielded an actual 80/20 property division in favor of defendant.

In reviewing a dispositional ruling in a divorce case, we first review the trial court's findings of fact for clear error and then decide whether the dispositional ruling was fair and equitable in light of the facts. *Sands v Sands,* 442 Mich 30, 34; 497 NW2d 493 (1993); *Sparks v Sparks,* 440 Mich 141, 151-152; 485 NW2d 893 (1992). Property disposition rulings will be affirmed unless we are left with the firm conviction that the distribution was inequitable. *Id.*

Although divisions of property are not governed by any set rules, certain principles nonetheless apply. Among the equitable factors to be considered are the source of the property; the parties'

contributions toward its acquisition, as well as to the general marital estate; the duration of the marriage; the needs and circumstances of the parties; their ages, health, life status, and earning abilities; the cause of the divorce, as well as past relations and conduct between the parties; and general principles of equity. *Sands, supra* at 35; *Sparks, supra* at 159-160. In addition, the court may consider the interruption of the personal career or education of either party. *Sands, supra* at 36.

Here, while the trial court clearly considered many of these factors, its determination that plaintiff had not contributed to Steel Tex's "acquisition, improvement or accumulation" is particularly in issue.

We are unable to agree with the court that plaintiff made no contribution to the company's assets or appreciation. The trial testimony indicates that plaintiff administered the household physically and financially and cared for the children until late in the marriage, while defendant, the company president, devoted himself to the business, working long work weeks. The business clearly prospered during the marriage. While the source of defendant's interest in the company was his father's annual gifts of stock, the financial yield over time from that interest and the increased value of that interest necessarily reflected defendant's investment of time and effort in maintaining and increasing the business, an investment that was facilitated by plaintiff's long-term commitment to remain at home to run the household and care for the children.

Although initially given to defendant by his father, the interest in the business was a major asset of the marriage that defendant was permitted to cultivate and nurture over the years. It is

inequitable to deprive plaintiff of any share of the business or its value on the basis that she enjoyed the benefits of defendant's salary over the years. The fruits of defendant's efforts in the business were both the increase in the value of the business since 1968 and the salary he drew over the years. The parties were building an asset as well as enjoying its fruits on an ongoing basis. That plaintiff's contribution to the asset came in the form of household and family services is irrelevant. The marriage was a partnership. The couple nurtured a business and three children, and watched all four grow. Defendant does not claim that he could have done it all himself. In contrast to *Grotelueschen v Grotelueschen,* 113 Mich App 395; 318 NW2d 227 (1982), cited by the trial court, the asset at issue did not increase in value simply by earning interest. Rather, it appreciated because of defendant's efforts, facilitated by plaintiff's activities at home. See *McNamara v McNamara,* 178 Mich App 382, 391; 443 NW2d 511 (1989).

We thus conclude that, viewed from the standpoint of whether plaintiff contributed to the acquisition, improvement, or accumulation of the property, or from the standpoint of whether the property appreciated in value during the marriage,[9] see *Rickel v Rickel,* 177 Mich App 647, 655; 442 NW2d 735 (1989); *Gregg v Gregg,* 133 Mich App 23, 29-30; 348 NW2d 295 (1984), the trial court erred in treating Steel Tex as defendant's sole and separate property. Accordingly, we reverse the trial court's judgment with regard to this issue, and remand with instructions to award plaintiff an equitable share of the business. We note that the court need

[9] Defendant argues that plaintiff failed to present the requisite proofs concerning the appreciation in the value of the business. However, plaintiff established that defendant's income from the business increased from $110,000 to $330,000 from 1980 to 1989. This demonstrates substantial appreciation.

not award plaintiff stock in the business, and may award a sum of money or other assets out of the marital estate representing her equitable share of the business.

II

A related issue is whether the trial court erred in declining to grant alimony. In contending that alimony should have been awarded, plaintiff cites the duration of the marriage, her viability in the labor force as compared with defendant's, and the ultimate disparity in the standard of living that plaintiff expects to encounter.

Principles similar to those of property distribution apply in determining whether to award alimony. *Ianitelli v Ianitelli,* 199 Mich App 641, 642-643; 502 NW2d 691 (1993); *Demman v Demman,* 195 Mich App 109, 110-111; 489 NW2d 161 (1992). *Ackerman v Ackerman,* 163 Mich App 796, 803; 414 NW2d 919 (1987). The main objective of alimony is to balance the incomes and needs of the parties in a way that would not impoverish either party, *Ackerman v Ackerman,* 197 Mich App 300, 302; 495 NW2d 173 (1992).

In its original opinion, the trial court indicated that alimony would not be granted because plaintiff presented little evidence regarding her monthly living expenses and none regarding her maintenance requirements, because she was in good health, working, and earning an "above-average wage," and also because she would receive over $560,000 in cash and other assets. In its subsequent denial of plaintiff's motion for a new trial, the court found that plaintiff had not demonstrated that the amount awarded her was inadequate to support a reasonable standard of living.

Plaintiff's information concerning monthly ex-

penses and maintenance requirements, submitted after trial, established that she could not maintain herself exclusively on her monthly income, which was considerably less than defendant's, on which the parties had formerly maintained an affluent lifestyle. Even without this evidence, we believe plaintiff presented a strong case for alimony given the length of the marriage, the parties' lifestyle during the marriage,[10] plaintiff's $27,000 income and defendant's $371,000 income. With regard to the trial court's determination that plaintiff's income, augmented by cash and other assets worth over $560,000, enabled her to maintain a reasonable standard of living without defendant's assistance, we believe the court put too much weight on the value of the property awarded to plaintiff. In a situation such as this, where both parties are awarded substantial assets, the court, in evaluating a claim for alimony, should focus on the income-earning potential of the assets and should not evaluate a party's ability to provide self-support by including in the amount available for support the value of the assets themselves. Given the length of the marriage, the magnitude of the marital estate, and defendant's capital position and earning potential after the divorce, plaintiff should not be expected to consume her capital to support herself.

Plaintiff has asked that we remand for an award of alimony with instructions to the court that alimony should be no less than a specified amount. However, in view of the fact that on remand the court will be awarding plaintiff an additional sum representing her equitable share of the value of the business, we are unable to determine an appropriate alimony award at this time. On remand, the

[10] The parties' 1989 tax return reported a gross adjusted income of $608,000.

court shall consider the applicable factors, *Demman, supra; Ackerman,* 163 Mich App 803, taking into account both parties' circumstances after the additional property award to plaintiff, and, in considering plaintiff's needs and circumstances, shall consider plaintiff's wages and the income she can earn from the property awarded to her, with due regard for the nonincome-producing nature of any assets.

III

Plaintiff next argues that, in determining the division of marital assets, the trial court assessed fault inequitably, overlooking evidence of defendant's fault and overemphasizing her own, while ignoring other necessary factors in reaching an equitable settlement.

The relative value to be given the fault element in a particular case and the extent to which particular actions are regarded as fault contributing to the breakdown of a marriage are issues calling for a subjective response; such matters are left to the trial court's discretion subject to the requirement that the distribution not be inequitable. The trial court is in the best position to determine the extent to which each party's activities contributed to the breakdown of the marriage. In dividing the property, the trial court properly considered plaintiff's conduct as "one factor among many," *Sparks, supra* at 163, and specifically addressed the duration of the marriage, and the needs and circumstances of the parties, including health and earning capacities, in addition to fault. While we would not have penalized plaintiff to the extent of a twenty percent differential in the property distribution, we are unable to say that the distribution was inequitable on this ground alone.

IV

Plaintiff next argues that the trial court, having found that the November 1991 amendment of the stock purchase agreement was "a deliberate attempt to deflate the value of the stock," should have sanctioned defendant accordingly. However, while the court denounced defendant's behavior as conduct that could not be condoned, it stopped short of finding that it was "devious and deceptive conduct" undertaken with the intent of misleading the court. *Sands, supra* at 36. Moreover, a party's attempt to conceal assets, while relevant in considering an equitable division of marital property, is only one of many facts the court must weigh, and it does not give rise to any automatic sanction. *Id.* at 36-37. We conclude that the court did not err in failing to penalize defendant on this basis.

V

Plaintiff argues that she should have been awarded attorney fees, because of the great disparity in income and defendant's attempt to deflate the value of the stock.

Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit, and this Court will not reverse the trial court's decision absent an abuse of discretion. *Maake v Maake,* 200 Mich App 184, 189; 503 NW2d 664 (1993). Attorney fees also may be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation. *Milligan v Milligan,* 197 Mich App 665, 671; 496 NW2d 394 (1992). A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Maake, supra* at 189.

Plaintiff has not established that defendant's attempt to change the value of his stock in Steel Tex from book value to fair market value hindered plaintiff in discovering the value of those assets and forced her to incur greater expense than she otherwise would have incurred. We note that this argument was not raised before the trial court in plaintiff's motion for a new trial (which emphasized instead the cost of professional fees in general and defendant's easier access to information about the parties' assets in particular).

Nevertheless, we conclude that the failure to award attorney fees was an abuse of discretion, given the trial court's distribution of property and failure to award alimony. Plaintiff could not have been expected to satisfy her considerable attorney and expert fees and costs out of her $27,000 salary, and should not have been required to invade principal to pay these fees, given defendant's considerable property and earnings.

However, in view of our reversal and remand regarding the alimony and property issues, we are unable to determine whether an award of attorney and expert fees and costs will be appropriate. On remand, the court shall consider the matter anew. The court shall not require plaintiff to pay attorney fees out of any property that the court treats as available to produce income. Of course, if the court's award of alimony and property on remand leaves the parties with assets and income comparable to one another, an award of fees would be inappropriate.

VI

Plaintiff argues that the trial court erred in reducing her share of the assets by $30,613, the amount she spent because defendant refused to

pay certain expenses that should have been paid from marital assets. We agree.

The trial court determined that in appropriating the $39,000 in the account in Christine's name, plaintiff advanced herself a portion of the marital estate that otherwise would have been available for distribution, and spent most of it. According to plaintiff's testimony at trial, she used some of the money to pay therapy and other medical bills, some to establish herself in a new residence,[11] some to pay joint debts and utility bills, some to buy Christmas presents for the children, and retained approximately $9,000 at the time of trial. The trial court allowed plaintiff to keep the unspent remainder, subtracted from the amount spent the amount for which defendant bore a shared responsibility, and treated the $30,613 that it determined that plaintiff spent for her own needs as an advance against her final award.

Under the circumstances that plaintiff received no interim alimony and no other contributions from defendant or the marital estate toward her support after filing for divorce, that her earnings were inadequate for her support, and that defendant had substantial income, it was inequitable to treat any amounts other than the $9,000 still retained by plaintiff as an advance against her final award.[12]

VII

Defendant raises one issue in his cross appeal: whether the trial court erred in valuing his JAR Corporation stock without considering tax consequences. In light of the court's determination that

[11] Plaintiff testified that she had been instructed by defendant and his lawyer not to remove any property from the marital home.

[12] That plaintiff had undertaken to pay her own therapy bills at a time when she was living in the marital home is irrelevant. Her circumstances and needs clearly had changed.

no sale or other taxable event was planned or contemplated, we find no clear error or abuse of discretion in its decision not to discount the stock value in anticipation of such consequences. *Nalevayko v Nalevayko,* 198 Mich App 163, 164; 497 NW2d 533 (1993).[13]

VIII

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

NEFF, P.J., concurred.

M.L. STACEY, J. *(concurring in part and dissenting in part).* I would affirm the trial court's decisions regarding valuation of assets and what constitutes marital property.

I would, however, remand the case to the trial court with instructions that it:

1. Order alimony in a suitable amount, after a hearing regarding all applicable factors relating to the determination of alimony;

2. Award plaintiff appropriate attorney fees; and

3. Abate its order relating to the return of funds to the marital estate by plaintiff.

[13] The cases cited by defendant do not mandate a contrary result. In *Everett v Everett,* 195 Mich App 50; 489 NW2d 111 (1992), concerning stock *options* (which are subject to expiration, see *id.* at 54), the trial court clearly erred in failing to consider tax consequences because the options would be taxed when exercised, *id.* at 55, and because *the plaintiff in that case asked the trial court to value the options under the assumption that all the options would be exercised. Id.* at 53. In *Lesko v Lesko,* 184 Mich App 395; 457 NW2d 695 (1990), the banked sick time had no value unless a taxable event occurred. It is not argued that defendant's interest in JAR Corporation had no value except if it were sold. Neither *Burkey v Burkey (On Rehearing),* 189 Mich App 72; 471 NW2d 631 (1991), nor *Kilbride v Kilbride,* 172 Mich App 421; 432 NW2d 324 (1988), addressed tax consequences. Finally, even the extrajurisdictional case cited by defendant does not mandate consideration of tax consequences, but merely indicates that a trial court *could* reasonably consider and adopt an expert's opinion that stock values should be reduced by a future tax. *Liddle v Liddle,* 140 Wis App 2d 132; 410 NW2d 196 (1987).

ROGALSKI v TAVERNIER

Docket No. 150189. Submitted July 5, 1994, at Detroit. Decided January 17, 1995, at 9:05 A.M. Leave to appeal sought.

Nancy Rogalski, Allen Rogalski, Angela Rogalski, and Dawn Rogalski, both individually and as next friend of Nancy Lee Rogalski, brought an action in the Macomb Circuit Court against Kathy Sue and Mark Tavernier, seeking damages for injuries allegedly suffered as a proximate result of the defendants having allowed Dawn Rogalski and John Knoth, both of whom were under the age of twenty-one years, to consume alcoholic beverages at a party the defendants were hosting. The plaintiffs alleged that they had suffered damages both as a result of an altercation in the Rogalski home when Dawn, after leaving the defendant's party, was followed home by Knoth who, after being refused admittance, entered the house through a window and was stabbed and killed by Dawn and as a result of Dawn's conviction of and incarceration for second-degree murder of Knoth. The court, Michael D. Schwartz, J., granted summary disposition for the defendants, finding no causal link between the unlawful serving of alcoholic beverages by the defendants and plaintiffs' claimed damages. The plaintiffs appealed.

The Court of Appeals *held:*

Section 33 of the Liquor Control Act, MCL 436.33; MSA 18.1004, imposes a duty not to furnish alcoholic beverage to a person under twenty-one years of age. The plaintiffs alleged that the defendants breached that duty and that the breach of that duty was a proximate cause of their alleged damages. However, because criminal or violent acts are not foreseeable results of the serving of alcoholic beverages to underage persons, the plaintiffs failed to establish a proximate causal link between the defendants' act of serving the alcoholic beverages and the damages allegedly suffered by the plaintiffs. Accord-

REFERENCES

Am Jur 2d, Intoxicating Liquors §§ 274, 554, 555.

Liability, under dramshop acts, of one who sells or furnishes liquor otherwise than in operation of regularly established liquor business. 8 ALR3d 1412.

ingly, the trial court properly granted summary disposition for the defendants, because an action based on guest host liability is not established in the absence of a showing of proximate causation.

Affirmed.

INTOXICATING LIQUORS — FURNISHING LIQUOR TO MINORS — CRIMINAL ACTS — FORESEEABILITY.

Criminal or violent acts are not foreseeable results of serving alcoholic beverages to underage persons; accordingly, guest host liability can not arise as a result of the criminal or violent acts of an intoxicated underage person (MCL 436.33; MSA 18.1004).

Dolora Paull, for the plaintiffs.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. (by *Nancy J. Bourget*), for the defendants.

Before: GRIBBS, P.J., and REILLY and T. L. BROWN,* JJ.

GRIBBS, P.J. The issue presented is whether social host liability to third parties for the acts of an intoxicated minor guest should be extended to circumstances involving criminal or violent acts. The trial court found that liability should not be so extended in this case and granted summary disposition to defendants. Plaintiffs now appeal as of right. We affirm.

On May 30, 1988, plaintiffs Dawn Rogalski and Angela Rogalski, both under twenty-one years old, attended a party hosted by defendants for their daughter's sixteenth birthday. Alcoholic beverages were consumed at the party. After the party, several teen-agers returned with Dawn and Angela to the Rogalski house. Sometime later, two other teen-agers, John Knoth and Randall Keranen, who had been at the party and who allegedly were allowed to leave the party in an intoxicated state

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

and without supervision, arrived at the Rogalski house.

When Dawn would not let them into the house, Knoth entered the house by climbing through a window. Dawn was angry and asked him to leave. He refused, and, at some point, Dawn grabbed a knife from the kitchen and stabbed Knoth once in the chest, killing him. Following a jury trial, Dawn Rogalski was convicted of second-degree murder. This Court affirmed the conviction in an unpublished opinion per curiam. The Michigan Supreme Court reversed the judgment of this Court and remanded the matter for a new trial before a different judge. *People v Rogalski,* 443 Mich 885 (1993).

Plaintiffs argue that defendants breached their duty under MCL 436.33; MSA 18.1004 not to furnish alcoholic beverages to a person under twenty-one years of age and that defendants were negligent in furnishing alcohol to John Knoth and Dawn Rogalski. They further contend that this negligence was the proximate cause of plaintiffs' injuries, which include a cut on Dawn's leg and the ramifications of Dawn's incarceration experienced by the remaining plaintiffs.

The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). A motion brought under that rule tests the legal sufficiency of plaintiffs' complaint and should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development possibly could justify recovery. *Longstreth v Gensel,* 423 Mich 675, 678; 377 NW2d 804 (1985). In granting defendants' motion, the trial court found that there was no causal link between the serving of alcoholic beverages by defendants and plaintiffs' claimed damages. It further found that neither breaking and entering nor murder was the

type of harm the Legislature intended to protect against in passing MCL 436.33; MSA 18.1004. We agree.

The issue whether social hosts are responsible for violent or criminal acts that occur after they have furnished alcohol to minors is a case of first impression in Michigan. MCL 436.33(1); MSA 18.1004(1) provides:

> Alcoholic liquor shall not be sold or furnished to a person unless the person has attained 21 years of age. A person who knowingly sells or furnishes alcoholic liquor to a person who is less than 21 years of age, or who fails to make diligent inquiry as to whether the person is less than 21 years of age, is guilty of a misdemeanor. A suitable sign which describes the section and the penalties for violating the section shall be posted in a conspicuous place in each room where alcoholic liquors are sold. The signs shall be approved and furnished by the state liquor control commission.

In *Longstreth,* the Court found that MCL 436.33; MSA 18.1004 applied to social hosts as well as licensees under the Liquor Control Act. 423 Mich 683-684. In reviewing the statute, the Court found that it was a penal statute, but that violation of the statute created only a rebuttable presumption of negligence. *Id.* at 692-693. The Court concluded that the protected class under the statute was those individuals under the legal drinking age. *Id.* at 693. That case, as do all other cases of social host liability in Michigan, dealt with an automobile accident.

The issue of duty is a question of law for the trial court. *Moning v Alfono,* 400 Mich 425, 436-437; 254 NW2d 759 (1977). In *Longstreth,* the Court determined that there is a duty not to serve alcohol to those persons under twenty-one years

old. Duty and proximate cause are interrelated because they both depend on whether the harm resulting from a defendant's conduct and any intervening causes were foreseeable. *Moning, supra* at 439. If the facts bearing upon proximate cause other than causation in fact are not in dispute and if reasonable minds could not differ about applying the legal concept of proximate cause to those facts, then the issue is one for the court. *Richards v Pierce,* 162 Mich App 308, 317; 412 NW2d 725 (1987). The trial court in the instant case found that reasonable minds could not differ that the acts of Knoth and Dawn Rogalski were not foreseeable consequences of defendants' acts. We agree.

This Court finds the reasoning of the court in *Van Mastrigt v Delta Tau Delta,* 393 Pa Super 142; 573 A2d 1128 (1990), to be especially applicable to the instant case. In *Van Mastrigt,* the plaintiff sought damages resulting from injuries due to his incarceration for the murder of another student, claiming that the defendants were responsible for his injuries because of their negligence in serving him alcohol and drugs as a minor. In affirming the trial court's dismissal of the plaintiff's complaint, the court stated:

> Even if we were to agree with appellant that the defendants played a role in placing appellant in his current predicament, we would be unable to make the quantum leap necessary for excusing appellant from his own crime. None of the defendants put a knife in appellant's hand. None of the defendants were responsible for the act of killing Jeanne Goldberg. A court determined that appellant alone was responsible for the actual murder of Jeanne Goldberg. It was as a result of this determination that appellant was incarcerated. If this incarceration has resulted in personal injuries, appellant has only to look to himself for the consequences of his senseless action. [*Id.* at 151.]

See also *Griesenbeck v Walker,* 199 NJ Super 132; 488 A2d 1038 (1985) (social hosts not liable for house fire started across town by minor daughter to whom they had served alcohol, because daughter's acts were not foreseeable).

When the Court in *Longstreth* held social hosts liable for the actions of minors to whom they had served alcohol, it did so in the context of alcohol-related automobile accidents. Such accidents are a danger clearly foreseeable by social hosts. However, criminal or violent acts are not foreseeable results of the serving of alcohol to minors and, therefore, cannot serve as a basis for social host liability.

Because we are affirming the trial court's grant of summary disposition, it is unnecessary to review the remaining issue raised by plaintiffs.

Affirmed.

SMEESTER v PUB-N-GRUB, INC (ON REMAND)

Docket No. 165882. Submitted July 7, 1993, at Lansing. Decided January 17, 1995, at 9:10 A.M. Leave to appeal sought.

Pamela Smeester brought an action in the Delta Circuit Court against Pub-N-Grub, Inc., her employer, seeking compensatory damages for wage loss, loss of earning capacity, medical expenses, and intangible damages for injuries sustained during the course of her employment. The defendant did not carry worker's compensation insurance. The court, Dean J. Shipman, J., granted partial summary disposition for both parties, denying the defendant's affirmative defenses and limiting damages to compensation available under the Worker's Disability Compensation Act. The Court of Appeals, GILLIS, P.J., and MICHAEL J. KELLY and GRIBBS, JJ., reversed, holding that both common-law damages and defenses not abolished by statute are available in a civil action, and finding that the trial court erred in limiting both in such a manner that the action became a duplicate of a worker's compensation proceeding. 192 Mich App 224 (1991). The Supreme Court vacated the judgment of the Court of Appeals and remanded for a determination by the Court of Appeals "whether, in a cause of action brought pursuant to MCL 418.641(2); MSA 17.237(641)(2), an employee may recover damages without first having to show the negligence of the employer." The Court further ordered that the Court of Appeals, if the record is sufficient, "decide the standard of liability, the defenses available, and the scope of recovery." 442 Mich 404, 408 (1993).

On remand, the Court of Appeals *held:*

1. A common-law action brought pursuant to § 641(2) does not act as an election of remedies; rather, § 641(2) imposes common-law liability in addition to, not as a substitute for, the benefits recoverable under the Worker's Disability Compensation Act.

2. A common-law action brought pursuant to § 641(2) requires proof that the employer was in some respect negligent.

3. An employer in a common-law action for damages brought

REFERENCES

Am Jur 2d, Workers' Compensation §§ 52, 66, 108.
See ALR Index under Workers' Compensation.

by an employee pursuant to § 641(2) may not raise as a defense the negligence of the employee, except to the extent that the employee's negligence is wilful.

4. An employee bringing a common-law action pursuant to § 641(2) is not limited to recovering as damages only those amounts that are payable as benefits under the Worker's Disability Compensation Act.

Reversed and remanded.

WORKER'S COMPENSATION — EMPLOYER TORT LIABILITY — NEGLIGENCE — DEFENSES — DAMAGES.

The common-law action of an employee against an employer permitted under the Worker's Disability Compensation Act where the employer is not insured pursuant to the act does not act as an election of remedies, but rather imposes common-law liability in addition to, not as a substitute for, worker's compensation benefits; in such a common-law action, negligence is an element of the employee's cause of action against the employer, the employee's negligence is a defense to the action only to the extent that the employee's negligence is wilful, and the damages recoverable by the employee are not limited to that which is payable as benefits under the Worker's Disability Compensation Act (MCL 418.641[2]; MSA 17.237[641][2]).

Green, Renner, Weisse, Rettig, Rademacher & Clark, P.C. (by *Richard C. Clark*), for the plaintiff.

Stupak & Bergman, P.C. (by *Frank A. Stupak*), for the defendant.

ON REMAND

Before: GRIBBS, P.J., and MICHAEL J. KELLY and GRIFFIN, JJ.

GRIBBS, P.J. Previously, this Court held that both common-law damages and defenses not abolished by statute were available in a civil action under § 641(2) of the Worker's Disability Compensation Act (WDCA), MCL 418.641(2); MSA 17.237(641)(2), when an employee sues an employer for an injury such that, had the employer been

insured as required by §§ 171 and 611 of the WDCA, MCL 418.171, 418.611; MSA 17.237(171), 17.237(611), suit would be prohibited by the exclusive remedy provision of § 131 of the WDCA, MCL 418.131; MSA 17.237(131). *Smeester v Pub-N-Grub, Inc,* 192 Mich App 224, 480 NW2d 329 (1991). The Supreme Court, however, found our opinion unclear and subject to conflicting interpretation and, accordingly, remanded for a determination "whether, in a cause of action brought pursuant to MCL 418.641(2); MSA 17.237(641)(2), an employee may recover damages without first having to show the negligence of the employer." The Court further ordered that, if this Court finds the record sufficient to make such determination, we are to "decide the standard of liability, the defenses available, and the scope of recovery." If, however, the record is insufficient to that end, this Court is required to remand to the trial court for further development of the record. *Smeester v Pub-N-Grub, Inc,* 442 Mich 404, 408; 500 NW2d 742 (1993).

Plaintiff, Pamela Smeester, was injured in the course of her employment at defendant, Pub-N-Grub, Inc., shortly after she was hired. When she submitted her medical bills to the employer, both parties discovered that defendant did not carry worker's compensation insurance. Plaintiff then brought this civil action, seeking traditional tort damages for her injury pursuant to § 641(2) of the WDCA.

The trial court granted plaintiff's motion in limine to disallow comparative negligence as an affirmative defense. Although no appeal was taken by defendant from that decision, the propriety of that ruling appears to be one of the issues we are constrained by the Supreme Court's order of remand to evaluate.

The order that originally generated this appeal was one in which the trial court granted defendant's motion to limit plaintiff's damages to what she otherwise could have recovered under the WDCA. We granted leave to appeal and originally held that common-law damages are available in a civil action of this nature. We held that such an action is not duplicative of a worker's compensation proceeding. By the terms of the Supreme Court's order of remand, that is another issue we must reconsider.

Two sections of the WDCA apply to these problems. Section 641(2) provides:

> The employee of an employer who violates the provisions of section 171 or 611 shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment notwithstanding the provisions of section 131.

The other directly applicable statutory provision is § 141, MCL 418.141; MSA 17.237(141), which provides:

> In an action to recover damages for personal injury sustained by an employee in the course of his employment or for death resulting from personal injuries so sustained it shall not be a defense:
>
> (a) That the employee was negligent, unless it shall appear that such negligence was wilful.
>
> (b) That the injury was caused by the negligence of a fellow employee.
>
> (c) That the employee had assumed the risks inherent in or incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances.

The WDCA is remedial in nature and is to be construed liberally in a humanitarian manner in favor of injured employees. *McGillis v Aida Engineering, Inc,* 161 Mich App 370, 374; 410 NW2d 817 (1987). However, because § 641 appears to restore the employee's common-law right to sue the employer, a cause of action otherwise eliminated by § 131, limitations on that common-law action will not be presumed lightly, and statutes will not be extended by implication to abrogate established rules of the common law. *Hasty v Broughton,* 133 Mich App 107, 113; 348 NW2d 299 (1984). Courts indulge a presumption that the Legislature is familiar with the rules of statutory construction and has drafted its enactments accordingly. *People v Jones,* 190 Mich App 509, 513; 476 NW2d 646 (1991).

We note that § 641 does not, as did the corresponding provision in the original version of the Workmen's Compensation Act, 1912 (1st Ex Sess) PA 10, part 6, § 1, declare that pursuit of such a common-law action constitutes an election of remedies. See *Twork v Munising Paper Co,* 275 Mich 174, 179; 266 NW 311 (1936). We hold that the WDCA does not absolve an employer who is uninsured from nonetheless remaining liable under its provisions for statutory benefits. Section 641(1) delineates criminal sanctions and § 641(2) imposes common-law liability in addition to, but not as a substitute for, benefits recoverable under the WDCA.

What, then, is the nature of this common-law action? As we previously held, such an action is one in tort, for which traditional tort damages, including those for emotional distress and loss of consortium, may be recovered. The common-law action is one in the nature of trespass on the case, in which the plaintiff must prove that the em-

ployer was in some respect negligent as a precondition to recovery. *Viaene v Mikel,* 349 Mich 533, 539; 84 NW2d 765 (1957); *Brown v Standard Oil Co,* 309 Mich 101; 14 NW2d 797 (1944); *Williams v Sealander,* 288 Mich 617; 286 NW 101 (1939); *Erickson v Leach,* 285 Mich 554, 558; 281 NW 324 (1938); *Frost v Clement,* 225 Mich 267, 269; 196 NW 324 (1923); *Smith v Hyne,* 208 Mich 334, 347; 175 NW 293 (1919); *Lydman v De Haas,* 185 Mich 128, 139; 151 NW 718 (1915).

While the foregoing cases were decided before the enactment of § 641, that provision simply restores the common-law right of action abolished by § 131 under the described circumstances. Therefore, it is appropriate to turn to the common-law principles that obtained before the adoption of § 641 to determine the nature of the common-law action thus resurrected.

Turning our attention to the question of comparative negligence, we note that Michigan's appellate courts in some situations have extended comparative negligence so as to apply it to situations in which, before the adoption of comparative negligence in *Placek v Sterling Heights,* 405 Mich 638; 275 NW2d 511 (1979), contributory negligence was no defense. *Vining v Detroit,* 162 Mich App 720, 724-728; 413 NW2d 486 (1987); *Hardy v Monsanto Enviro-Chem Systems, Inc,* 414 Mich 29, 38; 323 NW2d 270 (1982). Nonetheless, § 141(a) clearly precludes consideration of anything but the plaintiff's wilful negligence in defense of the common-law action restored in § 641(2).

Section 141 likewise renders inapposite the doctrine of assumption of risk, in all its manifold forms. Thus, an employee who falls victim to unsafe working conditions that the employee was fully aware of, and the hazard of which the employee readily might have avoided in the exercise

of due care, is within the doctrine of assumption of risk and foreclosed as a defense by § 141(c). *Wulff v Bossler,* 199 Mich 70; 165 NW 1048 (1917). Indeed, in effect, § 141 abolishes all or nearly all recognized common-law defenses. *Erickson v Leach, supra.*

Nothing in the WDCA purports to limit the damages recoverable in an action under § 641(2) in comparison with those otherwise available in a personal injury action sounding in tort. However, generally, it is abhorrent to the fundamental principles of the WDCA to allow any form of double recovery. *Stanley v Hinchliffe & Kenner,* 395 Mich 645, 657; 238 NW2d 13 (1976). Accordingly, if, as in *Viaene v Mikel, supra,* an employee successfully has pursued and recovered benefits in a worker's disability compensation proceeding, or been voluntarily awarded benefits, any such benefits must be subtracted from the recovery awarded by the trier of fact in a common-law action under § 641(2). See *Mayhew v Berrien County Rd Comm,* 414 Mich 399; 326 NW2d 366 (1982); *Borchardt-Spicer v GAF Corp,* 139 Mich App 658; 362 NW2d 728 (1984). Judgment then may be entered on the verdict thus adjusted.

The circuit court erred in determining that an action such as the present one under § 641(2) essentially is duplicative of a worker's compensation proceeding. There would be no point to pursuing such a common-law remedy, with its requirement that the plaintiff prove fault, when the same recovery could be had in a worker's compensation proceeding without the necessity or risk of adducing proof of employer negligence. This common-law action is principally one for damages not otherwise recoverable within the worker's compensation system, although, if the present plaintiff has not yet received such benefits, she may plead and

prove such damages on trial of this case. Should she fail to prove negligence, however, she can revert to the administrative remedy, which is not preconditioned on proof of employer fault. *Viaene v Mikel, supra.*

Accordingly, we hold: (1) negligence is an element of an employee's cause of action against an employer under § 641(2); (2) an employer may not assert as a defense the negligence of the employee, unless that negligence is wilful, MCL 418.141; MSA 17.237(141); and (3) an employee's damages are not limited to the worker's compensation benefits available pursuant to the WDCA.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

DOLAN v CONTINENTAL AIRLINES

Docket No. 149512. Submitted April 12, 1994, at Detroit. Decided January 17, 1995, at 9:15 A.M. Leave to appeal sought.

Sue Ann Dolan brought an action in the Wayne Circuit Court against Continental Airlines, alleging violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, breach of contract, and a public policy tort claim as a result of the termination of the plaintiff's employment with the defendant after she, without the employer's permission, allegedly contacted the United States Drug Enforcement Administration with information regarding suspected drug traffickers and terrorists after her supervisor posted a notice requiring all employees first to receive permission to make such contacts. The court, William J. Giovan, J., granted the defendant's motions to dismiss the claims. The plaintiff appealed.

The Court of Appeals *held:*

The circuit court's grant of the defendant's motions to dismiss the plaintiff's claims is affirmed.

TAYLOR, J., in an opinion with which R. D. GOTHAM, J., concurred in the result only, stated:

1. In order for the WPA to apply, the violation or suspected violation must be committed in the course of doing business. The WPA does not apply to this case because the failure to report or to be allowed to report suspected drug traffickers or terrorists is not itself a violation of the law and the defendant's refusal to allow employees to report to the DEA independently the information that the plaintiff sought to report did not constitute criminally irresponsible behavior on the part of the defendant.

2. The plaintiff's public policy tort claim is not preempted by the WPA. However, the plaintiff did not state a valid public policy tort claim.

3. The trial court properly dismissed the breach of contract claim. The plaintiff was an at-will employee with no legitimate expectation of termination only for just cause.

SHEPHERD, P.J., did not participate.

Cunningham & Associates (by *Douglas C. Cunningham*), for the plaintiff.

Miller, Canfield, Paddock & Stone (by *Leonard D. Givens* and *Megan P. Norris*), for the defendant.

Before: SHEPHERD, P.J., and TAYLOR and R. D. GOTHAM,* JJ.

TAYLOR, J. Plaintiff appeals as of right a circuit court order granting defendant's renewed motion to dismiss plaintiff's first amended complaint. We affirm.

Plaintiff worked for defendant as an agent in its Capitol City Airport hub. In early 1991, defendant informed plaintiff and her coemployees to be aware of persons purchasing tickets who fit certain "profiles" related to drug trafficking or terrorist activities. At the time, there were increased concerns about security measures because of the Persian Gulf Crisis. Relying on these profiles, on two separate occasions plaintiff reported persons to airport security, resulting in the arrest of these individuals. The United States Drug Enforcement Administration (DEA) advised plaintiff that because of her tips she would receive a monetary reward. Because of concerns about overzealous reporting and the unnecessary embarrassment of customers, plaintiff's supervisor, Gordy Sullivan, posted a notice directing defendant's employees not to call the DEA without first clearing it with him. After the notice was posted, a dispute developed regarding whether plaintiff directly contacted the DEA. She asserted that she did not, or, if she did, it was about the reward money and not in violation of Sullivan's notice. Plaintiff's employment with defendant was then terminated.

Plaintiff filed her original complaint asserting

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

violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, and breach of contract. The circuit court granted defendant's motion to dismiss the WPA claim, but granted plaintiff leave to amend her complaint in order to add a public policy tort claim. After plaintiff filed her amended complaint, defendant filed a renewed motion to dismiss both the breach of contract claim and the public policy tort claim. At that time, plaintiff also filed a motion requesting relief from the court's earlier order dismissing her WPA claim. The court consolidated these matters, granted defendant's motion to dismiss the breach of contract and public policy tort claims, and denied plaintiff's motion for relief from the court's original order that dismissed her WPA claim.

Plaintiff argues that the trial court erred in dismissing her WPA claim because she has stated a prima facie case under the WPA. To state a prima facie claim under the WPA, a plaintiff must establish

> (1) that plaintiff was engaged in protected activities as defined by the act, (2) that plaintiff was subsequently discharged, and (3) that a causal connection existed between the protected activity and the discharge. [*Tyrna v Adamo, Inc,* 159 Mich App 592, 601; 407 NW2d 47 (1987).]

Plaintiff asserts that, even after defendant's notice, any telephone call to the DEA to report profile information on customers constituted protected activity.

The fundamental question raised in this case is whether the WPA was intended to protect employees who report customers meeting a profile of terrorists or drug traffickers. That is, third parties

whose violations, if any, have no connection to the business. In *Dudewicz v Norris Schmid, Inc,* 443 Mich 68; 503 NW2d 645 (1993), the Supreme Court held that the WPA was intended to protect employees who report violations of law arising out of company business regardless of whether the criminal actor is an employer or employee. However, the Court noted that its holding did not begin to "test the outer limits of this rather broad statute." *Id.* at 77. The case before us does test the outer limits of WPA coverage.

In *Dudewicz,* the plaintiff filed assault and battery charges against a fellow employee. The employer told the plaintiff to drop the charges and the plaintiff's employment was terminated when he refused. In concluding that the WPA afforded the plaintiff protection, the Supreme Court explained that the Legislature intended the act to protect "employees who report violations of law by either their employers or fellow employees." *Id.* at 75. With regard to whether the WPA extends coverage to employees who report violations by third parties, the Court suggestively stated that "a strictly literal interpretation of the statute without an analysis of legislative intent arguably could lead to an interpretation that would bar discharge of an employee for reporting a crime by anyone under any circumstances." *Id.* at 77. Yet, because it was possible to do so, the Supreme Court resolved *Dudewicz* without addressing the outer limits of the WPA's reach.

In her dissent in *Dudewicz,* Justice BOYLE indicated that she agreed with the majority that the purpose of the act is "both to encourage employees to assist in law enforcement and to protect those employees who engage in whistleblowing activities." *Id.* at 83 (BOYLE, J., dissenting). However, she continued by indicating that

> this observation [of the majority] fails to take account of a significant focus of the statute noted in the bill analyses. A whistleblowing employee alerts the public to the employer's, or a co-worker's, "corruption or criminally irresponsible behavior in the conduct of government or large business." [*Id.*]

She summarized, saying:

> In other words, where the conduct of business itself violates a law, statute, or regulation, an employee's report of that illegal conduct is protected activity. [*Id.*]

In Justice BOYLE's view, when the employer in *Dudewicz* fired the plaintiff because he refused to drop the assault and battery charge against a coemployee, the plaintiff was not reporting illegal conduct on the part of the business, and thus, he should have had no WPA protection. I believe that the majority, had it gone that far in its analysis, would have agreed with Justice BOYLE's elaboration of the WPA's focus if not her ultimate conclusion. My position is supported by the *Dudewicz* majority's conclusion that states: "The WPA applies to an employee who reports a violation of a law arising out of a dispute over the handling of company business and occurring during business hours." *Id.* at 80. Had the *Dudewicz* majority utilized Justice BOYLE's approach, I believe it would have found that the defendant, by discharging the plaintiff for reporting criminal activity, was placing the business in the posture of being an accessory after the fact to the assaultive behavior of the assaulting employee. In doing so, the business was acting in a criminally irresponsible manner. Thus, in order for the WPA to apply, the violation or suspected violation must be committed in the course of doing business.

In this case, plaintiff claims that she was discharged for reporting third parties who met a profile that would have placed those individuals in a pool of potential criminal actors. Plaintiff does not assert that her failure to make such a report, or to be allowed to make one, is itself a violation of law. Accordingly, defendant's refusal to allow employees to report independently profile information did not constitute criminally irresponsible behavior on the part of the business, and thus, the WPA does not apply.

Plaintiff also argues that the trial court erred in dismissing her public policy tort claim. A WPA claim and a public policy tort claim are mutually exclusive. *Shuttleworth v Riverside Osteopathic Hosp,* 191 Mich App 25; 477 NW2d 453 (1991). As the Court said in *Dudewicz, supra* at 80:

> A public policy claim is sustainable, then, only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. As a result, because the WPA provides relief to Dudewicz for reporting his fellow employee's illegal activity, his public policy claim is not sustainable.

Given that the WPA affords no protection under the circumstances, plaintiff's public policy tort claim is not preempted by the WPA. It does not necessarily follow, however, that plaintiff has a viable public policy tort claim.

Plaintiff argues that defendant terminated her employment because it believed she telephoned the DEA regarding persons meeting profiles of suspected drug traffickers and terrorists. Taking this factual allegation as true, *Michigan Ins Repair Co, Inc v Manufacturers Nat'l Bank of Detroit,* 194 Mich App 668, 673; 487 NW2d 517 (1992), plaintiff has failed to state a valid public policy tort claim.

The Supreme Court, in *Suchodolski v Michigan Consolidated Gas Co,* 412 Mich 692, 695; 316 NW2d 710 (1982), has recognized three situations in which the grounds for discharge are so contrary to public policy as to be actionable even when the employment is at will. First, when the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty. Second, when the employee is discharged for the failure or refusal to violate the law in the course of employment. Third, when the employee is discharged for exercising a right conferred by a well-established legislative enactment. *Id.* at 695-696.

None of the above situations applies to the present case. Plaintiff does not cite any legislation explicitly prohibiting the termination of employees for reporting suspicious passengers to the DEA. Plaintiff does not allege that she was discharged for failing or refusing to violate the law. Finally, plaintiff does not allege that she was discharged for exercising a statutorily conferred right. Therefore, plaintiff has no valid public policy tort claim.

Finally, the trial court properly dismissed plaintiff's breach of contract claim. Plaintiff argues that she was protected as a "just cause" employee because of statements in defendant's human resources manual. The manual contained a progressive discipline system, but it also vested defendant with the unilateral option of an immediate termination. Accordingly, the manual could not create a legitimate expectation of termination only for just cause. *Rood v General Dynamics Corp,* 444 Mich 107, 140-142; 507 NW2d 591 (1993). This policy manual did not purport to be anything other than a disciplinary guideline and therefore the employer was able to treat plaintiff as an at-will

employee and terminate her employment accordingly.

Affirmed.

R. D. GOTHAM, J., concurred in the result only.

SHEPHERD, P.J., did not participate.

ALYAS v ILLINOIS EMPLOYERS INSURANCE OF WAUSAU

Docket No. 152389. Submitted September 13, 1994, at Detroit. Decided January 17, 1995, at 9:20 A.M.

Hala Alyas, as personal representative of the estate of Manhal J. Alyas, brought a dramshop action in the Oakland Circuit Court against John Gillard, Jr., doing business as Eddie's Bar, and others. The plaintiff obtained a consent judgment against Eddie's Bar and served writs of garnishment on Illinois Employers Insurance of Wausau and others. Wausau filed a disclosure stating that it had no liability because no monies were owed to the principal defendant under any Wausau insurance policy. The court, Robert L. Templin, J., granted summary disposition for Wausau. The Court of Appeals, HOOD, P.J., and CAVANAGH and J. W. FITZGERALD, JJ., reversed. 180 Mich App 154 (1989). On remand, the trial court granted summary disposition for Wausau on the basis of the plaintiff's failure to contest Wausau's disclosure. The plaintiff appealed.

The Court of Appeals *held:*

MCR 3.101(M)(2) provides that facts stated in a garnishment disclosure must be accepted as true unless the plaintiff timely has served interrogatories or a notice of deposition, or another party has filed a pleading or motion denying the accuracy of the disclosure. Under MCR 3.101(J)(1) (now MCR 3.101[L][1]), a plaintiff has fourteen days after service of the garnishee defendant's disclosure to serve the garnishee defendant with written interrogatories or a notice of deposition. In this case, the plaintiff failed to serve Wausau with interrogatories or a notice of deposition within the required period. Accordingly, the trial court was required to accept as true Wausau's disclaimer of liability to the principal defendant, and the trial court did not err in granting summary disposition for Wausau.

Affirmed.

REFERENCES

Am Jur 2d, Executions and Enforcement of Judgments §§ 709, 710.

See ALR Index under Attachment or Garnishment; Judgments, Orders, and Decrees.

FITZGERALD, J., dissenting, stated that summary disposition for Wausau would be inequitable and would exalt form over substance because Wausau did not assert the plaintiff's failure to contest timely the garnishment disclosure as a ground for summary disposition until its second motion for summary disposition, by which time extensive discovery had been conducted and the plaintiff had challenged the disclosure. The order granting summary disposition should be reversed and the case should be remanded to the circuit court.

GARNISHMENT — DISCLOSURES.

Facts stated in a garnishee defendant's disclosure must be accepted as true unless the plaintiff timely has served interrogatories or a notice of deposition, or another party has filed a pleading or motion denying the accuracy of the disclosure (MCR 3.101[J][1] [now (L)(1)], [M][2]).

John J. Grech & Associates, P.C. (by *John J. Grech*) (*Bendure & Thomas* by *Mark R. Bendure* and *Victor S. Valenti*), for Hala Alyas.

Harvey, Kruse, Westen & Milan, P.C. (by *Michael F. Schmidt* and *Maurice A. Borden*), for Illinois Employers Insurance of Wausau.

Before: SAWYER, P.J., and FITZGERALD and T. S. EVELAND,* JJ.

SAWYER, P.J. Plaintiff appeals from an order of the circuit court granting summary disposition for garnishee defendant Illinois Employers Insurance of Wausau (Wausau). We affirm.

Plaintiff's decedent was killed in an automobile accident. Plaintiff thereafter obtained a consent judgment against Eddie's Bar, which allegedly had served alcohol to the driver of the other vehicle involved in the accident. Garnishee defendant Wausau was the excess liability insurer for Eddie's

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

Bar.[1] Plaintiff thereafter filed writs of garnishment against Wausau and others. Wausau filed a garnishee disclosure and an answer that denied all liability on several grounds.[2] Summary disposition in favor of the insurance companies had been granted on grounds not relevant here and that grant of summary disposition was reversed by this Court in a prior opinion. *Alyas v Gillard,* 180 Mich App 154; 446 NW2d 610 (1989). On remand, the trial court again granted summary disposition in favor of Wausau, this time for plaintiff's failure to contest Wausau's garnishment disclosure within fourteen days as required by court rule.

The only issue on appeal is whether the trial court correctly granted summary disposition on the basis of plaintiff's failure to contest Wausau's disclosure. We agree with defendant that summary disposition was properly granted. MCR 3.101(M)(2) provides that facts stated in a garnishment disclosure must be accepted as true unless the plaintiff has served interrogatories or a notice of deposition within the time allowed by subrule J(1) or another party has filed a pleading or motion denying the accuracy of the disclosure. Under MCR 3.101(J)(1),[3] a plaintiff has fourteen days after service of the garnishee defendant's disclosure to serve the garnishee defendant with written interrogatories or notice of deposition. It is undisputed that in the case at bar plaintiff failed to do so within fourteen days. Accordingly, under subrule M(2), the trial court was required to accept as true the facts

[1] The primary liability carrier was Union Indemnity Insurance Company of New York, with Michigan Property & Casualty Guaranty Association assuming responsibility for Union Indemnity's duties under the policy when Union Indemnity went into receivership. Defendant Citizens Insurance Company of America was acting as MPCGA's servicing agent.

[2] Defendant Citizens also filed a disclosure denying liability.

[3] Now MCR 3.101(L)(1).

stated in Wausau's garnishment disclosure. That disclosure stated that there was no liability inasmuch as no monies were owed under any policy of insurance by Wausau to the principal defendant. Because that fact must be accepted as true, summary disposition in favor of Wausau was appropriate.

Plaintiff argues that Wausau should not be entitled to summary disposition because its disclosure was late and, therefore, its failure to file a timely disclosure should excuse plaintiff from the time limit imposed by MCR 3.101(M)(2). We disagree. While it does appear that Wausau's disclosure was late, the remedy provided by court rule is that plaintiff *may* take a default against the garnishee defendant. MCR 3.101(R)(1).[4] Plaintiff, however, did not take a default against Wausau before the filing of Wausau's disclosure. Indeed, plaintiff did not seek a default against Wausau until after Wausau had moved for summary disposition. Simply put, plaintiff could have taken a default against Wausau, but did not. That does not change the fact that, under subrule M(2), the statements in the disclosure Wausau eventually filed must be accepted as true because of plaintiff's failure to contest those statements.

Next, plaintiff asserts that defendant's disclosure was defective because it did not state the date and manner in which defendant gave notice to the principal defendant as required by the former provisions of MCR 3.101(H)(3). First, it is not at all clear from the record that Wausau did, in fact, fail to comply with the court rule. It used a garnishee disclosure form approved by the State Court Administrative Office, which included an instruction to forward a copy to the principal defendant, and

[4] Now MCR 3.101(S)(1).

the form included the principal defendant's name and address in the appropriate location. Second, even assuming that Wausau failed to comply with this requirement of the court rule, we fail to see why that failure should in any way excuse plaintiff's obligation under subrule M(2) to contest timely the facts stated in the garnishee disclosure, given that the requirement affects the principal defendant's interest.

Next, plaintiff argues that defendant's disclosure was deficient because it failed to disclose that it was an excess carrier or how much coverage was provided and, instead, simply stated that there was no liability. This argument, however, is relevant to the accuracy of the garnishee disclosure, and the accuracy of the disclosure is precisely what plaintiff is now precluded from arguing in light of plaintiff's failure to challenge the disclosure's statement of nonliability within the period required under subrule M(2).

Plaintiff also argues that summary disposition was inappropriate because Wausau suffered no prejudice from plaintiff's delay. However, there is no prejudice requirement under the court rule, but the court rule does make it mandatory to accept as true the statements in the disclosure unless challenged within the required period. MCR 3.101(M)(2).[5]

Finally, plaintiff argues that Wausau has waived its right to summary disposition of this issue because it had voluntarily engaged in discovery before raising this issue in its renewed motion for

[5] In this context, plaintiff also argues that his delay in seeking discovery should be excused because of the complexities of the case. That argument, however, overlooks the fact that plaintiff could have sought an extension of the time for the filing of interrogatories or the taking of depositions under MCR 3.101(T). Therefore, plaintiff could have obtained an extension if it was truly necessary. However, plaintiff did not seek such an extension from the trial court.

summary disposition. We disagree. While we certainly encourage parties to raise dispositive issues as soon as is practicable so as to avoid unnecessary litigation, the failure to do so is not grounds to thereafter deny the motion.

Affirmed. Defendants may tax costs.

T. S. EVELAND, J., concurred.

FITZGERALD, J. *(dissenting).* Given the procedural background of this case, I must respectfully dissent.

There is no dispute that plaintiff failed to contest within fourteen days after service the garnishee disclosure filed by Illinois Employers Insurance of Wausau (Wausau). Under MCR 3.101(M)(2), the trial court would be required to accept as true the facts in Wausau's garnishment disclosure wherein liability was denied and, consequently, a grant of summary disposition would be proper.

In this case, however, the trial court did not originally grant summary disposition for Wausau on this ground, although this ground was raised in Wausau's original motion. The trial court's April 18, 1988, order granting summary disposition was reversed by this Court on September 6, 1989.[1] The Supreme Court denied defendant's application for leave to appeal on July 17, 1990.[2]

Wausau waited sixteen months after the Supreme Court denied leave to appeal before refiling its motion for summary disposition based on plaintiff's failure to contest timely Wausau's garnishee disclosure. During this sixteen-month period, plaintiff challenged the disclosure and the parties engaged in extensive discovery. By the time Wausau refiled its motion for summary disposition, the

[1] 180 Mich App 154; 446 NW2d 610 (1989).

[2] 435 Mich 867 (1990).

technical defect had been cured. Under these circumstances, I believe it would be inequitable, and it would exalt form over substance, to deny plaintiff the right to an adjudication of the claim on its merits. I would reverse the grant of summary disposition in favor of Wausau and remand the case.

PEOPLE v SHELDON

Docket No. 172889. Submitted December 21, 1994, at Grand Rapids. Decided January 17, 1995, at 9:25 A.M.

Ronald C. Sheldon was bound over to the Branch Circuit Court on two counts of larceny over $100 involving the unauthorized removal of two automobiles from an impoundment lot. The court, Michael H. Cherry, J., dismissed the charges without prejudice and quashed the information, holding that the wrecker service that was holding the two vehicles following police impoundment did not have an ownership interest in the vehicles and thus the taking of the vehicles from the impoundment lot could not be a larceny and, even if the wrecker service had an ownership interest, the evidence presented at the preliminary examination failed to establish that the value of that ownership interest was more than $100. The people appealed.

The Court of Appeals *held:*

1. Larceny is not limited to the taking of property from the person who holds title to the property, but also includes the taking of property from a person who has rightful possession and control of the property. Pursuant to MCL 257.252a; MSA 9.1952(1), an operator of an impoundment lot has a right of possession of a vehicle that has been impounded because of abandonment until such time as the owner pays the towing and storage fees or posts a bond for the payment. Thus, with respect to the vehicle for which there was evidence that it had been impounded because it had been abandoned, the wrecker service had a sufficient possessory interest to make the taking of the vehicle a larceny. However, with respect to the other vehicle for which there was not sufficient evidence to establish that the vehicle had been impounded pursuant to statute, there was not sufficient evidence to establish the possessory interest necessary to support a charge of larceny. Accordingly, the evidence at the preliminary examination was sufficient only to

REFERENCES

Am Jur 2d, Larceny §§ 22, 45.

See ALR Index under Automobiles and Highway Traffic; Larceny or Theft.

establish probable cause to believe that one larceny had occurred.

2. The value of the property taken from the wrecker service was not the value that the vehicle would command on the open market, but rather was the value of the vehicle to the wrecker service, which was the value of the towing and storage fees the wrecker service, as the impoundment agent, was entitled by statute to receive. The prosecutor failed to present any evidence at the preliminary examination concerning the value of the towing and storage services and thus failed to establish probable cause to believe that the value of those services exceeded $100. Accordingly, the record at the preliminary examination supports only a single misdemeanor count of larceny under $100.

3. The circuit court erred in dismissing the charges entirely. The court should have remanded the matter to the district court for trial of the single misdemeanor count of larceny under $100 that was supported by the evidence at the preliminary examination. Accordingly, the matter must be remanded to the district court. However, the remand is without prejudice to the prosecutor refiling the original charges and establishing the ownership or possessory interests and values of those interests of more than $100 necessary to establish the original felony charges.

Affirmed in part, reversed in part, and remanded to the district court.

1. LARCENY — AUTOMOBILES — OWNERSHIP — POSSESSORY INTEREST — IMPOUNDMENT.

An impoundment agent holding an automobile that has been impounded by the police pursuant to statute because of abandonment has a sufficient possessory interest in the vehicle to make a taking of the vehicle from the impoundment lot without the agent's permission a larceny (MCL 257.252a, 750.356; MSA 9.1952[1], 28.588).

2. LARCENY — AUTOMOBILES — IMPOUNDMENT — VALUE.

The value of an automobile taken from an impoundment agent holding the vehicle in impoundment because it had been abandoned is, for the purpose of the bringing of a charge of larceny, the value of the towing and storage services to which the impoundment agent is entitled by statute (MCL 257.252g; MSA 9.1952[7]).

Frank J. Kelley; Attorney General, *Thomas L. Casey,* Solicitor General, *John L. Livesay,* Prose-

cuting Attorney, and *Vaughn K. Stecker,* Assistant Prosecuting Attorney, for the people.

Thomas E. Harmon, for the defendant.

Before: NEFF, P.J., and SAWYER and J. P. JOURDAN,* JJ.

SAWYER, J. The prosecutor appeals from an order of the circuit court quashing the information and dismissing the charges against defendant without prejudice. We affirm in part and reverse in part.

Defendant originally was charged with one count of larceny over $100. MCL 750.356; MSA 28.588. Following the preliminary examination, the prosecutor moved that defendant not only be bound over on that count, but also that an additional count of larceny over $100 and a count of attempted larceny over $100 be added. The examining magistrate bound over defendant on two counts of larceny over $100, but declined to add the attempted larceny charge, concluding that the evidence merely showed preparation, not perpetration. Defendant successfully had the two larceny charges dismissed in the circuit court as a result of his motion to quash the information.

This case involves the alleged unauthorized removal of motor vehicles from an impound lot. Removed from the impound lot, which was operated by Banker's Wrecker Service, were a 1954 Cadillac and a 1966 Cadillac. No evidence was presented concerning the ownership of those vehicles other than a statement by defendant to the police that he had purchased the 1966 Cadillac a few days before having removed it from the impound lot. The information states that the victim

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

of the larceny is Banker's Wrecker Service. It is the prosecutor's theory that, because Banker's Wrecker Service had the right of possession of the vehicles as a result of the impoundment, Banker's properly may be deemed the victim of the larceny. The trial court quashed the information after concluding that the wrecker service was not the owner of the vehicles. Additionally, the court held that even if it were to conclude that the wrecker service was the owner of the vehicles, there was insufficient evidence presented at the preliminary examination to establish that the value of the wrecker service's interest was more than $100.

The prosecutor first argues that the trial court erred in concluding that the automobiles did not belong to the wrecker service at the time they were removed from the impound lot. We agree in part. Clearly, there was no evidence presented that the wrecker service did, in fact, own the vehicles and possess lawful title to those vehicles. Thus, the question is whether the wrecker service enjoyed a right of possession sufficient to support a larceny charge at the time the vehicles were removed from the wrecker service's possession. We believe that it did.

Larceny is not limited to taking property away from the person who holds title to that property, but also includes taking property from a person who has rightful possession and control of the property. *People v Pohl,* 202 Mich App 203, 205; 507 NW2d 819 (1993); *People v Hatch,* 156 Mich App 265, 267; 401 NW2d 344 (1986). In fact, this expansive definition of "owner" for purposes of the crime of larceny is recognized in the jury instructions, specifically CJI2d 22.2, which provides as follows:

> "Owner" in this case means the actual owner of

> the property [or any other person whose consent was necessary before the property could be taken].

Furthermore, this position is part of the generally accepted principles of criminal law, as evidenced by the example given in Dressler, Understanding Criminal Law, § 32.06[B], p 503, citing 4 Blackstone, Commentaries, p 231.

> Similarly, if *D,* owner of an automobile, nonconsensually takes "his" vehicle from a mechanic who has a possessory interest in it because the car owner has not paid for repairs on it, *D* has taken and carried away the personal property "of another."

Professor Dressler's example is not directly on point to this case, inasmuch as the case at bar does not involve a garage keeper's lien on a vehicle brought in for repairs. Rather, it involves the right of the operator of an impound lot to hold a vehicle that has been impounded by the police. Accordingly, we must search the statutes for the legal authority of an impound lot operator to hold a vehicle.

With respect to abandoned vehicles, that authority can be found in MCL 257.252a(5) and (6); MSA 9.1952(1)(5) and (6). Under that statute, an owner of an abandoned vehicle may retrieve the vehicle from the impound lot upon the payment of the towing and storage fees. If the owner of the vehicle contests either the lawfulness of the impoundment or the reasonableness of the towing and storage fees, the owner may retrieve the vehicle upon the posting of a bond equal to the amount of the towing and storage fees, with the right to be reimbursed if it is subsequently determined that the vehicle had not been abandoned or that the towing and storage fees are unreasonable. Thus, the operator of the impound lot has the right of

possession of the vehicle until such time as the owner pays the towing and storage fees or posts a bond for their payment while the issue is being contested.

In the case at bar, one of the vehicles involved was impounded as an abandoned vehicle. Accordingly, even if defendant is the rightful owner of that vehicle, he did not have the right to remove the vehicle from Banker's Wrecker Service's possession until such time as he paid the impoundment fees or posted a bond. Accordingly, the unauthorized removal of the vehicle from the impound lot could constitute the crime of larceny.

However, with respect to the other vehicle involved, the evidence only establishes that it was impounded for unspecified "violations of state law." The testimony at the preliminary examination does not establish whether the impoundment was because the vehicle had been abandoned on a roadway, the driver had been arrested for some other crime, the vehicle had been registered improperly, or for some other reason. We believe that the testimony at the preliminary examination regarding the impoundment of the second vehicle for unspecified "violations of state law" is insufficient to warrant a binding over on a larceny charge. Such vague testimony is simply insufficient to establish a lawful impoundment such as to give the operator of the impound lot the right of possession of the vehicle until the towing and storage charges are paid, or a bond posted. If there had been testimony that the vehicle was parked in an unsafe manner or in a tow away zone, for example, then we could easily conclude that it was subject to impoundment under MCL 257.252d(1); MSA 9.1952(4)(1), which also requires the payment of the impoundment fees or the posting of a bond. However, the general reference to "violation of

state law" is insufficient to determine under what legal authority the car was impounded and whether that authority grants the operator of the impound lot the right of possession of the vehicle such that the rightful owner must pay the impoundment fees or post a bond before he is lawfully entitled to retrieve his vehicle.

For the above reasons, we conclude that the evidence presented at the preliminary examination only justified the conclusion that there is probable cause to believe that one larceny occurred, not two. Specifically, we conclude that there was probable cause to believe that a larceny occurred with respect to the vehicle that had been impounded as an abandoned vehicle, namely, the 1966 Cadillac.

Next, the prosecutor argues that the trial court additionally erred in concluding that there was not sufficient evidence to establish probable cause regarding the element of value. The trial court concluded that the value of the property taken from Banker's was the value of the impoundment fees Banker's was entitled to receive before the release of the vehicle. The prosecutor, on the other hand, argues that the value for purposes of the larceny is the whole value of the vehicle and that there was sufficient evidence presented to establish probable cause that the vehicles were valued over $100. We agree with the trial court.

This appears to present a novel issue. The cases relied upon by the prosecutor are not on point, inasmuch as they do not deal with the question of value. However neither does defendant cite any cases in which this question is addressed.

Defendant was charged specifically with a larceny from Banker's Wrecker Service. Therefore, we think it reasonable to conclude that the controlling question is what is the value of the "prop-

erty" that was stolen from Banker's Wrecker Service. By statute, the interest of Banker's in the property is limited to the towing and storage fees. Under MCL 257.252g; MSA 9.1952(7), an unclaimed, abandoned, or removed vehicle may be sold at public auction, but the operator of the impound lot only receives the towing and storage charges. After the payment of any expenses by the police agency and the payment of any secured debt, any remaining funds must be returned to the owner, if the owner can be located. If the owner cannot be located, the remainder of the funds is turned over to the unit of government that controls the police agency that made the impoundment.

Thus, Banker's Wrecker Service could never have received more than the amount of the towing and storage fees. That, we believe, represents the accurate value of its possessory interest in the property, inasmuch as that possessory interest only exists so as to secure the payment of those impoundment fees. Thus, where it is charged that the operator of the impound lot is the victim of the larceny, it is necessary to show that the value of the towing and storage fees exceeds $100 in order to charge the felony. In the case at bar, no evidence was presented regarding the value of the towing and storage fees, and, therefore, the prosecutor failed to establish probable cause to believe that the value exceeded $100, thereby precluding a felony charge.

For the above reasons, we conclude that the evidence presented at the preliminary examination only established probable cause to believe that a single incident of larceny under $100 occurred. Thus, the trial court correctly quashed the felony information. However, we do believe that the cir-

cuit court erred in dismissing the charges entirely. It should have remanded the matter to the district court for trial on one misdemeanor count of larceny under $100. Accordingly, although we do affirm the trial court order quashing the information, we further remand the matter to the district court for trial on one misdemeanor count of larceny under $100. However, the remand is without prejudice to the prosecutor to refile charges if he can establish the proper impoundment on the second count or to establish the felony aspects of either or both larcenies by demonstrating either that the value of the towing and storage fees exceeded $100 or by establishing that the vehicles involved were, in fact, owned by someone other than defendant, thus establishing a larceny over $100 with the rightful owner, rather than the wrecker service, being established as the victim of the crime.

Affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

MSI CONSTRUCTION MANAGERS, INC v CORVO IRON WORKS, INC

Docket No. 144824. Submitted May 10, 1994, at Detroit. Decided January 17, 1995, at 9:30 A.M.

Dale C. and Theresa Frank brought an action in the Wayne Circuit Court against MSI Construction Managers, Inc., and others, seeking damages related to injury sustained by Dale Frank at a construction project managed by MSI. MSI brought a third-party action against Corvo Iron Works, Inc., a subcontractor in the project, seeking indemnification pursuant to contract. The jury returned a verdict in favor of the Franks, finding MSI to be sixty-five percent negligent and Corvo to be thirty-five percent negligent. The jury also found in favor of MSI in the third-party action against Corvo. The court, J. Phillip Jourdan, J., entered a judgment that directed Corvo to fully indemnify MSI for damages awarded to the Franks. Corvo appealed.

The Court of Appeals *held:*

1. The indemnification agreement, when properly construed, essentially provided that Corvo was to indemnify MSI from and against all claims arising out of Corvo's work to the extent caused in whole or in part by any negligent act or omission by Corvo. Thus, Corvo must indemnify MSI to the extent of Corvo's negligence but is not required to indemnity MSI for MSI's negligence. The portion of the trial court judgment requiring Corvo to fully indemnify MSI must be vacated, and the trial court must enter an order requiring MSI to pay sixty-five percent of the award to the Franks and requiring Corvo to pay the remaining thirty-five percent.

2. The trial court did not abuse its discretion in admitting evidence of a citation issued to Corvo pursuant to the Michigan Occupational Safety and Health Act. Such evidence was relevant and more probative than prejudicial.

Judgment vacated in part.

INDEMNITY — CONTRACTS — JUDICIAL CONSTRUCTION.

Indemnity contracts should be construed to ascertain and give

REFERENCES

Am Jur 2d, Indemnity §§ 13-16.

See ALR Index under Indemnity.

effect to the intentions of the parties; such intentions are ascertained by considering the language used in the contract, as well as the situation of the parties and the circumstances surrounding the contract; an indemnity clause should be interpreted to give a reasonable meaning to all its provisions.

Coticchio, Zotter, Sullivan, Molter, Skupin & Turner, P.C. (by *Walter J. Zotter*), for MSI Construction Managers, Inc.

Harvey, Kruse, Westen & Milan, P.C. (by *Francis H. Poretta* and *Andrew C. Vredenburg*), for Corvo Iron Works, Inc.

Before: MARILYN KELLY, P.J., and SHEPHERD and L. P. BORRELLO,* JJ.

MARILYN KELLY, P.J. Third-party defendant, Corvo Iron Works, Inc., appeals as of right from an order of judgment in favor of third-party plaintiff, MSI Construction Managers, Inc., in this negligence action.

Corvo claims that the trial court erred in failing to properly apportion fault and in assessing damages. It also alleges that certain evidence was erroneously admitted. We vacate a portion of the judgment.

I

In 1987, plaintiff Dale Frank was seriously injured in a construction site accident. MSI was the construction manager of the project. Corvo, a subcontractor, supplied the steel beams involved in the accident. Frank filed a claim against MSI. MSI, as third-party plaintiff, sued Corvo seeking indemnification.

At trial, MSI and Corvo disputed the effect to be

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

given to an indemnification clause in the subcontract. Corvo claimed that, if it was found to be negligent, it would be liable only to the extent of its own negligence. MSI argued that the clause required Corvo to fully indemnify MSI if Corvo were found at all negligent. The judge permitted the jury to assess the relative degrees of fault between Corvo and MSI. He concluded that, if Corvo were found to be negligent, Corvo would be required to indemnify MSI to the full extent of the judgment.

The jury returned a verdict in favor of the Franks against MSI and Corvo. The jury found MSI to be sixty-five percent negligent and Corvo to be thirty-five percent negligent. The jury also found in favor of MSI against Corvo in the third-party suit. The order of judgment instructed Corvo to fully indemnify MSI for the entire amount awarded to the Franks.

II

On appeal, Corvo contends that the trial judge erred in requiring it to fully indemnify MSI for its negligence. Corvo contends that it should have been required to indemnify MSI only to the extent it was actually found to be negligent.

The disputed clause provides:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect and the Contractor and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from the performance of the Subcontractor's work under this Subcontract, provided that any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death

> or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, to the extent caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder. Such obligations should not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which otherwise exists as to any party or person described in this Paragraph 11.11.

Indemnity contracts should be construed to ascertain and give effect to the intentions of the parties. *Fischbach-Natkin Co v Power Process Piping, Inc,* 157 Mich App 448, 452; 403 NW2d 569 (1987). In ascertaining their intentions, one must consider the language used in the contract as well as the situation of the parties and circumstances surrounding the contract. *Meadows v Depco Equipment Co,* 4 Mich App 370, 375; 144 NW2d 844 (1966). A provision which seeks to indemnify a promisee against liability for its own negligence is valid in the case of concurrent negligence by multiple tortfeasors. *Fishbach-Natkin,* p 461; *Harbenski v Upper Peninsula Power Co,* 118 Mich App 440, 453; 325 NW2d 785 (1982). An indemnity clause should be interpreted to give a reasonable meaning to all its provisions. *Pritts v J I Case Co,* 108 Mich App 22, 30; 310 NW2d 261 (1981).

Here, in contrast to *Fishbach-Natkin* and *Pritts,* the trial court erred in concluding that the clause required Corvo to fully indemnify MSI for the entire judgment awarded to the Franks. The indemnity clause envisions that Corvo will indemnify MSI. However, MSI's interpretation of the indemnity clause emphasizes only language which

supports its position. It minimizes the importance of the phrase, "to the extent caused in whole or in part by any negligent act or omission of the Subcontractor." This language limits the extent of Corvo's liability.

We construe the contract most strictly against the party who is the indemnitee. *Gartside v YMCA,* 87 Mich App 335, 339; 274 NW2d 58 (1978). Here, when the various disputed phrases of the indemnity clause are emphasized equally, and none is ignored, the indemnity clause essentially provides:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Contractor from and against all claims arising out of the Subcontractor's work to the extent caused in whole or in part by any negligent act or omission of the Subcontractor.

MSI's claims to the contrary, the language here differs significantly from cases which have permitted indemnification. See *Paquin v Harnischfeger Corp,* 113 Mich App 43; 317 NW2d 279 (1982), *Gartside, supra, Fishbach-Natkin, supra,* and *Pritts supra.* Corvo is liable to MSI to the extent of its own negligence but is not required to indemnify MSI for MSI's negligence.

III

The trial court did not abuse its discretion when it allowed into evidence information concerning a citation issued to Corvo under the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq.*; MSA 17.50(1) *et seq. De Voe v C A Hull, Inc,* 169 Mich App 569, 577; 426 NW2d 709 (1988). The citation, although not dispositive on the issue of Corvo's negligence, was relevant as it tended to

show that Corvo had not provided a safe work environment for its employees. It was not more prejudicial than probative. We find that it was properly admitted. MRE 402; MRE 403.

We vacate that portion of the trial court's order which required Corvo to fully indemnify MSI. We instruct the trial court to enter an order requiring MSI to pay sixty-five percent and Corvo to pay the remaining thirty-five percent of the judgment to the Franks.

SHEPHERD, J., did not participate.

FRANK v WILLIAM A KIBBE & ASSOCIATES, INC

Docket No. 145045. Submitted May 10, 1994, at Detroit. Decided January 17, 1995, at 9:35 A.M.

Dale C. and Theresa Frank brought an action in the Wayne Circuit Court against William A. Kibbe & Associates, Inc., and MSI Construction Managers, Inc., seeking damages as the result of injuries suffered by Dale Frank in an accident at a construction site. A mediation evaluation was returned in favor of the plaintiffs in an aggregate sum of $1,469,500. The evaluation against defendant Kibbe was $60,000. Kibbe accepted the evaluation, but the plaintiffs rejected it. After a trial, the jury rendered an aggregate verdict of $1,496,900 in favor of the plaintiffs, but returned a verdict of no cause of action with respect to Kibbe. The plaintiffs moved for entry of an order of judgment that included no costs against them on the basis that the aggregate verdict exceeded the aggregate mediation evaluation. Kibbe moved for taxation of costs and attorney fees, arguing that it was entitled to actual costs pursuant to MCR 2.403(O)(1). The court, J. Phillip Jourdan, J., reduced the future damages of the verdict to their present cash value, added interest on the entire adjusted verdict through the date of entry of the judgment, and then awarded mediation sanctions to Kibbe on the basis that the aggregate verdict after those adjustments was less than the aggregate mediation evaluation. The plaintiffs appealed.

The Court of Appeals *held:*

1. The trial court erred in reducing the future damages to their present cash value for the purpose of determining whether mediation sanctions should be imposed. MCR 2.403(O) speaks in terms of the jury verdict rather than the order of judgment. Accordingly, while future damages are to be reduced to their present value for the purpose of the entry of an order of judgment, that reduction should not be made for the purpose of determining mediation sanctions.

2. The term "assessable costs and interest" in MCR 2.403(O)

REFERENCES

Am Jur 2d, Costs §§ 14, 20, 24; Interest and Usury §§ 96, 97.
See ALR Index under Interest on Money; Sanctions.

(3) means interest that properly can be assessed under MCL 600.6013; MSA 27A.6013. Because § 6013 provides that interest may not be assessed on the portion of the verdict that represents future damages, the trial court erred in assessing interest on the full amount of the award.

3. Although § 6013 permits interest to be assessed to the date of the entry of the judgment, MCR 2.403 limits the period during which interest may be assessed for the purpose of determining mediation sanctions to the period between the filing of the complaint and the date of the mediation evaluation. The court rules control with respect to the determination of mediation sanctions; accordingly, the trial court erred in calculating interest for the entire period from the filing of the complaint to the entry of the order of judgment for the purpose of determining whether to order mediation sanctions.

4. The term "more favorable" as used to describe verdicts for the purpose of MCR 2.403(O)(4) has the same meaning as that term is given in MCR 2.403(O)(3), that a verdict is more favorable for a plaintiff than a mediation evaluation only if the verdict exceeds the mediation evaluation by more than ten percent.

5. Although the trial court erred both in improperly reducing the future damages to their present cash value and in calculating interest on the full amount of the award for the entire period between the filing of the complaint and the entry of the order of judgment, the court did not err in awarding mediation sanctions to defendant Kibbe, because the aggregate verdict when properly adjusted in accordance with the provisions of the court rule and statute is less than ten percent greater than the aggregate mediation evaluation and, thus, cannot be considered to be more favorable to the plaintiffs.

Affirmed.

1. COSTS — MEDIATION SANCTIONS — FUTURE DAMAGES.

Future damages in a jury verdict should not be reduced to their present value for the purpose of determining whether mediation sanctions should be awarded; while future damages should be so reduced for the purpose of entry of an order of judgment, the court rule governing mediation sanctions refers to a comparison of the verdict, not the order of judgment, with the mediation evaluation (MCR 2.403[O]).

2. COSTS — MEDIATION SANCTIONS — INTEREST — FUTURE DAMAGES.

Assessable costs and interest as used in the court rule relating to the determination of mediation sanctions means the interest that properly can be assessed pursuant to the statute governing

interest on a judgment and, thus, may not be assessed on that portion of the verdict that represents future damages; however, the period for which the interest may be calculated is that permitted by the court rule rather than that permitted by the statute; thus, interest may be calculated for the period from the filing of the complaint to the date of the mediation evaluation (MCR 2.403[O][3]; MCL 600.6013; MSA 27A.6013).

3. COSTS — MEDIATION SANCTIONS — AGGREGATE VERDICTS — MORE FAVORABLE VERDICTS.

An aggregate verdict for the purpose of the court rule dealing with the granting of mediation sanctions is more favorable than an aggregate mediation evaluation only if the verdict exceeds the mediation evaluation by more than ten percent (MCR 2.403[O][4]).

Miller, Cohen, Martins & Ice, P.C. (*Bendure & Thomas,* by *Mark R. Bendure* and *Sidney A. Klingler,* of Counsel), for the plaintiffs.

Sullivan, Ward, Bone, Tyler & Asher, P.C. (by *Michelle A. Thomas* and *Thomas M. Slavin*), for William A. Kibbe & Associates, Inc.

Before: MARILYN KELLY, P.J., and SHEPHERD and L. P. BORRELLO,* JJ.

MARILYN KELLY, P.J. Plaintiffs, Dale and Theresa Frank, appeal as of right from the portion of an order of judgment holding them liable to defendant William A. Kibbe & Associates, Inc. for mediation sanctions pursuant to MCR 2.403. The Franks raise several issues concerning the correct assessment of mediation sanctions. We affirm.

I

Dale Frank was injured in a construction site accident and sought damages. His wife, Theresa, made a derivative claim. A mediation evaluation

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

awarded the Franks an aggregate sum of $1,469,500. The evaluation against defendant Kibbe was $60,000. Kibbe accepted the evaluation while the Franks rejected it. After trial, the jury rendered an aggregate verdict of $1,496,900 in favor of the Franks. With respect to Kibbe, the jury returned a verdict of no cause of action.

The Franks filed a motion for entry of an order of judgment containing no costs against them, on the basis that the aggregate verdict exceeded the aggregate mediation evaluation. Kibbe filed a motion for taxation of costs and attorney fees, arguing that it was entitled to actual costs pursuant to MCR 2.403(0)(1).

The trial judge reduced the value of the future damages portion of the verdict to its present cash value. He also added interest on the entire adjusted verdict through the date of entry of judgment. After making the adjustments, the judge concluded that the aggregate verdict for the Franks was $1,186,250.50. He compared the aggregate verdict to the mediation evaluation to determine if sanctions should be applied. Since it was below the aggregate mediation award, he awarded mediation sanctions to Kibbe in the amount of $63,911.74.

II

A

On appeal, the Franks argue that the judge erred in reducing the future damages portion of the verdict to its present value when determining which party was entitled to mediation sanctions. They contend that, solely because of this error, the verdict fell below the aggregate mediation award. The Franks insist that, had the future damages portion of the award not been reduced, they would

have been relieved of any obligation to pay mediation sanctions pursuant to MCR 2.403(O)(4).

Kibbe counters, first, that the trial court did not err in reducing the future damages portion of the award to present value. It also contests the method by which the court calculated assessable interest and costs.

The court calculated interest and costs on the full amount of the adjusted award from the date of the claim until the date of entry of its order. Kibbe argues that interest may be calculated only from the filing of the complaint until the date of the mediation evaluation. It further argues that interest may be calculated only on the portion of the award which represents present damages. Finally, Kibbe argues that, even if the judge had not reduced the jury verdict, the aggregate verdict would not have been "more favorable" to the Franks. It did not exceed the mediation evaluation by more than ten percent, relying on the definition of "more favorable" found in MCR 2.403(O)(3). Consequently, Kibbe concludes that the trial court correctly awarded it mediation sanctions pursuant to MCR 2.403(O)(3) and MCR 2.403(O)(4).

B

The rules of statutory construction apply to court rules. *Michigan Basic Property Ins Ass'n v Hackert Furniture Distributing Co,* 194 Mich App 230, 234; 486 NW2d 68 (1992). When two statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. *Gebhardt v O'Rourke,* 444 Mich 535, 542-543; 510 NW2d 900 (1994). In construing a statute, the court should presume that every word has meaning and avoid a construction which would render a statute, or any

part of it, surplusage or nugatory. *Altman v Meridian Twp,* 439 Mich 623, 635; 487 NW2d 155 (1992). In interpreting statutes, we engage in de novo review.

To resolve this dispute, we are required to interpret MCR 2.403(O) and to read it in conjunction with MCL 600.6013; MSA 27A.6013 and MCL 600.6306; MSA 27A.6306. The former controls the calculation of interest on judgments and the latter determines the value of future damages. MCR 2.403(O)(3) provides:

> For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

MCR 2.403(O)(4) provides:

> In cases involving multiple parties, the following rules apply:
>
> (a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the mediation evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

MCL 600.6306; MSA 27A.6306, the general stat-

ute on the calculation of interest, requires that an order of judgment entered following a verdict adjust future damages to their gross present cash value. In contrast, MCR 2.403(O), the specific court rule dealing with the award of mediation sanctions, speaks only of the verdict not the order of judgment. "Verdict" is defined in MCR 2.403(O)(2) to include: 1) a jury verdict, 2) a judgment by the court after a nonjury trial and 3) a judgment entered as a result of a ruling on a motion filed after mediation.

Here, based on the definition of verdict set out in MCR 2.403(O), the court erred in reducing future damages to present cash value before determining if mediation sanctions were appropriate. The judge should have considered the amount of the jury verdict, adjusted only as permitted by MCR 2.403(O)(3), when determining if sanctions were required.

C

Whether interest should be calculated on the full amount of the verdict in determining whether a verdict is more favorable to either party is a matter of first impression. The calculation of interest is governed by MCL 600.6013; MSA 27A.6013 which provides:

> (1) Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment. . . .

Consequently, the term "assessable costs and interest" in MCR 2.403(O)(3), when read in con-

junction with MCL 600.6013; MSA 27A.6013 means interest which properly can be assessed under MCL 600.6013; MSA 27A.6013. Since interest may not be assessed on the portion of the verdict which represents future damages, the trial court erred in assessing interest on the full amount of the award.

MCR 2.403 also limits the period during which interest may be assessed to the time between the filing of the complaint and the date of the mediation evaluation. Although MCL 600.6013; MSA 27A.6013 permits interest to be assessed to the date of entry of judgment, we believe that the specific requirement set forth in the court rule controls. *Gebhardt,* pp 542-543. Thus, the trial judge erred in calculating interest for the entire period from filing of the complaint until entry of the order of judgment.

Here, interest should have been calculated only for the period between the filing of the claim and the date of the mediation award. In addition it should have been calculated only on the portion of the verdict which represented present damages.

III

The Franks also contend that, since the aggregate verdict absolutely exceeded the aggregate mediation award, the plain language of MCR 2.403(O)(4) mandates they not be required to pay mediation sanctions. Alternatively, they argue that, when the interest and costs permitted by MCR 2.403(O)(3) are included in the award, the verdict exceeds the ten percent requirement established in MCR 2.403(O)(3).

In response, Kibbe argues that the Franks erroneously interpret MCR 2.403(O)(4). It contends that the definition of "more favorable" used in

MCR 2.403(O)(4) is found in MCR 2.403(O)(3). According to MCR 2.403(O)(3), in order for a verdict to be more favorable to the Franks, it must exceed the aggregate mediation award by more than ten percent.

We consider the meaning of the last sentence of MCR 2.403(O)(4)(a) to determine if the verdict was more favorable to the Franks or to Kibbe:

> However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

The Franks contend that a "more favorable" verdict is any verdict which exceeds the mediation evaluation by any amount. Kibbe contends that "more favorable" is defined in MCR 2.403(O)(3) and requires that the aggregate verdict exceed the aggregate mediation award by more than ten percent.

We conclude that "more favorable" when used in MCR 2.403(O)(4) should be assigned the same meaning it is given in MCR 2.403(O)(3). We reach this conclusion because it creates the type of internal harmony statutes and court rules seek to establish. Also, it is nearly impossible to read and interpret MCR 2.403(O)(4) without relying heavily upon the definitions in MCR 2.403(O)(3). Provisions must be read in the context of the entire statute so as to produce a harmonious whole. *In re Forfeiture of $5,264,* 432 Mich 242, 251; 439 NW2d 246 (1989). Seeming inconsistencies should be reconciled if possible. *People v Budnick,* 197 Mich App 21, 24; 494 NW2d 778 (1992).

Thus, we affirm the trial court's decision awarding sanctions to Kibbe. We agree with the Franks that the trial court improperly reduced the future

damages to present value. We agree with Kibbe that the trial judge improperly calculated interest on the full amount of the award for a period not permitted by the court rule. When the verdict is combined with the correct amount of interest for the correct period, the aggregate verdict is less than ten percent greater than the aggregate mediation evaluation. The verdict cannot be considered more favorable to the Franks, as that phrase is defined in MCR 2.403(O)(3). Mediation sanctions were properly awarded to Kibbe.

Affirmed.

SHEPHERD, J., did not participate.

MADISON v CITY OF DETROIT

Docket No. 157204. Submitted May 10, 1994, at Detroit. Decided January 17, 1995, at 9:40 A.M.

Valerie Madison brought an action in the Wayne Circuit Court against the City of Detroit, her employer, alleging intentional tort as the cause of an injury she sustained at work. The court, Michael J. Talbot, J., granted summary disposition for the defendant, ruling the claim barred by governmental immunity. The plaintiff appealed.

The Court of Appeals *held:*

The Worker's Disability Compensation Act, which makes an exception for intentional tort by employers to the rule that worker's compensation is the exclusive remedy for work-related injury, and the governmental immunity act, which provides no exception to governmental immunity for intentional tort, must be construed in pari materia to permit an intentional tort exception to governmental immunity in cases of workplace injury to public employees and allow injured public employees to maintain intentional tort claims for work-related injuries.

Reversed and remanded for trial.

GOVERNMENTAL IMMUNITY — INTENTIONAL TORTS — WORKPLACE INJURIES.

A governmental agency, as an employer, may not raise governmental immunity as a defense to an intentional tort claim brought by an employee for a work-related injury (MCL 418.131[1], 691.1407[1]; MSA 17.237[131][1], 3.996[107][1]).

William Pultusker, for the plaintiff.

REFERENCES

Am Jur 2d, Municipal, County, School, and State Tort Liability § 179; Workers' Compensation § 75.

Comment Note.—Municipal immunity from liability for torts. 60 ALR2d 1198.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Sharon D. Blackmon, Assistant Corporation Counsel, for the defendant.

Before: MARILYN KELLY, P.J., and SHEPHERD and L. P. BORRELLO,* JJ.

MARILYN KELLY, P.J. Plaintiff appeals as of right from a grant of summary disposition for defendant[1] and dismissal of her intentional tort claim on the basis of governmental immunity. Plaintiff asserts that the trial court erred in failing to find an intentional tort exception to governmental immunity in worker's compensation cases. We agree and reverse.

I

Plaintiff was employed by defendant's transportation department in 1988. Her assignment was to collect money from bus fare collection boxes. Defendant provided a truck with a crane to lift the large metal boxes, which held thousands of coins. When the truck malfunctioned, defendant replaced it with one not equipped with a crane. Plaintiff asserts that she was then required to lift the metal boxes without mechanical aid and, in so doing, injured her back on the job in February, 1989. Unable to work, she collected worker's compensation benefits.

Plaintiff sued her employer, alleging a right to recovery under the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131; MSA 17.237(131). In response, defendant moved for summary disposition, alleging it was immune from

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

[1] Reference to defendant will be in the singular since the defendant accounting department operates under the authority of the defendant City of Detroit.

tort liability pursuant to § 17 of the governmental immunity act, MCL 691.1407; MSA 3.996(107). The trial court agreed with defendant's position and dismissed plaintiff's tort claim.

II

A

The central issue in this case is the interpretation and reconciliation of § 131(1) of the WDCA and § 7(1) of the governmental immunity act, being MCL 418.131(1); MSA 17.237(131)(1) and MCL 691.1407(1); MSA 3.996(107)(1), respectively. As this is a matter of statutory interpretation, appellate review is de novo. *In re Lafayette Towers,* 200 Mich App 269, 273; 503 NW2d 740 (1993).

Section 131(1) of the WDCA provides:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law. [MCL 418.131(1); MSA 17.237(131)(1).]

Section 7(1) of the governmental immunity act states:

> Except as otherwise provided in this act, all

> governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. [MCL 691.1407(1); MSA 3.996(107)(1).]

Plaintiff contends that there is a statutory conflict between MCL 418.131(1); MSA 17.237(131)(1) and MCL 691.1407(1); MSA 3.996(107)(1). Plaintiff argues that the statutes should be construed in *pari materia* to permit an intentional tort exception to governmental immunity in worker's compensation cases. She bases her argument on the fact that § 131 was enacted after § 7(1) of the governmental immunity act. In response, defendant asserts that governmental immunity bars plaintiff's claim. In particular, defendant argues that § 131(1) of the WDCA did not create an intentional tort exception to governmental immunity in worker's compensation cases. Defendant argues that, merely because § 131(1) of the WDCA was amended more recently, does not alter the Legislature's intent to provide government agencies with a broad grant of immunity.

B

Generally, government agencies are immune from tort liability for injuries arising out of the exercise or discharge of a governmental function. MCL 691.1407(1); MSA 3.996(107)(1), *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567, 591; 363 NW2d 641 (1984). More specifically, our Supreme Court has concluded that there is no intentional tort exception to governmental immunity where the tort was committed within the scope of a governmental function. *Smith v Dep't of Public Health,* 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of*

State Police, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989).

A governmental function has been defined as "any activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law." *Ross, supra,* p 591. Here, defendant was authorized to own, construct and operate a transportation department. MCL 117.4f; MSA 5.2079. Ignoring momentarily the potential impact of the WDCA, were plaintiff an ordinary citizen claiming an intentional tort against a governmental entity engaged in a governmental function, her claim would fail.

However, when the government is the plaintiff's employer, the governmental immunity statute must be read in *pari materia* with the WDCA. MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.,* MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.* First, we are unable to call to mind even one governmental function which does not require that employees carry out necessary everyday tasks in the course of employment. The WDCA, not the governmental immunity act, defines the duties of the government, acting as an employer, to an injured employee.

Second, the governmental immunity act takes great pains to protect government employees who might be subject to tort liability from an outside source when their actions are not grossly negligent. The protection is broad and extends to employees at all levels, not simply to those in the highest positions of authority. It was made broad to enable common government employees to enjoy a certain degree of security as they go about performing their jobs. See *Pavlov v Community EMS,* 195 Mich App 711, 722; 491 NW2d 874 (1992). Extending fair and legitimately enacted remedies to them under the WDCA when injured on

government jobs is consistent with protection afforded them against third parties by the governmental immunity act.

Finally, the WDCA contains no language freeing the government from its requirements, regulations and restraints in other areas, but generally treats it as any other employer.

C

We do not believe that the Legislature intended to shield any employer, particularly the government, when its agent intentionally orders an employee to commit acts certain to cause injury. We cannot believe the Legislature intended that the government escape the liability which accompanies an intentional tort under the WDCA. In its extreme, such an interpretation would protect a government agency whose supervisor orders an employee to step into water the supervisor knows is electrified, disregarding the certainty of injury. It is inconsistent with the jurisprudence of our state which imputes the state of mind of a supervisor to a corporate employer. *Travis v Dreis & Krump Mfg Co,* 207 Mich App 1, 3; 523 NW2d 818 (1994). It flies in the face of nearly all modern regulation of workplace safety.

The Legislature could not have intended that the government, unlike other employers, be permitted to hide behind a claim of immunity under facts such as those alleged here. As Justice ARCHER once observed, "In describing the scope of this exception, it is important to focus on the responsibility of government for its actions or omissions, not its immunity from liability." *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139, 215; 422 NW2d 205 (1988) (ARCHER, J., concurring in part and dissenting in part).

Given our resolution of the governmental immunity issue, we do not reach plaintiff's equal protection claim.

We reverse the decision of the trial judge and remand for trial on plaintiff's intentional tort claim under the WDCA.

SHEPHERD, J., did not participate.

AGEE v FORD MOTOR COMPANY

Docket Nos. 165377, 166023. Submitted September 15, 1994, at Detroit. Decided January 17, 1995, at 9:45 A.M.

Lawrence Agee and others brought an action in the Wayne Circuit Court against Ford Motor Company, claiming damages from alleged exposure to asbestos during manufacturing processes at a Ford plant. The plaintiffs, former employees of the defendant, and spouses with derivative claims, relying on the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act, alleged that the defendant knowingly placed the employees in certain danger of injury from the asbestos. The court, Robert J. Colombo, Jr., J., denied the defendant's first motion for summary disposition and thereafter granted in part and denied in part the defendant's second motion for summary disposition. The defendant filed separate appeals by leave granted from the denial of the motions. The appeals were consolidated.

The Court of Appeals *held:*

The plaintiffs' allegation of intentional tort was insufficient to circumvent the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131; MSA 17.237(131). The plaintiffs failed to offer proof that the defendant had actual knowledge that injury was certain to occur to any of its employees. The first order denying summary disposition must be reversed and the matter must be remanded for entry of an order of summary disposition for the defendant. The order denying the second motion for summary disposition is moot and must be vacated.

Reversed and remanded in part and vacated in part.

Richard A. Bockoff, Thomas C. Miller, and *Anthony V. Trogan, Jr.,* for the plaintiffs.

Dickinson, Wright, Moon, Van Dusen & Freeman (by *Robert S. Krause, Robert W. Powell,* and *Kathleen A. Lang*), for the defendant.

Before: MICHAEL J. KELLY, P.J., and BRENNAN and J. A. FULLERTON,* JJ.

MICHAEL J. KELLY, P.J. Defendant appeals by leave granted from the circuit court orders that denied its motions for summary disposition against the various plaintiffs. We reverse.

Plaintiffs are former Ford Motor Company employees (and spouses with derivative claims) claiming damages from alleged exposure to asbestos during manufacturing processes at a Ford plant. Their complaint alleged that defendant knowingly placed them in certain danger of injury from the asbestos. Defendant initially moved for summary disposition under MCR 2.116(C)(4), (7), and (8), and raised MCR 2.116(C)(10) as an additional ground for summary disposition in its reply brief to plaintiffs' answer to the motion for summary disposition. The motion challenged the applicability of the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131; MSA 17.237(131). The circuit court denied the motion on May 21, 1993. That order is the subject of defendant's appeal in Docket No. 165377. Defendant moved for summary disposition a second time on May 28, 1993, challenging plaintiffs' claim for damages for fear of cancer and for exemplary damages under MCR 2.116(C)(8) and (10). The circuit court granted the motion in part and denied it in part on July 1, 1993. That order is the subject of defendant's appeal in Docket No. 166023. The appeals were consolidated by the Court of Appeals.

Because plaintiffs alleged injuries arising out of and in the course of their employment, they have a viable cause of action only if their claim falls under the intentional tort exception to the exclu-

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

sive remedy provision of the WDCA. Although plaintiffs' battery claim alleges a traditional intentional tort, the narrow definition of "intentional tort" in § 131 of the WDCA controls whether the exclusive remedy provision applies.

Section 131 provides, in relevant part:

> The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. [MCL 418.131; MSA 17.237(131).]

This section, requiring actual knowledge of certain injury, was enacted in 1987 to tighten the previous standard for the intentional tort exception, which required knowledge only that an injury was "substantially certain" to occur. See *Beauchamp v Dow Chemical Co,* 427 Mich 1, 20; 398 NW2d 882 (1986). Some decisions of this Court have maintained the rigidity of the new standard. See, e.g., *Smith v Mirror Lite Co,* 196 Mich App 190; 492 NW2d 744 (1992); *Benson v Callahan Mining Corp,* 191 Mich App 443; 479 NW2d 12 (1991).[1] Others

[1] Just as the trial court did in denying defendant's motion for summary disposition, plaintiffs rely in part on *McNees v Cedar Springs Stamping Co,* 184 Mich App 101; 457 NW2d 68 (1990). In *McNees,* the Court found that the plaintiff had sufficiently pleaded an intentional tort under § 131 of the WDCA where the employer had actual knowledge of a defective foot pedal on a press machine and of several related, near accidents, refused to correct the defect, and yet ordered the plaintiff to operate the machine. However, we note, first, that the facts in *McNees* are distinguishable, and, second, that *McNees* is not binding precedent under Administrative Order No. 1994-4. In addition, in *Oaks v Twin City Foods, Inc,* 198 Mich App 296, 298; 497 NW2d 196 (1993), which is binding under Administra-

have interpreted the standard more broadly. See *Travis v Dreis & Krump Mfg Co,* 207 Mich App 1; 523 NW2d 818 (1994). (We doubt the Supreme Court majority will stamp its approval on *Travis.*)

In this case, plaintiffs' complaint alleged that defendant had actual knowledge that injury was certain to occur because asbestos dust and fibers were allowed to circulate throughout defendant's plant. The complaint further alleged that defendant knew that asbestos exposure would lead to certain injury to at least some of its employees. In support of this contention, plaintiffs submitted to this Court that they have expert witness testimony that injury was certain to occur to about one-third of the employees at defendant's plant as a result of asbestos exposure.[2]

We hold that plaintiffs' allegation of intentional tort, even with the proffered expert testimony, is insufficient to circumvent the exclusive remedy provision of the WDCA. Plaintiffs have not offered proof that defendant had "actual knowledge" that injury was certain to occur to any of its employees,

tive Order No. 1994-4, a panel of this Court questioned the outcome in *McNees.* The panel noted that to the extent *McNees* was correctly decided, it was distinguishable as a case of exceptional egregiousness. The employer in *McNees* had maintained a history of violations of safety and health laws, received orders to repair the machine, and, after the plaintiff's accident, destroyed damaging evidence. We find no evidence of such egregious conduct in this case. We also doubt the correctness of another decision cited by plaintiffs, *Adams v Shepherd Products, US, Inc,* 187 Mich App 695; 468 NW2d 332 (1991), which met with disapproval both in *Oaks, supra* at 298, and in *Benson, supra* at 447.

[2] Defendant notes that this information was not presented until oral argument on appeal. However, we will consider the information in the context of MCR 2.116(C)(10). Essentially, we deem plaintiffs' attempt to present evidence in support of their claim, as if they were responding to a motion for summary disposition under MCR 2.116(C)(10), a waiver of their objection to defendant's failure to make a formal motion under that rule in the trial court. An order granting summary disposition under the wrong court rule may be reviewed under the correct one. *Ginther v Zimmerman,* 195 Mich App 647, 649; 491 NW2d 282 (1992).

let alone one-third of them. The complaint essentially alleges only that defendant had knowledge that asbestos posed health hazards and that its ventilation system exposed its employees to those hazards. The internal Ford memoranda attached to plaintiffs' response to defendant's motion for summary disposition merely establish that some of the air samples taken at defendant's plant between 1967 and 1973 exceeded the regulatory limits for asbestos, indicating a health risk for employees. Nothing in the memoranda suggests that defendant had actual knowledge of certain injury. There is no bridge for the gap. In fact, plaintiffs' brief reflects the weakness of the evidence:

> The exhibits provide that Defendant *knew of the risks* of asbestos exposure. Moreover, they knew of the failures in their ability to control the asbestos dust and fibers and *therefore, knew "an injury was certain to occur"* to some or all of its employees exposed to the asbestos. [Emphasis added.]

Plaintiffs provide no explanation for concluding that defendant had actual knowledge of certain injury to plaintiffs simply because it had knowledge of the general risks.[3] Cf. *Oaks v Twin City*

[3] We also question, but do not decide, whether the proffered statistic is sufficient to meet the "certain injury" test of § 131. The line of cases since the enactment of § 131 suggests a higher degree of certainty than a showing of certain injury to someone, somewhere, sometime. Nearly all unsafe conditions in the workplace could be characterized as certain to lead to injury to some employees at some time. For example, the plaintiff in *Benson, supra,* who slipped and fell on ice in an employee parking lot, could have characterized her injury as certain to occur to someone, somewhere, sometime. Yet, the *Benson* panel rejected the plaintiff's nonspecific allegation of certain injury. Adopting plaintiffs' statistic as a sufficient showing of certain injury would place the intentional tort standard in § 131 on a slippery slope. We suggest that the proffered statistic is more properly viewed as reflecting a one-in-three chance of injury to each plaintiff, which is far from the degree of certainty required under § 131.

Foods, Inc, 198 Mich App 296; 497 NW2d 196 (1993) (holding that summary disposition for the defendant was proper for lack of actual knowledge of certain injury where the plaintiff had died after walking on an unguarded catwalk that the defendant had been told posed a certain risk of injury).

The order denying summary disposition in Docket No. 165377 is reversed and the matter is remanded for entry of an order of summary disposition in favor of defendant. The order denying summary disposition in Docket No. 166023 is moot and is hereby vacated.

Reversed and remanded in part and vacated in part.

In re FORFEITURE OF SURETY BOND
(PEOPLE v MEADOWS)

Docket No. 155280. Submitted July 6, 1994, at Grand Rapids. Decided January 17, 1995, at 9:50 A.M.

Michael G. Meadows was charged in the Gratiot Circuit Court with two felony counts and was released after posting a surety bond furnished by Bond Bonding Agency. Meadows subsequently entered a plea of guilty with regard to one of the counts, and his bond was continued pending sentencing. When Meadows did not appear for sentencing, the court, Timothy M. Green, J., issued a bench warrant for Meadows' arrest and entered an order forfeiting the surety bond and directing Bond Bonding to surrender Meadows to the county sheriff immediately or appear before the court on a subsequent date to show cause why a judgment should not be entered against it for the full amount of the bond. Bond Bonding received notice of the order. Without the aid of Bond Bonding, Meadows was arrested in another county on a separate charge before the date of the show cause hearing. Meadows was transported to Gratiot County and appeared before the circuit court, where he was sentenced for his conviction to thirty days in jail, with credit for fifteen days already served. Meadows completed his sentence before the date of the show cause hearing, and Bond Bonding did not appear at the hearing. The court thereafter ordered Bond Bonding to forfeit the bond to the county clerk. Bond Bonding appealed.

The Court of Appeals *held:*

1. Bond Bonding was not released from liability on the bond because it failed to pursue its statutory remedies despite the fact that it was aware of Meadows' whereabouts during the period between his default and subsequent arrest. A surety is not released from liability where the principal's incarceration in the same jurisdiction has either ended before the date of the default or commenced after that date.

2. Bond Bonding breached the conditions of the surety bond

REFERENCES

Am Jur 2d, Bail and Recognizance §§ 108, 191, 198.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction. 35 ALR4th 1192.

before Meadows' case was finally determined and his sentence was imposed by failing to secure his appearance as required. Therefore, it is of no consequence that Meadows had already served his sentence when the court entered the judgment against Bond Bonding for the full amount of the bond.

Affirmed.

1. BAIL — SURETY BONDS — FORFEITURE.

A surety that has incurred liability on a surety bond as a result of the principal's failure to appear in court as ordered is not released from liability by the principal's incarceration in the same jurisdiction where the incarceration either ends before the date of default or commences after the date of default.

2. BAIL — SURETY BONDS — FORFEITURE.

A bondsman generally is relieved of responsibility on a surety bond once the principal is sentenced for the offense for which the bond was posted; however, a judgment may be entered against the bondsman where the conditions of the surety bond are breached before the principal's case is finally determined and sentence is imposed.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Mark A. Gates,* Prosecuting Attorney, for the people.

Brisbois & Brisbois (by *James A. Brisbois, Jr.*), for Bond Bonding Agency.

Before: HOLBROOK, JR., P.J., and MURPHY and J. C. KINGSLEY,* JJ.

HOLBROOK, JR., P.J. Defendant was charged by the Gratiot County Prosecutor with two felony counts and released on February 14, 1992, after posting a $5,000 surety bond furnished by Bond Bonding Agency. On February 24, defendant pleaded guilty to one felony count, and bond was continued pending sentencing. Defendant failed to appear on May 11, 1992, and a bench warrant was

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

issued. The court entered an order forfeiting the surety bond and directing Bond Bonding to surrender defendant to the county sheriff immediately, or appear before the court on June 29, 1992, at 10:30 A.M., to show cause why a judgment should not enter against it for the full amount of the bond. Notice of the order was delivered to Bond Bonding on May 18, 1992, by certified mail. Bond Bonding apparently made two unsuccessful attempts to persuade defendant to surrender to the sheriff.

On June 4, 1992, defendant was arrested in another county on a separate charge. A hold was placed on defendant and he was subsequently transported to Gratiot County where he appeared before the circuit court on June 8. At that time, defendant was sentenced for his earlier plea to serve thirty days in jail, with credit for fifteen days already served. On June 29, 1992, a show cause hearing was held at which Bond Bonding did not appear. On July 20, 1992, the circuit court ordered Bond Bonding to forfeit $5,000 immediately to the Gratiot County Clerk. Bond Bonding appeals as of right, and we affirm.

A surety bond is a contract between the government, a principal, and a surety whereby the surety promises that if the principal defaults, the surety will pay the judgment on the bond. *People v Johnson,* 72 Mich App 702, 707-708; 250 NW2d 508 (1976). Where a principal defaults by failing to appear, a surety is authorized to arrest and deliver the principal to the jail or to the county sheriff, with or without the assistance of a police officer. MCL 765.26; MSA 28.913. Here, Bond Bonding asserts that it "contacted" and "informed" defendant on May 20 and June 2, 1992, that he should surrender to Gratiot County officials immediately. Defendant failed to do so, but ultimately was

arrested in another county on June 4, 1992, apparently without the aid of Bond Bonding.

In *People v Glumb,* 42 Mich App 166, 169-170; 201 NW2d 282 (1972), the principal-defendant escaped from jail in Lenawee County and failed to appear for trial on a separate charge in Oakland County, resulting in his bond being forfeited. The principal was eventually captured in Texas and returned to jail in Wayne County, where he escaped again. Thereafter, while the principal remained at large, a judgment was entered against his surety for the full amount of his bond. Adopting the majority rule that "the escape and subsequent nonappearance of the accused will neither excuse the production of the principal nor prevent the forfeiture of the bond," *id.* at 169, this Court reasoned at 169-170:

> As the people properly point out, MCL 765.26; MSA 28.913 provides the procedure whereby a surety that deems itself insecure may be relieved of its obligation. The statute provides that the surety deliver the accused to a jail in the county from which the accused is bailed. Such delivery may be accomplished either by the surety itself or with the assistance of any peace officer. At no time during the period when appellant had notice that defendant was in the custody of the Lenawee County or Wayne County authorities did it ever seek to take advantage of the provisions of this statute. As such, the inaction by appellant for a period of three years must be viewed as a continuing assurance on its part that defendant would appear. Not having taken advantage of these opportunities, the denial of the late motion to reinstate and cancel was not an abuse of discretion.

Consistent with *Glumb,* we interpret MCL 765.26; MSA 28.913 as intending to reward a surety who, through its own diligence, apprehends and surren-

ders the principal to the appropriate authorities. Thus, Bond Bonding was not released from liability inasmuch as it failed to pursue its statutory remedies despite the fact that it was plainly aware of defendant's whereabouts during the period between his default and subsequent arrest.

A majority of jurisdictions are in accord with this reasoning, holding that a surety is not released from liability where the principal's incarceration in the same jurisdiction has either ended before the date of default or commenced after the date of default.[1] The rationale adopted by the courts generally denies relief on the ground that the principal was at large at the time of default and the surety had not availed itself of statutory remedies to exonerate its obligation. See, generally, anno: *Bail: Effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction,* 35 ALR4th 1192, § 14. See also *United States v Egan,* 394 F2d 262, 267 (CA 2, 1968); *Tri-State Bonding Co v State,* 263 Ark 620; 567 SW2d 937 (1978); *State v Childs,* 208 NJ Super 61, 64-65; 504 A2d 1212 (1986); *State v Armstrong,* 605 SW2d 526 (Mo App, 1980); *Leach v State,* 293 So 2d 77, 78 (Fla App, 1974). Nonetheless, some courts have granted relief to the surety, emphasizing that the equities of the case weighed in its favor. See ALR4th *supra.*

Here, the only equity weighing in Bond Bond-

[1] The facts of this case are thus distinguished from the situation where a principal is arrested on another charge and his incarceration extends to the date of default, making it impossible for the surety to produce the principal. Under such circumstances, Michigan follows the majority rule that the surety is either released from liability or liability is suspended for the duration of the incarceration. *People v Robb,* 98 Mich 397, 400-401; 57 NW 257 (1894); *People v Griffin,* 22 Mich App 101; 177 NW2d 213 (1970). Cf. *People v McCracken,* 11 Mich App 553, 554; 161 NW2d 758 (1968) (the defendant's failure to appear because he was incarcerated in Indiana did not justify the release of the surety because the surety was required to ensure the defendant's presence within this state's jurisdiction).

ing's favor is that defendant eventually did appear before the circuit court and serve his sentence. A bondsman is generally relieved of responsibility on a bond once the principal-defendant is sentenced. *People v Brow,* 253 Mich 140, 142; 234 NW 117 (1931). However, by failing to secure defendant's appearance in court as required, Bond Bonding breached the conditions of the surety bond before defendant's case was finally determined and his sentence was imposed. Thus, we find it to be of no consequence that defendant had already served his sentence when the court entered the judgment against Bond Bonding for the full amount of the bond.

Once a default occurs, the surety must be given an opportunity to appear before the court and show cause why the judgment should not be entered against it for the full amount of the bond. If good cause is not shown, the court must enter a judgment against the surety on the bond for any amount it deems appropriate up to the full amount of the bond. MCL 765.28; MSA 28.915; *People v Person,* 44 Mich App 630; 205 NW2d 610 (1973). See also former MCR 6.106(F) (revised, effective June 1, 1992). The judgment is as "enforceable, reviewable and appealable" as any other judgment rendered in a personal action. *People v Evans,* 434 Mich 314, 331; 454 NW2d 105 (1990); MCL 765.28; MSA 28.915. See also MCL 600.4835; MSA 27A.4835; MCR 2.612; *People v Munley,* 175 Mich App 399; 438 NW2d 292 (1989). Bond Bonding failed to appear at the show cause hearing and failed to pursue a remedy by any other method.[2]

In sum, we conclude that Bond Bonding was not

[2] Bond Bonding alleges that the reason defendant failed to appear on May 11, 1992, was because he was in the hospital. Bond Bonding failed, however, to take advantage of its opportunity to relay this information to the circuit court at the show cause hearing on June 29.

released from liability by the mere fortuity of defendant's apprehension through the efforts of others and that it was not without an adequate remedy. *Evans, supra* at 330-332. Thus, the circuit court did not abuse its discretion in forfeiting the entire amount of the bond because of defendant's failure to appear and Bond Bonding's failure to show cause why the judgment should not enter. See *People v Benmore,* 298 Mich 701; 299 NW 773 (1941).

Affirmed.

SCHMIDT v BRETZLAFF

Docket No. 158140. Submitted November 2, 1994, at Detroit. Decided January 17, 1995, at 9:55 A.M.

Johann Schmidt brought an action in the Wayne Circuit Court against Edward Bretzlaff and C & J Contracting Company, Inc., and obtained a consent judgment, William J. Giovan, J. The plaintiff obtained a writ of execution on the judgment and began seizing the defendants' equipment to satisfy the judgment. The defendants obtained a temporary restraining order to stop the execution and eventually persuaded the trial court to quash the writ of execution and to order the plaintiff to release and return the defendants' equipment on the grounds of promissory estoppel. The plaintiff appealed.

The Court of Appeals *held:*

The trial court abused its discretion by quashing the writ of execution in the absence of a promise by the plaintiff not to execute on the judgment. Defendant Bretzlaff's subjective belief that the plaintiff would not execute on the judgment cannot support a defense of promissory estoppel.

Reversed.

EXECUTION — QUASHING WRITS OF EXECUTION.

A court that has granted a writ of execution may quash the writ at its discretion; a writ of execution should be quashed if it would be illegal or inequitable to permit its further use or enforcement; a court should vacate any execution involving fraud, unfairness, injustice, or oppressiveness.

Winegarden, Shedd, Haley, Lindholm & Robertson (by *Damion Frasier* and *Peter D. Mooney*), for the plaintiff.

Jeffery D. Meek & Associates (by *Jeffery D. Meek* and *Kelly K. Hunt*), for the defendants.

REFERENCES

Am Jur 2d, Executions and Enforcement of Judgments §§ 62, 116.
See ALR Index under Estoppel and Waiver; Execution.

Before: FITZGERALD, P.J., and MICHAEL J. KELLY and E. R. POST,* JJ.

FITZGERALD, P.J. Plaintiff Johann Schmidt appeals as of right a circuit court order quashing his writ of execution and ordering the release and return of defendants' equipment in this contract action. We reverse.

On February 12, 1991, plaintiff filed a contract action against defendants Edward Bretzlaff and C & J Contracting Company, Inc., a family business owned by Bretzlaff. On November 21, 1991, a consent judgment was entered against defendants in the amount of $66,200.

On August 28, 1992, plaintiff obtained a writ of execution, and, on September 8, 1992, began seizing defendants' equipment. On September 22, 1992, defendants moved for a temporary restraining order and an order to show cause why relief should not be granted from the writ of execution. On that same date, the trial court entered an order directing plaintiff to show cause why a preliminary injunction enjoining plaintiff from selling, conveying, transferring, encumbering, disposing of, or damaging any of the equipment seized by plaintiff should not be entered. The order also temporarily restrained plaintiff from taking all of the above-stated actions.

A motion hearing was held on October 2, 1992, at which time plaintiff filed a response to defendants' motion. At the conclusion of the hearing, the trial court quashed the writ of execution on the basis of promissory estoppel and ordered payment on the judgment to be made by defendants in monthly installments of $1,500.

On appeal, plaintiff argues that the trial court

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

abused its discretion in quashing the writ of execution on the basis of promissory estoppel. We agree.

Our research has unveiled no Michigan law regarding a trial court's ability to quash a writ of execution. Therefore, we turn to other jurisdictions for guidance.

Generally, the quashing of an execution rests largely in the discretion of the court. *Oklahoma Salvage & Supply Co v First Nat'l Bank of Okmulgee,* 122 Okla 128; 251 P 1006 (1926); *Sautbine v United States Cities Corp,* 114 Okla 110; 243 P 499 (1926); *Barnette v Bohannon,* 27 Okla 368; 112 P 987 (1910). The trial court's order quashing execution will not be disturbed on appeal absent an abuse of that discretion. *Id.*

A court entering a writ of execution has the power to quash or vacate such writ. 30 Am Jur 2d (Rev), Executions and Enforcement of Judgments, § 409, pp 273-274. *Campau v Godfrey,* 18 Mich 27, 43 (1869). Such power of the court arises from its complete control of its own process and is inherent. *Id.* A writ of execution will be quashed if it would be illegal or inequitable to permit its further use or enforcement. *Sandburg v Papineau,* 81 Ill 446 (1876); *Commercial Nat'l Bank v Stoddard,* 70 Ill App 79 (1897); *Creditors' Adjustment Co v Newman,* 185 Cal 509; 197 P 334 (1921). The courts are particularly inclined to vacate an execution where there is some element of fraud, unfairness, injustice, or oppressiveness involved. 30 Am Jur 2d (Rev), Executions and Enforcement of Judgments, § 415, p 276.

The trial court relied on the doctrine of promissory estoppel in quashing the writ of execution. The elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee,

(3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Mt Carmel Mercy Hosp v Allstate Ins Co,* 194 Mich App 580, 589; 487 NW2d 849 (1992).

To support a claim of estoppel, a promise must be definite and clear. *State Bank of Standish v Curry,* 442 Mich 76, 85; 500 NW2d 104 (1993). A promise is a manifestation of intention to act or refrain from acting in a specified manner, made in a way that would justify a promisee in understanding that a commitment had been made. *Id.*

In this case, defendants assert that plaintiff's acts of showing defendant Bretzlaff a large sum of money and stating that he would not do anything "to hurt defendants," together with defendants' plan to run the concrete-crushing plant with plaintiff, are tantamount to a promise to refrain from enforcing the judgment. We disagree. If defendants were told that the judgment would not be enforced, then the first element of promissory estoppel would be satisfied. However, there is no dispute that plaintiff never explicitly made such an assurance. Defendant Bretzlaff's subjective belief that plaintiff would not execute on the judgment is insufficient to constitute a promise that would support an estoppel defense. Hence, the trial court abused its discretion in quashing the writ of execution under these circumstances.

Given our resolution of this case, we need not address the remainder of the issues raised by plaintiff.

Reversed.

GOLEC v METAL EXCHANGE CORPORATION

Docket No. 151639. Submitted April 7, 1994, at Detroit. Decided January 17, 1995, at 10:00 A.M. Leave to appeal sought.

Stanlislaw Golec brought an action in the Wayne Circuit Court against Metal Exchange Corporation, doing business as Continental Aluminum Company, and certain supervisory employees, seeking damages for personal injuries suffered in the course of his employment with defendant corporation when an explosion in a furnace he was loading caused molten aluminum to splash on him and alleging that the injuries were the result of acts of the defendants that constituted an intentional tort within the meaning of the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1). The court, Samuel A. Turner, J., granted summary disposition for the defendants, holding that the plaintiff's complaint failed to state a claim upon which relief could be granted because the allegations in the complaint failed to establish an intentional tort within the meaning of § 131(1). The plaintiff appealed.

The Court of Appeals *held:*

1. A motion for summary disposition under MCR 2.116(C)(8) for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim on the basis of the pleadings alone. All factual allegations made in support of the claim and any inferences that reasonably can be drawn from those allegations are accepted as true.

2. Section 131(1) of the Worker's Disability Compensation Act exempts from the operation of the exclusive remedy provision tort claims for damages resulting from intentional torts. An intentional tort within the meaning of § 131(1) occurs where there is a deliberate act by an employer and a specific intent by the employer to injure the employee. The specific intent to injure is established where an employer had actual knowledge that injury was certain to occur and wilfully disregarded that knowledge.

3. The plaintiff alleged that the defendants were aware that the aluminum scrap he was loading into the furnace was wet, that wet scrap could cause the molten aluminum to explode and splash out of the furnace, that the tractor that his supervi-

sor told him to use lacked adequate shielding to protect the driver from splashes, that he had not been provided with proper protective clothing, and that he already had been slightly injured by molten aluminum splashed by a small explosion shortly before the incident that caused his serious injuries and that the defendants nevertheless required him to continue the loading of the furnace under those conditions. The allegations of the plaintiff are sufficient to state a claim for an intentional tort under § 131(1) and cannot be said to be so unenforceable as a matter of law that no factual development could possibly justify a right of recovery.

Reversed and remanded.

Kepes, Wine & McNeilage, P.C. (by *Carol A. McNeilage*) (*Paskin, Nagi & Baxter, P.C.,* by *Jeannette A. Paskin,* of Counsel), for the plaintiff.

Vandeveer Garzia (by *Pamela L. Abbott*), for the defendants.

Before: GRIBBS, P.J., and WEAVER and R. P. HATHAWAY,* JJ.

GRIBBS, P.J Plaintiff filed suit against defendants for personal injuries sustained during the course of his employment when an explosion in a furnace caused molten aluminum to splash on him, resulting in serious burns. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), alleging that plaintiff's claim did not fall within the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1); MSA 17.237(131)(1). The trial court granted summary disposition for defendants and dismissed plaintiff's complaint. Plaintiff appeals as of right. We reverse.

Initially, we note that the trial court did not grant defendants' motion for summary disposition

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

pursuant to MCR 2.116(C)(10), but instead dismissed plaintiff's first amended complaint for failing to state a claim upon which relief could be granted. The trial court concluded that plaintiff's allegations failed to state an intentional tort falling within the exception to the exclusive remedy of the WDCA and thus determined that it was unnecessary to address the sufficiency of the evidentiary support for plaintiff's allegations. Consequently, we limit our review to a determination of whether summary disposition was appropriately granted pursuant to MCR 2.116(C)(8).

Summary disposition of a claim may be granted on the ground that the opposing party "has failed to state a claim on which relief can be granted." MCR 2.116(C)(8); *Radtke v Everett,* 442 Mich 368, 373; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts alleged. *Marcelletti v Bathani,* 198 Mich App 655, 658; 500 NW2d 124 (1993). However, a mere statement of conclusions that are not supported by allegations of fact will not suffice to state a cause of action. *Roberts v Pinkins,* 171 Mich App 648, 651; 430 NW2d 808 (1988). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections,* 439 Mich 158, 163; 483 NW2d 26 (1992).

Generally, the right to recover benefits for personal injury or occupational disease under the WDCA is the exclusive remedy of an employee against an employer who has complied with the act. MCL 418.131(1); MSA 17.237(131)(1); *Smith v Mirror Lite Co,* 196 Mich App 190, 192; 492 NW2d

744 (1992). The exclusive remedy provision does not apply, however, to claims arising from intentional torts. Section 131(1) of the WDCA provides in part:

> An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

Thus, to avoid the exclusive remedy provision through the intentional tort exception, there must be a deliberate act by the employer and a specific intent that there be an injury. Specific intent is established if the employer had actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge. MCL 418.131(1); MSA 17.237(131)(1); *Pawlak v Redox Corp,* 182 Mich App 758, 767-768; 453 NW2d 304 (1990). To support such conclusions, a plaintiff must be able to allege a specific danger known to the employer that was certain to result in an injury and must allege that the employer required the plaintiff to work in the face of that danger. *McNees v Cedar Springs Stamping Co,* 184 Mich App 101, 105; 457 NW2d 68 (1990). Whether the facts alleged by the plaintiff are sufficient to constitute an intentional tort is a question of law for the court, but whether the facts are as the plaintiff alleges is a question for the jury. *Adams v Shepherd Products, US, Inc,* 187 Mich App 695, 696-697; 468 NW2d 332 (1991).

For purposes of this motion, the trial court accepted the following facts as true. Plaintiff, a

welder by trade, had been on an extended disability leave after being injured by a tractor driven by another employee. When plaintiff returned to defendant Continental Aluminum Company, his services as a welder were no longer needed, and he was given a job as a packer. Eventually, plaintiff was assigned as a furnace loader.

One night when he arrived for work, the tractor usually used for loading scrap aluminum into the furnace was out of service, and plaintiff was instructed by his supervisor to use a front-end loader that had no protective shield. A roof leak over the pile of aluminum plaintiff was to load into the furnace led to moisture accumulation on the scrap pile. Loading wet scrap aluminum into a vat of molten aluminum is hazardous because of the potential for a steam explosion. These steam explosions, which vary in intensity, can cause molten aluminum to splash outside the furnace vat. In addition to the moisture accumulation, closed aerosol containers were also alleged to be incorporated into the scrap aluminum. As with wet aluminum, loading scrap that contains pressurized canisters into a vat of molten aluminum is hazardous because of the danger of explosion.

During his shift that night, a minor explosion splashed molten aluminum from the vat onto plaintiff's wrist while he sat in the front-end loader, causing a small burn injury. Plaintiff informed his shift leader, defendant Bogdan J. Mazur, of the explosion and of the hazardous conditions existing in the scrap pile. Plaintiff was instructed to take a break, and Mazur contacted his supervisor, defendant Richard Rziemkowski. Despite being informed of the problems with the scrap, the explosion, and plaintiff's injury, Rziemkowski instructed Mazur to continue to have the furnace loaded. Plaintiff was instructed to return

to his duties. A few hours later a major explosion occurred, which showered plaintiff with molten aluminum causing severe burns and serious injury.

In his amended complaint, plaintiff alleged a wide variety of failures, omissions, and other deliberate acts that he claims meets the threshold of an intentional tort. In summary, plaintiff bases his claim on defendants': (1) failure to provide adequate protective clothing; (2) violation of industry standards, including those promulgated pursuant to the Occupational Safety and Health Act and the Michigan Occupational Safety and Health Act and those adopted by the American National Standards Institute, particularly with respect to the failure to require him to wear protective clothing; (3) failure to implement safety rules; (4) requiring him to perform his job in an unshielded tractor; and (5) failure to eliminate the hazards of excessive moisture and sealed aerosol canisters from the scrap aluminum. Plaintiff further alleged that defendants had knowledge: (1) that the use of an unshielded tractor was improper for loading scrap aluminum into the furnace; (2) that plaintiff was performing his job without proper protective clothing while using an unshielded tractor; (3) that they were in violation of safety standards; (4) that a roof leak caused the scrap aluminum to become wet; (5) that wet scrap aluminum can cause a steam explosion when placed on molten aluminum; (6) that pressurized canisters were in the scrap aluminum to be loaded into the furnace; (7) that pressurized canisters can cause an explosion when placed on molten aluminum; (8) that burn injuries can result from an explosion of molten aluminum; (9) that plaintiff had been burned that same evening by an explosion of molten aluminum; (10) that wet scrap or the presence of a

closed canister probably caused that explosion; and (11) that at least seven other employees had suffered burn injuries that year. Plaintiff alleged that despite this knowledge of the specific danger of explosion and the certainty of injury given the condition of the scrap pile and the lack of protections provided to plaintiff, defendants nevertheless ordered him to continue loading the furnace under the same conditions that existed just before his earlier injury.

The trial court accepted all of plaintiff's well-pleaded factual allegations as true. However, the trial court concluded that these facts, even if true, established only negligence on the part of defendants and not an intentional tort within the meaning of § 131(1). In this regard, we believe the trial court erred.

In the amorphous vista of the intentional tort exception, it is difficult for the courts to establish any bright-line determination of what combination of circumstances will constitute an intentional tort. As observed by Judge SAWYER in his concurrence in *Benson v Callahan Mining Corp,* 191 Mich App 443, 450-451; 479 NW2d 12 (1991), the distinctions between cases finding an intentional tort and those that do not are subtle at best. The difficulty arises in determining when the employer's conduct passes from merely providing an unsafe workplace in which injury is possible or even likely to the point where an injury is certain to occur and the employer had knowledge of that certainty. *Id.*

Despite our inability to formulate a definitive classification, we are convinced that plaintiff's allegations, if true, are sufficient to constitute an intentional tort under the statutory exception. An intentional tort under § 131(1) of the WDCA requires the existence of a deliberate act by the

employer and that the employer specifically intended an injury. This specific intent is deemed to exist if the employer had actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge. *Pawlak, supra.* In the present case, plaintiff has alleged that defendants knew that the roof leaked over the scrap aluminum, which caused the scrap he was instructed to load into the furnace to become wet, and knew that wet aluminum can cause an explosion of molten aluminum that can cause burn injuries. Additionally plaintiff alleged that defendant knew that sealed canisters were contained in the pile of scrap and that such canisters can also cause an explosion of molten aluminum if placed in the vat. Defendants also knew, as alleged by plaintiff, that he was not wearing proper protective clothing, that he was working by supervisory directive in an unshielded tractor, and that he had been injured earlier that same shift from an explosion of molten aluminum. Despite this knowledge of a specific danger and of other burn injuries sustained in the past, defendants, through the chain of command, ordered plaintiff to continue loading the wet scrap that contained pressurized canisters into the furnace vat with an unshielded tractor while not properly attired with protective clothing.

We believe that these allegations sufficiently establish that defendants had actual knowledge of a specific danger—i.e., an explosion of molten aluminum—that was certain to result in an injury to an employee not protected properly with appropriate clothing and equipment and that they wilfully disregarded that knowledge by requiring plaintiff to work under the same conditions that produced his earlier minor injury. *McNees, supra.*

The facts alleged by plaintiff in his amended complaint are distinguishable from those in *Ben-*

son, supra. Plaintiff's allegations suggest more than that his employer had knowledge that an injury was certain to occur at some point in time. We believe that plaintiff's prior injury during that same shift is significant to the requirement that defendants had knowledge that an injury was certain to occur under the conditions in which they required plaintiff to resume working. We are convinced that the allegations presented in this case surpass the threshold of a mere failure to provide safer equipment or other safety devices and cross over into the realm of the intentional tort. Compare *Mirror Lite Co, supra, Benson, supra,* and *Phillips v Ludvanwall, Inc,* 190 Mich App 136; 475 NW2d 423 (1991), with *Adams, supra,* and *McNees, supra.*

While we firmly agree that the intentional tort exception to the exclusive remedy provision of the WDCA is narrow, the exception must have meaning and can exist without a formal declaration by the employer that it desires a particular employee to be injured. In light of the statutory language, the exception encompasses the conditions that existed on the night of plaintiff's injury. These conditions, including the lack of proper protections, the hazardous nature of the scrap aluminum, and the prior explosion that injured plaintiff, are alleged to have been known fully to defendants and combined to create a situation that we have little difficulty determining is sufficient to constitute an intentional tort within the meaning of § 131(1). Plaintiff's amended complaint was not so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade, supra.* Plaintiff must be given an opportunity to establish before a jury whether the facts are as he alleges. *Adams, supra.*

Reversed and remanded. We do not retain jurisdiction.

WEAVER, J., did not participate.

DYKSTRA v DEPARTMENT OF TRANSPORTATION

McBRIDE v DEPARTMENT OF TRANSPORATION

Docket Nos. 156448, 156484. Submitted November 17, 1994, at Grand Rapids. Decided January 17, 1995, at 10:05 A.M.

William J. and Marcelyn B. Dykstra brought an action in the Court of Claims against the Department of Transportation, seeking damages for injuries sustained in an automobile accident that occurred on an icy highway that is under the jurisdiction of the department. Darla J. McBride brought actions in the Court of Claims and the Clare Circuit Court against the department and others, seeking damages for injuries she suffered in the same accident.

The actions were consolidated, and the court, Kurt N. Hansen, J., granted summary disposition for the department. The Dykstras appealed and McBride appealed. The appeals were consolidated.

The Court of Appeals *held:*

1. Brine that formed after deicing salt was spread on the highway and that later froze was part of the natural accumulation of ice and snow for which the department was under no obligation to remove.

2. Neither the salting of the highway nor the icy condition was a nuisance per se. To the extent that public nuisance was alleged, there is no public nuisance exception to governmental immunity.

Affirmed.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION.

Brine that forms after deicing salt is spread on a highway and that later freezes is part of the natural accumulation of ice and snow; the state has no obligation to remove natural accumulations of ice and snow on highways (MCL 691.1402; MSA 3.996[102]).

REFERENCES

Am Jur 2d, Highways, Streets, and Bridges § 509.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from ice or snow on surface of highway or street. 97 ALR3d 11.

Davidson, Breen & Doud, P.C. (by *Craig A. Zanot*), for William J. Dykstra and Marcelyn B. Dykstra.

Laurence A. Long and *Chaklos, Jungerheld & Hahn, P.C.* (by *Thomas C. Wimsatt*), for Darla J. McBride.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Brenda E. Turner* and *Harold J. Martin,* Assistant Attorneys General, for the Department of Transportation.

Before: NEFF, P.J., and MACKENZIE and J. R. CHYLINSKI,* JJ.

MACKENZIE, J. These appeals concern two negligence actions involving the highway exception to governmental immunity that were consolidated and decided below. In Docket No. 156448, plaintiffs William Dykstra and Marcelyn Dykstra appeal as of right from the trial court order that granted summary disposition to defendant Department of Transportation (MDOT) pursuant to MCR 2.116(C)(8) and (C)(10). In Docket No. 156484, plaintiff Darla McBride appeals as of right, and defendant William Dykstra cross appeals, from the same order. We affirm.

The trial court did not err in granting MDOT's motion for summary disposition pursuant to MCR 2.116(C)(10) with respect to the plaintiffs' negligence claims. MDOT is not liable pursuant to the natural accumulation doctrine, which provides that the state does not have an obligation to remove the natural accumulation of ice and snow from any location. See *Hampton v Master Products, Inc,* 84 Mich App 767, 770; 270 NW2d 514

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

(1978). The brine that formed after the road was salted and that later froze is a "natural accumulation" for purposes of the natural accumulation doctrine. *Zielinski v Szokola,* 167 Mich App 611, 621; 423 NW2d 289 (1988). While plaintiffs are correct that this holding of *Zielinski* technically is dicta, we find it persuasive and choose to follow it. Plaintiffs' claim that the natural accumulation doctrine is irrelevant in light of the statutory standard of conduct found in the highway exception to governmental immunity, MCL 691.1402; MSA 3.996(102), has been rejected by another panel of this Court. *Reese v Wayne Co,* 193 Mich App 215, 217; 483 NW2d 671 (1992).

The trial court also was correct in granting MDOT's motion for summary disposition pursuant to MCR 2.116(C)(8) with respect to the Dykstras' nuisance claim. Neither the conduct of MDOT's agent in salting the road nor the icy condition itself is a nuisance per se. *Li v Feldt (After Second Remand),* 439 Mich 457, 477; 487 NW2d 127 (1992) (opinion of CAVANAGH, C.J.); *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139, 152; 422 NW2d 205 (1988) (opinion of BRICKLEY, J.). To the extent that plaintiffs claimed to have alleged a public nuisance, there is no public nuisance exception to governmental immunity. *Li, supra,* p 474; *Summers v Detroit,* 206 Mich App 46; 520 NW2d 356 (1994).

Affirmed.

WEST BLOOMFIELD HOSPITAL v CERTIFICATE OF NEED BOARD

Docket Nos. 149134, 149139, 149140, 149181, 149228. Submitted September 15, 1994, at Lansing. Decided January 17, 1995, at 10:10 A.M.

West Bloomfield Hospital, Huron Valley Hospital, William Beaumont Hospital, Sisters of Mercy Health Corporation, Pontiac Osteopathic Hospital, and two other medical care facilities, all of which were located in the same area of Oakland County, each applied in 1983 or 1984 to the Department of Public Health for a certificate of need in order to build a new or alter an existing medical facility. Following a comparative review of the seven proposals, the department determined that there was no need for any of the proposed projects. The applicants appealed the department's decision to the Certificate of Need Board, which eventually affirmed the department's decision in all respects except for the application of Pontiac Osteopathic Hospital. The board found that the department's disapproval of Pontiac Osteopathic's application was arbitrary and not in accordance with law and, accordingly, granted a certificate of need to Pontiac Osteopathic. The other applicants appealed the board's decision to the Ingham Circuit Court. The court, James R. Giddings, J., vacated the portion of the board's decision granting a certificate of need to Pontiac Osteopathic and affirmed the order in all other respects. Five separate appeals, each with a cross appeal, were filed and were consolidated.

The Court of Appeals *held:*

Section 22132 of the now-repealed certificate of need legislation in effect when the applications at issue were filed, MCL 333.22132; MSA 14.15(22132), provided that the "determination of need shall be consistent with the criteria and guidelines published for this purpose in the state medical facilities plan." The Legislature clearly intended the adoption of a state medical facilities plan to provide protection against the depart-

REFERENCES

Am Jur 2d, Administrative Law §§ 478, 479; Hospitals and Asylums § 4.

See ALR Index under Administrative Law; Hospitals.

ment's unbridled discretion in granting or denying applications for certificates of need. Because the department did not adopt a state medical facilities plan as mandated by § 22132, the department's use of unpromulgated criteria in evaluating the issuance of certificates of need to these applicants was in violation of the statutory procedural limitations in applying its discretion and, thereby, rendered the department's denial of the certificates invalid. The fact that the criteria that the department did use might have been adequate does not change the effect of the failure of the department to perform the task required of it by statute. The court should have ordered the issuance of the certificates of need.

Reversed and remanded.

CAVANAGH, J., dissenting, stated that the order of the circuit court should be affirmed, because the use by the Department of Public Health of the acute care bed need method as a substitute for the nonexistent state medical facilities plan in evaluating the applications for certificates of need was consistent with the legislative intent and reached a result consistent with the purpose of the certificate of need legislation.

HOSPITALS — CERTIFICATES OF NEED — STATE MEDICAL FACILITIES PLAN.

A provision in a former section of the Public Health Code relative to the issuance of certificates of need required the Department of Public Health to adopt a state medical facilities plan that set forth the criteria and guidelines by which the determination of need would be made; the failure of the department to adopt a state medical facilities plan as required by statute rendered any determination concerning a certificate of need a violation of the statutory procedural limitations of its discretion (MCL 333.22132; MSA 14.15[22132], now repealed).

Foster, Swift, Collins & Smith (by *Gary J. McRay* and *Eric E. Doster*), for West Bloomfield Hospital.

Miller, Canfield, Paddock & Stone (by *James C. Foresman* and *Jay B. Rising*), for Huron Valley Hospital.

Dickinson, Wright, Moon, Van Dusen & Freeman (by *Peter H. Ellsworth* and *William C. Bertrand, Jr.*), for William Beaumont Hospital.

Howard & Howard (by *David L. Kaser* and *Todd D. Chamberlain*), for Sisters of Mercy Health Corporation.

McGinty, Brown, Jakubiak, Frankland, Hitch & Henderson, P.C. (by *Kenneth P. Frankland*), for Pontiac Osteopathic Hospital.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Susan I. Leffler* and *Marvin L. Bromley,* Assistant Attorneys General, for the Certificate of Need Board and the Department of Public Health.

Before: WEAVER, P.J., and CAVANAGH and TAYLOR, JJ.

TAYLOR, J. Appellant health care facilities appeal as of right from a circuit court order affirming in part and reversing in part an order of the Certificate of Need Board. Appellee Department of Public Health cross appeals from the same order. The appeals were consolidated for purposes of our review. We reverse.

This matter arises out of competition among several health care facilities to secure a certificate of need authorizing hospital construction in a section of Oakland County described as subarea 48. On December 21, 1983, Pontiac Osteopathic Hospital filed with the department an application for a certificate to authorize a new 112-bed satellite hospital in Clarkston. Pontiac Osteopathic proposed a transfer to Clarkston of 112 currently licensed beds from its existing 308-bed facility in downtown Pontiac. The existing facility would then be renovated as a modern 196-bed hospital. At that time, two other matters were pending before the department. One was a certificate application from Huron Valley Hospital proposing an

addition of 150 beds to an authorized but uncompleted 153-bed facility. The other was West Bloomfield Hospital's letter of intent to build an additional 200-bed facility while voluntarily delicensing the same number of beds in two or more of its other hospitals located in another subarea in the southeastern lower peninsula. All three parties sought authorization to establish new service for acute care hospital beds in the area.

In February 1984, the department notified the applicants of its determination that a comparative review of their proposals was required pursuant to the now-repealed certificate of need provisions of the Public Health Code, MCL 333.22101 *et seq.*; MSA 14.15(22101) *et seq.*[1] The department published its notice of intent to conduct the comparative review, and four other facilities then filed certificate applications. After conducting a comparative review of all seven proposals, the department determined that the area did not need any of the proposed projects. The seven applicants appealed the department's decision to the need board. Discovery took place over the next three years, during which time there were interlocutory appeals, collateral actions, and multiple preliminary motions. After nine days of prehearing conferences and motions, the evidentiary hearing was conducted over the course of sixty days spanning seven months. On June 30, 1989, the hearing officer issued a 112-page Proposal for Decision recommending that the need board affirm the department's decision and deny all of the requested certificates.

The applicants filed exceptions to the proposal for decision, and the department filed replies, after which the need board heard oral arguments and

[1] For the present legislative scheme, see MCL 333.22201 *et seq.*; MSA 14.15(22201) *et seq.*

issued its order affirming the department's decision with respect to all applications except that of Pontiac Osteopathic. The board found that the department's disapproval of Pontiac Osteopathic's application was arbitrary and not in accordance with law. Accordingly, the board granted a certificate to Pontiac Osteopathic, but denied certificates to all the other applicants on the basis of its own determination that there was no need for the proposed health facilities or services.

The board's decision was appealed to the circuit court. The circuit court vacated the portion of the board's decision granting a certificate to Pontiac Osteopathic and affirmed the decision in all other respects. This appeal from the circuit court decision followed.

There are many issues raised in this matter, one of which is dispositive. The Legislature conditioned the department's authority to grant certificates of need upon the adoption by the department of a state medical facilities plan. MCL 333.22132; MSA 14.15(22132). The department's failure to adopt a facilities plan constitutes a violation of a clear legal duty. *LundBerg v Corrections Comm,* 57 Mich App 327, 329; 225 NW2d 752 (1975). Because the required facilities plan was not promulgated, the granting or denial of a certificate of need was not within the power of the department. *Williams v Warden, Michigan Reformatory,* 88 Mich App 782, 786; 279 NW2d 313 (1979).

The certificate of need legislation illustrated the Legislature's conclusion that it was in the public interest to establish a certificate of need program to "provide for review and determination of need before new institutional health services, facilities, and organizations were offered or developed or substantial expenditures were undertaken in preparation for their offering or development." MCL

333.22111; MSA 14.15(22111). Accordingly, § 22113(1), MCL 333.22113(1); MSA 14.15(22113)(1), provided in part:

> [A] person shall not begin operation of a new health facility, make a change in bed capacity, make a change in service, or undertake a capital expenditure for the construction, conversion, addition to, or modernization in excess of $150,000.00 of a health facility or make commitment for financing the offering or development of a new institutional health service without first obtaining a certification of need which documents a demonstrated need and grants permission for the proposed project.

In order to ensure the existence of standards against which the actions of the department could be measured, the Legislature specifically mandated that the department's determination of need be made in accordance with a properly promulgated and published "state medical facilities plan." Section 22132 provided:

> In reviewing a request for a certificate of need for the construction of, addition to, or modernization of a health facility, including a project to correct a licensing deficiency, approval shall be based on, but not limited to, a demonstrated current and future need for the facility or a part of the facility. *The determination of need shall be consistent with the criteria and guidelines published for this purpose in the state medical facilities plan.* [Emphasis added.]

Although the Legislature employed the term "shall" in directing the department to create a facilities plan, the parties acknowledge that a facilities plan was never adopted as required by the act. MCL 333.22132; MSA 14.15(22132). Under

well-established rules of statutory construction, the term "shall" denotes that the duty imposed is mandatory and imperative and excludes the idea of administrative discretion. *Macomb Co Road Comm v Fisher,* 170 Mich App 697, 700; 428 NW2d 744 (1988); *McGrath v Clark,* 89 Mich App 194, 197; 280 NW2d 480 (1979). When the Legislature chooses to vest an administrative agency with the power to regulate public conduct, it must provide for adequate standards and guidelines to protect the public from the exercise of uncontrolled, arbitrary power. *Saroki v Detroit,* 73 Mich App 519; 252 NW2d 234 (1977). See, also, *Dep't of Natural Resources v Seaman,* 396 Mich 299; 240 NW2d 206 (1976); *Osius v St Clair Shores,* 344 Mich 693; 75 NW2d 25 (1956). Where the Legislature has set out specific standards of conduct, or has otherwise directed the agency to act in a particular manner, the agency may not ignore the Legislature's mandate. See *Ranke v Corps & Securities Comm,* 317 Mich 304; 26 NW2d 898 (1947); *Pharris v Secretary of State,* 117 Mich App 202, 208-209; 323 NW2d 652 (1982).

In this case, the Legislature intended the facilities plan to provide protection against the department's unbridled discretion in granting or denying certificate applications. However, the department failed to adopt a facilities plan, ignoring the Legislature's mandate to limit its exercise of "absolute, uncontrolled discretion in its issuance of certificates of need." *Huron Valley Hosp, Inc v State Health Facilities Comm,* 110 Mich App 236, 243; 312 NW2d 422 (1981). Like the Court in *Huron Valley,* we conclude that the department's use of unpromulgated criteria in evaluating the issuance of certificates was "in violation of the statutory procedural limitations in applying its discretion." *Id.* at 243-244. The failure of the department to

adopt and follow a facilities plan, where such action was mandated by law, was error. *Williams, supra* at 786. Thus, the denial of the certificates was invalid. *Huron Valley Hosp, supra* at 244.

The circuit court incorrectly determined that the department's failure to adopt the legislatively mandated facilities plan was inconsequential because the criteria that the department did use were adequate. The court reasoned that the department should not be held culpable for its failure to adopt a facilities plan. We soundly reject this proposition. The public's right to engage in what is otherwise lawful conduct must not be left to the regulation of administrative bodies functioning without rules, regulations, or guidelines, simply because the administrative agencies refuse to perform the tasks that the law requires of them.

We reverse and remand to the circuit court for issuance of certificates of need. We do not retain jurisdiction.

WEAVER, P.J., concurred.

CAVANAGH, J. *(dissenting).* I respectfully dissent.

Appellant health care facilities have provided no authority for the proposition that a comparative review may not be carried out in the absence of a state medical facilities plan; the statute simply fails to provide for such an eventuality. Accordingly, I agree with the circuit court's excellently reasoned opinion finding that the Department of Public Health's use of the acute care bed need method as a surrogate for the nonexistent facilities plan in this comparative review was consistent with the legislative intent, particularly in view of the inclusion of the acute care bed need method in the state medical facilities plan. See MCL 333.22154; MSA 14.15(22154) (repealed).

Moreover, I am unhappy that the result of the majority opinion is to undermine the purpose of the certificate of need legislation, which was to attempt to exercise some restraint on runaway health care costs. Following extensive and detailed investigation, which has been subject to exhaustive and impartial review, the competent authority has determined that there is no need for the proposed projects. Therefore, there is nothing to be gained, and much to be lost, by requiring further proceedings in this case.

Because none of the issues raised on appeal warrant reversal, I would affirm.

LIVINGSTON COUNTY BOARD OF SOCIAL SERVICES v DEPARTMENT OF SOCIAL SERVICES

Docket No. 143740. Submitted January 11, 1994, at Grand Rapids. Decided January 17, 1995, at 10:15 A.M. Leave to appeal sought.

The Livingston County Board of Social Services brought an action in the Livingston Circuit Court against the Department of Social Services, seeking a declaration that the procedures set forth in MCL 400.45(5); MSA 16.445(5) for the selection of directors of county departments of social services take precedence over an employment preference plan adopted by the state civil service commission for the displacement or "bumping" of employees by other employees with more seniority in cases of reduction in staff. A similar action by the Eaton County Board of Social Services was consolidated with the action by the Livingston board. The court, Daniel A. Burress, J., issued a judgment declaring that the statute governs only the ordinary appointment process for selecting county directors and does not control the replacement of such directors by means of bumping during reductions in staff. The plaintiffs appealed.

The Court of Appeals *held:*

The selection procedures of § 45(5) apply to all appointments of directors of county departments of social services and do not intrude upon the power of the state civil service commission to establish the terms and conditions of employment of civil servants.

1. Section 45(5) clearly and unambiguously authorizes county boards of social services to participate in all appointments of their respective county social services director. In this case, the displacement of the directors of the department of social services of Livingston and Eaton Counties by employees from the central offices of the DSS constituted appointments that should have been conducted pursuant to § 45(5).

2. Section 45(5) does not violate the state constitution. Const

REFERENCES

Am Jur 2d, Civil Service §§ 29, 36, 37; Public Officers and Employees §§ 21, 100, 106.

See ALR Index under Civil Service; Public Officers and Employees.

1963, art 11, § 5, which enumerates the powers of the state civil service commission with respect to the regulation of civil servants, and Const 1963, art 5, § 2, which directs the Legislature to allocate the functions, powers, and duties of the executive branch of state government within not more than twenty principal departments, must be construed in light of the entire constitution and should not be read to nullify or impair one another. Accordingly, the plenary power of the state civil service commission under art 11, § 5 was not intended to extend to the selection of county directors of social services, which is to be governed by MCL 400.45(5); MSA 16.445(5) even in cases of bumping during reductions in force.

Reversed.

Social Services — Appointments of County Directors of Social Services.

The procedures set by statute for the selection and appointment of directors of county departments of social services apply to all such appointments; employment preference rules promulgated by the state civil service commission for the displacement of employees by other employees with more seniority in cases of reductions in staff do not apply to the selection and appointment of directors of county departments of social services (MCL 400.45[5]; MSA 16.445[5]).

Clary, Nantz, Wood, Hoffius, Rankin & Cooper (by *John H. Gretzinger*), for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *John Wernet,* Assistant Attorney General, for the defendant.

Before: Murphy, P.J., and Griffin and Sawyer, JJ.

Griffin, J. In this action for declaratory judgment, we are asked to determine whether the statutory selection procedures for the appointment of a county director of social services set forth in MCL 400.45(5); MSA 16.445(5) control over the administrative employment preference rules promulgated by the Michigan Civil Service Commis-

sion. We hold that the statute is constitutional and takes precedence over the administrative rules.

I

The relevant facts are not in dispute. In 1991, the Department of Social Services eliminated several central office administrative positions in Lansing that had position comparison equivalent levels of 15. Two of the positions eliminated were held by David Fitzgerald and Joseph Schwinger. Instead of being laid off, both employees elected to exercise their "bumping" privileges to displace other less senior employees in accordance with the Non-Exclusively Represented Employee (NERE) Employment Preference Plan created by the DSS. The NERE Employment Preference Plan was created pursuant to the administrative employment preference rules promulgated by the Michigan Civil Service Commission.[1] Fitzgerald and Schwinger

[1] The NERE Employment Preference Plan was created under the authority of § 2-19 of the Rules of the Michigan Civil Service Commission entitled Employment Preference:

> 2-19.1 Definition. - Employment Preference is a system or process for determining an employee's rights to retain present class and level, or displace another employee, when staff reductions occur.
>
> 2-19.2 Application. - Employment preference shall be applied within an employee's current principal department or autonomous entity established pursuant to law.
>
> * * *
>
> 2-19.4 Qualification. - An employee is eligible to apply preference to positions where the employee meets the qualifications for the position based on state classified employment experience. Displacement will be subject to current approved selective certification qualifications for the position of the less senior employee.
>
> 2-19.5 Employee Rights to Apply Preference. - Within the county of employment, an employee shall apply preference to the least senior position for which qualified within the current class and level; then to the least senior position for which qualified in a different classification at the current or lower level which will minimize loss of pay.

requested employment preference for county director positions located outside Ingham County.

Applying the administrative employment rules, the DSS ordered that the existing county directors of social services for Livingston and Eaton Counties be replaced by Fitzgerald and Schwinger. The action by the DSS was taken unilaterally without consultation with or consent of the county boards of social services.

On March 1, 1991, plaintiff Livingston County Board of Social Services brought an action for declaratory judgment, seeking to invalidate the appointment of Fitzgerald. Thereafter, a virtually identical complaint filed by plaintiff Eaton County Board of Social Services was ordered consolidated. Both plaintiffs allege that the DSS failed to follow the procedures set forth in MCL 400.45(5); MSA 16.445(5) for the selection of county directors. Under the statute, a county director is required to be appointed from "among persons certified as eligible and recommended by the department and by the county social services board." On August 8, 1991, the circuit court ruled that the statute at issue "does not address or control the replacement of such county directors by means of 'bumping' during a reduction in force." Defendant's challenge to the constitutionality of § 45(5) was raised below but not ruled on.

II

On appeal, plaintiffs assert that the selection procedures under § 45(5) are intended to apply to all appointments to the position of county director. Further, plaintiffs contend that the provisions of

2-19.5a Departmental Layoff Plans. - A department layoff plan approved by the Department of Civil Service may modify application of county preference based on organizational or geographic limits but may not modify other parts of this rule.

§ 45(5) do not intrude upon the power of the Civil Service Commission to establish the terms and conditions of employment for state employees. After thorough review, we agree with both assertions.

III

The primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature. *Sagar Trust v Dep't of Treasury,* 204 Mich App 128, 129; 514 NW2d 514 (1994); *Great Lakes Sales, Inc v State Tax Comm,* 194 Mich App 271, 275; 486 NW2d 367 (1992). When the language used in a statute is clear, the statute must be enforced as written. *Gebhardt v O'Rourke,* 444 Mich 535, 541-542; 510 NW2d 900 (1994); *Hiltz v Phil's Quality Market,* 417 Mich 335; 337 NW2d 237 (1983). In construing the language of a statute, every word or phrase should be accorded its plain and ordinary meaning unless defined in the statute. *Consumers Power Co v Lansing Bd of Water & Light,* 200 Mich App 73, 76; 503 NW2d 680 (1993). Where a term is not defined by statute, this Court may resort to dictionary definitions. *Id.; Ludington Service Corp v Ins Comm'r,* 194 Mich App 255, 261; 486 NW2d 120 (1992), aff'd 444 Mich 481; 511 NW2d 661 (1994).

Section 45(5) of the Social Welfare Act sets forth the selection procedures for the appointment of county directors of social services:

> The director, employees, and assistants of the county department shall be appointed by the state department from among persons certified as qualified by the state civil service commission. The county social services board shall review the qualifications of and interview each applicant for the position of county social services director. The county director shall be appointed from among

> persons certified as eligible and recommended by the department and by the county social services board. The county social services board shall advise and make recommendations to the state director regarding the performance of the county director within 6 months after the appointment of the county director and annually after that time. A copy of each evaluation shall be provided to the county director. [MCL 400.45(5); MSA 16.445(5).]

Because the language used in the statute is clear and unambiguous, we construe it in light of its plain and ordinary meaning. Both parties argue that the crucial word in the statute is "appoint." The word "appoint" is not defined by statute. The *Random House College Dictionary: Revised Edition* (1984), p 66, defines "appoint" as "1. to name or assign to a position, office, or the like; designate: *to appoint a judge to the bench.* 2. to determine by authority or agreement; fix; set: *to appoint a time for a meeting.*" Here, the actions of the DSS in directing Fitzgerald and Schwinger to replace the existing county directors in Livingston and Eaton Counties under the NERE Employment Preference Plan satisfies this definition.

We also reject defendant's claim that § 45(5) is not meant to apply "to the peculiar circumstances that accompany a reduction in force." On its face, the statute makes no distinctions based on the circumstances giving rise to the appointment. Therefore, we construe § 45(5) as authorizing the county social services board to participate in all county director appointments. In our view, any attempt to carve out a distinction in the present case would ignore the plain meaning of the statute.

IV

Having found the statute to be applicable, we

next turn to the issue whether the statute violates the state constitution. The DSS argues that § 45(5) imposes job qualifications upon the county director position in violation of Const 1963, art 11, § 5. In response, plaintiffs maintain that the statute is a proper exercise of legislative power. We agree with plaintiffs.

The Michigan Civil Service Commission is an administrative agency established by the Michigan Constitution. *Viculin v Dep't of Civil Service,* 386 Mich 375, 393; 192 NW2d 449 (1971); *Dep't of Social Services v Kulling,* 190 Mich App 360, 363; 475 NW2d 464 (1991). Because the commission's grant of power is derived from the constitution, its valid exercise of power cannot be taken away by the Legislature. *Council No 11, AFSCME v Civil Service Comm,* 408 Mich 385, 408; 292 NW2d 442 (1980); *Pillon v Attorney General,* 345 Mich 536, 547; 77 NW2d 257 (1956). Under Const 1963, art 11, § 5, the commission possesses the following enumerated powers to regulate classified civil servants:

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

The foreword to the Rules of the Michigan Civil Service Commission describes the constitutional authority for the employment preference rules promulgated by the commission:

> The Constitution of the State of Michigan establishes the framework for a State Civil Service Commission and provides that the Commission shall "make rules and regulations covering all personnel transactions, and regulate all conditions of employment" in the state civil service.
>
> The purpose of these rules is to translate this broad Constitutional language into specific regulations concerning such basic matters as examination, appointment, classification, pay and fringe benefits, appeal rights, and many other aspects of state employment.

Although the Civil Service Commission possesses plenary power to "make rules and regulations covering all personnel transactions and regulate all conditions of employment," art 11, § 5 must be read in conjunction with Const 1963, art 5, § 2. Provisions of the state constitution must be construed in light of the whole document and should not be read to nullify or impair one another. *Durant v Dep't of Education (On Second Remand),* 186 Mich App 83, 115; 463 NW2d 461 (1990); *Marsh v Dep't of Civil Service,* 142 Mich App 557, 566; 370 NW2d 613 (1985).

Const 1963, art 5, § 2, provides, in pertinent part:

> All executive and administrative offices, agencies and instrumentalities of the executive branch of state government and their respective functions, powers and duties, except for the office of governor and lieutenant governor and the governing bodies of institutions of higher education provided for in this constitution, shall be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes.

This provision directs the Legislature to allocate the entities in the executive branch of state gov-

ernment and their respective "functions, powers and duties" within not more than twenty principal departments. The Executive Organization Act, MCL 16.101 *et seq.*; MSA 3.29(1) *et seq.*, implemented this constitutional provision.[2] *House Speaker v Governor,* 443 Mich 560, 563; 506 NW2d 190 (1993); *Soap & Detergent Ass'n v Natural Resources Comm,* 415 Mich 728, 741; 330 NW2d 346 (1982). Under this act, the DSS was created as one of nineteen principal departments. MCL 16.104(18); MSA 3.29(4)(18) and MCL 16.550; MSA 3.29(450). Further, the "powers, duties and functions" of the Department of Social Welfare, as created by 1939 PA 280, were transferred to the newly created DSS. MCL 16.552; MSA 3.29(452).

At the time of the Executive Organization Act, the power of the county social welfare boards to participate in the selection of the position of county directors was recognized by 1939 PA 280, as codified by MCL 400.45; MSA 16.445.[3] Under 1939 PA 280, county social welfare boards were given the statutory authority to employ "a director of the county department." The statute further authorized county boards, subject to the approval of the county boards of supervisors, to "select the

[2] The title to the Executive Organization Act states:

> AN ACT to organize the executive and administrative agencies of state government; to establish principal departments and department heads; to define the powers and duties of the principal departments and their governing agents; to allocate executive and administrative powers, duties, functions, and services among the principal departments; to provide for a method for the gradual implementation of the provisions of this act and for the transfer of existing funds and appropriations of the principal departments herein created and established.

[3] 1939 PA 280 was amended by 1966 PA 74 to substitute "county department of social services" for "county department of social welfare" and "county social services board" for "county social welfare board."

personnel . . . necessary to carry out the provisions of this act . . . ." Neither art 5, § 2 nor the Executive Organization Act exempted the state classified civil service.

In light of this history and the constitutionally mandated transfer of the "functions, powers and duties" of the Department of Social Welfare, we conclude that the plenary power of the Civil Service Commission was not intended to extend to the position of county director of social services. Accordingly, we hold that the selection procedures for the appointment of a county director under § 45(5) are constitutional and must be followed even in the event of a reduction in force. The statutory selection procedures for the appointment of a county director take precedence over the administrative rules.

Reversed.

Murphy, P.J., I concur in the result only.

FRAME v NEHLS

Docket No. 168015. Submitted December 6, 1994, at Grand Rapids. Decided January 17, 1995, at 10:20 A.M. Leave to appeal sought.

Gina E. Frame brought a paternity action in the Kalamazoo Circuit Court against Jay J. Franklin Nehls. The court, William G. Schma, J., adjudged the defendant to be the father of the child. Stephen Nehls, the child's paternal grandfather, then sought the right to visit the child. The court denied the request, ruling that it had to follow *Nelson v Kendrick*, 187 Mich App 367 (1991), which held that grandparent visitation rights cannot be sought in a paternity action because MCL 722.27b; MSA 25.312(7b), in part, allows a grandparent to seek an order of visitation only if a child custody dispute involving the child is pending in court. Stephen Nehls appealed.

The Court of Appeals *held:*

1. *Nelson* failed to address language in § 7b dealing with visitation rights for parents of a putative father. Because *Nelson* failed to address a statutory section needed for full consideration of the issue, Administrative Order No. 1994-4 does not bind the Court of Appeals to follow *Nelson*.

2. Section 7b violates a grandparent's and a grandchild's rights to equal protection to the extent it allows grandparents of a child born to separated or divorced parents to seek visitation rights when a child custody dispute is pending but does not allow grandparents of a child born out of wedlock to seek in a paternity action visitation rights to the child. The classifications created by § 7b are not related to any legitimate governmental interest.

Reversed and remanded.

CHILDREN BORN OUT OF WEDLOCK — CHILD CUSTODY ACT — VISITATION BY GRANDPARENTS — CONSTITUTIONAL LAW — EQUAL PROTECTION.

Section 7b of the Child Custody Act, to the extent that it allows

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REFERENCES

Am Jur 2d, Constitutional Law §§ 754, 755, 767; Parent and Child § 36.

Discrimination on basis of illegitimacy as denial of constitutional rights. 38 ALR3d 613.

Grandparents' visitation rights. 90 ALR3d 222.

the grandparents of a child whose custody is being disputed in court by the child's separated or divorced parents to seek the right to visit the child but does not allow the grandparents of a child born out of wedlock to seek in a paternity action the right to visit the child, violates equal protection (MCL 722.27b; MSA 25.312[7b]; US Const, Am XIV; Const 1963, art 1, § 2).

Miller, Johnson, Snell & Cummiskey (by *Harry Contos, Jr.*), for Gina E. Framme.

Richard D. Stroba, for Stephen Nehls.

Before: MICHAEL J. KELLY, P.J., and CONNOR and J. M. GRAVES, JR.,* JJ.

CONNOR, J. Stephen Nehls (hereafter "appellant") appeals as of right from the trial court's order awarding summary disposition in favor of plaintiff and dismissing appellant's petition for grandparent visitation rights with his grandson, Dustin. Appellant is the paternal grandfather of Dustin, who was born out of wedlock to plaintiff Gina E. Frame and defendant Jay J. Franklin Nehls. We reverse and remand.

Dustin was born in March of 1991. In May of 1993, defendant was adjudicated Dustin's father, ordered to support him, and granted visitation.

After the trial court determined that Jay Nehls was Dustin's father, appellant moved for grandparent visitation rights with the child. The trial court granted summary disposition in favor of plaintiff on the grounds that *Nelson v Kendrick,* 187 Mich App 367; 466 NW2d 402 (1991), precludes the award of grandparent visitation in a paternity action. On appeal, appellant claims that *Nelson* was wrongly decided and that the provision of the Child Custody Act upon which it relied, MCL 722.27b; MSA 25.312(7b), violates equal protection. We agree.

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

Grandparent visitation rights are expressly created by statute as part of the Child Custody Act, MCL 722.27b; MSA 25.312(7b), which provides in part:

> (1) Except as provided in this subsection, a grandparent of the child may seek an order for visitation in the manner set forth in this section only if a child custody dispute with respect to that child is pending before the court. . . .
>
> * * *
>
> (3) A grandparent seeking a grandchild visitation order may commence an action for grandchild visitation, by complaint or complaint and motion for an order to show cause, in the circuit court in the county in which the grandchild resides. . . . A grandchild visitation order shall not be entered for the parents of a putative father unless the father has . . . been adjudicated to be the father by a court of competent jurisdiction . . . .

We believe the above-quoted language indicates that grandparent visitation is statutorily recognized in paternity actions.

In *Nelson,* the trial court entered a stipulated order establishing paternity, visitation, and support, and allowing visitation by grandparents. *Nelson, supra,* 369. However, when the grandparents attempted to enforce the visitation order, the trial court ruled that it had no jurisdiction over the issue of the grandparent visitation at the time it entered the original order and that, "inasmuch as it addressed grandparent visitation rights, the original order was void for lack of jurisdiction." *Id.* On appeal, this Court concluded that the trial court had ruled properly because the father's action to determine paternity did not constitute a child custody dispute as defined by § 7b. *Id.* at 370-371.

Nelson did not address language in MCL

722.27b(3); MSA 25.312(7b)(3) dealing with grandchild visitation for the parents of a putative father. Because *Nelson* failed to address a statutory section needed for full consideration of the issue, Administrative Order No. 1994-4 is not controlling and we are not bound by *Nelson.*

Equal protection of the law is guaranteed by the federal and state constitutions. US Const, Am XIV; Const 1963, art 1, § 2. The constitutional guarantee of equal protection requires that persons in similar circumstances be treated alike. *El Souri v Dep't of Social Services,* 429 Mich 203, 207; 414 NW2d 679 (1987). When a legislative classification is challenged as being violative of equal protection, the standard utilized to determine its validity depends on the type of classification and the nature of the interest affected. *Dep't of Civil Rights ex rel Forton v Waterford Twp,* 425 Mich 173, 190; 387 NW2d 821 (1986).

Classifications based on illegitimacy are subject to intermediate or "heightened" scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Clark v Jeter,* 486 US 456, 461; 108 S Ct 1910; 100 L Ed 2d 465 (1988); and see *Gerhardt v Estate of Moore,* 150 Wis 2d 563; 441 NW2d 734 (1989) (statutory scheme similar to Michigan's statute invalidated on equal protection grounds). The Equal Protection Clause of the Michigan Constitution provides the same level of protection as the federal counterpart. *Doe v Dep't of Social Services,* 439 Mich 650, 672; 487 NW2d 166 (1992). Under intermediate scrutiny, the statutory classification must be substantially related to an important governmental interest. *Clark, supra,* 461; and see *Dep't of Civil Rights, supra,* 191.

We find that *Nelson*'s interpretation of § 7b deprives appellant of equal protection of the law and therefore should not be followed. Appellant is the paternal grandfather of the child. His son is

not married to the child's mother, but his son has been judicially adjudicated to be the child's father. Section 7b of the Child Custody Act provides that the grandparent of a child involved in a child custody dispute is entitled to pursue grandparent visitation. The *Nelson* Court found that § 7b did not provide the court with jurisdiction to order grandparent visitation rights to the grandparents of a child born out of wedlock. The grandparents of a child born to married parents would be entitled to pursue visitation rights pursuant to § 7b. This classification, seemingly based upon the fortuity of a marriage contract, is not related to an important governmental interest, and constitutes a deprivation of equal protection with regard to both the child and his grandfather.

The injustice of this dichotomy is exacerbated by the provision in § 7b(3) that grandchild visitation is permissible when a putative father acknowledges paternity, as long as the visitation request occurs in the context of a "child custody" dispute and not in a paternity proceeding. Because the classification resulting from § 7b and *Nelson*'s interpretation of it is arbitrary, it violates appellant's and Dustin's rights to equal protection of the law and, therefore, should be set aside.

Even if this case was considered under the most lenient "rational basis" test, we believe the outcome would be the same. There appears to be no conceivable set of facts demonstrating that the legislative judgment reflected in the classification is rationally related to any legitimate governmental interest. We can envision no well-founded reason to treat the grandparents of children born out of wedlock differently if paternity is established.

Reversed and remanded.

PEOPLE v D'ANGELO

Docket No. 169630. Submitted December 7, 1994, at Grand Rapids. Decided January 17, 1995, at 10:25 A.M.

Christine L. D'Angelo was convicted by a jury in the 89th District Court, Harold A. Johnson, J., of entering without permission a dwelling house that she owned but that was occupied by someone else. The Cheboygan Circuit Court, Robert C. Livo, J., affirmed. The defendant appealed by leave granted.

The Court of Appeals *held:*

1. The trial court erred in denying the defendant's motion for a directed verdict with regard to the charge of entry without permission.

2. The trial court erred in adding language to the applicable standard jury instruction where the language added was contrary to the statute under which the defendant was charged.

3. The relevant statute, MCL 750.115; MSA 28.310, clearly states that permission to enter a dwelling may be obtained from the owner or occupant, and does not require that permission to enter be obtained from each of the enumerated entities. It is reasonable to surmise that permission from any of those designated entities is sufficient. Because the statute does not clearly proscribe the defendant's conduct, the conviction must be reversed.

Reversed.

CRIMINAL LAW — BREAKING AND ENTERING — PERMISSION TO ENTER PREMISES.

The statute making criminal the entering of a dwelling without permission does not require that permission to enter be obtained from each of the enumerated entities; permission to enter from any of the designated entities, such as an owner, is sufficient (MCL 750.115; MSA 28.310).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Joseph P. Kwiatkowski,*

REFERENCES

Am Jur 2d, Burglary § 64.5.

See ALR Index under Breaking and Entering.

Prosecuting Attorney, and *Catherine M. Castagne,* Chief Assistant Prosecutor, for the people.

Scott L. Pavlich, for the defendant.

Before: M. J. KELLY, P.J., and CONNOR and J. M. GRAVES, JR.,* JJ.

CONNOR, J. A jury in the 89th District Court convicted defendant of entering without permission, MCL 750.115; MSA 28.310. The Cheboygan Circuit Court affirmed defendant's conviction. Defendant appeals by leave granted. We reverse.

This case stems from an incident in which defendant entered a dwelling house that she owned, but which was occupied by Sharon K. Bishop, without Bishop's permission. Bishop testified that in August of 1992, she lived in the residence at 9050 Afton Road in Cheboygan County with her children as well as her fiance and his children. Bishop's fiance is defendant's son. When Bishop first moved into the residence, she paid rent to her fiance, but, after their engagement, she stopped paying him rent. Testimony revealed that on August 23, 1992, defendant pulled into the driveway adjacent to the house and approached the front porch in an angry, belligerent manner. According to Bishop, defendant picked up a shovel, slammed it against the front of the house and tried to enter the residence. Bishop testified that defendant was able to get a foot inside the door before she was able to close the door. Defendant did not have permission to enter the residence.

The trial court granted defendant's motion for a directed verdict with regard to a charge of malicious destruction of property. However, the court declined to grant a directed verdict regarding a

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

charge of entry without permission, reasoning as follows:

> [I]t's the Court's belief that an owner could be criminally liable for entering without permission, a premises of which they are the owner. And I say that because I believe that when . . . possession is relinquished to a third party, third person, they then enjoy some rights with regard to the use and enjoyment of the property and could exclude the owner and so if the owner goes on those premises without permission, he or she could be criminally responsible. And that's the way I read the statute.

We find the trial court erred in denying the motion for a directed verdict with regard to the charge of entry without permission. *People v Warren (After Remand),* 200 Mich App 586, 588; 504 NW2d 907 (1993).

MCL 750.115; MSA 28.310 states that

> [a]ny person who shall break and enter, or shall enter without breaking, any dwelling . . . without first obtaining permission to enter from the *owner or occupant,* agent, or person having immediate control thereof, shall be guilty of a misdemeanor . . . . [Emphasis added.]

Both defendant and the prosecution expressed dissatisfaction with the standard jury instruction, CJI2d 25.4, because it requires that the prosecutor prove that the defendant entered without getting permission "from someone who had authority to give permission" without further defining who are persons "in authority."[1] Defendant proposed the

[1] CJI2d 25.4 states:

> (1) [The defendant is charged with the crime of / You may also consider the lesser charge of] entering a building without the owner's permission. To prove this charge, the prosecutor

following special, additional instruction based upon the language of the statute:

> Someone who had authority to give permission would be defined as owner or occupant, agent, or person having immediate control thereof.

The trial court denied that request, electing instead to add language to CJI2d 25.4, paragraph three, so it read:

> Second, that the defendant did this without first getting permission to enter from someone who had authority to give permission. If an owner gives up possession to a third party, they cannot enter without first obtaining permission from the third party.

We find that the language added to CJI2d 25.4 by the trial court was contrary to the statute and should not have been given. *People v Harris,* 190 Mich App 652, 664; 476 NW2d 767 (1991). The statutory language does not require that permission to enter be obtained from each of the enumerated entities. Consequently, we conclude that it is reasonable to surmise that permission from any of those designated entities, such as an owner, should suffice. While we acknowledge that the Legislature may not have intended this result, the statute clearly states that permission to enter may be obtained from the owner or occupant. MCL 750.115; MSA 28.310. We are unable to correct the

must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant entered a building. It does not matter whether the defendant got [his/her] entire body inside. If the defendant put any part of [his/her] body into the building, that is enough to count as an entry.

(3) Second, that the defendant did this without first getting permission to enter from someone who had authority to give permission.

statute simply by modifying CJI2d 25.4. The statute is clear, and it would not have put defendant owner on notice that she was violating the statute by entering the residence that she owned without securing permission from the occupant. *People v Murphy,* 203 Mich App 738, 748; 513 NW2d 451 (1994). Because the statute did not clearly proscribe defendant's conduct, reversal of her conviction is warranted. *People v Hawkins,* 157 Mich App 767, 770; 404 NW2d 662 (1987), reversed on other grounds 428 Mich 903 (1987).

In light of our holding, we need not address defendant's remaining issue.

Reversed.

BURNSIDE v STATE FARM FIRE AND CASUALTY COMPANY

Docket No. 147884. Submitted September 7, 1994, at Grand Rapids. Decided January 17, 1995, at 10:30 A.M. Leave to appeal sought.

Harlan and Margaret Burnside brought an action in the Kent Circuit Court against State Farm Fire and Casualty Company, seeking damages for the failure of the defendant to pay their claim under a fire insurance policy when their home burned and alleging breach of the insurance contract, tortious bad-faith handling of the insurance claim, and intentional infliction of emotional distress. The tort claim was dismissed before trial, and the jury returned a verdict for the defendant with respect to the claim of intentional infliction of emotional distress, found that the defendant breached the insurance contract, and returned a verdict for the plaintiffs with respect to that claim for the maximum allowable damages. The jury also awarded the plaintiffs penalty interest pursuant to the Uniform Trade Practices Act, MCL 500.2006; MSA 24.12006, and returned a special verdict finding that the defendant acted in bad faith when it refused to pay the plaintiffs' claim. The court, Dennis B. Leiber, J., awarded the plaintiffs mediation sanctions, but denied the plaintiffs' motion for attorney fees and actual costs, holding that attorney fees and actual costs are not recoverable as a result of a bad-faith breach of a fire insurance contract. The plaintiffs appealed.

The Court of Appeals *held:*

It is well-settled that attorney fees are not allowed, either as costs or as damages, unless authorized expressly by statute, by court rule, or by a recognized court-made exception. No statute or court rule authorizes attorney fees under these circumstances. The courts of this state have not recognized an exception to the general prohibition against an award of attorney fees under these circumstances, and there is no sound public policy reason to create such an exception in this case in view of the fact that the Legislature addressed the problem of the bad-faith handling of fire insurance claims by insurance companies

REFERENCES

Am Jur 2d, Costs § 72.

See ALR Index under Attorneys' Fees; Costs of Actions.

by the adoption of the penalty interest provision of the Uniform Trade Practices Act.

Affirmed.

M. J. TALBOT, J., concurring, stated that a mere breach of contract, whether in good faith or not, does not create an independent tort action for exemplary or consequential damages such as attorney fees and, in any event, that it is clear that the Legislature did not intend attorney fees under these circumstances, because it provided for penalty interest pursuant to the Uniform Trade Practices Act and, although it provided for attorney fees for bad-faith handling of claims under the no-fault act, it made no similar provision with respect to fire insurance claims.

COSTS — ATTORNEY FEES — FIRE INSURANCE — BAD FAITH.

It is well-settled that attorney fees are not allowed, either as costs or as damages, unless recovery of those fees is authorized expressly by statute, by court rule, or by a recognized court-made exception; attorney fees are not authorized by statute or court rule where there has been a breach of contract by a fire insurance company arising out of the bad-faith handling of a fire insurance claim, and there is neither a recognized court-made exception to the general rule nor any strong public policy reason to fashion such an exception under those circumstances.

Miller, Johnson, Snell & Cummiskey, P.L.C. (by *James S. Brady* and *Matthew L. Vicari*), for the plaintiffs.

Smith, Haughey, Rice & Roegge (by *John D. Vander Ploeg* and *Phillip K. Mowers*), and *Tolley, Verwys, VandenBosch & Walton, P.C.* (by *David L. Harrison*), for the defendant.

Before: MACKENZIE, P.J., and GRIFFIN and M. J. TALBOT,* JJ.

GRIFFIN, J. Plaintiffs appeal as of right from an order of the circuit court denying their motion for an award of costs and attorney fees against defendant in this breach of contract action. Plaintiffs'

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

motion was based upon the jury's determination that defendant breached its implied contractual duty as an insurer to act fairly and reasonably in investigating and refusing to pay plaintiffs' claim. We affirm. In doing so, we hold that the application of the American rule precludes the recovery of attorney fees incurred as the result of an insurer's bad-faith refusal to pay a claim.

I

On January 8, 1989, plaintiffs' home was destroyed by fire. Plaintiffs' residence and its contents were insured by defendant against loss caused by fire. On April 17, 1989, plaintiffs submitted a proof of loss to defendant totaling $229,627.04, plus additional living expenses. Following a lengthy investigation, defendant denied plaintiffs' claim on September 13, 1989, citing the following reasons: (1) the fire was intentionally caused by plaintiffs, and (2) plaintiffs misrepresented and concealed material facts and falsely swore to the cause of the fire.

On October 5, 1989, plaintiffs brought the instant action against defendant. In their complaint, plaintiffs alleged the following claims: (1) breach of the insurance contract, including violations of MCL 500.2836; MSA 24.12836 and the Uniform Trade Practices Act (UTPA), MCL 500.2001 *et seq.*; MSA 24.12001 *et seq.*, (2) commission of the tort of bad-faith handling of an insurance claim, and (3) intentional infliction of emotional distress. Following defendant's motion for summary disposition, the trial court dismissed plaintiffs' bad-faith tort claim, but denied the motion with respect to plaintiffs' claims of breach of contract and intentional infliction of emotional distress.

On June 17, 1991, a lengthy jury trial was

commenced. At the close of proofs, the trial court gave the following jury instruction regarding the award of attorney fees:

> Michigan law recognizes a contractual obligation on the part of an insurance company to act fairly and reasonably in the investigation of a claim and in denying payment of its insureds' claim. You must make a determination whether State Farm Fire and Casualty Company acted fairly and reasonably in its investigation of the claim and in denying payment of its insureds' claim.
>
> Michigan law further permits an award of attorney fees to be determined by a judge as a proper measure of damages arising out of the breach of an insurer's implied contractual duty to act fairly and reasonably in investigating and refusing to pay an insured's claim.

The jury returned a verdict in favor of defendant with respect to plaintiffs' claim of intentional infliction of emotional distress. With respect to the contract claim, the jury found that defendant had breached the insurance contract and assessed the maximum allowable damages. The jury also awarded plaintiffs penalty interest at the rate of twelve percent per annum under § 2006 of the UTPA, MCL 500.2006; MSA 24.12006. Pursuant to a special verdict form, the jury also found that defendant acted in "bad faith" when it refused to pay plaintiffs' claim.[1] A verdict in plaintiffs' favor with respect to defendant's counterclaim was also rendered.

On September 12, 1991, plaintiffs moved for attorney fees and actual costs on the basis of the jury's determination that defendant acted in bad

[1] Defendant has not filed a cross appeal. We note, however, that the tort of bad-faith breach of an insurance contract does not exist in Michigan. *Runions v Auto-Owners Ins Co,* 197 Mich App 105; 495 NW2d 166 (1992).

faith and for mediation sanctions pursuant to MCR 2.403(O). The trial court awarded plaintiffs $109,933.67 in mediation sanctions but ruled, contrary to its jury instruction at trial, that attorney fees and actual costs were not recoverable as the result of the bad-faith breach of an insurance contract. The trial court determined that under these circumstances the recovery of attorney fees and actual costs were not authorized by court rule, statute, or controlling case law.

II

On appeal, plaintiffs contend that the trial court erred in denying their motion for attorney fees and actual costs in light of the jury's finding that defendant refused in bad faith to pay their claim. Plaintiffs assert that under the common law of Michigan, an insurer found to have violated its duty to act "fairly and reasonably" must reimburse the insured party its full contract damages in enforcing the insurance contract. In response, defendant maintains that Michigan law does not allow a party to recover attorney fees and actual costs because of the bad-faith breach of an insurance contract. Further, defendant argues that an award of penalty interest under the UTPA is the exclusive remedy when an insurance company acts in bad faith. After thorough review, we agree with defendant's argument.

III

In Michigan, it is well-settled that the recovery of attorney fees is governed by the "American rule." *Matras v Amoco Oil Co,* 424 Mich 675; 385 NW2d 586 (1986). Under the American rule, attorney fees are generally not allowed, as either costs

or damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception. *Clute v General Accident Assurance Co of Canada,* 177 Mich App 411, 417; 442 NW2d 689 (1989). See also *Brooks v Rose,* 191 Mich App 565, 575; 478 NW2d 731 (1991); *State Farm Mutual Automobile Ins Co v Allen,* 50 Mich App 71, 74; 212 NW2d 821 (1973). Exceptions to the general rule are construed narrowly. *Rose, supra; Scott v Hurd-Corrigan Moving & Storage Co, Inc,* 103 Mich App 322, 347; 302 NW2d 867 (1981).

Plaintiffs, relying on the decisions of the Sixth Circuit Court of Appeals in *Murphy v Cincinnati Ins Co,* 772 F2d 273 (CA 6, 1985), argue that they are entitled to attorney fees as damages arising from defendant's bad-faith refusal to provide coverage. In *Murphy,* the insureds were awarded the proceeds of their fire insurance policy and $16,637.59 in attorney fees incurred as a result of the insurance company's bad-faith refusal to pay their claim. In upholding the lower court's award of attorney fees, the Sixth Circuit Court of Appeals interpreted Michigan case law to permit the recovery of attorney fees as an item of damages arising out of an insurer's breach of its implied contractual duty to act fairly and reasonably in investigating and refusing to pay an insured's claim. In reaching this decision, the Sixth Circuit noted that Michigan follows the rule in *Hadley v Baxendale,* 9 Exch 341; 156 Eng Rep 145 (1854),[2] that a party

[2] In *Huler v Nassar,* 322 Mich 1, 8; 33 NW2d 637 (1948), quoting 15 Am Jur, Damages, § 52, p 454, our Supreme Court set forth the two parts of the rule stated in *Hadley v Baxendale:*

> "(1) Where there are no special circumstances to distinguish the contract involved from the great mass of contracts of the same kind, the damages recoverable are such as would naturally and generally result from the breach according to the usual course of things, and (2) where there are special circumstances in the contract and its observance would take the

who fails to perform its contractual obligations becomes liable for all foreseeable damages flowing from the breach.

Underlying the Sixth Circuit's decision in *Murphy* was our Supreme Court's holding in *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401; 295 NW2d 50 (1980). In *Kewin,* the Supreme Court addressed the issues whether, and under what circumstances, mental distress and exemplary damages are recoverable as a result of a bad-faith breach of a commercial contract. The instant issue was noted but not addressed by the *Kewin* Court. *Id.* at 421, n 2. In holding that mental anguish damages are not recoverable unless contemplated by the parties at the time of the contract, the Supreme Court reaffirmed the application of the *Hadley v Baxendale* rule in the context of commercial contracts. Moreover, the Supreme Court noted that application of the rule "in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it." *Id.* at 414-415.

Implicit in the holding in *Kewin,* and reaffirmed in *Valentine v General American Credit, Inc,* 420 Mich 256; 362 NW2d 628 (1984), however, was the willingness of our Supreme Court to apply less than scrupulously the foreseeability test stated in *Hadley v Baxendale* in the face of another controlling point of law. In *Valentine,* the Supreme Court held that although mental distress damages are foreseeable within the rule of *Hadley v Baxendale* for virtually all breach of contract actions, the general rule in most jurisdictions is to deny recov-

contract out of the natural or usual course of things, damages which result in consequence of those special circumstances are recoverable if, and only if, those special circumstances were communicated or known to the party breaching the contract at the time he entered into the contract."

ery. As a rationale for its decision to deny recovery, the Court explained that the rule barring the recovery of mental distress damages is "a gloss on the generality of the rule stated in *Hadley v Baxendale* [and] is fully applicable to an action for breach of an employment contract." 420 Mich 260-261.

Similarly, other jurisdictions have recognized the American rule's limitation upon the recovery of attorney fees incurred as a foreseeable result of an insurer's breach of a contract to provide coverage:

> These contentions lay bare the underlying conflict between the principle that breach of contract damages will be awarded to protect the promisee's expectation interest and the principle, known as the American rule, that costs awarded to a prevailing party ordinarily do not include the counsel fees of the prevailing party.
>
> Where a liability insurer has promised to defend the insured against a covered claim and fails to do so, where a health insurer has promised to pay certain benefits for the insured to a third-party provider and fails to do so, and, indeed, where any promisor breaches the contract and causes loss to the promisee, expense incurred by the promisee in engaging counsel to press the breach of contract claim "may fairly and reasonably be considered [as] arising naturally, *i.e.,* according to the usual course of things, from such breach of contract itself." *Hadley v Baxendale,* 9 Ex 341, 354; 156 Eng Rep 145, 151 (1854).
>
> The American rule stands as a barrier to the recovery, as consequential damages, of foreseeable counsel fees incurred in enforcing remedies for the breach. The rule has been part of the jurisprudence of this country for nearly 200 years.
>
> "During the late colonial period, legislation provided for fee recovery as an aspect of comprehensive fee regulation. But this regulatory scheme did

> not long survive the Revolution. During the first half of the nineteenth century, lawyers freed themselves from fee regulation and gained the right to charge clients what the market would bear. As a result, the right to recover attorney fees from an opposing party became an unimportant vestige. This triumph of fee contracts between lawyer and client as the financial basis of litigation prepared the way for legislators and judges to proclaim the principle that one party should not be liable for an opponent's legal expenses." [*Collier v MD-Individual Practice Ass'n, Inc,* 327 Md 1, 13-14; 607 A2d 537 (1992), citing Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery,* 47 Law & Contemp Probs 9 (1984).]

See also *Rhodes v COPIC Ins Co,* 819 P2d 1060, 1062 (Colo App, 1991).

IV

After applying these principles in the present case, we reject the Sixth Circuit's decision in *Murphy* and hold that the recovery of attorney fees incurred as a result of an insurer's bad-faith refusal to pay an insured's claim is governed by the American rule. Like the Court in *Valentine,* we conclude that the American rule is a "gloss on the generality" of the foreseeability test stated in *Hadley v Baxendale.*

We find unavailing plaintiffs' argument that the American rule is inapplicable when an insurer acts in bad faith. In general, breach of contract damages are not awarded to punish a wrongdoer. We see no reason to carve out an exception in this instance when none exists.[3] An insured's right to

[3] We share the sentiments of the Maryland Court of Appeals in *Collier v MD-Individual Practice Ass'n, Inc,* 327 MD 1, 17; 607 A2d 537 (1992), that from the standpoint of a strict application of the American rule, there is no logical reason why attorney fees should be

recover attorney fees as an element of damages is not triggered by the foreseeability of loss. Instead, attorney fees are recoverable only when expressly authorized by statute, court rule, or a recognized exception.

In this case, plaintiffs concede that the recovery of attorney fees and actual costs are not authorized by statute or court rule. Furthermore, plaintiffs' public policy arguments have already been addressed by the Legislature by the enactment of the UTPA. As stated by defendant in its brief:

> The insurer which acts in bad faith, however, does not do so with impunity. The Legislature has provided in the Uniform Trade Practices Act, MCL 500.2001 *et seq.*; MSA 24.12001 *et seq.*, that an insurer is liable for penalty interest if it fails to timely pay a claim not reasonably in dispute. *McCahill v Commercial Union Ins Co,* 179 Mich App 761, 778-778 [sic]; 446 NW2d 579 (1989). The statute is intended to provide a penalty to be assessed against recalcitrant insurers who procrastinate or are dilatory in paying meritorious claims in bad faith. *Commercial Union Ins Co v Liberty Mut Ins Co,* 426 Mich 127, 136, n 5; 393 NW2d 161 (1986). This statute evinces an intent to compensate a plaintiff for the delay in recovering funds rightfully his or hers. *Medley v Canady,* 126 Mich App 739, 744; 337 NW2d 909 (1983). The UTPA provides other consequences enforceable by the Insurance Commissioner in what has been described as "a comprehensive, exclusive scheme of enforcement of the rights and duties it creates." *Crossley v Allstate Ins Co,* 155 Mich App 694, 697; 400 NW2d 625 (1986).

Finally, we disagree with plaintiffs' argument that their right to recover attorney fees and actual

recoverable as damages in some instances "when successful plaintiffs' actions for other breaches of insurance contracts, or for breaches of other contracts, do not ordinarily include those counsel fees."

costs is controlled by *Pollock v Fire Ins Exchange,* 167 Mich App 415; 423 NW2d 234 (1988), and *Wendt v Auto-Owners Ins Co,* 156 Mich App 19; 401 NW2d 375 (1986). Neither case dealt with the precise issue of the recovery of attorney fees by an insured or addressed the interplay between the American rule and the rule stated in *Hadley v Baxendale.* In any event, we are not persuaded by these decisions and decline to follow them.

Our resolution of this issue renders it unnecessary to address plaintiffs' remaining issue on appeal.

Affirmed.

M. J. TALBOT, J. *(concurring.)* I concur. Quite simply, no Michigan authority exists that would permit the recovery of attorney fees by a plaintiff for a bad-faith breach of an insurance contract. *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401; 295 NW2d 50 (1980), reaffirmed the general principle that damages from a breach of a commercial contract are limited to the monetary value of the contract. While *Kewin* does allow for recovery of damages beyond the contract where there is proof of tortious conduct independent of the breach or where contemplated by the parties at the time of the contract, the law in Michigan is still very clear: damages outside the contract are extraordinary and conditional upon these two very narrow instances. Neither of these circumstances exists in this case.

Furthermore, when there is a mere breach of contract, whether in good faith or not, there is no independent tortious action and, hence, no basis for exemplary damages. Every contract is accompanied by a common-law duty to use ordinary care in the performance of that contract. *Nelson v Northwestern Savings & Loan Ass'n,* 146 Mich

App 505; 381 NW2d 757 (1985). That duty, however, is not independent of the contract. It is not a duty imposed by law upon all that gives rise to a tort action. It is a duty arising out of that contract only and owed only to the contracting parties. Therefore, a tort action with exemplary or consequential damages cannot lie. *Kewin, supra* at 422.

Finally, the Legislature has established a statutory scheme whereby the insurer that fails to make prompt payment of a valid claim does not do so with impunity. The twelve percent award provided for by MCL 500.2006(4); MSA 24.12006(4) appears to be the penalty that the Legislature saw fit to impose upon an insurance company in a situation such as this. It is noteworthy that the Legislature specifically included a provision in the no-fault act that provides for the payment of the insured's attorney fees for an unreasonable failure to pay a claim. MCL 500.3148(1); MSA 24.13148. The portion of the Insurance Code covering fire insurance contracts, however, does not contain a similar provision for recovery of attorney fees for failure to make payment on a valid fire insurance claim.

SHIRILLA v CITY OF DETROIT

Docket No. 159927. Submitted October 4, 1994, at Detroit. Decided January 17, 1995, at 10:35 A.M.

George Shirilla brought an action in the Wayne Circuit Court against the City of Detroit, alleging violation of the Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, as a result of the defendant's refusal to hire the plaintiff as a city bus driver because he was taking insulin for his diabetic condition. The court, John H. Gillis, Jr., J., granted summary disposition for the defendant. The plaintiff appealed.

The Court of Appeals *held:*

1. The trial court erred in granting summary disposition under MCR 2.116(C)(8). However, summary disposition was appropriate under MCR 2.116(C)(10).

2. Section 31 of the Motor Bus Transportation Act, MCL 474.131; MSA 9.1675(31), incorporating 49 CFR 391.41, which places a blanket prohibition on the employment in motor carrier driving positions of diabetic persons requiring insulin and makes no exception for an applicant who, despite a diabetic condition, is able to perform the job safely, creates a conflict with the Handicappers' Civil Rights Act. The handicappers' act was impliedly repealed in part by § 31, the later of the two enactments, as applied to the facts of this case.

3. Section 31 of the Motor Bus Transportation Act provides a nondiscretionary ban on the hire of certain diabetic drivers, such as the plaintiff.

Affirmed.

1. MASTER AND SERVANT — DIABETIC PERSONS — MOTOR CARRIER DRIVING POSITIONS — CODE OF FEDERAL REGULATIONS — MOTOR BUS TRANSPORTATION ACT.

The Code of Federal Regulations places a blanket prohibition on the employment in motor carrier driving positions of diabetic

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REFERENCES

Am Jur 2d, Carriers §§ 28-30; Job Discrimination § 208; Statutes § 255.

Handicap as job disqualification under state legislation forbidding job discrimination on account of handicap. 78 ALR4th 265.

persons requiring insulin and makes no exception for a person who, despite a diabetic condition, is able to perform the job safely; the section of the code that contains the prohibition was incorporated into state law with the enactment of § 31 of the Motor Bus Transportation Act (49 CFR 391.41; MCL 474.131; MSA 9.1675[31]).

2. STATUTES — JUDICIAL CONSTRUCTION — REPEAL BY IMPLICATION.
Where it is clear that a statute conflicts with an earlier enacted provision, the Legislature is deemed to have repealed the prior statute to the extent of the conflict.

3. CIVIL RIGHTS — CONFLICT OF LAWS — HANDICAPPERS' CIVIL RIGHTS ACT — MOTOR BUS TRANSPORTATION ACT — FEDERAL MOTOR CARRIER SAFETY REGULATIONS.
The Legislature, in enacting § 31 of the Motor Bus Transportation Act, incorporated into state law certain sections of the federal motor carrier safety regulations; where a conflict exists between § 31 and provisions of the Handicappers' Civil Rights Act, which act predates § 31, the Legislature is deemed to have repealed the Handicappers' Civil Rights Act to the extent of the conflict (49 CFR 391.41; MCL 37.1101 *et seq.*, 474.131; MSA 3.550[101] *et seq.*, 9.1675[31]).

Stark & Gordon (by *Deborah L. Gordon* and *Martha I. Seijas*), for the plaintiff.

Jack Timmony, Assistant Corporation Counsel, for the defendant.

Before: MICHAEL J. KELLY, P.J., and W. P. CYNAR* and P. D. SCHAEFER,** JJ.

MICHAEL J. KELLY, P.J. Plaintiff appeals as of right an order of the circuit court granting defendant's motion for summary disposition under MCR 2.116(C)(8) for failure to state a claim under the Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* We affirm.

Plaintiff applied for employment as a city bus

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1994-7.

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

driver in May 1989. On July 19, 1990, plaintiff received word that he was certified for hiring. On July 24, 1990, he was instructed to appear for a physical examination. Following the examination, defendant informed plaintiff that his employment application was rejected because he was taking insulin. On August 2, 1990, plaintiff's doctor informed defendant that plaintiff's diabetic condition was under control and would not impair his driving ability. However, defendant refused to hire plaintiff. Plaintiff subsequently filed this action under the handicappers' act.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court granted defendant's motion on the ground that plaintiff's complaint failed to state a claim upon which relief could be granted.

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings. *Wade v Dep't of Corrections,* 439 Mich 158, 162; 483 NW2d 26 (1992). All well-pleaded allegations must be accepted as true and construed most favorably to the nonmoving party. *Id.* at 162-163. Summary disposition is appropriate only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Id.* at 163.

The trial court erred in grounding summary disposition on MCR 2.116(C)(8). Plaintiff's complaint contained all the elements of a claim under the handicappers' act, alleging that he was denied employment on the basis of a handicap unrelated to his ability to perform the duties of the position for which he applied. See *Sanchez v Lagoudakis,* 440 Mich 496, 502; 486 NW2d 657 (1992); MCL 37.1202(1)(b); MSA 3.550(202)(1)(b).

However, because the trial court considered evidence submitted by defendant, it appears that the

court simply misstated the rule under which it was deciding the motion for summary disposition. An order granting summary disposition under the wrong court rule may be reviewed under the correct rule. *Ginther v Zimmerman,* 195 Mich App 647, 649; 491 NW2d 282 (1992). Our review of the record indicates that summary disposition was appropriate under MCR 2.116(C)(10).

In reviewing an order of summary disposition under MCR 2.116(C)(10), this Court examines all relevant affidavits, depositions, admissions, and other documentary evidence and construes the evidence in favor of the nonmoving party. The Court then determines whether a genuine issue of material fact exists on which reasonable minds could differ. *Farm Bureau Mutual Ins Co v Stark,* 437 Mich 175, 184-185; 468 NW2d 498 (1991).

In support of its motion for summary disposition, defendant submitted an affidavit explaining that the sole reason for not hiring plaintiff was his diabetic condition, which required insulin and precluded him from working as a bus driver under state and federal regulations. Specifically, defendant invoked 49 CFR 391.41(b)(3) of the federal motor carrier safety regulations, as incorporated into state law in 1989 with the enactment of § 31 of the Motor Bus Transportation Act (MBTA), MCL 474.131; MSA 9.1675(31).[1] Section 31 of the MBTA provides, in relevant part:

> The following federal motor carrier safety regulations adopted by the United Stated department of transportation and in effect on the effective date of this section are adopted by the department and shall be enforced in relation to motor carriers of passengers:

[1] Apparently, it is no longer disputed that defendant's public transportation network extends beyond the city limits and is therefore subject to the MBTA.

* * *

(b) 49 CFR part 391, qualifications of drivers, except 391.11(b)(1).

49 CFR 391.41 provides, in relevant part:

(a) A person shall not drive a motor vehicle unless he is physically qualified to do so and, except as provided in § 391.67, has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a motor vehicle.

(b) A person is physically qualified to drive a motor vehicle if that person—

* * *

(3) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control . . . .

Plaintiff's discrimination claim arises under § 202 of the handicappers' act, which provides, in pertinent part:

(1) An employer shall not:

(a) Fail or refuse to hire, recruit, or promote an individual because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position. [MCL 37.1202; MSA 3.550(202).]

The central issue is whether § 31 of the MBTA, incorporating 49 CFR 391.41, creates a conflict with the handicappers' act and, if so, how that conflict should be resolved. This analysis begins with the plain language of the statutes at issue. *House Speaker v State Administrative Bd,* 441 Mich 547, 562-563; 495 NW2d 539 (1993).

We believe that a clear conflict exists. The plain language of 49 CFR 391.41 places a blanket prohibition on the employment in motor carrier driving

positions of diabetic persons requiring insulin.[2] It makes no exception for the applicant who, despite his diabetic condition, is able to perform the job safely. In doing so, the regulation renders irrelevant and superfluous the central inquiry of the handicappers' act: Whether the diabetic condition that prompted denial of a job application is related to the applicant's ability to perform the duties of the position applied for.

Section 31 of the MBTA does not indicate whether the Legislature intended to alter the handicappers' act. Thus, the rules of statutory construction must be consulted to resolve the conflict. *Rancour v Detroit Edison Co,* 150 Mich App 276, 284-285; 388 NW2d 336 (1986). The handicappers' act, enacted in 1976, predates the Legislature's adoption of the federal motor carrier safety regulations. It is presumed that the Legislature was aware of the handicappers' act at the time it adopted 49 CFR 391.41 in 1989. *House Speaker, supra* at 562-563. Where it is clear that a statute conflicts with an earlier enacted provision, the Legislature is deemed to have repealed the prior statute to the extent of the conflict. *Id.* at 563. Here, the Legislature chose to adopt a provision that clearly conflicts with the handicappers' act. Enforcing the two statutes as written would place defendant in a Catch-22 dilemma. By hiring plaintiff as a driver despite his diabetes, defendant would violate § 31 of the MBTA; yet, by refusing to hire plaintiff because of his diabetes, defendant might violate the handicappers' act. Although there is a presumption against implied repeals that requires courts to read statutes harmoniously and give them a reasonable effect, *House Speaker,*

[2] Plaintiff does not challenge § 31 of the MBTA under the Equal Protection Clauses of the federal and state constitutions. US Const, Am XIV; Const 1963, art 1, § 2.

supra at 562, we cannot do so in this case without reading a qualification into 49 CFR 391.41 that simply is not there.[3] Doing so would constitute not a harmonious reading of the two statutes but rather a shortcut of the conflict analysis by merely resolving the conflict in favor of the handicappers' act. Where a clear conflict exists, the later enactment controls. *Wozniak v General Motors Corp,* 198 Mich App 172, 181; 497 NW2d 562 (1993). We therefore deem the handicappers' act impliedly repealed in part by § 31 of the MBTA as applied to the facts of this case.

Plaintiff's reliance on *Dep't of Civil Rights ex rel Lanphar v A & C Carriers,* 157 Mich App 534; 403 NW2d 586 (1987), is misplaced. While the Court did state that the handicappers' act was not preempted by the federal motor carrier safety regulations, *id.* at 538, the Court's focus was on an apparent conflict between state law and a federal regulation. Here, the federal regulation at issue is in fact *state* law by virtue of § 31 of the MBTA. Thus, the conflict analysis is different. Moreover, the Court ultimately held that "[i]f an individual is not qualified under federal law to drive a motor carrier within interstate commerce, it cannot be a violation of the handicappers' act to refuse to employ the individual as an interstate motor carrier driver." *Dep't of Civil Rights, supra.*

Plaintiff's reliance on *Wilks v Taylor School Dist,* 174 Mich App 232; 435 NW2d 436 (1988), also

[3] Although 49 CFR 391.41 requires an applicant to present medical certification of his physical qualifications for a motor carrier position, the certification must be based on the grounds for qualification listed in that provision. The certification requirement does not carve an exception to the grounds for qualification by mandating a determination that an applicant is also unable to perform the duties of the motor carrier position safely. Here, plaintiff's doctor found that plaintiff had diabetes but also determined that this condition would not affect his ability to perform the bus driving job safely. The latter determination is irrelevant under 49 CFR 391.41.

is misplaced. In *Wilks,* the defendant motor carrier refused to hire the plaintiff as a school bus driver because its medical examiner determined that she was physically unfit to drive a bus and refused to issue a certificate of health, which was required of any individual desiring to be a school bus driver pursuant to a statute then in effect, MCL 257.316a; MSA 9.2016(1). *Wilks* at 234-235. If the plaintiff did not have the required certification, the defendant argued, it could not be expected to violate the law and hire the plaintiff, regardless of the plaintiff's actual ability to perform the job. *Id.* at 237. The case is clearly inapposite.

Similarly, *Smith v Dep't of Motor Vehicles,* 163 Cal App 3d 321; 209 Cal Rptr 283 (1984), is also inapposite. There, the California statute at issue did not directly prohibit the defendant from granting driving licenses to diabetic persons. Unlike the MBTA, the California statute merely directed the defendant to give consideration to the standards required of motor carrier drivers in the federal regulations. *Id.* at 326. It did not adopt those regulations. It left the decision to grant or deny a license to the defendant's discretion. *Id.* at 327-328.

Our reading of § 31 of the MBTA as a nondiscretionary ban on the hire of certain diabetic drivers is bolstered by the Legislature's subsequent adoption of § 2k of the Motor Carrier Safety Act, MCL 480.12k; MSA 9.1666(2k). Both statutes address the safety of motor carriers and adopt 49 CFR 391.41. However, the Motor Carrier Safety Act provides an exception to the blanket exclusion under 49 CFR 391.41. Because these two statutes relate to the same class of persons and have a common purpose, they should be read in pari materia. *Feld v Robert & Charles Beauty Salon,* 435 Mich 352, 360; 459 NW2d 279 (1990), citing *Rathbun v Michigan,* 284 Mich 521, 543; 280 NW 35 (1938). Pursu-

ant to MCL 480.12k; MSA 9.1666(2k), an applicant for a driver position who is not physically qualified to drive under 49 CFR 391.41 and who is otherwise qualified to drive may be granted a waiver. By providing a means of exempting certain individuals from the dictates of 49 CFR 391.41, the waiver procedure suggests that 49 CFR 391.41 is otherwise unconditional. The analysis is supported by the doctrine of *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). See *Feld, supra* at 362. In addition, the highly procedural nature of the waiver exception indicates that it should not be read as a substantive qualification of § 31 of the MBTA or 49 CFR 391.41 or as an incorporation of the principles of the handicappers' act into these provisions.[4] Instead, an applicant claiming fitness for a position despite a disability listed under 49 CFR 391.41 must follow the detailed procedures outlined in the waiver provision.

The waiver process would provide plaintiff with a procedure in which he would bear the burden of proving that his diabetic condition would have no bearing on his ability to perform the duties of a bus driver. The proof process would require, for example, the filing of reports by at least two medical examiners regarding plaintiff's ability to perform safely the duties of the bus driving position. MCL 480.12k(4)(a); MSA 9.1666(2k)(4)(a). The decision on waiver would be made by the Motor Carrier Division of the Department of State Police and could be appealed. MCL 480.12k(7); MSA 9.1666(2k)(7); MCL 480.12-l; MSA 9.1666(2-l). All that would be left to defendant's discretion would

[4] Even if the waiver provision constituted a substantive qualification of § 31 of the MBTA, it is inapplicable to this case because it did not take effect until April 1991, after defendant rejected plaintiff's application.

be the selection of one of the medical examiners and the decision whether to provide the required employer signature on plaintiff's waiver request. MCL 480.12k(4)(a); MSA 9.1666(2k)(4)(a); MCL 480.12k(5); MSA 9.1666(2k)(5).

Our decision does not reach the issue whether plaintiff's diabetic condition actually was related to his ability to work as a bus driver and constituted sufficient grounds for the denial of his application. That decision has already been made by the Legislature with the adoption of the federal motor carrier safety regulations. Our decision merely gives effect to that adoption. Any changes to those safety regulations must be made by the Legislature.[5]

Affirmed.

[5] In this regard, we note that the enactment of the Americans with Disabilities Act of 1990, 42 USC 12101 *et seq.*, the federal analogue to Michigan's handicappers' act, has prompted a review of the grounds for disqualification listed in 49 CFR 391.41.

PEOPLE v OSWALD

Docket No. 164122. Submitted December 21, 1994, at Grand Rapids. Decided January 18, 1995, at 9:00 A.M.

David A. Oswald pleaded guilty in the Bay Circuit Court, Eugene C. Penzien, J., of first-degree retail fraud. The court imposed probation and required the defendant to pay, as a condition of probation, a fine that exceeded the maximum fine set by the first-degree retail fraud statute. The defendant appealed.

The Court of Appeals *held:*

1. Express mention in the probation statute that jail time imposed as part of probation shall not exceed the maximum period of incarceration provided in the statute under which the conviction was obtained implies the exclusion of a similar limitation on the amount of fines that may be imposed as part of probation where the statute is silent with regard to limitation of fines.

2. Probation is a matter of grace, not of right, and the trial court enjoys broad discretion in determining the conditions to be imposed as part of probation.

3. The defendant, in failing to supply the Court of Appeals with a copy of the presentence investigation report, has waived appellate review of his claim that the fine was excessive.

Affirmed.

SENTENCES — PROBATION — FINES.

The amount of fines to be imposed as a condition of probation rests in the discretion of the sentencing court and is not limited to the maximum fine set by the statute under which the conviction was obtained (MCL 771.3[2][b]; MSA 28.1133[2][b]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Joseph K. Sheeran,* and *Martha G. Mettee,* Assistant Prosecuting Attorney, for the people.

REFERENCES

Am Jur 2d, Criminal Law §§ 570, 613, 614.

See ALR Index under Parole, Probation, and Pardon.

Skronek & Cowdry (by *William R. Cowdry*), for the defendant on appeal.

Before: NEFF, P.J., and SAWYER and J. P. JOURDAN,* JJ.

PER CURIAM. Defendant pleaded guilty of retail fraud in the first degree. MCL 750.356c; MSA 28.588(3). He was placed on five years' probation, with the first seven months to be served in the county jail. Additionally, the order of probation required the payment of a $1,500 fine. Defendant now appeals, and we affirm.

Defendant first argues that the trial court was not authorized by statute to impose a $1,500 fine. Rather, defendant argues that the trial court was limited to the maximum fine of $1,000 authorized by the first-degree retail fraud statute. MCL 750.356c(1); MSA 28.588(3)(1). We disagree.

The trial court is authorized to impose a fine as a condition of probation, though the probation statute does not restrict the amount of that fine. MCL 771.3(2)(b); MSA 28.1133(2)(b). Defendant's argument that the amount of the fine should be restricted to the maximum fine that is authorized by the underlying criminal statute has no support in the text of the probation statute. Indeed, the primary thrust of defendant's argument, that in other instances the probation statute links the penalty to the underlying criminal statute involved, weakens rather than supports defendant's position. For example, under MCL 771.3(2)(a); MSA 28.1133(2)(a), the maximum amount of jail time that may be imposed as a condition of probation may not exceed the maximum period of incarceration provided for in the underlying statute. The fact that the Legislature chose in that section to

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

limit specifically the court's authority in imposing a term of imprisonment to that contained in the underlying criminal statute, while failing to impose any such limit under the fine provisions of the probation statute, reflects a legislative intent not to impose any such limit with respect to fines. It is a basic principle of statutory construction that the express mention of one thing implies the exclusion of other similar things. *Jennings v Southwood,* 446 Mich 125, 142; 521 NW2d 230 (1994). Therefore, the express mention of a limitation regarding the period of incarceration being linked to the underlying criminal statute implies the exclusion of a similar limitation on the amount of fines that may be imposed.

Defendant's position further ignores the fact that probation is a matter of grace, not of right, and that the trial court enjoys broad discretion in determining the conditions to be imposed as part of probation. *People v Whiteside,* 437 Mich 188, 192; 468 NW2d 504 (1991). Indeed, had defendant found the term of probation to be overly onerous, he could have declined the grant of probation, notified the court that he would not abide by the terms of probation, and submitted himself for sentencing directly under the retail fraud statute, with its limitation of the amount of fine that may be imposed.

To the extent that defendant also argues that the amount of the fine, even if authorized by statute, is nevertheless excessive, and therefore disproportionate, defendant has waived any such review of his sentence by failing to submit to this Court a copy of the presentence investigation report as required by MCR 7.212(C)(6).

Affirmed.

FRUEHAUF TRAILER CORPORATION v HAGELTHORN

Docket No. 162101. Submitted November 9, 1994, at Detroit. Decided January 18, 1995, at 9:05 A.M.

Fruehauf Trailer Corporation and K-H Corporation brought an action in the Wayne Circuit Court against George A. Hagelthorn and Rather Engineering, P.C., seeking to enjoin Hagelthorn, on the basis of the attorney-client privilege, from discussing with anyone any information relating to the plaintiffs and from acting as a consultant or testifying as an expert in any products liability action brought against the plaintiffs. Hagelthorn, a mechanical engineer, previously had worked for the plaintiffs and their predecessor, Fruehauf Corporation, as an employee or consultant who assisted them in defending against products liability actions. The plaintiffs sought the injunction after Hagelthorn was retained as a consultant and expert for a plaintiff in a products liability action against Fruehauf. The court, Marianne O. Battani, J., granted a temporary restraining order, but refused to grant a preliminary or a permanent injunction and dismissed the action. The plaintiffs appealed.

The Court of Appeals *held:*

1. While working for Fruehauf, Hagelthorn functioned as a technical expert, not as an attorney or attorney's agent who would be subject to the attorney-client privilege as attorney.

2. Corporate employees are bound by the attorney-client privilege not to reveal confidential communications with counsel given within the scope of the employees' duties to enable the corporation to obtain legal advice. A fact and a communication of that fact are entirely different things. Thus, although a client may not be compelled to reveal what the client said or wrote to an attorney, the client may not refuse to disclose any relevant fact within the client's knowledge merely because the client incorporated a statement of that fact into communications with the attorney. In this case, the plaintiffs sought to prevent Hagelthorn from disclosing technical facts within his knowledge, not merely communications with attorneys. The attorney-client privilege therefore may not be asserted with a claim that Hagelthorn had been a client.

3. Any information Hagelthorn conveyed to the plaintiffs'

attorneys was not confidential and therefore was not subject to the attorney-client privilege.

Affirmed.

Cardelli, Schaefer, Mason & Orlans (by *Deborah A. Hebert*), for the plaintiff.

Sachs, Waldman, O'Hare, Helveston, Hodges & Barnes, P.C. (by *Andrew Nickelhoff*), for the defendants.

Before: WAHLS, P.J., and CAVANAGH and N. J. LAMBROS,* JJ.

PER CURIAM. Plaintiffs appeal as of right from the circuit court's orders denying their motion for a preliminary injunction and dismissing their petition for a permanent injunction. We affirm.

Defendant George Allan Hagelthorn, a certified mechanical engineer, was formerly employed as manager of reliability by Fruehauf Corporation, the predecessor of plaintiffs Fruehauf Trailer Corporation and K-H Corporation (Fruehauf). In that capacity, among other things, defendant assisted Fruehauf's attorneys in defending against products liability actions throughout the United States.

After defendant retired from his position with Fruehauf in 1982, he provided technical advice and expert testimony to plaintiffs' attorneys in products liability litigation through his consulting business, defendant Rather Engineering, P.C. Defendant also was retained to provide consultation and expert witness services to a plaintiff in a case brought against Fruehauf in Indiana.

In September 1992, plaintiffs filed a complaint to enjoin defendant from discussing with anyone any information relating to plaintiffs and from consult-

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

ing or testifying as an expert in any products liability case brought against plaintiffs, asserting that defendant's consultation and expert services violated the attorney-client privilege. The court issued a temporary restraining order. Plaintiffs moved for a preliminary injunction. The court denied the motion and dissolved the temporary restraining order. Relying on the record created for the preliminary injunction, the court then entered an order of dismissal of the petition for a permanent injunction. This appeal followed.

The issue on appeal is whether the court erred in denying the motion for a preliminary injunction on the ground that defendant was not bound by the attorney-client privilege.

In determining whether to issue a preliminary injunction, the court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable injury if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief; and (4) the harm to the public interest if the injunction is issued. This Court will not disturb a trial court's grant or denial of a preliminary injunction absent an abuse of discretion. *Campau v McMath,* 185 Mich App 724, 729; 463 NW2d 186 (1990). We will sustain the trial court's findings of fact unless we are convinced that we would have reached a different result. *Kern v Flint,* 125 Mich App 24, 27; 335 NW2d 708 (1983).

The purpose of the attorney-client privilege is to permit a client to confide in the client's counselor, knowing that such communications are safe from disclosure. *Yates v Keane,* 184 Mich App 80, 83; 457 NW2d 693 (1990); *U S Fire Ins Co v Citizens*

Ins Co of America, 156 Mich App 588, 592; 402 NW2d 11 (1986). The scope of the privilege is narrow: it attaches only to confidential communications by the client to its adviser that are made for the purpose of obtaining legal advice. *Yates, supra.*

Plaintiffs have not clarified on which side of the attorney-client relationship defendant supposedly falls. In their argument on appeal, they appear to consider that he was acting as an agent of the attorney; however, they indiscriminately cite cases that address the issue whether a corporate employee may be considered an agent of the client for purposes of asserting the privilege. Plaintiffs' failure adequately to draw this distinction tends to weaken their position because, rightly or wrongly, it implies a lack of understanding of the nature and purpose of the privilege. In order to address this issue properly, we will analyze each side of the attorney-client relationship separately.

First, we consider the attorney side of the relationship. The circuit court found that defendant functioned as a technical expert, and not as an attorney, while employed by Fruehauf.[1] That finding is supported by the record, and we are not convinced that we would have reached a different result. *Kern, supra.*

Plaintiffs cite three cases in support of their assertion that defendant was acting in a quasi-legal capacity while employed by plaintiffs. The first case, *American Motors Corp v Huffstutler,* 61 Ohio St 3d 343; 575 NE2d 116 (1991), is clearly distinguishable from the case at bar. Unlike defendant Hagelthorn, the defendant in *Huffstutler,* besides being an engineer, was also a licensed

[1] Plaintiffs do not, and we consequently need not, address the question of defendant's postretirement relationship with Fruehauf.

attorney who performed legal services for his employer.

The other two cases are distinguishable on the grounds that the nonattorneys in those cases were disqualified from participating in specific litigation in which they had earlier been involved on behalf of the opposing party and with respect to which they were privy to certain confidential information. See *Williams v Trans World Airlines, Inc,* 588 F Supp 1037 (WD Mo, 1984); *Conforti & Eisele, Inc v Division of Building & Construction,* 170 NJ Super 64; 405 A2d 487 (1979). The injunction requested in the present case was not limited to specific litigation or confidential information but sought to prevent defendant from providing any services that related in any way to plaintiffs. Moreover, plaintiffs do not contend that defendant is "switching sides" in related litigation.

Accordingly, we agree with the circuit court that defendant Hagelthorn was not functioning as an attorney, nor was he an agent of an attorney, while employed by Fruehauf.[2]

We next consider the client side of the attorney-client relationship. The controlling case in this context is *Upjohn Co v United States,* 449 US 383; 101 S Ct 677; 66 L Ed 2d 584 (1981). In that case, the United States Supreme Court determined that corporate employees are bound by the attorney-client privilege not to reveal confidential communications between themselves and corporate counsel given within the scope of the employees' corporate duties to enable the corporation to obtain legal advice; however, the protection of the privilege extends only to communications, and not to facts.

[2] We do not hold that an engineer or other specialist can never be considered an agent of an attorney for purposes of asserting the attorney-client privilege; we merely conclude that such an assumption is not warranted in this case. See *In re Petition of Delaware,* 91 Mich App 399, 406; 283 NW2d 754 (1979).

Id. at 394-395. " 'A fact is one thing and a communication of that fact is an entirely different thing.' " *Id.* at 395-396. Thus, a client may not be compelled to reveal what it said or wrote to its attorney, but it may not refuse to disclose any relevant fact within its knowledge merely because it incorporated a statement of that fact into its communication to the attorney. *Id.* at 396.

Were plaintiffs in the present case asserting the privilege with respect only to *communications* between defendant and counsel, we might agree with their position. However, plaintiffs are actually attempting to silence defendant entirely, i.e., to prevent his disclosure of the technical facts underlying his communications. Under these circumstances, pursuant to *Upjohn,* the privilege may not be asserted.

The trial court further found as fact that information relayed between defendant and plaintiffs' attorneys was not confidential and that defendant was not advised that his discussions with the attorneys were confidential; consequently, the privilege was inapplicable. See *Yates, supra.* Again, those findings are supported by the record and we are not convinced that we would have reached a different result. *Kern, supra.*

We conclude that the trial court did not abuse its discretion in denying the motion for a preliminary injunction and dismissing the complaint for the reason that plaintiffs would not have prevailed on the merits owing to the inapplicability of the attorney-client privilege. Plaintiffs' failure to secure defendant's signature to a confidentiality agreement is not a matter that may appropriately be remedied by resort to equitable relief.

Affirmed.

SIMKINS v GENERAL MOTORS CORPORATION (ON REMAND)

Docket No. 162042. Submitted November 1, 1994, at Lansing. Decided January 18, 1995, at 9:10 A.M. Leave to appeal sought.

Elizabeth A. Simkins sought worker's disability compensation benefits for injuries she suffered when she was struck by an automobile as she crossed a public road that ran beside the premises of her employer, General Motors Corporation. A referee awarded benefits, finding that because the plaintiff was crossing the road to begin her work day at the defendant's plant, the injuries arose out of and in the course of her employment. Valley Forge Insurance Company, the plaintiff's no-fault insurer was permitted to intervene to assert a claim for reimbursement of medical benefits it had paid on her behalf. The Worker's Compensation Appeal Board affirmed by a vote of two to one. The majority held that the injuries arose out of the employment because, although the plaintiff was walking from a parking lot that was not owned by the defendant, she had driven her own vehicle to a parking lot owned by the defendant and was driven by a fellow employee from that lot to the lot not owned by the defendant because it was nearer to the entrance they intended to use to enter the defendant's plant. The dissenting member believed that under these circumstances the injuries did not arise out of the employment relationship within the meaning of § 301(1) of the Worker's Disability Compensation Act, MCL 418.301(1); MSA 17.237(301)(1). The Court of Appeals denied leave to appeal, but remanded to the appeal board for consideration of the reimbursement issue. The Supreme Court denied leave to appeal, 440 Mich 909 (1992), but, on reconsideration, remanded the case to the Court of Appeals for consideration as on leave granted. 442 Mich 851 (1993).

On remand, the Court of Appeals *held:*

1. Although injuries incurred while an employee is traveling to or from a parking area owned, leased, or maintained by the employer at the beginning or end of a work day are deemed to be injuries incurred in the course of the employment relationship and thus compensable under the Worker's Disability Compensation Act, usually injuries that have occurred off the employer's premises and are not associated with movement to

or from a parking area controlled by the employer have been held to be not compensable. Even though the plaintiff's injuries would have been compensable had she been crossing a public road from an employer-owned parking lot, they are not compensable where, as here, the parking lot was not employer-owned. The fact that she had parked her own vehicle in an employer-owned lot before leaving that lot in the vehicle of the fellow employee does not make this accident sufficiently related to her employment to justify the granting of worker's compensation benefits

2. Because the appeal board failed to address the reimbursement claim of the intervening no-fault insurer, the matter must be remanded to the Worker's Compensation Appellate Commission for consideration of that claim, if the no-fault insurer still wishes to pursue it.

Reversed and remanded.

Hanba, Lazar & Ackerman, P.C. (by *Michael D. Smith*), for the plaintiff.

Groves, Decker & Wyatt (by *Harvey R. Groves*), and *Braun Kendrick Finkbeiner* (by *Scott C. Strattard*), for General Motors Corporation.

Warren C. Droomers, for Valley Forge Insurance Company.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Angelita Espino,* Assistant Attorney General, for Second Injury Fund.

ON REMAND

Before: GRIBBS, P.J., and MCDONALD and S. D. BORMAN,* JJ.

PER CURIAM. The Worker's Compensation Appeal Board affirmed an award of disability compensation benefits to plaintiff, Elizabeth A. Simkins, who was injured seriously in an automobile acci-

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

dent. This Court denied defendant's application for leave to appeal that decision; however, we remanded the case to the appeal board for consideration of Valley Forge Insurance Company's claim for reimbursement of medical and health care benefits it had paid. The Supreme Court denied leave to appeal, 440 Mich 909 (1992), but, on defendant's motion for reconsideration, remanded the case to this Court for consideration as on leave granted. 442 Mich 851 (1993).

The controversy was submitted to a worker's compensation magistrate on the following stipulated statement of facts, which we have edited slightly:

> Elizabeth A. Simkins is an employee of the Fisher Body Flint Plant of General Motors Corporation. She worked on the first shift, which started at 6:18 A.M.
>
> At some time before 6:00 A.M. on September 4, 1984, Mrs. Simkins drove her car to the Fisher Body Flint Plant and parked on the Fisher Body premises in the north parking lot. She left her car and, after an unknown period, got into the car of a fellow employee. They drove onto Saginaw Street, a public street bordering the east side of the Fisher Plant, headed south to Hemphill and turned right, or west, onto Hemphill. Hemphill is a public street bordering the Fisher Plant on the south side. It has four lanes, two each for westbound and eastbound traffic.
>
> The coemployee drove his car into a privately owned parking lot on the south side of Hemphill and parked. The lot was located almost directly across the street from the Plant Gate and about in the middle of the block. He and Mrs. Simkins alighted and, after paying the parking attendant, started across Hemphill to the Plant Gate at Post 11.
>
> At about 5:58 A.M., twenty minutes before her

> shift was to start, Mrs. Simkins was struck by an automobile. At the moment that she was struck, Mrs. Simkins was going north across Hemphill and was in the eastbound inside lane near the double yellow center line.
>
> Mrs. Simkins has been unable to perform her job since September 4, 1984.

Following the hearing, the referee awarded plaintiff disability compensation and medical and nursing care benefits, because he concluded that her injury arose out of and in the course of her employment under the "presumption" of MCL 418.301(3); MSA 17.237(301)(3) because

> she had entered the "premises" when she entered the company-owned parking lot. The mere fact that she was given a ride to a closer, noncompany lot, did not remove her from the scope of her employment. The injury sustained when crossing the street to the plant gate is compensable.

On appeal, two members of the appeal board affirmed, concluding that

> plaintiff's slight deviation in her route from one parking lot controlled by defendant to another not controlled by defendant, but directly across the street from the plant entrance kept plaintiff within the zone and environment and hazards of her employment.

The third member of the panel dissented on the ground that

> leaving those premises to park in an undesignated private lot and to cross a street not shown to be under defendant's control or the protection against street traffic presumably provided by defendant's parking lot, placed plaintiff beyond the "zone, environment and hazards" of defendant's prem-

ises, thus depriving her of the presumption afforded by Section 301(3) of the Act.

We reluctantly agree with the dissenting member of the appeal board. We have surveyed the "going to work" parking lot decisions and can reconcile them only on the point that those that allowed benefits had at least some slight employer connection to the employee's injury, which this case lacks.

Cases allowing compensation for employees injured while going to work involved travel from a parking area owned, leased, or maintained by the employer. *Lasiewicki v Tusco Products Co,* 372 Mich 125; 125 NW2d 479 (1963) (employer-maintained parking area); *Smith v Greenville Products Co,* 185 Mich App 512; 462 NW2d 789 (1990) (employer-provided parking); *Upton v General Motors Corp,* 124 Mich App 61; 333 NW2d 384 (1983) (driveway of employer's plant); *Jean v Chrysler Corp,* 2 Mich App 564; 140 NW2d 756 (1966) (employer leased a designated parking area). Compensation has been denied, however, when the injury occurred off the employer's premises, including private parking areas, in *Benenetau v Detroit Free Press,* 117 Mich App 253; 323 NW2d 498 (1982); *Denny v Kostadinovski,* 117 Mich App 517; 342 NW2d 19 (1981); *Tedford v Stouffer's Northland Inn,* 106 Mich App 493; 308 NW2d 254 (1981).

An anomaly from that line of cases is *Fischer v Lincoln Tool & Die Co,* 37 Mich App 198; 194 NW2d 476 (1971), where the worker was injured on a public sidewalk while walking to work after parking his car on a public street. The employer provided no employee parking. This Court affirmed an award of compensation benefits under an interpretation of the premises rule that "embraces the

liberal spirit previously accorded the workmen's compensation act." *Id.* at 204. *Fischer* has been criticized, however, for extending the premises rule too far, even threatening "demolition of the premises rule." 1 Larson, Workmen's Compensation Law, § 15.12(b), pp 4-12-4-16; see also *Tedford v Stouffer's Northland Inn, supra.* Of *Fischer* and a New Jersey case, *Dinardo v Newark Bd of Ed,* 118 NJ Super 536; 289 A2d 259 (1972), Larson, *supra* at pp 4-5-4-16, says:

> The real flaw in these opinions was that they ignored the special doctrine that accounts for extension of the premises rule to the trip to parking lots. This is the principle that travel between two parts of the employer's premises is compensable. By establishing or sponsoring a parking lot not contiguous to the working premises, the employer has created the necessity for encountering the hazards lying between these two portions of the premises. No such considerations apply to a trip to some bus stop or railway terminal or to some parking location on a public street over which the employer has no conceivable control.

In this case, there was no employer connection with plaintiff's accident. She was injured while crossing a public street from a private parking lot and was not yet on the employer's premises. We recognize that, had she been injured while crossing from the parking lot that the employer did provide, she would be entitled to compensation benefits under the case law, but, as Justice LEVIN recognized in a concurring opinion "a line must be drawn at some point." *McClure v General Motors Corp (On Rehearing),* 408 Mich 191, 226; 289 NW2d 631 (1980). The decisions we have analyzed draw the line at some employer connection other than the mere fact that the employee was travel-

ing to work but had not arrived yet on the employer's premises.

The appeal raises one other question. Valley Forge Insurance Company, plaintiff's no-fault automobile insurer, sought reimbursement from defendant of medical expenses that it had paid on Mrs. Simkins' behalf. The appeal board allowed Valley Forge to intervene, but the appeal board's majority opinion failed to address the request for reimbursement. The case is remanded to the Worker's Compensation Appellate Commission for determination of that issue if, in light of our reversal of the award, the issue remains one that the insurer wishes to or can now pursue.

The award of worker's disability compensation benefits is reversed, and the case is remanded to the appellate commission where Valley Forge may renew its petition for reimbursement.

Reversed and remanded.

MACKINAC BRIDGE AUTHORITY v SILICOSIS, DUST DISEASE, AND LOGGING INDUSTRY COMPENSATION FUND

Docket No. 167449. Submitted November 16, 1994, at Grand Rapids. Decided January 18, 1995, at 9:15 A.M.

A worker's compensation magistrate determined that Frank E. Nichols was suffering from a dust disease within the meaning of § 531 of the Worker's Disability Compensation Act, MCL 418.531; MSA 17.237(531), and ordered that the Silicosis, Dust Disease, and Logging Industry Compensation Fund (Silicosis Fund) reimburse Nichols' employer, Mackinac Bridge Authority, and its insurance carrier, Accident Fund of Michigan, all sums paid in excess of $12,500, except for those payments excluded by statute from the reimbursement requirement. The Silicosis Fund reimbursed the insurance carrier the accrued compensation in excess of $12,500, but it refused to reimburse the carrier the interest awarded on the reimbursed amount. On the date of the magistrate's order in 1988, § 531 excluded from the reimbursement requirement, among other things, payments made pursuant to subsections 2, 4, and 5 of § 801 of the Worker's Disability Compensation Act, MCL 418.801(2), (4), and (5); MSA 17.237(801)(2), (4), and (5). Before 1985, § 801(5) had provided that interest should be awarded on past due benefits paid pursuant to the order of a hearing referee. Accordingly, § 531(1) had the effect of excluding unpaid interest from the reimbursement requirement. In 1985, a new subsection was added to § 801 as subsection 3, causing the former subsections 4 and 5 to be renumbered as subsections 5 and 6, respectively; however, § 531(1) was not amended to reflect the new numbering scheme. The employer and its insurance carrier argued that because § 531(1) did not refer to § 801(6), which now contained the unpaid interest provision, § 531(1) did not have the effect of excluding such interest from the reimbursement requirement. The Silicosis Fund argued that the failure to amend § 531(1) to conform to the amended numbering of § 801 after its 1985 amendment was an oversight or clerical error and that it was not the intent of the Legislature to require the Silicosis Fund to reimburse interest payments. The magistrate, while finding the Silicosis Fund's arguments compelling, nevertheless found the statutory scheme to be unambiguous and thus not subject to

judicial interpretation. The Worker's Compensation Appellate Commission affirmed. The Silicosis Fund appealed by leave granted.

The Court of Appeals *held:*

The Legislature corrected the mismatch between § 531 and § 801 by its passage of 1994 PA 97, which was filed with the Secretary of State on April 13, 1994, and was ordered to take immediate effect. Although the Legislature did not express an intent that the amendment was to be retroactive, retroactive application of the amendment is appropriate because the Legislature's intent was to correct an oversight and to prevent unintended reimbursements as a result of that oversight.

Reversed.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Michael J. Gillman,* Special Assistant Attorney General, for Mackinac Bridge Authority and Accident Fund of Michigan.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Rose A. Houk,* Assistant Attorney General, for Silicosis, Dust Disease, and Logging Industry Compensation Fund.

Before: NEFF, P.J., and MACKENZIE and J. R. CHYLINSKI,* JJ.

PER CURIAM. The Silicosis, Dust Disease, and Logging Industry Compensation Fund (Silicosis Fund) appeals by leave granted the July 28, 1993, order of the Worker's Compensation Appellate Commission, which affirmed the magistrate's decision ordering the Silicosis Fund to reimburse the employer's carrier, Accident Fund of Michigan, for both weekly benefits payable to plaintiff and the accrued interest on unpaid benefits. We reverse.

I

A magistrate found plaintiff to be suffering from

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

a dust disease within the meaning of § 531 of the Worker's Disability Compensation Act, MCL 418.531; MSA 17.237(531). The Silicosis Fund is required by § 531(1) to reimburse the carrier for all sums paid in excess of $12,500, excluding payments made pursuant to particular sections of the act. Although the Silicosis Fund reimbursed the carrier the accrued compensation in excess of $12,500, it refused to reimburse the carrier the interest awarded on the reimbursed amount.

The dispute was submitted to a magistrate for a decision on briefs alone. Section 531 excludes from reimbursement any payments made pursuant to certain sections: § 315, MCL 418.315; MSA 17.237(315), regarding medical care, § 319, MCL 418.319; MSA 17.237(319), regarding medical or occupational rehabilitation, § 345, MCL 418.245; MSA 17.237(345), regarding funeral expenses, and three subsections of § 801, MCL 418.801; MSA 17.237(801). Before 1985, § 801(2) provided for a penalty in case weekly compensation benefits are not timely paid. Subsection 4 provided that an employer who had notice or knowledge of a disability or death and failed to give notice to the carrier would have to pay the late penalty until such time as it gave notice. Subsection 5 provided that interest should be awarded at the rate of twelve percent per annum on past due benefits paid pursuant to the order of a hearing referee. Section 531(1) excluded from the Silicosis Fund's reimbursement liability any payments made pursuant to these subsections, including interest on unpaid benefits mandated by § 801(5).

In 1985, § 801 was amended to include a new subsection 3 that mandated a penalty for unpaid medical bills or travel allowances. As a result, the remaining provisions were renumbered, and the interest provision that was formerly subsection 5

became subsection 6.[1] No corresponding amendment was made to § 531(1). Therefore, as a result of renumbering, § 531(1) no longer referred to the interest provision of § 801.

The magistrate summarized the arguments of the parties and resolved them as follows:

> The Accident Fund argues that the sections should be read literally and applied as found at the time the obligation to make payment arose.
>
> The [Silicosis] Fund argues that the failure to conform § 531 to newly amended § 801 was merely an oversight and/or clerical error. It was not the intent of the Legislature, according to the Fund, to change the prior law so as to require reimbursement for interest payments.
>
> The Fund's arguments are compelling. The amendments to and renumbering of § 801 without a corresponding amendment to § 531 results, if the sections are read literally, in the exclusion from reimbursement of payments made pursuant to § 801(4). Section 801(4), however, does not refer to any payments. It excludes certain penalty payments as elements of loss for ratemaking purposes. The sections, then, if read literally, do not make sense.
>
> On the other hand, the question arises as to how far a judicial officer may go to correct the errors, omissions or oversights of the Legislature in the drafting of legislation. In this case, the subtleties of language are not at issue. There is no ambiguous language to be interpreted so as to give effect to legislative intent. It is a cardinal rule of statutory construction that courts may not speculate as to the probable intent of the Legislature beyond the words employed in a statute. When the language of the statute is clear and unambiguous, the statute must be applied and not interpreted. *Pi-Con [Inc] v [AJ] Anderson Construction [Co],* 169 Mich App 389 [425 NW2d 563] (1988).

[1] The amendment also reduced the interest rate to ten percent.

> In order to reach the statutory interpretation urged by the Fund, § 531 must be not merely interpreted but judicially amended. Its reference to § 801 must be amended in order to restore the reference to interest payments and to include penalty payments for medical bills. Amendment rather than interpretation of legislation is the prerogative and responsibility of the Legislature. Magistrates are not empowered by either statute or custom to rewrite the Act even if it is to achieve a goal the Legislature would have intended.

The magistrate ordered the Silicosis Fund to reimburse the carrier the interest payments made on the principal sum in excess of the initial $12,500.

The Silicosis Fund appealed, and, in a two-to-one decision, the WCAC affirmed. Two commissioners adopted the magistrate's analysis as their own. The dissenting commissioner would have held that as a result of the 1985 amendment of § 801, the act as a whole is ambiguous. Because the primary rule of statutory interpretation is to determine and to effectuate the Legislature's intent, the dissenter would interpret § 531(1) to include present § 801(6) (interest) and to exclude present § 801(4) (which involves rate-making).

This Court granted the Silicosis Fund's application for leave to appeal, and we now reverse.

II

1994 PA 97, filed on April 13, 1994, and ordered to take immediate effect, corrects the mismatch between §§ 531 and 801 caused by the 1985 amendment of § 801. Section 531(1) now excludes reimbursement for payments made pursuant to § 801(2), (5), and (6). Therefore, interest payments are once again not reimbursed by the Silicosis Fund.

The general rule in worker's 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). This rule is not without exceptions, however. One recognized exception requires retroactive application of remedial legislation. This exception was invoked in *Riza v Delray Baking Co,* 200 Mich App 169; 504 NW2d 193 (1993), which involved an amendment limiting the number of compensable hours of nursing or attendant care where such care is provided by an employee's spouse or other relatives. Although the Legislature did not expressly make the amendment retroactive, this Court found that the circumstances warranted the inference that the Legislature intended the amendment to have retroactive effect:

> We reject as unpersuasive plaintiff's argument that the weekly limitation added to § 315(1), should not be applied retroactively at all because his injury date was in 1971 and the workers' compensation law is generally considered humanitarian and remedial. An employer should not be deprived of the benefit of retroactive application of a statutory amendment where the Legislature plainly intended to reduce the burden on the employer with regard to the payment of lifetime attendant or custodial care. [*Id.* at 175.]

We believe that the same analysis should be applied in this case. The carrier's claim for reimbursement of interest payments is based not on a past substantive decision by the Legislature, but rather on the Legislature's oversight in failing to amend § 531 at the same time that it amended § 801 in 1985. Because the recent amendment of § 531 clearly was meant to remedy the past error,

we hold that the Silicosis Fund should have the benefit of the amendment under circumstances where the Legislature clearly intended to benefit the Silicosis Fund, or rather to prevent unintended reimbursements by the Silicosis Fund as a result of the past drafting error.

Reversed.

FORTUNATE v DEPARTMENT OF TRANSPORTATION

Docket No. 158193. Submitted November 8, 1994, at Detroit. Decided November 30, 1994; approved for publication February 2, 1995, at 9:00 A.M. Leave to appeal sought.

Tania and Alan Fortunate brought an action in the Court of Claims against the Department of Transportation, seeking damages for injuries sustained by Tania while traveling on I-94 in Detroit when an unidentified person on a pedestrian bridge threw a concrete block on her automobile. The court, William E. Collette, J., granted summary disposition for the defendant, finding that the highway exception to governmental immunity, MCL 691.1402; MSA 3.996(102), did not extend to the bridge, which was outside the traveled portion of the roadbed and was designed solely for use by pedestrians. The plaintiffs appealed.

The Court of Appeals *held:*

The grant of summary disposition was proper. The highway exception to governmental immunity extends liability only to the traveled portion of the roadway actually designed for public vehicular travel. Excluded from the exception are specific installations whose only rational purposes narrowly service the unique needs of pedestrians.

Affirmed.

DeNardis, McCandless & Muller, P.C. (by *Gregory J. Muller*), for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Brenda E. Turner* and *Vincent J. Leone,* Assistant Attorneys General, for the defendant.

Before: WAHLS, P.J., and CAVANAGH and N. J. LAMBROS,* JJ.

PER CURIAM. Plaintiffs appeal as of right from a

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

Court of Claims order granting defendant's motion for summary disposition pursuant to "MCR 2.116(C)(7)(8) [sic]." We affirm.

Plaintiff Tania Fortunate sustained injuries while traveling on I-94 in Detroit after an unidentified person threw a concrete block on her car from a pedestrian bridge.

Plaintiffs brought this action against the Department of Transportation, alleging violation of its duty to design and maintain the roadway and bridge, and nuisance. Defendant moved for summary disposition on the basis of governmental immunity. The court granted the motion, finding that the state had no duty to protect plaintiff from the action of the intervening tortfeasor. This appeal followed.

The highway exception to governmental immunity, MCL 691.1402; MSA 3.996(102), extends liability only to the traveled portion of the roadbed actually designed for public vehicular travel. *Scheurman v Dep't of Transportation,* 434 Mich 619, 623; 456 NW2d 66 (1990). Excluded from the exception are specific installations whose only rational purposes narrowly service the unique needs of pedestrians. *Mason v Wayne Co Bd of Comm'rs,* 447 Mich 130; 523 NW2d 791 (1994). We believe that the exception is intended to promote safe highways but not necessarily safety on the highways. *Scheurman, supra* at 631; see also *Reardon v Dep't of Mental Health,* 430 Mich 398, 417; 424 NW2d 248 (1988) (public building exception intended to promote safe public buildings but not necessarily safety in public buildings).

Not only was the bridge in this case outside the traveled portion of the roadbed, it also was designed solely for use by pedestrians.

Accordingly, while we share in the trial court's sympathy for plaintiff's injuries, we must conclude that summary disposition was properly granted.

Affirmed.

GIBSON v AMERICAN MOTORS CORPORATION

Docket Nos. 145175, 145489. Submitted September 20, 1994, at Detroit. Decided November 28, 1994; approved for publication February 2, 1995, at 9:05 A.M.

Judith K. Gibson brought a products liability action in the Wexford Circuit Court against American Motors Corporation and others, alleging damages arising out of injuries suffered when her Jeep rolled over while she was in the course of her employment with the Detroit Free Press. Sherman L. Gibson, Judith's husband, brought a separate, similar action in the Wexford Circuit Court against the same defendants, alleging damages arising out of his injuries in a separate accident involving his Jeep during the course of his employment with the Detroit Free Press. Sherman Gibson's action was transferred to the Missaukee Circuit Court. Travelers Insurance Company, the Detroit Free Press' worker's disability compensation insurer, and the Second Injury Fund intervened in both lawsuits, claiming a lien on any recovery or settlement proceeds for reimbursement of worker's compensation benefits they had paid to the plaintiffs. Both suits were settled. The Wexford Circuit Court, Charles D. Corwin, J., and the Missaukee Circuit Court, Charles D. Corwin, J., each entered an order that limited the reimbursement of the intervenors to the amounts recoverable under the no-fault act. Travelers appealed each of those orders, and the appeals were consolidated.

The Court of Appeals *held:*

The right of reimbursement of a worker's compensation insurer is limited to the reimbursement that a no-fault insurer is entitled to where the right of reimbursement arises out of a motor vehicle accident that occurred during the course of the injured employee's employment. The fact that the source of the funds for the reimbursement is the settlement of a products liability action does not affect the limitation on the right of reimbursement. Accordingly, the trial courts did not err in limiting the reimbursements.

Affirmed.

Law Offices of Thomas R. Rensberry, P.C. (by

William J. Donoghue, Jr.), for Judith K. and Sherman L. Gibson.

Lacey & Jones (by *Gerald M. Marcinkoski*), for Travelers Insurance Company.

Before: NEFF, P.J., and WAHLS and R. D. KUHN,* JJ.

PER CURIAM. Both plaintiffs worked for the Detroit Free Press. Plaintiff Sherman Gibson was injured in a roll-over accident while he was driving a Jeep CJ-7 during the course of his employment in Missaukee County. About one week later, his wife Judith Gibson was also injured in a roll-over accident while driving a Jeep CJ-7 during the course of her employment in Wexford County. The plaintiffs filed separate products liability actions against defendants in the Wexford Circuit Court. The suit filed by Sherman Gibson was transferred to the Missaukee Circuit Court. Travelers Insurance Company and the Second Injury Fund paid worker's compensation benefits to plaintiffs for medical expenses and wage loss. Each insurance company intervened in both lawsuits, claiming a lien on any recovery or settlement proceeds. The cases eventually were settled by the parties. Travelers appeals as of right two orders entered by the circuit courts that limited its reimbursement right to the amounts recoverable under the no-fault act. We affirm.

It is established that a worker's compensation insurance carrier's statutory right of reimbursement under the Worker's Disability Compensation Act is limited to the reimbursement that a no-fault insurance carrier is entitled to under the no-fault act, MCL 500.3116; MSA 24.13116, when an

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

employee is injured in a motor vehicle during the course of employment. *Bialochowski v Cross Concrete Pumping Co,* 428 Mich 219; 407 NW2d 355 (1987); *Great American Ins Co v Queen,* 410 Mich 73; 300 NW2d 895 (1980); *Ryan v Ford Motor Co,* 141 Mich App 762; 368 NW2d 266 (1985). The fact that the settlements were based on a products liability action does not affect this limitation. *Id.* at 768-769. Accordingly, the circuit courts did not err in limiting Travelers' reimbursement right.

Affirmed.

GARABEDIAN v WILLIAM BEAUMONT HOSPITAL

Docket No. 159869. Submitted November 2, 1994, at Detroit. Decided February 6, 1995, at 9:00 A.M. Leave to appeal sought.

Sarah Garabedian brought an action in the Oakland Circuit Court against William Beaumont Hospital, seeking damages for injuries she sustained in a fall from a hospital bed allegedly as a result of negligent nursing care. The court, Rudy J. Nichols, J., directed a verdict for the defendant, ruling that the plaintiff had failed to present sufficient evidence of causation. The plaintiff appealed.

The Court of Appeals *held:*

The plaintiffs' nursing expert, in testifying that the plaintiff's mental condition should have been evaluated by a nurse and that such an evaluation might have revealed a need for intervention that might have prevented the plaintiff's injury, presented a speculative theory of causation that did not establish a reasonable basis for concluding that it was more likely than not that conduct by the defendant's employees was the cause of the plaintiff's injuries.

Affirmed.

HOLBROOK, JR., J., dissenting, stated the plaintiff's circumstantial evidence was sufficient to permit reasonable jurors to infer a logical and substantial nexus between the defendant's alleged negligence and the plaintiff's injuries.

NEGLIGENCE — CAUSATION — CIRCUMSTANTIAL EVIDENCE.

Circumstantial proof of causation must facilitate reasonable inferences of causation, not mere speculation.

William S. Stern, for the plaintiff.

Kitch, Saurbier, Drutchas, Wagner & Kenney, P.C. (by *Linda M. Garbarino* and *Anthony J. Paradiso*), for the defendant.

REFERENCES

Am Jur 2d, Evidence § 1432.

See ALR Index under Circumstantial Evidence.

Before: TAYLOR, P.J., and HOLBROOK, JR., and M. E. DODGE,* JJ.

TAYLOR, P.J. Plaintiff appeals as of right from the circuit court's order granting a directed verdict in favor of defendant. The principal issue on appeal is whether plaintiff presented sufficient evidence of causation to allow the matter to go to the jury. We affirm.

Plaintiff, an eighty-seven-year-old woman, had been taken by her daughter, Agnes Nassar, to the William Beaumont Hospital emergency room with a terrible headache and sudden blindness. Ms. Nassar was only allowed to visit plaintiff for five minutes each hour. Ms. Nassar testified that plaintiff's mental condition deteriorated after she received medication and described her condition as "out of it." Concerned that the side rails on plaintiff's bed were not up, Ms. Nassar told the nurses she felt plaintiff was going to fall off the bed. The nurses said they were watching her. However, plaintiff did fall off the bed and an x-ray showed that she broke her hip.

Registered nurse Sharon LaMarre testified that to comply with the standard of care, a registered nurse is required to conduct a nurse's assessment, which in this case would include an ongoing assessment of plaintiff's mental condition. Her review of plaintiff's medical record indicated that such an assessment was not made. LaMarre further opined that an evaluation of plaintiff's mental condition might have indicated a need for some type of intervention. For example, having a family member or a nurse stay with the patient. LaMarre concluded that, had such intervention occurred in this case, the accident might have been prevented.

In granting defendant's motion for a directed

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

verdict, the trial court reasoned that the case was virtually devoid of any showing of breach of duty and proximate cause. Initially, we note that the court's statement regarding there being no evidence of a breach of duty was erroneous because defendant had not presented that argument in seeking a directed verdict. Pursuant to MCR 2.515, a party must state specific grounds in support of a motion for a directed verdict. On appeal, we will not review grounds for sustaining a directed verdict that were not articulated to the trial court. *McClain v Alger,* 150 Mich App 306, 312-313; 388 NW2d 349 (1986). Accordingly, the only issue we must determine is whether plaintiff presented sufficient evidence regarding causation.

In reviewing a trial court's ruling on a motion for a directed verdict, the Court of Appeals must examine the evidence presented in a light most favorable to the nonmoving party. *Locke v Pachtman,* 446 Mich 216, 223; 521 NW2d 786 (1994); *Morrow v Boldt,* 203 Mich App 324, 327; 512 NW2d 83 (1994). Granting plaintiff every reasonable inference and resolving any conflict in the evidence in plaintiff's favor, *Goldman v Phantom Freight, Inc,* 162 Mich App 472, 477; 413 NW2d 433 (1987), we agree with the trial court's conclusion that reasonable minds could not differ with respect to the question of causation.

Because plaintiff does not recall how she fell from the bed, and because there were no witnesses to the fall, plaintiff must rely on circumstantial evidence to establish the causal link between defendant's alleged negligence and the harm suffered. *Skinner v Square D Co,* 445 Mich 153, 163; 516 NW2d 475 (1994). "To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id.* at 164. According to LaMarre's testimony, if plaintiff

had been adequately evaluated, the evaluation might have revealed a need for intervention, and that intervention might have prevented plaintiff's injury. Plaintiff's attenuated theory of causation does not establish a reasonable basis for concluding that it is more likely than not that conduct by defendant's employees was the cause of plaintiff's injury. *Id.* at 165. "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id.* We cannot conclude that plaintiff's injury is attributable to defendant's alleged failure to evaluate and chart plaintiff's condition. *Boyd v Wyandotte,* 402 Mich 98, 105; 260 NW2d 439 (1977).

Given our resolution of this issue, we find it unnecessary to address the issue advanced in defendant's cross appeal.

Affirmed.

M. E. DODGE, J., concurred.

HOLBROOK, JR., J. *(dissenting).* Viewing the evidence in a light most favorable to plaintiff, and permitting every reasonable inference in her favor, I would find that plaintiff presented sufficient evidence of causation to withstand a motion for a directed verdict.

According to plaintiff's proofs, before falling off the stretcher, plaintiff experienced a severe headache, loss of sight in her right eye, placement in a dark room to reduce eye strain, an x-ray, a computerized axial tomography scan, a lumbar puncture, insertion of an intravenous needle, and administration of a sedative and two diuretics. In addition, plaintiff's daughter, Agnes Nassar, was permitted

to sit with plaintiff for only five minutes each hour, notwithstanding the fact that Nassar had expressed concern to the nurses that plaintiff might fall from bed because plaintiff was "out of it," her bedside rails were not raised, and she was not otherwise restrained. In light of these facts, coupled with plaintiff's advanced age and disoriented condition, it was beyond mere speculation that she might attempt to get up and go to the bathroom without asking for assistance. Thus, plaintiff's proofs were sufficient to establish a prima facie case that the nursing staff was negligent in failing to appropriately assess and monitor plaintiff's condition and that, had they done so, plaintiff's injuries more than likely would have been prevented.

The majority's reliance on *Boyd v Wyandotte,* 402 Mich 98; 260 NW2d 439 (1977), is mistaken. The *Boyd* Court held that, under the circumstances of that case, a physician's failure to maintain adequate records of a patient's treatment was not a proper theory of recovery under negligence principles. *Id.* at 104-105. Here, plaintiff's theory is that defendant's employees were negligent in failing to assess and monitor her condition consistent with the appropriate standard of care and that, had they done so, it was more than likely that her injury would not have occurred. The majority is therefore mistaken when it relies on *Boyd* as support for the proposition that plaintiff's injury in this case was not "attributable to defendant's alleged failure to evaluate and chart plaintiff's condition." *Ante,* p 476.

Plaintiff's circumstantial proofs were sufficient to permit a reasonable jury to infer a logical and substantial nexus between defendant's alleged negligence and plaintiff's injuries. See, e.g., *Washington Hosp Center v Martin,* 454 A2d 306 (DC App,

1982); *Osborn v Public Hosp Dist 1,* 80 Wash 2d 201; 492 P2d 1025 (1972); *Norris v Rowan Memorial Hosp, Inc,* 21 NC App 623; 205 SE2d 345 (1974).

Accordingly, I dissent.

MICHIGAN STATE AFL-CIO v CIVIL SERVICE COMMISSION (AFTER REMAND)

Docket No. 149885. Submitted May 17, 1994, at Detroit. Decided February 6, 1995, at 9:05 A.M. Leave to appeal sought.

The Michigan State AFL-CIO, two persons in the state classified civil service, and several other labor unions that represent state civil servants brought an action in the Wayne Circuit Court against the Civil Service Commission and the State Personnel Director, seeking a declaratory judgment and an injunction against the enforcement of Civil Service Commission Rule 1-5.7, which prohibits civil servants from engaging in political activities during the hours they are on actual duty and defines "actual duty" to include those times during which civil servants are released from their regular workplace to engage in permitted union activities or business. The court, John H. Hausner, J., granted summary disposition for the plaintiffs, declaring Rule 1-5.7 invalid on the ground that it violates the political activities of public employees act, 1976 PA 169, MCL 15.401 *et seq.*; MSA 4.1702(1) *et seq.*, and permanently enjoining the defendants from enforcing Rule 1-5.7. The Court of Appeals, GRIFFIN, P.J., and REILLY and T. M. BURNS, JJ., reversed, holding that although the trial court properly concluded that the plaintiffs had standing to sue, it had erred in declaring that Rule 1-5.7 violates the provisions of 1976 PA 169 and remanded the case to the trial court for a determination of the remaining constitutional issues that had been raised in the plaintiffs' complaint. 191 Mich App 535 (1991). On remand, the trial court granted summary disposition for the defendants, holding that Rule 1-5.7 does not violate classified public employees' constitutional rights of free expression, free association, equal protection, and due process, and that it is not vague or overbroad in the constitutional sense. The plaintiffs appealed.

The Court of Appeals *held:*

REFERENCES

Am Jur 2d, Public Officers and Employees §§ 327, 329, 330.

Validity, construction, and effect of state statutes restricting political activities of public officers or employees. 51 ALR4th 702.

1. The doctrine of law of the case binds courts of equal or subordinate jurisdiction during subsequent proceedings of the same case with respect to all questions of law specifically decided in a prior decision as long as the facts remain substantially the same. Accordingly, the panel in this appeal is bound by the determinations of the panel in the prior appeal with respect to questions actually decided in that appeal.

2. The panel in the prior appeal held that Rule 1-5.7 prohibits classified public employees who are released from their normal duties to perform union activities while still receiving state compensation from engaging in partisan political activities and that Rule 1-5.7 does not regulate the speech and association of classified employees while they are off duty. Accordingly, because Rule 1-5.7 does not attempt to restrict the speech of the citizenry at large, it is unnecessary to evaluate the rule under the strict scrutiny standard under which a compelling state interest must be shown.

3. The United States Supreme Court long has recognized Congress' power to restrict the partisan political conduct of federal employees even in the face of the free speech and free association guarantees of US Const, Am I, because of the need to ensure that government employment decisions occur on the basis of meritorious performance and not on the basis of political affiliations. Rule 1-5.7, which affords Michigan classified civil service employees a broader degree of political freedom than is afforded federal employees in that it does not restrict off-duty political activities, does not offend the rights of free speech and free association guaranteed under the Michigan Constitution, which rights are coterminous with those same rights under the United States Constitution.

4. Rule 1-5.7 is not vague or overbroad in the constitutional sense, because it provides fair notice of the prohibited conduct. Although Rule 1-5.7 does not distinguish explicitly partisan political activity from nonpartisan political activity, the term "partisan political activity" is not so ambiguous that a classified employee of ordinary intelligence must guess at its meaning. Furthermore, while Rule 1-5.7 specifically prohibits a classified employee from engaging in partisan political activities while released from regular employment activities for employer-paid union leave activities, the effect of Rule 1-5.7, when read in conjunction with the rules that were incorporated by reference in that rule, is to prohibit all political activity, whether partisan or nonpartisan, while an employee is on

actual duty. Accordingly, the failure to differentiate between partisan and nonpartisan political activities does not render the rule impermissibly vague and overbroad.

5. Because all classified employees, both union and nonunion, must refrain from all political activity while on actual duty, the specific prohibition against partisan political activities during union-leave time does not deny classified union employees equal protection or due process. Indeed, to read Rule 1-5.7 to permit partisan political activities while on union leave would lead to disparate treatment, because then only union employees would be able to engage in partisan political activity while on duty.

Affirmed.

CIVIL SERVICE — POLITICAL ACTIVITIES — FREE SPEECH AND ASSOCIATION — VAGUENESS — EQUAL PROTECTION.

The rule of the Civil Service Commission that prohibits civil servants from engaging in partisan political activities during those times that they, pursuant to the terms of a collective bargaining agreement, are released from their regular workplaces for participation in union-related activities or business while continuing to be compensated by the state does not deny such civil servants their constitutional rights of free speech and free association, is not by its terms vague and overbroad in the constitutional sense, and does not deny such civil servants their constitutional rights of equal protection and due process (Const 1963, art 1, §§ 2, 3, 5, 17; Civil Service Commission Rule 1-5.7).

Sachs, Waldman, O'Hare, Helveston, Hodges & Barnes, P.C. (by *Theodore Sachs* and *Andrew Nickelhoff*), for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Deborah Ann Devine,* Assistant Attorney General, for the defendants.

Amicus Curiae:

Mark Brewer (*Paul Denenfeld,* of Counsel), for the ACLU Fund of Michigan.

AFTER REMAND

Before: MICHAEL J. KELLY, P.J., and CORRIGAN and C. D. CORWIN,* JJ.

CORRIGAN, J. This is the second appeal challenging the validity of Civil Service Rule (CSR) 1-5.7, modified effective July 14, 1988, restricting the use of union leave programs for partisan political activity. This Court, in the original appeal, *AFL-CIO v Michigan Civil Service Comm,* 191 Mich App 535; 478 NW2d 722 (1991) (hereinafter *AFL-CIO I*), ruled that the modification of the rule was within the Civil Service Commission's authority and did not conflict with § 4 of the political activities of public employees act, 1976 PA 169, § 4, MCL 15.404; MSA 4.1702(4). This Court reversed the circuit court's holding, dissolved the injunction against enforcement of CSR 1-5.7, and remanded for a determination of the remaining constitutional issues in counts I and III of plaintiffs' August 1988 complaint.

Plaintiffs appeal as of right the order on remand granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim) and 2.116(C)(10) (no genuine issue of material fact). We affirm the circuit court's determination that CSR 1-5.7, as modified, does not violate classified public employees' rights of free expression and association under the Michigan Constitution's Declaration of Rights, Const 1963, art 1, §§ 3[1] and 5,[2] nor is the rule unconstitutionally

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

[1] Const 1963, art 1, § 3 provides:

> The people have the right peacably to assemble, to consult for the common good, to instruct their representatives and to petition the government for the redress of grievances.

[2] Const 1963, art 1, § 5 provides:

vague or overbroad, nor does it violate classified employees' rights to equal protection and due process, Const 1963, art 1, §§ 2[3] and 17.[4]

I. UNDERLYING FACTS

The pertinent facts and procedural history are fully set forth in *AFL-CIO I.* We emphasize *AFL-CIO I's* summary of the relevant texts and the factual predicate that spawned the modification of the rule:

> Before July 14, 1988, CSR 1-5.7, relating to political activities, provided:
>
> "1-5.7 Prohibited During Work Hours. Activities permitted under sections 1-5.1 and 1-5.5 shall not be engaged in by a classified employee during the hours the employee is on actual duty."
>
> Effective July 14, 1988, the rule was amended by adding the following language:
>
> "Actual duty includes the employee's scheduled work hours and overtime. Off duty includes all time outside scheduled work hours and overtime, annual leave, unpaid leave of absence, lost time and leave granted to the employee to become a full time employee of an employee organization holding exclusive representation rights, pursuant to an approved collective bargaining agreement. For purposes of this rule, employees released from their regular state workplace for union activities,

Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

[3] Const 1963, art 1, § 2 provides in part:

No person shall be denied the equal protection of the laws.

[4] Const 1963, art 1, § 17 provides in part:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

union business or any other employee organization purpose under any leave arrangement, including 'annual leave buyback' provisions, shall be considered to be on actual duty, released by the employer to take part in union activities deemed to be in the best interests of the state and not including partisan political activity."

The modification was apparently adopted in response to a training seminar on election campaign strategies held December 1-3, 1987. The session was sponsored jointly by the United Auto Workers-Community Action Program (UAW-CAP) and the Michigan Democratic Party. A handbook on political campaign techniques prepared by the National Democratic Committee was used as a training manual at the seminar. Although the Director of the Office of State Employer knew the three-day seminar was an event sponsored by the UAW-CAP, he did not know that it was a seminar that was patently political.

Approximately fifty-six employees who were members of the UAW Local 6000 attended the seminar. Seventeen invoked the union officer leave provision of their collective bargaining agreement, one used the Administrative Leave Bank 1 provision of the agreement, and one attended without utilizing any union leave arrangement. The remaining thirty-seven were union members who used the administrative leave buyback program, which was not negotiated as part of a collective bargaining agreement but gained recognition over a period of time. [*AFL-CIO I, supra* at 537-541.]

II. LAW OF THE CASE

Because this Court already has decided controlling questions that affect this appeal, we apply the doctrine of law of the case. Under that doctrine, an appellate court's decision concerning a particular issue binds courts of equal or subordinate jurisdiction during subsequent proceedings in the

same case. A legal question may not be decided differently where the facts remain materially the same. *Bruce Twp v Gout (After Remand),* 207 Mich App 554; 526 NW2d 40 (1994); *People v Peters (After Remand),* 205 Mich App 312, 316; 517 NW2d 773 (1994); *Bennett v Bennett,* 197 Mich App 497, 499; 496 NW2d 353 (1992). The doctrine applies only to those questions specifically determined in the prior decision and to questions necessarily determined in arriving at that decision. *Peters, supra.* The basic purpose of the doctrine is to maintain consistency and to avoid reconsideration of matters previously decided during a single continuing lawsuit. *Locricchio v Evening News Ass'n,* 438 Mich 84, 109; 476 NW2d 112 (1991); *Bennett, supra.*

In *AFL-CIO I,* this Court held that the Civil Service Commission did not exceed its constitutional authority or violate the provisions of 1976 PA 169, MCL 15.401 *et seq.*; MSA 4.1702(1) *et seq.,* by adopting CSR 1-5.7 as modified. Section 4 of 1976 PA 169, MCL 15.404; MSA 4.1702(4), prohibits a public employee from engaging in otherwise-protected political activities[5] "during those hours

[5] MCL 15.402, 15.403; MSA 4.1702(2), 4.1702(3) enumerate a classified employee's protected political activities, which the Civil Service Commission essentially adopted in Civil Service Rules 1-5.1 through 1-5.5 as follows:

> 1-5.1 Candidates for Public Office.—An employee in the classified service may become a candidate for nomination and election to any local elective office, partisan or non-partisan, without first obtaining a leave of absence.
>
> 1-5.1a An employee in the classified service may become a candidate for nomination and election to state office but shall request and shall receive a leave of absence without pay at the time of compliance with the candidacy filing requirements or sixty (60) days prior to the election in question, whichever date is closer to the election.
>
> 1-5.2 State Office Defined.—"State Office" in section 1-5.1a means full-time elective office in the Executive or Legislative Branch of State Government, Justice of the State Supreme Court, Judge of the Court of Appeals.

when that person is being compensated for the performance of that person's duties as a public employee." *AFL-CIO I, supra* at 548.

Plaintiffs have not contested the validity of CSR 1-5.1 through CSR 1-5.5 or 1976 PA 169. Rather, they have argued that "union leave" is off-duty time beyond the reach of Civil Service Commission regulation. This Court has already rejected plaintiffs' characterization of union leave as off-duty time, *AFL-CIO I, supra* at 550-551. CSR 1-5.7 defines union-leave time as "actual duty." *AFL-CIO I* held that actual duty means "on-the-job behavior related to job performance" for purposes of § 4 of 1976 PA 169 and CSR 1-5.7, including activities of classified employees during working hours for which they were being compensated. *AFL-CIO I, supra* at 550. The Court relied on

1-5.3 Leave of Absence for Primary Election.—An employee on required leave of absence for a primary election but not nominated in that election shall return from leave of absence immediately after the official canvass of votes.

1-5.3a An employee nominated in a primary election shall remain on leave of absence until the special or general election.

1-5.3b An employee nominated in a primary election who withdraws from the general or special election in accordance with applicable election law shall return from leave of absence immediately upon such withdrawal.

1-5.4. Leave of Absence for General or Special Election.—An employee on required leave of absence for a general or special election but not elected in that election shall return from leave of absence immediately after the official canvass of votes.

1-5.4a An employee on required leave elected in a general or special election shall leave state classified employment by resignation, retirement or appropriate separation immediately upon assumption of the office.

1-5.5 Political Party Activities.—An employee in the classified service may:

1-5.5a Become a member or an officer of a political party committee formed or permitted under the election laws of Michigan or of the United States.

1-5.5b Be a delegate to any convention held by a political party.

1-5.5c Engage in political activities on behalf of a candidate or issue in connection with a partisan or non-partisan election.

Council No 11, AFSCME v Civil Service Comm, 408 Mich 385, 408; 292 NW2d 442 (1980), in which our Supreme Court stated that "the commission's 'sphere of authority' delimits its rule-making power and confines its jurisdiction over the political activity of classified personnel to on-the-job behavior related to job performance." *AFL-CIO I* held that a prohibition against political activity by classified employees is permissible if three conditions are satisfied:

> (1) the classified employee receives some form of compensation for the time spent on leave, (2) the employee would be performing duties at the usual job site if the employee were not on leave, and (3) the employee is permitted to leave for a specific purpose approved by the employer. [*AFL-CIO I, supra* at 550].

This Court concluded that the release of employees under various union-leave arrangements was part of the employees' duties for which they were being compensated. The law of this case establishes that a civil servant's release to participate in union activities under various union-leave arrangements is on-the-job behavior related to job performance; the union-leave programs at issue do not implicate classified employees' off-duty activities. Plaintiffs may not relitigate this issue on appeal.

III. FREE SPEECH AND ASSOCIATION

Plaintiffs first contend that CSR 1-5.7, as modified, abridges classified employees' rights to free speech and association, contrary to Const 1963, art 1, §§ 3 and 5. Plaintiffs do not contest the commission's authority to regulate classified employees' political activities on the job or the constitutional-

ity of 1976 PA 169, which prohibits a public employee from engaging in political activity while on duty, MCL 15.404; MSA 4.1702(4). See n 5, *supra.* They again contend that CSR 1-5.7 creates a blanket prohibition of partisan political activity during off-hours and off-premises union activities. As noted, it is the law of this case that union leave constitutes actual-duty time. Thus, we reject plaintiffs' attempt to recast union leave as off-duty time in contravention of *AFL-CIO I.*

The circuit court concluded that CSR 1-5.7 satisfied a strict scrutiny standard. Although we do not reject the circuit court's holding, we conclude that CSR 1-5.7, as modified, need not be evaluated under the strict scrutiny standard reserved for governmental attempts to restrict the speech of private citizens. The Civil Service Commission was not obliged to demonstrate that CSR 1-5.7 furthers a compelling state interest. The state must demonstrate a compelling state interest where it seeks to restrict the speech of the citizenry at large on the basis of the content of the speech.[6] *R A V v St Paul, Minnesota,* 505 US —; 112 S Ct 2538; 120 L Ed 2d 305 (1992); *Kropf v Sterling Heights,* 391 Mich 139; 215 NW2d 179 (1974); *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10),* 396 Mich 465, 481; 242 NW2d 3 (1976). However, CSR 1-5.7 does not regulate the speech and association of state classified employees while they are off duty. On the contrary, CSR 1-5.7, as modified, prohibits classified public employees released for union activities while being compensated by

[6] However, states may restrict the speech of its citizenry with reasonable time, place, and manner restrictions that are content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. *Ward v Rock Against Racism,* 491 US 781, 791; 109 S Ct 2746; 105 L Ed 2d 661 (1989); *Perry Ed Ass'n v Perry Local Educators' Ass'n,* 460 US 37; 103 S Ct 948; 74 L Ed 2d 794 (1983).

the state from engaging in partisan political activity during working hours. *AFL-CIO I, supra* at 551-552; *Council No 11, supra.*

Plaintiffs' complaint alleges violations of the Michigan Constitution, but their argument ostensibly rests in part on First Amendment authority, U S Const, Am I.[7] We reject the notion that government employees have a right grounded in the First Amendment to active participation in partisan politics, whether they are on or off the job. The United States Supreme Court long has recognized Congress' power to restrict the partisan political conduct of federal employees, both on and off duty. *Ex Parte Curtis,* 106 US 371; 1 S Ct 381; 27 L Ed 232 (1882). In a plurality opinion, the United States Supreme Court recently reaffirmed the government's valid and important interest in regulating partisan political conduct of its employees, both on and off duty. "To begin with, even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees. . . . Even something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees." *Waters v Churchill,* 511 US —, —; 114 S Ct 1878; 128 L Ed 2d 686, 697-698 (1994), citing *Broadrick v Oklahoma,* 413 US 601; 93 S Ct 2908; 37 L Ed 2d 830 (1973); *United States Civil Service Comm v Nat'l Ass'n of Letter Carriers,* 413 US 548; 93 S Ct 2880; 37 L Ed 2d 796 (1973); see also *Brown v Glines,* 444 US 348; 100 S Ct 594; 62 L Ed 2d 540, 549, n 13 (1979); *Council No 11, supra* at 406-409.

[7] Generally, the rights to free speech and association under the Michigan Constitution, Const 1963, art 1, §§ 3 and 5, are coterminous with those under the First Amendment. *Woodland v Michigan Citizens Lobby,* 423 Mich 188, 202; 378 NW2d 337 (1985).

Restricting partisan political activity of those in government service ensures that employment decisions occur on the basis of meritorious performance, and not on the basis of political affiliations. *Letter Carriers, supra* at 555, citing *United Public Workers v Mitchell,* 330 US 75, 98; 67 S Ct 556; 91 L Ed 754 (1947); *Council No 11, supra* at 397-398. Federal employees are barred from participation in various partisan political activities, both on and off duty, pursuant to the Hatch Act, 5 USC 7324(a)(2). The Supreme Court has upheld the validity of the Hatch Act's restrictions on partisan political activity.[8] *Letter Carriers, supra* at 554-557, citing *Mitchell, supra.* Indeed, an early executive directive under Thomas Jefferson sought to restrict electioneering in the Executive Branch:

> Early in our history, Thomas Jefferson was disturbed by the political activity of some of those in the Executive Branch of the Government. See 10 J. Richardson, Messages and Papers of the Presidents 98 (1899). The heads of the executive departments, in response to his directive, issued an order stating in part that "[t]he right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; *but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it." Id.* at 98-99. [*Letter Carriers, supra* at 557. Emphasis added.]

Such restrictions serve "valid and important state interests, particularly with respect to attracting greater numbers of qualified people by insuring their job security, free from the vicissitudes of the

[8] The Civil Service Regulations exempt nonpartisan political activity from the ambit of the Hatch Act, 5 CFR 733.122.

elective process, and by protecting them from 'political extortion.' " *Broadrick, supra* at 606.

Plaintiffs also contend that CSR 1-5.7 regulates speech on the basis of content, in violation of the First Amendment. In *Letter Carriers, supra* at 556, the Supreme Court concluded that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by [government] employees." The First Amendment does not invalidate the bar against partisan political activities in CSR 1-5.7.

Nonetheless, we recognize that Michigan has chosen to accord its classified civil service employees a broader degree of political freedom than that enjoyed by federal employees. The adoption of the civil service system,[9] as amended in 1940 and by the 1963 Constitution, limits the prohibition on employees' political activities to on-duty hours. *Council No 11, supra* at 406-407, recognized the commission's authority to regulate

> employment-related activity involving matters such as job specifications, compensation, grievance procedures, discipline, collective bargaining and job performance, including the power to prohibit activity during working hours which is found to interfere with satisfactory job performance.

CSR 1-5.7 properly effects the Civil Service Commission's legitimate ban on partisan political activity during actual-duty hours. Nothing in this rule offends a recognized Michigan or federal constitutional right to free speech or assembly. The state government, as an employer, most assuredly may restrict the partisan political activity of its employees while they are on duty.

[9] See 1937 PA 346 and 1939 PA 245.

IV. VAGUENESS AND OVERBREADTH

Plaintiffs next contend that CSR 1-5.7 as modified is unconstitutionally vague and overbroad. We disagree. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v Rockford,* 408 US 104, 108; 92 S Ct 2294; 33 L Ed 2d 222 (1972). In *Woll v Attorney General,* 409 Mich 500, 533; 297 NW2d 578 (1980), citing *Grayned, supra* at 108-109, our Supreme Court enunciated the standards for evaluating vagueness:

> A statute may be challenged for vagueness on the grounds that it
>
> —is overbroad, impinging on First Amendment freedoms, or
>
> —does not provide fair notice of the conduct proscribed, or
>
> —is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed.

See also *Kotmar, Ltd v Liquor Control Comm,* 207 Mich App 687, 696; 525 NW2d 921 (1994). Applying these standards, plaintiffs' arguments fail. CSR 1-5.7 provides fair notice of prohibited conduct. The meaning of the words can be ascertained by reference to judicial determinations, to the common law, to dictionaries, and to the words themselves. *Id.*

Plaintiffs specifically argue that CSR 1-5.7 is vague and overbroad because it does not explicitly distinguish "partisan" from "nonpartisan" political activity. We disagree. In *Broadrick, supra,* the United States Supreme Court considered language in an Oklahoma statute that, among other things, prohibited classified employees from becoming offi-

cers or members of a partisan political club.[10] The Court in *Broadrick, supra* at 608, quoting *Letter Carriers, supra* at 578-579, in which the Court had held that the civil service regulations accompanying the Hatch Act[11] prohibiting federal employees from partisan political activity are neither unconstitutionally vague nor overbroad, acknowledged that words such as "partisan" inevitably contain germs of uncertainty, but concluded that

> "there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

Just as in *Broadrick* and *Letter Carriers,* the term "partisan political activity" is not so ambiguous that a classified employee of ordinary intelligence must necessarily guess at its meaning. *Broadrick, supra* at 607; *Letter Carriers, supra* at 579-580. We find no error warranting reversal.

Plaintiffs complain that CSR 1-5.7 is vague and overbroad because it does not differentiate partisan from nonpartisan political activity. Although helpful, such differentiation is not required. Plaintiffs are mistaken in hypothesizing that union-leave programs can be used for nonpartisan political activity. CSR 1-5.7 specifically refers back to CSR 1-5.1 and 1-5.5. CSR 1-5.5c permits an employee to engage in both partisan and nonpartisan political activity, but CSR 1-5.7 bars *all* political activity while an employee is on actual duty. Moreover, *all* political activity is a prohibited sub-

[10] Okla Stat Ann, Title 74, § 818.

[11] 5 USC 7324(a)(2) and accompanying regulations 5 CFR 733.122.

ject of collective bargaining. CSR 6-2.1(19). Union leave is designed for union activity, not for political activities. Plaintiffs' attack on CSR 1-5.7 as vague and overbroad is without merit.

V. EQUAL PROTECTION AND DUE PROCESS

Finally, we reject plaintiffs' contention that CSR 1-5.7 violates equal protection and due process, Const 1963, art 1, §§ 2 and 17. CSR 1-5.7 bars union employees from partisan political activities while on union leave. Nonunion employees are not eligible for union leave. Union and nonunion members alike enjoy annual leave, sick leave, educational leave, and leave for jury duty. Moreover, both union and nonunion employees are prohibited from engaging in both partisan and nonpartisian political activities while on duty pursuant to the first sentence of CSR 1-5.7. Thus, the additional language of CSR 1-5.7 requiring classified employees to refrain from partisian activities while on union leave does not result in an advantage for nonunion employees, to whom union-leave time is not available. Indeed, the adoption of plaintiffs' views would lead to disparate treatment, because then only union employees could engage in partisan political activity while they are on duty. Accordingly, plaintiffs' equal protection and due process claims lack merit.

Affirmed.

PEOPLE v MILLER

Docket No. 163510. Submitted November 15, 1994, at Detroit. Decided February 6, 1995, at 9:10 A.M. Leave to appeal sought.

Danny J. Miller was convicted by a jury in the Recorder's Court for the City of Detroit, Leonard Townsend, J., of armed robbery, possession of a firearm during the commission of a felony, and felonious assault. The proofs at trial established that the defendant stole at gunpoint a twelve-pack of beer from a liquor store. The store clerk notified the police and gave a description of the defendant and his vehicle. The police observed the defendant's vehicle, engaged in a high-speed chase, during which the defendant shot at the police and tried to run a police car off the road, and arrested the defendant when he eventually crashed. While the defendant was still at the scene of the crash, the store clerk was brought there and identified the defendant as the person who had robbed him. The defendant appealed.

The Court of Appeals *held:*

1. Although the defendant did not object at trial that the on-the-scene identification was improper because it was undertaken in violation of his right to counsel, the issue will be considered on appeal because of its importance. Because an adversary judicial proceeding had not been initiated yet, the constitutional right to counsel pursuant to US Const, Am VI had not attached. However, independent of any federal constitutional mandate, before or after commencement of the judicial phase of a prosecution a suspect is entitled to be represented by counsel at any identification procedure unless the particular circumstances justify the undertaking of identification procedures before counsel can be secured.

2. Police officers may conduct an on-the-scene identification without the presence of counsel if undertaken promptly after

REFERENCES

Am Jur 2d, Criminal Law §§ 735, 746, 972, 974.

Accused's right to assistance of counsel at or prior to arraignment. 5 ALR3d 1269.

Validity, under Federal Constitution, of police lineup or showup procedures—Supreme Court cases. 34 L Ed 2d 839.

the crime, except where the police have very strong evidence that the person stopped is the culprit or where the police have made a valid arrest of the suspect for a separate crime, unless the police have more than a mere suspicion that the suspect was responsible for the second crime to which the identification pertains. Because the defendant already had been arrested for the assault on the police during the chase and the police had more than a mere suspicion that the defendant had committed the robbery, the on-the-scene identification of the defendant without benefit of counsel was improper. However, because this issue was not raised at trial, reversal would be appropriate only where the error could have been decisive of the outcome of the trial or where prejudice would be presumed or reversal would be automatic. Under the circumstances of this case, prejudice is not presumed, reversal is not automatic, and the error in admitting evidence of the on-the-scene identification was not decisive of the outcome.

3. The question whether the in-court identification by the store clerk was admitted improperly because the on-the-scene identification was impermissibly suggestive has not been preserved for appellate review. Because there was no objection at trial, no hearing was held, and no record is available from which it can be determined whether the on-the-scene identification was unduly suggestive.

4. The in-court identification by the store clerk had a source independent of the pretrial identification at the crash scene. The clerk had ample opportunity to observe the defendant for several minutes in a well-lit situation and was able to make an in-court identification of the defendant without dependence on the pretrial confrontation.

5. The testimony of the police officer who was with the store clerk when he made the on-the-scene identification of the defendant to the effect that the clerk had identified the defendant as the robber is not hearsay, because the clerk was available for cross-examination.

6. The record does not support the defendant's allegation that the prosecutor asked questions and a police officer gave answers that impermissibly infringed on the defendant's right to remain silent.

Affirmed.

CRIMINAL LAW — ON-THE-SCENE IDENTIFICATIONS — RIGHT TO COUNSEL.

Police officers may conduct an on-the-scene identification without the presence of counsel promptly after a crime, except where

the police have very strong evidence that the person stopped is the culprit or where the police have made a valid arrest of the suspect for a separate crime, unless the police have more than a mere suspicion that the suspect was responsible for the crime to which the identification pertains.

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 Prosecutor, for the people.

John D. Lazar, for the defendant on appeal.

Before: HOOD, P.J., and JANSEN and A. T. DAVIS, JR.,* JJ.

JANSEN, J. Following a jury trial in the Recorder's Court for the City of Detroit, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, possession of a firearm during the commission of a felony, second offense, MCL 750.227b; MSA 28.424(2), and felonious assault, MCL 750.82; MSA 28.277, arising out of two separate cases that were consolidated for trial. The trial court sentenced defendant to five to fifteen years' imprisonment for the conviction of armed robbery, to be served consecutively to a five-year term for the conviction of felony-firearm. Defendant was sentenced to thirty-two months' to four years' imprisonment for the conviction of felonious assault, to be served concurrently with the other two sentences. Defendant appeals as of right, and we affirm.

I

The incident occurred on September 9, 1992, at

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

approximately 5:30 P.M. at Beck's Liquor Store in Van Buren Township. Matthew Daman, the cashier working at the store at that time, stated that defendant first entered the store and went to the beer cooler. Defendant took out a twelve-pack of Budweiser beer and placed it on the counter. He searched his pockets and told Daman that his money was in the car and that he would return after going to the car. A few minutes later, defendant returned with a shotgun and aimed it at Daman. Defendant picked up the beer with one hand, while holding the shotgun with the other hand. Defendant said, "Thank you for the beer," and walked out of the store. Once defendant was near the door, he said, "Thank you, this beer is on the house."

Daman ran after defendant and saw him drive away in a white truck with a white top. Daman saw some of the license plate numbers. Daman went back to the store, called the police, and gave them a description of defendant's vehicle and the direction in which defendant was traveling. Van Buren Township Police Officer Fred Sweet stated that he received a radio report of an armed robbery at Beck's Party Store. Sweet received both a description that the assailant was a white male with a shotgun who was driving a white pickup truck with a white cab and information concerning some of the license plate numbers.

As Sweet was driving toward Beck's, he observed a pickup truck matching the description given. Once behind the truck, Sweet noticed that the license plate numbers given to him matched those on the truck. Sweet engaged his siren, and defendant sped away. Three patrol cars began to chase defendant. Sweet drove alongside defendant's truck and saw him drinking from a can of Budweiser beer. Defendant then entered Sweet's lane

and attempted to push Sweet's car off the road. Defendant hit Sweet's car three or four times. Sweet was able to get in front of defendant, and he saw defendant pick up a shotgun. Sweet then heard a gunshot, and defendant again drove beside Sweet and rammed the side of Sweet's car twice. Ultimately, defendant lost control of his truck, and it rolled onto a grass median on I-94.

The police officers apprehended defendant. Inside the truck was a shotgun, several shotgun shells, empty beer cans, and several unopened beer cans. John Gora, the officer in charge of the case, arrived shortly thereafter. Defendant was in the back seat of a patrol car. Gora then went to the police station, where Daman was giving a statement, and brought Daman to the scene of the crash. Daman identified defendant as the person who committed the robbery. Daman was taken back to the police station, and defendant was taken to the police station in a separate vehicle.

II

Defendant first argues that Daman's on-the-scene identification of him was improper because it was taken in violation of his right to counsel. We note that while defendant did not raise this issue below, it involves an important legal issue for which the facts are sufficiently presented. However, we conclude that this was plain, unpreserved error that was not decisive of the outcome or prejudicial to defendant. *People v Grant,* 445 Mich 535, 553; 520 NW2d 123 (1994).

Defendant bases his argument that he was entitled to counsel at the on-the-scene identification pursuant to Michigan case law. Indeed, defendant's argument could not be premised on the Sixth Amendment right to counsel. Clearly, the

Sixth Amendment right to counsel did not attach here because the corporeal identification was not conducted at or after the initiation of adversary judicial proceedings. *Moore v Illinois,* 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977); *People v Anderson (After Remand),* 446 Mich 392, 402; 521 NW2d 538 (1994).

In *People v Jackson,* 391 Mich 323, 338; 217 NW2d 22 (1974), our Supreme Court stated:

> [I]ndependent of any Federal constitutional mandate, . . . both before and after commencement of the judicial phase of a prosecution, a suspect is entitled to be represented by counsel at a corporeal identification or a photographic identification unless the circumstances justify the conduct of an identification procedure before the suspect can be given an opportunity to request and obtain counsel and that, except in exigent circumstances, photographs of a suspect known to be in custody or who can readily be produced for a lineup may not be displayed to witnesses.

This rule has been somewhat limited by the Supreme Court in *People v Kurylczyk,* 443 Mich 289, 302; 505 NW2d 528 (1993), where the Court held that in the case of photographic identifications, the right of counsel attaches with custody.

The Supreme Court has noted in dicta that a recognized justification for the absence of counsel at an eyewitness identification procedure exists where there is a prompt on-the-scene corporeal identification within minutes of the crime. *People v Anderson,* 389 Mich 155, 187, n 23; 205 NW2d 461 (1973). Therefore, the question is whether, under Michigan case law, defendant was entitled to counsel at the corporeal identification conducted by the police at the scene of the crash.

This Court essentially has adopted three differ-

ent approaches in analyzing whether a defendant is entitled to counsel during a prompt on-the-scene corporeal identification. In *People v Dixon,* 85 Mich App 271, 280-281; 271 NW2d 196 (1978), this Court held that when a police officer has more than a mere suspicion that the suspect is wanted for the crime, the officer cannot return the suspect to the scene of the crime, but must take the suspect to the police station and a have a lineup at which counsel is present. The "mere suspicion" rule announced in *Dixon,* although advocated by defendant in his brief, has not gained support as a blanket rule. Indeed, two judges signing the *Dixon* majority later disaffirmed the rule and followed *People v Turner,* 120 Mich App 23; 328 NW2d 5 (1982). See *People v Fields,* 125 Mich App 377, 382; 336 NW2d 478 (1983) (HOLBROOK, JR., J., concurring); *People v Wilki,* 132 Mich App 140, 146; 347 NW2d 735 (1984) (MAHER, J., concurring).

In *Turner,* this Court held that police officers may conduct an on-the-scene identification without the presence of counsel any time promptly after the crime except where the police have very strong evidence that the person stopped is the culprit. Very strong evidence exists where the suspect has decreased any exculpatory motive, such as where the suspect has confessed or presented the police with highly distinctive evidence of the crime or has a highly distinctive personal appearance. *Id.,* p 36. However, this Court also held that where the police already have arrested validly the suspect for a separate offense, the police may subject the suspect to an on-the-scene identification without counsel unless they have more than a mere suspicion that the suspect was responsible for the crime to which the identification pertains. *Id.,* p 37.

The third approach was taken in *People v Cow-*

ard, 111 Mich App 55; 315 NW2d 144 (1981). There, this Court recognized that a prompt on-the-scene identification within minutes of the crime is justified without counsel. Accord *People v Purofoy,* 116 Mich App 471, 480; 323 NW2d 446 (1982). This Court specifically noted that there was nothing in the record to suggest that the police officers were not attempting, in good faith, to determine whether there was a reasonable likelihood that the suspect was connected with the crime or was merely an unfortunate victim of circumstances. *Coward, supra,* pp 63-64. Thus, the implication is that the identification procedure must be a prompt on-the-scene identification and reasonable police practice. See *People v Marks,* 155 Mich App 203, 214; 399 NW2d 469 (1986).

We adopt the *Turner* rule. Even the prosecutor acknowledges that the approach outlined in *Turner* appears to be the most widely adopted by this Court. *People v Raybon,* 125 Mich App 295, 307; 336 NW2d 782 (1983); *Fields, supra,* p 381; *People v McCuaig,* 126 Mich App 754, 758; 338 NW2d 4 (1983); *People v St Cyr,* 129 Mich App 471, 474; 341 NW2d 533 (1983); *Wilki, supra,* p 143; *People v Murray,* 147 Mich App 227, 230; 383 NW2d 613 (1985), aff'd on other grounds 428 Mich 343; 408 NW2d 789 (1987). As this Court has stated, on-the-scene identifications are inherently suggestive and the *Turner* rule protects a defendant's right to counsel. *Wilki, supra,* p 143.

We apply the "more than a mere suspicion" rule of *Turner* because defendant already was arrested validly for a separate offense (the assault committed on the police). We conclude that the police had more than a mere suspicion that defendant was responsible for the armed robbery and that, therefore, counsel was required at the corporeal identification made at the scene of the crash. Here, the

police knew that the assailant was a white male with a shotgun driving in a white pickup truck with a white cab. The police knew some of the license plate numbers. Sweet stated that he followed defendant's truck because of the description and because the license plate numbers matched. Once defendant was apprehended, a shotgun was found, as well as several empty and several unopened beer cans. The police knew someone had committed an armed robbery at a liquor store.

Under these circumstances, we conclude that, at the time of his apprehension, the police had more than a mere suspicion that defendant was the culprit of the armed robbery. The police were presented with highly distinctive evidence of the crime, including a shotgun, beer cans, the description of the truck, and the matching license plate numbers. Because there was more than a mere suspicion that defendant was the person who committed the armed robbery, the police should have transported defendant to the police station to conduct a lineup with counsel present.

Although we believe that the testimony concerning the on-the-scene identification should have been suppressed, we find that reversal is not required under the standard for assessment of unpreserved nonconstitutional plain error. *Grant, supra,* p 552. The error was unpreserved because defendant did not object at trial to the testimony concerning the on-the-scene identification.

A plain unpreserved error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases where prejudice is presumed or reversal is automatic. *Id.,* p 553. We believe that the error involved was not decisive of the outcome.

There was ample evidence that defendant com-

mitted the crime. Daman saw defendant before the on-the-scene identification and identified defendant as the assailant in court. Daman testified that defendant used a shotgun, and a shotgun was confiscated from defendant's truck. Further, Daman's description of the truck matched the truck that the defendant was driving when he was apprehended. There were unopened Budweiser beer cans in the truck, and Daman stated that defendant took a twelve-pack of Budweiser beer cans. Therefore, even if we ignore the testimony concerning the on-the-scene identification, there was sufficient evidence presented to sustain a conviction of armed robbery. Accordingly, the error was not decisive of the outcome of this case, and defendant was not prejudiced by the erroneous admission of the on-the-scene identification testimony.

III

Defendant next argues that the admission of the in-court identification by Daman was improper because the on-the-scene identification was impermissibly suggestive. Defendant did not move at trial to suppress the in-court identification testimony, nor did he move for an evidentiary hearing concerning the suggestiveness of the on-the-scene identification. Because there was no evidentiary hearing concerning this matter below, we do not have a record on which we can review whether the on-the-scene identification was unduly suggestive. This issue, therefore, is not preserved for appellate review. *People v Lee,* 391 Mich 618, 626-627; 218 NW2d 655 (1974); *People v Daniels,* 163 Mich App 703, 710-711; 415 NW2d 282 (1987).

IV

Defendant also argues that the in-court identifi-

cation was improper because there was no independent basis for the identification. The need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or unduly suggestive comments. *Kurylczyk, supra,* p 303; *People v Laidlaw,* 169 Mich App 84, 92; 425 NW2d 738 (1988); *People v Syakovich,* 182 Mich App 85, 89; 452 NW2d 211 (1989). Because we have found that the pretrial identification technically was tainted by improper procedure, we will address this issue. We conclude, however, that an independent basis for the in-court identification was established pursuant to the factors set forth in *People v Kachar,* 400 Mich 78, 95-96; 252 NW2d 807 (1977).

Because there was no evidentiary hearing held below, our review is somewhat limited. The trial testimony indicates that Daman had no prior relationship with or knowledge of the defendant. However, Daman had several good opportunities to observe defendant. Defendant initially entered the store and placed the beer on the counter. He left the store, and returned with a shotgun. Daman was about three feet away from defendant when he stood across the counter. When defendant left, Daman again saw defendant in the truck. The length of time between the offense and the disputed in-court identification was five months. Daman consistently has identified defendant as the assailant, both in court and at the pretrial identification done at the crash scene. There was no previous identification of another person as the assailant. Further, although Daman did state that he was afraid and the situation was "pretty scary," his actions of following defendant and noting the type and color of the truck indicate that he kept a clear head. Daman noted that the assailant had a beard.

Accordingly, we find that the in-court identification had an independent source. Daman clearly saw defendant for several minutes in a well-lit situation. Thus, we are confident that Daman was able to make an in-court identification of defendant without dependence on the pretrial confrontation done at the scene of the crash.

V

Defendant next argues that he was prejudiced by police officer Gora's testimony that Daman identified defendant as the person who robbed the store. Defendant contends that such testimony was inadmissible hearsay. Our Supreme Court has recently held that third-party identification testimony about the prior statement of a witness is not hearsay where the identifier (Daman) is subject to cross-examination. *People v Malone,* 445 Mich 369, 377-378; 518 NW2d 418 (1994); MRE 801(d)(1)(C). Daman was subject to cross-examination. The testimony was properly admitted.

VI

Last, defendant argues that the prosecutor elicited testimony from a police officer that impermissibly infringed on defendant's right to remain silent. Defendant did not object to this testimony at trial. Error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party was affected and a timely objection was made. MRE 103(a)(1).

At trial, the prosecutor elicited testimony from Michigan State Police Trooper Michael Asbridge that defendant, while in the processing holding area of the police station, denied firing his shotgun from his truck. Asbridge further stated that defen-

dant told him that he did not fire at the police officer and that defendant denied committing any armed robbery. The trooper further stated that defendant did not have much of a story. Generally, Asbridge's testimony concerning defendant was that defendant was visibly intoxicated and was acting in a belligerent manner.

We do not find that a substantial right of defendant's was affected. There was no comment by Asbridge concerning defendant's silence, nor was there any testimony indicating that defendant had asserted his right to remain silent. Moreover, the prosecutor's questions were concerned with defendant's sobriety and his behavior in the police station. We do not find that the prosecutor's questions impermissibly infringed on defendant's right to remain silent.

Affirmed.

PEOPLE v FERGUSON

Docket No. 163614. Submitted December 13, 1994, at Lansing. Decided February 6, 1995, at 9:15 A.M.

Raymond B. Ferguson was convicted by a jury in the Oakland Circuit Court, Denise Langford-Morris, J., of breaking and entering an occupied dwelling with intent to commit a felony and pleaded guilty of being an habitual offender, fourth offense. The defendant appealed, claiming that the trial court erred in instructing the jurors that, if they unanimously found that the defendant committed breaking and entering, they did not need to reach unanimity regarding whether the defendant had intended to commit assault with intent to murder, assault with intent to inflict great bodily harm, or felonious assault.

The Court of Appeals *held:*

1. Under the facts of this case, assault with intent to inflict great bodily harm and felonious assault are lesser included offenses of assault with intent to commit murder. Regardless of which assaultive felony the individual jurors concluded that the defendant intended to commit, each juror, at a minimum, found defendant guilty of breaking and entering with intent to commit felonious assault. Accordingly, the jury's verdict was unanimous.

2. The trial court did not err in denying the defendant's motion for a new trial based on ineffective assistance of counsel. The alleged errors by counsel involved matters of trial strategy and cannot be deemed to constitute ineffective assistance.

Affirmed.

CRIMINAL LAW — BREAKING AND ENTERING — ASSAULT — JURY INSTRUCTIONS.

Where the prosecution offers evidence of breaking and entering with intent to commit assault with intent to commit murder, assault with intent to inflict great bodily harm, or felonious assault, unanimity by the jury is required regarding the ques-

REFERENCES

Am Jur 2d, Trial §§ 1753-1756.
See ALR Index under Verdicts.

> tion whether the defendant committed breaking and entering, but not regarding the question of which of the three assaultive felonies the defendant intended to commit.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Richard Thompson,* Prosecuting Attorney, *Joyce F. Todd,* Chief, Appellate Division, and *Marilyn J. Day,* Assistant Prosecuting Attorney, for the people.

Laurence R. Imerman, for the defendant on appeal.

Before: TAYLOR, P.J., and GRIFFIN and W. G. SCHMA,* JJ.

TAYLOR, P.J. Defendant appeals as of right from his jury conviction of breaking and entering an occupied dwelling with intent to commit a felony, MCL 750.110; MSA 28.305, and his plea of guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. We affirm.

Defendant broke the windows of the complainant's mobile home while threatening to kill the complainant, who was in the home at the time. Defendant originally was charged with breaking and entering with intent to commit assault with intent to murder. With regard to the intent element of the breaking and entering charge, the court instructed the jury:

> The crime of breaking and entering requires proof of a specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that he did the acts with the intent to cause a particular result. For the crime of breaking and entering, this means that the prosecution must prove that the defendant intended to break and enter to assault the victim

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

> with intent to murder or commit great bodily harm or felonious assault.

The three alternative intent theories were reflected in the verdict form:

> Count I, guilty of breaking and entering an occupied dwelling with intent to commit assault with intent to commit murder or do great bodily harm or felonious assault . . . .

During deliberations, the jury inquired whether the jurors must all agree on one of the three types of assaults and the court instructed that the jurors could find guilt if they found a breaking and entering "with the specific intent to do any of the listed assaults." They complied and the jury foreperson read the verdict as follows:

> Guilty of breaking and entering an occupied dwelling with intent to commit assault, intent to commit murder, or do great bodily harm, and felonious assault.

Defendant argues that the trial court erroneously permitted the jury to convict him of breaking and entering without specifying which of the three separate assaultive felonies he intended to commit. He asserts that the instructions and verdict form did not require juror unanimity with regard to whether he intended to commit assault with intent to murder, assault with intent to do great bodily harm, or felonious assault. Because defendant failed to object to the jury instructions or the verdict form, appellate review is precluded absent manifest injustice. *People v Van Dorsten,* 441 Mich 540, 545; 494 NW2d 737 (1993).

Pursuant to MCL 750.110; MSA 28.305:

> Any person who breaks and enters any occupied dwelling house, with intent to commit any felony or larceny therein, shall be guilty of a felony . . . .

The elements of this crime are: (1) breaking and (2) entering (3) an occupied dwelling (4) with felonious intent. *People v Davenport,* 122 Mich App 159, 161; 332 NW2d 443 (1982). The prosecution must charge and prove some particular felony or felonious intent. *People v Westerberg,* 274 Mich 647, 649; 265 NW 489 (1936). Where specific intent is required by law to complete a crime, no description of that crime can be complete without it. *Id.* at 649-650. The reasoning behind this rule is that the information must be specific enough to allow a defendant to prepare a defense. *Id.* at 649.

The *Westerberg* opinion stands for the utterly reasonable proposition that the prosecution cannot merely assert a breaking and entering with an intent to commit some unspecified felony; rather, the particular felony the accused intended to commit must be specified. *Id.* at 650. In this case, the jury was presented with three choices of assaultive intent; two of which were lesser included offenses of the most severe assault, namely, assault with intent to commit murder. Regardless of which intent individual jurors concluded defendant possessed, each juror, at a minimum, found defendant guilty of breaking and entering with intent to commit felonious assault, the least severe of the assaults. Defendant cannot successfully assert that he was denied a fair trial because certain of the jurors may have concluded that he possessed a more egregious intent than that required for felonious assault. Accordingly, we conclude that the jury's verdict was unanimous and defendant has failed to show manifest injustice.

The situation presented by this case is distin-

guishable from the situation where the alleged intended felonies are not lesser included offenses of the most serious intended felony. For example, if the intended felonies tendered for the jury's consideration were murder, arson, or robbery, unanimity would have been required with regard to which felony, or felonies, was intended. Because the instant case does not involve such differing mens rea, we hold that the verdict was unanimous. Further, we note that our holding in this case is consistent with the recent Supreme Court decision in *People v Cooks,* 446 Mich 503; 521 NW2d 275 (1994). Although the *Cooks* decision involved actus reus rather than mens rea, the test announced by the *Cooks* Court supports our decision. In *Cooks,* the Court held that

> a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*Id.* at 524.]

In this case, the alleged intended felonies were not materially distinct: assault is a component of all three of the felonies. Furthermore, there is no reason to believe the jurors were confused about the factual basis of defendant's guilt. In order to return a verdict of guilty, all jurors must have agreed that defendant broke into the mobile home with intent to commit a felony involving an assault. Accordingly, a specific unanimity instruction was not required.

Defendant also argues that the trial court erred in denying his motion for a new trial based on

ineffective assistance of counsel. We disagree. In reviewing the allegations of ineffective assistance of counsel, we find that the alleged errors clearly involved matters of trial strategy. *People v Barnett,* 163 Mich App 331, 338; 414 NW2d 378 (1987).

Affirmed.

DOBRZENSKI v DOBRZENSKI

Docket No. 150498. Submitted August 3, 1994, at Lansing. Decided February 6, 1995, at 9:20 A.M.

Sandra K. Dobrzenski brought an action in the Genesee Circuit Court against Timothy Dobrzenski, seeking a judgment of divorce. The court, Donald R. Freeman, J., entered an order that granted a judgment of divorce and determined child custody and support. The defendant appealed from the portion of the judgment relating to the division of marital property, contending that he was denied due process of law.

The Court of Appeals *held:*

The parties did not receive due process of law. The judgment of divorce, the order of child custody, and the order of support are affirmed, but the property settlement award must be reversed and remanded for a rehearing before a different judge. The distribution of property on remand is to be made equitably on the basis of a finding of equal fault or no fault.

Affirmed in part, reversed in part, and remanded.

CAVANAGH, J., dissenting, stated that the defendant is not entitled to an evidentiary hearing de novo with regard to the property settlement award, because he failed to comply with the requirement of MCL 552.507(5); MSA 25.176(7)(5) that he submit a written request for a hearing de novo within twenty-one days after the recommendation of the referee was made available to him and because he stipulated the trial court's use of the transcripts of the referee's hearing in lieu of a new evidentiary hearing.

Earl R. Spuhler, for the plaintiff.

D. Craig Henry, for the defendant.

Before: MICHAEL J. KELLY, P.J., and CAVANAGH and M. J. SHAMO,* JJ.

MICHAEL J. KELLY, P.J. Defendant appeals as of

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

right from the portion of his judgment of divorce that relates to the division of marital property. We affirm in part, reverse in part, and remand.

On September 10, 1986, plaintiff filed a complaint seeking a divorce, and a judgment of divorce was entered on March 4, 1992. Whatever occurred between these dates is subject to conflicting interpretations, but we conclude that the parties did not receive due process of law. " 'Due process applies to any adjudication of important rights.' " *In re Brock,* 442 Mich 101, 110; 499 NW2d 752 (1993), quoting *In re LaFlure,* 48 Mich App 377, 385; 210 NW2d 482 (1973). It is a flexible concept calling " 'for such procedural protections as the particular situation demands.' " *Brock,* p 111, quoting *Mathews v Eldridge,* 424 US 319, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976). Due process requires fundamental fairness, which involves consideration of the private interest at stake, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedures, and the state or government interest, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Brock,* p 111, citing *Mathews,* p 335.

Here, the proceedings got away from the court and rambled out of control. Issues were tried piecemeal, tossed back and forth between referee and judge, and complicated with multiple show cause hearings and motion hearings using four different court reporters, double reversal of findings by the court, twenty-three adjournments, lost records, substitutions of counsel, and partial hearings in propria persona. The record defies review.

In order to accord the parties rudimentary due process, we order bifurcation of the proceedings, reversing all aspects of the property settlement

award, which constitutes the heart of the dispute on appeal, while affirming and leaving intact the judgment of divorce, the order of custody, and the order of support. We remand for a rehearing of the property settlement division before a different circuit court judge. Because this was an eight-year marriage and the record supports the allegations of both parties regarding fault, we order that distribution be made equitably on the basis of a finding of equal fault or no fault.

While our treatment of this case is somewhat unusual, so was the hodgepodge treatment afforded this case below. MCR 7.216(A) confers on this Court the authority to remedy such situations. While we agree with the dissent that defendant may have caused some of the alleged errors, the compounded effect of the delays and irregularities leads us to the conclusion that a new hearing is necessary in the interest of justice to all parties. Our decision renders defendant's specific claims of error moot.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We retain jurisdiction.

M. J. SHAMO, J., concurred.

CAVANAGH, J. *(dissenting).* I respectfully dissent, because I disagree with defendant's contention that he was entitled to an evidentiary hearing de novo before the circuit court. Not only did defendant fail to comply with the requirement of MCL 552.507(5); MSA 25.176(7)(5) that he submit a written request within twenty-one days after the recommendation of the referee was made available to him, *Constantini v Constantini,* 171 Mich App 466, 468-469; 430 NW2d 748 (1988), but he also stipulated the court's use of transcripts of the referee's hearings in lieu of a new evidentiary hearing.

Defendant claims the trial court abused its discretion by adjourning and postponing scheduled trial and hearing dates on approximately twenty-five occasions over a six-year period, citing MCL 552.508; MSA 25.176(8). However, that statute specifies time frames for dispositions of child or spousal support orders only, and makes no mention of any time frame for marital property distribution. Furthermore, while the numerous adjournments have undoubtedly tended to increase the confusion surrounding this case, part of the delay can be attributed to defendant's dilatory tactics, and defendant at no time objected to the adjournment of this matter because of the trial court's conflict with other trials.

I would affirm.

ALAR v MERCY MEMORIAL HOSPITAL

Docket Nos. 139088, 139253. Submitted April 7, 1994, at Detroit. Decided February 6, 1995, at 9:25 A.M.

Christopher M. Alar brought an action in the Monroe Circuit Court against Mercy Memorial Hospital, Gayl Godsell-Stytz, D.O., and Northern Professional Emergency Physicians, P.C., alleging against Dr. Godsell-Stytz claims for damages for breach of the physician-patient privilege and intentional interference with a business relationship. Derivative claims of vicarious liability were brought against Northern Professional, a company providing emergency room physicians to hospitals by contract, and the hospital. The plaintiff also claimed that Dr. Godsell-Stytz' conduct breached a contract entered into between him and the hospital for which the hospital was liable independent of the claims of vicarious liability. The action followed the revocation of the plaintiff's admission to the United States Air Force Academy after the plaintiff's alleged attempted suicide and admission to the emergency room and psychiatric unit at the hospital. The plaintiff's admission to the academy was revoked after a review of the plaintiff's medical records, which occurred after Dr. Godsell-Stytz contacted the academy, without the plaintiff's permission, to notify the academy of the plaintiff's admission to the hospital. The jury found that the doctor was liable for breach of the physician-patient privilege and tortious interference with a business relationship, that the hospital was not vicariously liable for the doctor's tortious conduct, but did breach its contract with the plaintiff, and that Northern Professional was not vicariously liable because the doctor was not its employee. The court, Michael W. LaBeau, J., entered a judgment consistent with the findings of the jury. The hospital appealed from the judgment for the plaintiff, an order denying its motion for judgment notwithstanding the verdict, and an order assessing costs. (Docket No. 139088). The plaintiff cross appealed from the judgment for

REFERENCES

Am Jur 2d, Agency §§ 73, 75, 78-80; Contracts § 164; Physicians, Surgeons, and Other Healers §§ 169, 172, 173; Torts § 26.

Physician's tort liability for unauthorized disclosure of confidential information about patient. 48 ALR4th 668.

Northern Professional, the order assessing costs, the denial of his motions to amend the special verdict and for judgment notwithstanding the verdict, and the grant of costs to the hospital. Dr. Godsell-Stytz appealed from the judgment against her and the denial of her motion for judgment notwithstanding the verdict. (Docket No. 139253). The appeals were consolidated.

The Court of Appeals *held:*

1. The trial court erred in denying the hospital's motions for a directed verdict and judgment notwithstanding the verdict because the plaintiff failed to prove the existence of a contract. The judgment against the hospital must be vacated.

2. The evidence presented a question of fact for the jury to decide regarding whether the doctor was an employee of Northern Professional. The trial court properly denied the plaintiff's motions for a directed verdict or judgment notwithstanding the verdict regarding this issue.

3. The trial court properly denied the plaintiff's motions for a directed verdict and judgment notwithstanding the verdict regarding whether the doctor, who was found to be an agent of the hospital, was acting within the scope of her agency when she breached the plaintiff's right to confidentiality by contacting the academy. The evidence created a question for the jury to decide.

4. The plaintiff's claim that the trial court erred in rescinding the portion of the order awarding the plaintiff costs and attorneys fees against the doctor is rendered moot by the Court of Appeals decision.

5. The award of costs to the hospital was permissible.

6. As a matter of law, the doctor's disclosure about the plaintiff cannot be considered a cause in fact of the rescinding of the plaintiff's appointment to the academy. The doctor's conduct was not a proximate cause of the plaintiff's loss. There is no basis for a conclusion that a different outcome might have occurred had the plaintiff, not the doctor, reported the plaintiff's hospitalization.

7. Because the doctor is not liable to the plaintiff, the other defendants cannot be held liable to the plaintiff under a theory of vicarious liability.

8. In Docket No. 139088, the judgment in favor of Northern Professional must be affirmed and the judgment against the hospital must be vacated. In Docket No. 139253, the judgment against the doctor must be reversed.

Affirmed in part, reversed in part, and vacated in part.

JANSEN, J., concurring in part and dissenting in part, stated

that the hospital is entitled to judgment as a matter of law in Docket No. 139088 and that the plaintiff has failed to raise an issue that requires reversal, except with regard to the award of costs and attorney fees against the doctor. With regard to Docket No. 139253, however, it cannot be said that the doctor's conduct was not a proximate cause of the plaintiff's injury. The trial court's judgment in Docket No. 139088 should be reversed, the judgment against the hospital should be vacated, and the action should be remanded to the trial court to reinstate the order awarding the plaintiff attorney fees against the doctor. The trial court's judgment against Dr. Godsell-Stytz in Docket No. 139253 should be affirmed.

1. CONTRACTS — IMPLIED CONTRACTS — CONSIDERATION — PREEXISTING DUTIES.

An act performed pursuant to a preexisting duty cannot provide the consideration necessary for an implied contract.

2. AGENCY — ACTUAL AUTHORITY — APPARENT AUTHORITY.

The authority of an agent to bind a principal may be either actual or apparent; actual authority may be either express or implied, with implied authority being that authority the agent believes the agent possesses; apparent authority arises where acts and appearances lead a third person reasonably to believe that an agency relationship exists; apparent authority must be traceable to the principal and may not be established by the agent's acts and conduct alone.

3. TORTS — BREACH OF PROFESSIONAL CONFIDENCE — PROXIMATE CAUSE.

A breach of a professional confidence must be a proximate cause of the plaintiff's loss in order to be actionable; proof of two separate elements is required to show proximate cause: cause in fact and legal cause; an injury that would have occurred regardless of the breach cannot be said to have been proximately caused by the breach.

Ready, Sullivan & Ready (by *Thomas D. Ready* and *Dwight R. Robinson*), for Christopher M. Alar.

Law Offices of Thomas J. Trenta, P.C. (by *Thomas J. Trenta* and *Richard T. Counsman*), for Gayl Godsell-Stytz, D.O., and Northern Professional Emergency Physicians, P.C.

Kitch, Saurbier, Drutchas, Wagner & Kenney,

P.C. (by *Susan Healy Zitterman, William A. Tanoury,* and *David R. Nauts*) (*Lisa Diehl Vandecaveye,* of Counsel), for Mercy Memorial Hospital.

Before: CAVANAGH, P.J., and JANSEN and D. C. KOLENDA,* JJ.

CAVANAGH, P.J. In Docket No. 139088, defendant Mercy Memorial Hospital appeals as of right from a January 18, 1991, judgment in favor of plaintiff, a March 8, 1991, order denying its motion for judgment notwithstanding the verdict (JNOV), and a February 13, 1991, order assessing costs. Plaintiff Christopher Alar cross appeals as of right from the January 18, 1991, judgment in favor of defendant Northern Professional Emergency Physicians, P.C., and the February 13, 1991, order assessing costs. Plaintiff also cross appeals from the trial court's denial of his motions to amend the special verdict, for JNOV, and the grant of taxable costs to defendant Mercy Memorial Hospital. We vacate the judgment against Mercy Memorial Hospital and affirm the judgment in favor of Northern Professional Emergency Physicians.

In Docket No. 139253, defendant Gayl Godsell-Stytz, D.O., appeals as of right from the January 18, 1991, judgment against her and from the denial of her motion for JNOV. The appeals were consolidated. We reverse.

FACTS

This case arises from plaintiff's alleged attempted suicide and subsequent admission to the emergency room and psychiatric unit at Mercy Memorial Hospital on June 8, 1988. Plaintiff, who had been appointed to the United States Air Force

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

Academy in March 1988, was a senior high school student at Catholic Central High School at the time of the incident. Plaintiff had been involved in an exclusive relationship with Jill Bodine. During the spring of 1988, plaintiff talked to Jill about harming himself. Plaintiff claimed that he would mention suicide to get Jill's attention or divert it from any problem they may have been having at the moment. Jill testified, however, that she believed plaintiff had been unhappy for a few months and believed he was serious about harming himself.

On June 8, 1988, Jill informed plaintiff that she wanted to date other men in the fall because they were going away to separate universities. Plaintiff objected to this. After Jill left, plaintiff wrote a note suggesting that harm might befall him and he retrieved a gun from his parents' room to make sure that Jill would take him seriously.

Plaintiff then went to the school and gave Jill the note while she was in a student meeting. Jill found plaintiff in a car in the parking lot and plaintiff had the gun in his hand. Plaintiff told Jill that if he could not stay with her, his life was not worth living. Jill attempted to get the gun, but plaintiff was able to keep it away from her. Jill then went back into the school and the principal approached the car and asked plaintiff to help him load some boxes. While plaintiff was in the hallway of the school, the police arrived and plaintiff was taken to Mercy Memorial Hospital.

While in the emergency room, Dr. Godsell-Stytz saw plaintiff, treated him, and they spoke about the Air Force Academy. Dr. Godsell-Stytz was familiar with the Air Force Academy because her husband was a graduate. Eventually, plaintiff was taken to Pineview Center, the psychiatric unit at Mercy Memorial Hospital.

Plaintiff voluntarily admitted himself into Pineview under the care of Dr. Gary Koloff, a psychiatrist. Dr. Godsell-Stytz consulted with Dr. Koloff shortly after plaintiff was admitted. Dr. Godsell-Stytz told Dr. Koloff that she felt the Air Force Academy needed to be informed of plaintiff's situation, but she did not tell Dr. Koloff that she intended to call the academy herself. Further, when she spoke with plaintiff in the emergency room, she did not ask for plaintiff's permission to notify the Air Force Academy and she did not tell plaintiff that she intended to notify the academy.

Dr. Godsell-Stytz called the Air Force Academy and notified Lieutenant Colonel John F. Swiney, Jr., the director of cadet selections at the academy, of plaintiff's admission to the hospital. Lt. Col. Swiney contacted the Department of Defense Medical Examination Review Board and advised them of plaintiff's situation. After a review of plaintiff's medical records, his admission to the Air Force Academy was revoked on June 27, 1988.

Plaintiff filed an action in the Monroe Circuit Court contending that Dr. Godsell-Stytz breached the physician-patient privilege, resulting in the loss of his appointment to the Air Force Academy, and that Dr. Godsell-Stytz' actions constituted intentional interference with a business relationship. Derivative claims of vicarious liability were brought against Northern Professional Emergency Physicians, a company providing emergency room physicians to hospitals by contract, and Mercy Memorial Hospital. Plaintiff also claimed that Dr. Godsell-Stytz' conduct breached a contract entered into between him and Mercy Memorial Hospital for which the hospital was liable independent of the vicarious liability claims.

Following a lengthy jury trial, the jury found

that Dr. Godsell-Stytz was liable for breach of the physician-patient privilege and tortious interference with a business relationship, that Mercy Memorial Hospital was not vicariously liable for Dr. Godsell-Stytz' tortious conduct, but that the hospital breached its contract with plaintiff, and that Northern Professional Emergency Physicians was not vicariously liable because Dr. Godsell-Stytz was not its employee. The jury awarded plaintiff $95,000 in damages. Following postjudgment proceedings regarding motions for JNOV and costs and attorney fees, these appeals ensued.

DISCUSSION

DOCKET NO. 139088

Defendant Mercy Memorial Hospital raises nine issues in its brief; however, we find one issue to be dispositive and we vacate the judgment against Mercy Memorial. We agree with Mercy Memorial that the trial court erred in denying its motions for a directed verdict and JNOV because plaintiff failed to prove the existence of a contract.

I

In reviewing a motion for a directed verdict, this Court views the testimony and legitimate inferences drawn therefrom in a light most favorable to the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds could differ. *Brisboy v Fibreboard Corp,* 429 Mich 540, 549; 418 NW2d 650 (1988). Similarly, if the evidence is such that reasonable minds could differ, then judgment notwithstanding the verdict is also improper. *Davis v Wayne Co Sheriff,* 201 Mich App 572, 579; 507 NW2d 751 (1993).

Plaintiff's claim against Mercy Memorial was premised on an alleged breach of contract. Upon his admission to Pineview, plaintiff was given a "Rights and Privileges" form that summarized his rights under the Mental Health Code. Plaintiff claims that this document is a contract entered into by himself and Mercy Memorial that Mercy Memorial breached when Dr. Godsell-Stytz called the Air Force Academy concerning plaintiff's admission to the hospital.

Mercy Memorial was required by MCL 333.20201; MSA 14.15(20201) to adopt a policy describing the rights and responsibilities of patients and to treat patients in accordance with that policy. Included in this policy is the patient's right to confidential treatment of personal and medical records. MCL 333.20201(2)(c); MSA 14.15(20201)(2)(c). Additionally, Mercy Memorial was required by statute to keep confidential information acquired in the course of providing plaintiff with mental health services. MCL 330.1748; MSA 14.800(748). Therefore, the requirement that such duties be imparted to plaintiff was a preexisting duty under the statute. Because Mercy Memorial had a preexisting statutory duty to afford plaintiff these rights of confidentiality when plaintiff sought the services of the hospital and became a patient, this duty could not provide adequate consideration for any alleged contractual relationship. Mercy Memorial's preexisting duty imposed by statute cannot be considered adequate consideration to create a contract. *Powers v Peoples Community Hosp Authority,* 183 Mich App 550, 554; 455 NW2d 371 (1990); *Penner v Seaway Hosp,* 169 Mich App 502, 510-511; 427 NW2d 584 (1988).

Thus, the trial court erred in denying Mercy Memorial's motions for a directed verdict and JNOV. Other than the rights and privileges docu-

ment, plaintiff presented no evidence regarding the question of consideration supporting an alleged contract. Failing to prove one of the essential elements of a contract, plaintiff could not sustain his claim of breach of contract. We therefore vacate the judgment against defendant Mercy Memorial Hospital.

II

In his cross appeal, plaintiff raises four issues. He first argues that the trial court erred in denying his motion for a directed verdict concerning whether Dr. Godsell-Stytz was an employee of Northern Professional Emergency Physicians. The jury specifically found that there was no employee-employer relationship between Dr. Godsell-Stytz and Northern Professional. We find that because the evidence presented a factual question with regard to this issue, the trial court did not err in denying plaintiff's motion for a directed verdict and all postjudgment motions related to this issue.

Contrary to plaintiff's assertion, the record does not establish that, as a matter of law, an employee-employer relationship existed between Dr. Godsell-Stytz and Northern Professional. The contract at issue presents conflicting evidence regarding Dr. Godsell-Stytz' status. The contract, under the heading "Status of Physician," stated that the physician was an independent contractor for the furnishing of emergency services. However, the contract also provided that Northern Professional would perform all scheduling, including absences, and prohibited absences during certain holiday periods. Northern Professional also had sole discretion to determine whether a complaint by a hospital against a doctor was serious and meritorious enough to warrant immediate termination, and could suspend or terminate the contract under a

variety of circumstances. Further, Northern Professional paid the doctors an hourly wage for services and acquired an assignment of all fees and charges for the doctors' services.

Also, in the agreement entered into by Northern Professional and Mercy Memorial, Northern Professional was defined as a "Michigan professional Corporation employing physicians qualified to provide emergency medicine services." An emergency physician was defined as a "subcontractor or employee of the Corporation." This agreement also provided that Northern Professional is an independent contractor and personnel employed or contracted by Northern Professional were not entitled to benefits provided to hospital employees. Finally, the agreement stated that all personnel provided by Northern Professional are employees or independent contractors of Northern Professional, and Northern Professional was required to pay all compensation and fringe benefits, withhold applicable taxes, pay unemployment compensation fund payments, and maintain worker's compensation fund insurance.

Therefore, viewed in a light most favorable to Northern Professional, the evidence presented a question of fact whether Dr. Godsell-Stytz was an employee of Northern Professional over whom Northern Professional retained the right of control, or whether she was an independent contractor over whom Northern Professional had no control. *Jenkins v Raleigh Trucking Services, Inc,* 187 Mich App 424, 429; 468 NW2d 64 (1991). The trial court did not err in denying plaintiff's motion for a directed verdict or JNOV regarding this issue.

III

Plaintiff next claims that the trial court erred in

denying his motions for a directed verdict and JNOV regarding whether Dr. Godsell-Stytz, who was found to be an agent of Mercy Memorial, was acting within the scope of her agency when she breached plaintiff's right to confidentiality by contacting the Air Force Academy. We again find that there was a factual issue for the jury to determine and that the trial court properly denied the motions for a directed verdict and JNOV.

Plaintiff contends that, as a matter of law, Dr. Godsell-Stytz was acting within the scope of the actual or apparent authority of her agency when she contacted the Air Force Academy concerning plaintiff's admission to the hospital. The authority of an agent to bind a principal may be either actual or apparent. *Meretta v Peach,* 195 Mich App 695, 698; 491 NW2d 278 (1992). Actual authority may be either express or implied. Implied authority is the authority that an agent believes the agent possesses. *Id.* Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists. However, apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent. *Id.,* pp 698-699.

Plaintiff relates the testimony indicating that Dr. Godsell-Stytz called the Air Force Academy from Mercy Memorial, left her name and the hospital's telephone number for the return call, and advised Lt. Col. Swiney that she was a physician at Mercy Memorial. These facts, however, do not prove as a matter of law that Dr. Godsell-Stytz was acting within the scope of any actual or apparent authority. In fact, plaintiff has pointed to no evidence that Mercy Memorial conferred any actual authority on Dr. Godsell-Stytz to inform the Air Force Academy of plaintiff's admission to the

hospital, nor do the facts and circumstances indicate that she had the apparent authority to do this.

Accordingly, viewed in a light most favorable to Mercy Memorial, the evidence, at best, created a jury question regarding whether Dr. Godsell-Stytz was acting within the scope of her authority as an agent of the hospital when she contacted the Air Force Academy. The trial court properly denied plaintiff's motions for a directed verdict and JNOV regarding this issue.

IV

Plaintiff next claims that the trial court erred in rescinding that portion of the February 13, 1991, order awarding plaintiff costs and attorney fees against Dr. Godsell-Stytz. Our disposition of this case and of Docket No. 139253, below, renders this issue moot.

V

Plaintiff last contends that Mercy Memorial is precluded from taxing costs pursuant to MCR 2.625 because this lawsuit involved only a single cause of action and plaintiff prevailed on that cause of action against Mercy Memorial. In light of our resolution of the contract issue raised by Mercy Memorial and finding that plaintiff failed to establish the existence of a contract, we find that the award of costs pursuant to MCR 2.625(B)(3) was permissible.

DOCKET NO. 139253

In this appeal, Dr. Godsell-Stytz raises several issues, of which we find the issue regarding proximate cause to be dispositive.

I

As with all purportedly tortious conduct, a breach of a professional confidence must, in order to be actionable, be a proximate cause of the plaintiff's loss. *Gebhardt v O'Rourke,* 444 Mich 535, 544; 510 NW2d 900 (1994). That requires proof of two separate elements: (1) cause in fact, and (2) legal cause. *Skinner v Square D Co,* 445 Mich 153, 162-163; 516 NW2d 475 (1994). We are reversing in this case because Dr. Godsell-Stytz' disclosure about plaintiff cannot, as a matter of law, be considered a cause in fact of the rescinding of plaintiff's appointment to the Air Force Academy.

It was undisputed at trial that "applicants to the Academy are required to disclose any new illness or injury since completing the final qualifying medical examination and failure to so comply may cause the applicant to be refused admission." Therefore, we must assume that plaintiff would have reported his 1988 hospitalization at Mercy Memorial Hospital. The integrity of the legal process demands that the courts assume that persons with such an obligation will honor it. It would corrode the integrity and effectiveness of the legal system to do otherwise. Cf. *Pantely v Garris, Garris & Garris, PC,* 180 Mich App 768; 447 NW2d 864 (1989). It was also undisputed at trial that plaintiff's appointment was rescinded because, as the result of defendant doctor's report, his medical records were reviewed and a decision was made, on the basis of that review, to take action. That review was performed according to Department of Defense policy by an established board that regularly conducts such reviews.

Three conclusions inevitably follow: (1) it was not defendant doctor's disclosures that resulted in

the rescinding of plaintiff's appointment; that happened as a result of a review of medical records occasioned by the disclosures, a very significant distinction; (2) the very same review would have occurred had plaintiff reported, as he was required to do, his hospitalization; the same board and policy would have been involved; and (3) because the very same review would have occurred, the only principled conclusion to draw is that plaintiff would have lost his appointment. Accordingly, the proofs at trial provide no basis whatsoever to conclude that "but for" defendant doctor's disclosures, plaintiff's "injury" would not have occurred. The contrary conclusion is what was indisputably established by the evidence at trial: when plaintiff did whatever he did on June 8, 1988, he lost his appointment to the Air Force Academy by virtue of that conduct. What defendant doctor did made no difference, meaning that her conduct was not a proximate cause of plaintiff's loss. *Glesner v Jones,* 368 Mich 510, 512; 118 NW2d 378 (1962). Injuries that would have occurred anyway cannot be said to have been proximately caused. *Nielsen v Henry H Stevens, Inc,* 368 Mich 216, 220; 118 NW2d 397 (1962).

With all due respect to our dissenting colleague, we must say that it is patently incorrect to conclude, as she does, that plaintiff's appointment might not have been revoked had he, not defendant doctor, reported his hospitalization because he might have been able to present it "in a different light." The trial record does not allow that conclusion. What resulted in the rescinding of plaintiff's appointment was not defendant doctor's report to the Air Force Academy, but the review of plaintiff's medical records prompted by that report. Had plaintiff reported the hospitalization, as he had to, exactly the same review would have

occurred because the same records would have been studied by the same board for the same reason. In other words, no matter how he reported his hospitalization, even if there was a way to report it differently than had defendant doctor, the outcome would have been the same because plaintiff lacked any ability whatsoever to alter the records of that hospitalization. Therefore, it is not speculative to conclude that the outcome would have been the same had plaintiff reported his hospitalization. There is no basis for a conclusion that a different outcome might have occurred had plaintiff, not defendant doctor, reported that hospitalization.

II

In *Azzar v Primebank, FSB,* 198 Mich App 512; 499 NW2d 793 (1993), this Court, on the basis of several decisions by the Supreme Court of the United States, held that enforcement of the First Amendment guarantee of the right to petition the government can require conferring absolute immunity from liability on any person who presents information to the government upon which the government acts, even if that information would, if disclosed under other circumstances, give rise to tort liability. Defendant doctor contends, alternatively, that she is entitled to such immunity. We are not deciding that contention, however, because we need not decide it in light of our decision regarding proximate cause. We leave the fleshing out of *Azzar* to a case where the need to do that will provide the appropriate focus.

III

It necessarily follows that the other defendants

in this case cannot possibly be held liable to plaintiff for a reason in addition to those ably discussed by Judge JANSEN in her opinion concurring in part. Their liability, if any, is exclusively vicarious. Because defendant doctor cannot, for the reasons discussed above, be held liable to plaintiff, neither other defendant can be held liable, there being nothing from which to derive liability.

DISPOSITION

In Docket No. 139088, the judgment in favor of Northern Professional Emergency Physicians is affirmed and the judgment against Mercy Memorial Hospital is vacated. In Docket No. 139253, the judgment against Dr. Godsell-Stytz is reversed. The issue of mediation sanctions in Docket No. 139088 is moot. We retain no further jurisdiction.

D. C. KOLENDA, J., concurred.

JANSEN, J. *(concurring in part and dissenting in part).* I concur in Docket No. 139088 that defendant Mercy Memorial Hospital is entitled to judgment as a matter of law for the reasons set forth in the majority opinion. I also concur that plaintiff, as the cross appellant in Docket No. 139088, has failed to raise an issue that requires reversal, except with regard to the award of costs and attorney fees. I must respectfully dissent, however, in Docket No. 139253, because I cannot agree that Dr. Godsell-Stytz' conduct was not a proximate cause of plaintiff's injury.

In her appeal, Dr. Godsell-Stytz raises a total of nine issues. I do not find any of these issues to require reversal.

Dr. Godsell-Stytz first argues that the trial court erred in failing to identify properly plaintiff's

claim against her as one alleging malpractice or negligence. She specifically claims that there is no cause of action for breach of the physician-patient privilege.

In *Saur v Probes,* 190 Mich App 636; 476 NW2d 496 (1991), this Court held that a cause of action exists for a psychiatrist's unauthorized disclosure of privileged communications. MCL 600.2157; MSA 27A.2157 prohibits a physician from disclosing information acquired when attending a patient in a professional character if the information was necessary to enable the physician to prescribe for the patient as a physician. The statute does not create civil liability for an unauthorized disclosure. However, the purpose of the statute is to protect the confidential nature of the physician-patient relationship and to encourage free discourse between physicians and their patients. *Swickard v Wayne Co Medical Examiner,* 438 Mich 536, 560; 475 NW2d 304 (1991). As this Court explained in *Saur, supra,* p 639, the statute exhibits this state's policy of protecting physician-patient confidences absent a superseding public or private interest. Therefore, a cause of action exists for a physician's unauthorized disclosure of privileged communications.

Such a cause of action is more akin to an action for a breach of a fiduciary duty or breach of confidentiality rather than an action for negligence or breach of the standard of care. In the absence of any authorization provided by law for the disclosure of the privileged communication, a waiver of the privilege by the patient, or if the disclosure is justified by the supervening interests of society, a third party, or the patient, the breach of the privilege by a physician is rather straightforward. Because an action based on a breach of the physician-patient privilege does not involve the

type of complex medical terms that are involved in a medical malpractice case, there is no need for expert testimony to establish the standard of care and breach thereof. Accordingly, I see no need for plaintiff to have presented expert testimony, as argued by Dr. Godsell-Stytz, where a jury could easily understand the breach of the physician-patient privilege.

The trial court did not err in denying defendant's motion for judgment notwithstanding the verdict (JNOV) on this ground. Further, because the trial court properly identified the cause of action, it did not err in denying defendant's requested jury instructions regarding medical malpractice, duty of care, comparative negligence, and more than one proximate cause because those requested instructions were not applicable in this case. MCR 2.516(D)(2).

Dr. Godsell-Stytz next argues that the trial court erred in denying her motion for a directed verdict because plaintiff failed to raise a factual question regarding the issue of proximate cause. Specifically, she argues that plaintiff failed to show sufficient evidence that her conduct was a proximate cause of the revocation of plaintiff's appointment to the Air Force Academy. I disagree with the majority's conclusion regarding this issue.

Proving proximate cause requires proof of two separate elements: (1) cause in fact, and (2) legal cause. Cause in fact usually requires a showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. Legal cause usually involves examining the foreseeability of consequences, and whether the defendant should be held legally responsible for those consequences. *Skinner v Square D Co,* 445 Mich 153, 162-163; 516 NW2d 475 (1994). A plaintiff must first establish cause in fact before legal cause becomes a relevant

issue. *Id.,* p 163. Usually, proximate cause is a factual issue for the jury to determine. *Schutte v Celotex Corp,* 196 Mich App 135, 138; 492 NW2d 773 (1992).

Viewing the testimony and legitimate inferences therefrom in a light most favorable to plaintiff, I find that there was a factual question on which reasonable minds could differ to justify submitting the issue to the jury. Regarding the cause in fact element, there is no dispute that Dr. Godsell-Stytz telephoned the Air Force Academy shortly after plaintiff's admission to Pineview and informed Lieutenant Colonel John F. Swiney, Jr., of plaintiff's hospitalization. Lt. Col. Swiney then contacted the Department of Defense Medical Examination Review Board (DODMERB) and plaintiff's medical records were reviewed. Ultimately, plaintiff's appointment was revoked. There was testimony from Colonel Larry Jecha, M.D., that a prior suicide attempt is a disqualifying defect for entry into the military and that the immaturity exhibited by plaintiff under stress was sufficient under the DODMERB's regulations to disqualify plaintiff. Lt. Col. Swiney testified that excellent health is required for admission, that psychological impairment such as psychosis, suicidal attempts, and emotional instability could disqualify an applicant, and that suicidal ideation would be a great concern if the DODMERB felt this could manifest itself again under the stress of the academy. Finally, applicants to the academy are required to disclose any new illness or injury since completion of the final qualifying medical examination and failure to so comply may cause the applicant to be refused admission.

However, in this case, there was no opportunity for plaintiff to notify the academy of his admission to Pineview because Dr. Godsell-Stytz called on the

day of plaintiff's admission to Pineview. Thus, there was a factual issue to be determined regarding whether Dr. Godsell-Stytz' telephone call to the academy caused plaintiff's appointment to be revoked or whether the appointment would have been revoked irrespective of whether she contacted the academy. Therefore, where it was speculative regarding whether plaintiff's appointment would have been revoked had he contacted the academy, and where plaintiff could have presented the admission in a different light, I believe the trial court did not err in denying the doctor's motion for a directed verdict regarding this issue. There was a factual question regarding whether, but for the doctor's actions, plaintiff's injury would not have occurred.

Further, I would find a strict violation of the physician-patient privilege by Dr. Godsell-Stytz and hold her liable for this conduct. Dr. Godsell-Stytz' conduct was a proximate cause of plaintiff's injury because she contacted the Air Force Academy regarding plaintiff's hospitalization. I cannot agree that the doctor's conduct made no difference. Dr. Godsell-Stytz violated the physician-patient privilege and her conduct led to a review of the medical records, which in turn led to the revocation of plaintiff's appointment. Therefore, there was a question of fact regarding whether Dr. Godsell-Stytz' conduct proximately caused plaintiff's injury. As our Supreme Court has noted, there may be more than one proximate cause for the same injury and a defendant cannot escape liability for its negligent conduct merely because the negligence of others may also have contributed to the harm. *Brisboy v Fibreboard Corp,* 429 Mich 540, 547; 418 NW2d 650 (1988).

Regarding the issue concerning legal cause, there was a factual issue whether it was foresee-

able that, by contacting the academy in violation of the duty of confidentiality, there was a risk of harm to plaintiff with regard to his status at the academy. Dr. Godsell-Stytz testified that her husband was a former Air Force Academy cadet and an Air Force officer. She was aware that the information she knew about plaintiff's condition was important to the academy and she admitted that her primary concern in notifying the academy was to assist plaintiff's admission to the academy. Such testimony could reasonably permit the jury to find that it was foreseeable to Dr. Godsell-Stytz that plaintiff might lose his appointment because of her disclosure of confidential information to the academy. Accordingly, the trial court did not err in denying the doctor's motion for a directed verdict regarding the issue of proximate cause where there were factual issues for the jury to resolve.

Dr. Godsell-Stytz also argues that the trial court abused its discretion in not allowing medical records from the Monroe County Community Mental Health Clinic to be admitted. Error may not be predicated on a ruling that excludes evidence unless a substantial right of the party was affected. MRE 103(a)(1).

Plaintiff successfully precluded admission of the medical records via a motion in limine based on relevancy. The trial court agreed with plaintiff that, because Dr. Godsell-Stytz was unaware of the mental health clinic records at the time she notified the academy, the records were irrelevant. No substantial right of the doctor was affected by the refusal to admit the medical records because Dr. Godsell-Stytz admitted that she was unaware of the records when she contacted the academy. Further, the Air Force Academy did not become aware of plaintiff's prior treatment at the mental

health clinic until after the investigation started and plaintiff's appointment was put on hold.

Additionally, the records were used by Dr. Godsell-Stytz to impeach plaintiff's testimony at trial. Thus, the substance of the records were made known at trial. I find no error regarding this issue.

Dr. Godsell-Stytz also contends that the trial court erred in starting the trial in the absence of her lead attorney. Apparently, there was a bad snowstorm in the Detroit area on the date that the trial commenced and lead counsel for Dr. Godsell-Stytz was delayed. Cocounsel for Dr. Godsell-Stytz (who was from the same law firm as the lead counsel), indicated that he could stand in for the lead counsel and, therefore, Dr. Godsell-Stytz was represented by an attorney until lead counsel arrived. Dr. Godsell-Stytz has failed to demonstrate any prejudice resulting from the cocounsel's participating in the jury voir dire. I find no error on the part of the trial court in this regard.

Dr. Godsell-Stytz further argues that the trial court erred in allowing plaintiff to pursue causes of action based on the privilege statutes. As previously stated, although the physician-patient privilege statute does not create civil liability, this Court has recognized a cause of action for a psychiatrist's disclosure of privileged communications. *Saur, supra,* pp 637-638. Accordingly, the trial court did not err in allowing plaintiff to pursue a cause of action based on the breach of the physician-patient privilege.

Further, to the extent that defendant doctor also argues in regard to this issue that the trial court erred in allowing the hospital's rules and regulations to be introduced into evidence, that the privilege statutes should not have been the basis for jury instructions, and that she did not breach a privilege because plaintiff's identity is not pro-

tected by the physician-patient privilege, I find these issues to be unpreserved for appellate review because they are not within the scope of the statement of questions presented on appeal. MCR 7.212(C)(4); *Preston v Dep't of Treasury,* 190 Mich App 491, 498; 476 NW2d 455 (1991).

Dr. Godsell-Stytz also claims that the trial court abused its discretion in excluding the opinion testimony of Colonel Thomas C. Wilkinson, the director of admissions for the academy, concerning his interpretation of a cadet's reporting duties. As has been noted, the instructions to appointees booklet includes a paragraph that states that an applicant must report any illness or injury suffered after the final qualifying medical examination. The failure to comply with this requirement may cause the applicant to be refused admission.

MRE 701 provides that a lay witness may give opinion testimony if the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Any opinion by Col. Wilkinson would not necessarily have been helpful to a clear understanding of his testimony or the determination of a fact in issue. Dr. Godsell-Stytz elicited testimony from Col. Jecha that the situation presented by plaintiff's actions would have required plaintiff to report under the provision. Therefore, the jury knew of plaintiff's reporting requirement. A substantial right of Dr. Godsell-Stytz was not affected by the trial court's ruling. MRE 103(a)(2).

Dr. Godsell-Stytz next argues that the trial court erred in denying her motion for JNOV regarding plaintiff's claim of tortious interference with a business relationship. Plaintiff presented sufficient evidence regarding each element to justify submitting the claim to the jury.

The elements of tortious interference with a business relationship are: (1) the existence of a valid business relation or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, and (4) damages to the party whose relationship or expectancy was disrupted. *Winiemko v Valenti,* 203 Mich App 411, 416; 513 NW2d 181 (1994).

First, plaintiff presented evidence that he had a reasonable and valid expectation of being admitted to the Air Force Academy. No one disputes that plaintiff had received an appointment to the academy in March 1988. Regarding the second element, it is clear that Dr. Godsell-Stytz knew of plaintiff's appointment to the academy after she spoke with him in the emergency room. Regarding the third element, there was evidence that Dr. Godsell-Stytz contacted the academy in violation of the physician-patient privilege and without plaintiff's authorization. Dr. Godsell-Stytz' action was in violation of state law and hospital regulations. Plaintiff presented evidence that Dr. Godsell-Stytz' contact with the academy resulted in his appointment being placed on deferred status, and ultimately his appointment was revoked following the DODMERB's investigation. Whether the same result would have occurred had plaintiff notified the academy himself is speculative and at least raises a factual issue for the jury to resolve. Last, plaintiff presented evidence of damages, being the loss of his appointment to the academy and the resulting educational and career damages. Therefore, the trial court did not err in denying Dr. Godsell-Stytz' motion for JNOV regarding the claim of tortious interference with a relationship.

Dr. Godsell-Stytz next argues that the trial court

erred in failing to disqualify a juror who allegedly misrepresented whether the juror had been a patient at Mercy Memorial.

During voir dire, the prospective jurors were asked whether they had been a patient at Mercy Memorial Hospital. Several jurors responded with differing answers. At the start of the fifth day of trial, defense counsel for Mercy Memorial advised the court that he had learned that one of the jurors either had been less than candid or misunderstood the question. Apparently, one of the jurors had been admitted to the psychiatric unit of the hospital. For confidentiality reasons, the name of the juror was not disclosed on the record. Defense counsel stated on the record that there had been a discussion in chambers and that the parties knew of this problem and had agreed not to automatically remove the juror. Defense counsel for Dr. Godsell-Stytz agreed that the juror would not be removed and that the juror would not be questioned.

Immediately after the jury verdict, counsel for Dr. Godsell-Stytz raised the issue of the juror in question. Counsel requested an interrogation of each juror and argued that if any jurors disclosed that they had not been truthful, then he would move for a mistrial. However, the trial court denied the request, noting that none of the parties desired to question or remove the juror when the issue was first brought to the court's attention.

On these facts, I believe Dr. Godsell-Stytz waived this issue for appellate review. She agreed not to question or remove the juror. She may not now claim error with regard to something that her own attorney deemed proper at trial. *People v McCurdy,* 185 Mich App 503, 507; 462 NW2d 775 (1990). To do otherwise would allow her to harbor error as an appellate parachute. *People v Shuler,*

188 Mich App 548, 552; 470 NW2d 492 (1991). She is not entitled to a new trial on this basis.

Last, both Mercy Memorial and Dr. Godsell-Stytz have argued that her communication to the Air Force Academy is protected by the First Amendment right to petition the government. This argument merits little consideration. While the First Amendment of the federal constitution protects the right of the people to petition the government for a redress of grievances, this right is clearly not applicable to the facts of this case. Dr. Godsell-Stytz was not contacting the Air Force Academy for a redress of grievances; rather, she stated that she called the Air Force Academy to help plaintiff have a better chance of entering into or staying in the academy. The trial court did not err in denying defendants' motions for a directed verdict and JNOV regarding this issue.

Finally, because I would conclude that the trial court did not err in denying defendant doctor's motion for a directed verdict or JNOV, I would agree with plaintiff that the trial court erred in rescinding that portion of the February 13, 1991, order awarding plaintiff costs and attorney fees against defendant doctor. The trial court's recision of its order awarding plaintiff attorney fees pursuant to MCR 2.405 was erroneous because Dr. Godsell-Stytz never requested that the order be modified, nor did she object to the entry of the order. Rather, only counsel for codefendant Northern Professional Emergency Physicians, P.C., argued that it was entitled to costs and attorney fees because Northern Professional was the prevailing party. Therefore, I would find that the trial court's original order awarding attorney fees and costs pursuant to MCR 2.405 to plaintiff against Dr. Godsell-Stytz was not an abuse of discretion. *Butzer v Camelot Hall Convalescent Centre, Inc (After*

Remand), 201 Mich App 275, 278; 505 NW2d 862 (1993).

Accordingly, I agree to reverse in Docket No. 139088 and vacate the judgment against Mercy Memorial Hospital. In the cross appeal, I would remand for the trial court to reinstate that portion of the February 13, 1991, order awarding plaintiff attorney fees against Dr. Godsell-Stytz. I would affirm in Docket No. 139253.

PEOPLE v MEZY

Docket No. 143092. Submitted August 2, 1994, at Lansing. Decided February 6, 1995, at 9:30 A.M. Leave to appeal sought.

Basil Mezy was convicted by a jury in the Oakland Circuit Court, Richard D. Kuhn, J., of conspiracy to possess with intent to deliver more than 650 grams of cocaine. Previously, the defendant had been indicted in the United States District Court for the Eastern District of Michigan for conspiracy to possess with intent to distribute more than five kilograms of cocaine, a charge that was dismissed as part of a plea agreement that led to the defendant's conviction on his plea of guilty of laundering monetary instruments. The defendant also had been indicted and convicted in the United States District Court for the Middle District of Florida for conspiracy to possess with intent to distribute more than five kilograms of cocaine and for interstate travel to facilitate a cocaine conspiracy. Before trial of the state charge, the defendant moved to quash the state indictment on the ground of double jeopardy. The trial court denied the motion, holding that while the Michigan and federal prosecutions arose out of the same transaction, the defendant's double jeopardy rights were not violated because the state's interests in prosecuting the defendant were substantially different than the federal government's interests. The defendant appealed.

The Court of Appeals *held:*

1. The panel in *People v Hermiz,* 207 Mich App 449 (1994), held in the appeal of one of the defendant's coconspirators that the Florida federal prosecution did not preclude on double jeopardy grounds the state prosecution. That holding is binding on this panel pursuant to Administrative Order No. 1994-4. Accordingly, the present prosecution was not precluded by reason of the federal prosecution in Florida.

2. A trial court's determinations concerning whether state

REFERENCES

Am Jur 2d, Appeal and Error §§ 702, 703, 821, 873, 883; Criminal Law § 282.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts—modern view. 6 ALR4th 802.

and federal prosecutions arose out of a single criminal transaction and whether a state's interests in the prosecution of an individual are substantially distinct from the interests of the federal government in prosecuting the individual are reviewed de novo, with the trial court's findings of fact being reviewed for clear error.

3. The trial court's finding that the state's prosecution of the defendant and the federal prosecution of the defendant in the United States District Court for the Eastern District of Michigan arose out of the same transaction is not clear error. The time periods alleged, the parties named and charged, and the acts alleged in the respective state and federal indictments all support the conclusion that the crimes charged in the two indictments arose out of the same transaction.

4. In determining whether the federal prosecution satisfied Michigan's interests in prosecuting the defendant under MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), it is necessary to consider whether the maximum penalties of the statutes involved are greatly disparate, whether some reason exists why the federal government cannot be entrusted to vindicate fully this state's interests in securing a conviction, and whether the differences in the statutes are merely jurisdictional or are more substantive.

5. The maximum penalty under both the state and federal statute is life imprisonment. The fact that the state statute makes the life sentence mandatory without possibility of parole while the federal statute permits parole and a sentence for a term of years does not render the penalties of the two statutes greatly disparate.

6. There is no reason why the federal government cannot be entrusted to vindicate fully Michigan's interests in securing a conviction. The fact that the federal prosecutor agreed to dismiss the drug delivery charge during plea negotiations does not demonstrate that the federal government is any less committed to combating drug crimes than is the State of Michigan.

7. Although a conviction under 21 USC 841(b)(1)(A)(ii) requires proof of possession of five kilograms of cocaine while a conviction under the Michigan statute requires proof of possession of only 650 grams of cocaine, that alone does not create a substantive difference between the two statutes.

8. The trial court erred in holding that the federal prosecution did not satisfy Michigan's interests in prosecuting the defendant. Accordingly, the state's prosecution of the defendant violated his rights under the Double Jeopardy Clause of the Michigan Constitution, Const 1963, art 1, § 15.

Reversed.

1. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — STANDARD OF REVIEW.

A trial court's determinations concerning whether state and federal prosecutions arose out a single criminal transaction and whether a state's interests in the prosecution of an individual are substantially distinct from the interests of the federal government in prosecuting the individual are reviewed de novo; the trial court's findings of fact are reviewed for clear error.

2. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — FEDERAL AND STATE PROSECUTIONS.

A determination whether a federal prosecution satisfies a state's interests in prosecuting an individual requires consideration whether the maximum penalties of the respective statutes involved are greatly disparate, whether some reason exists why the federal government cannot be entrusted to vindicate fully the state's interests in securing a conviction, and whether the differences in the statutes are merely jurisdictional or are substantive.

3. CONTROLLED SUBSTANCES — FEDERAL AND STATE PROSECUTIONS.

The federal government's interests in bringing a prosecution for conspiracy to possess with intent to distribute more than five kilograms of cocaine satisfies the same interests that the State of Michigan has in bringing a prosecution for conspiracy to possess with intent to deliver more than 650 grams of cocaine (21 USC 841[a][1], 841(b)(1)(A)(ii), 846; MCL 333.7401[2][a][i], 750.157a; MSA 14.15[7401][2][a][i], 28.354[1]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Richard Thompson,* Prosecuting Attorney, *Joyce F. Todd,* Chief, Appellate Division, and *Robert C. Williams,* Assistant Prosecuting Attorney, for the people.

Laurence R. Imerman, for the defendant.

Before: MICHAEL J. KELLY, P.J., and CAVANAGH and M. J. SHAMO,* JJ.

MICHAEL J. KELLY, P.J. Defendant appeals as of right his conviction of and sentence for conspiracy

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

to possess with intent to deliver more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i); MCL 750.157a; MSA 28.354(1). The trial court imposed the statutory sentence of mandatory life imprisonment without parole. We reverse.

I

In August 1988, defendant was indicted in the United States District Court for the Eastern District of Michigan for conspiracy to possess with intent to distribute more than five kilograms of cocaine in violation of 21 USC 841(a)(1) and 846. Defendant entered into a plea agreement and pleaded guilty of laundering monetary instruments, 18 USC 1956(a)(2)(B)(ii), in exchange for a dismissal of the conspiracy charge. Defendant was sentenced to thirty-three months in federal prison.

In June 1989, defendant was indicted once again in a federal court, this time in the Middle District of Florida, for conspiracy to possess with intent to distribute more than five kilograms of cocaine, 21 USC 841(a)(1) and 846, and interstate travel to facilitate a cocaine conspiracy, 18 USC 1952(a)(3). In July 1990, he was convicted of one count of the former and two counts of the latter and sentenced to one prison term of 264 months and two terms of sixty months, respectively. The terms were to run concurrently with each other but consecutively to the term already being served by defendant.

In July 1990, defendant was charged in the Oakland Circuit Court along with eight others in a single-count indictment alleging thirty-one overt acts as part of a conspiracy to violate § 7401(2)(a)(i). Before trial, defendant filed a motion to quash the indictment on double jeopardy grounds, which he later amended. The circuit court denied the

motion nine months after the defendant had been found guilty as charged by a jury on July 3, 1991.

II

Defendant argues that his double jeopardy rights were violated because his indictment in the state court arose out of the same transaction on which his convictions in the federal court were based. However, with respect to the federal prosecution in Florida, our review of the record reveals no material distinction between the facts of this case and those in *People v Hermiz,* 207 Mich App 449; 526 NW2d 1 (1994), in which another panel of this Court rejected a similar double jeopardy challenge by one of defendant's coconspirators, Issam Hermiz. We are bound under Administrative Order No. 1994-4 to follow the holding in *Hermiz.*

The *Hermiz* decision, however, does not address the prosecution in Michigan federal court, because Issam Hermiz based his double jeopardy challenge only on the Florida federal prosecution. Unlike this defendant, Hermiz was not named in the Michigan federal indictment. We must determine whether defendant's conviction in Michigan federal court barred his subsequent conviction in Michigan state court under double jeopardy principles. We hold that it did.

A

The Double Jeopardy Clause of the Michigan Constitution[1] prohibits prosecution of an offense arising out of the same criminal act that forms the basis of a prior prosecution in another jurisdiction unless it appears from the record that the interests of Michigan and those of the jurisdiction that

[1] Const 1963, art 1, § 15.

initially prosecuted are substantially different. *People v Cooper,* 398 Mich 450, 461; 247 NW2d 866 (1976). Thus, the threshold question in this case is whether defendant's conviction under Michigan law arose out of the same conspiracy or, in the words of *Cooper,* the "same criminal act" as his conviction in Michigan federal court. The Michigan Constitution requires resolution of this issue case by case under the "same transaction test." *People v McMiller,* 202 Mich App 82, 85; 507 NW2d 812 (1993). This test looks at whether the charges grow out of a "continuous time sequence" and demonstrate a "single intent and goal." *Id.*

The "same transaction test" is broader than its federal counterpart, the "same elements test." See *United States v Dixon,* 509 US —, —; 113 S Ct 2849; 125 L Ed 2d 556, 568 (1993), overruling *Grady v Corbin,* 495 US 508; 110 S Ct 2084; 109 L Ed 2d 548 (1990); *McMiller, supra* at 84-85. Nonetheless, we find the factors considered under the federal test useful in applying the Michigan test, particularly in the context of conspiracies. The test used by a majority of federal courts focuses on the totality of the circumstances and considers the following factors: (1) time, (2) persons acting as coconspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged that indicates the nature and scope of the activity that the government sought to punish in each case, and (5) the places where the events alleged as part of the conspiracy took place. See *United States v Thomas,* 759 F2d 659, 662 (CA 8, 1985); *United States v Marable,* 578 F2d 151, 154 (CA 5, 1978).

The trial court reviewed these factors and determined that the Michigan state and federal prosecutions arose out of the same transaction. How-

ever, it ultimately concluded that defendant's double jeopardy rights were not violated because, under the second prong of the *Cooper* analysis, the state interests in prosecuting defendant were substantially different from the federal interests. While review de novo applies to a trial court's holdings concerning whether there was a single criminal transaction and whether the state interests are substantially distinct, see *McMiller, supra* at 84-85; *People v Bero,* 168 Mich App 545, 558-559; 425 NW2d 138 (1988), the court's findings of fact are reviewed for clear error, *People v Stoughton,* 185 Mich App 219, 227; 460 NW2d 591 (1990); *United States v Thomas, supra* at 662. Giving all due deference to the trial court's findings of fact under the "same transaction test," we find no error in its conclusion that defendant's state and federal prosecutions arose out of the same transaction.

The record in this case indicates that the conspiracy charges in the Michigan state and federal indictments clearly arose out of the same transaction. Most notably, the time frame of the state indictment, January 1985 to August 1989, completely encompasses the time frame of the federal indictment, January 1987 to October 1988. Under the federal indictment, defendant was alleged to have been part of a drug conspiracy along with several others who were also listed, though not named, in the state indictment as participants in the drug transactions. Defendant further was alleged to have "met with coconspirators at various locations and obtained quantities of cocaine for distribution in the Eastern District of Michigan and elsewhere." A similar allegation in the same paragraph charged that defendant "met with coconspirators at various locations where he delivered the proceeds of cocaine distribution to oth-

ers." In the following paragraph, Basam Jarges, one of defendant's coconspirators, was alleged to have done the same.

The charges against defendant in the state indictment were strikingly similar. Although the time frame of the state indictment was broader, the most specific of the few overt acts attributed to defendant occurred between November 27, 1987, and January 30, 1988—well within the time frame of the federal indictment. Furthermore, much like the charges in the federal indictment, these acts consisted of meetings "with Jaime Giraldo and Norberto Giraldo, in various locations, including Southfield, Michigan. The purpose of the meetings was to obtain cocaine and to return money to pay for the cocaine." In the same paragraph, coconspirator Basam Jarges was alleged to have done the same. Jaime and Norberto Giraldo were named in the federal indictment and alleged to have obtained cocaine on a periodic basis.

The only other paragraphs of the state indictment referring to defendant simply stated, first, that defendant began working for the Kalasho organization in 1986, second, that defendant traveled with several conspirators to a home in Sterling Heights, Michigan, in December 1988 to recover two kilograms of cocaine stolen from the Kalasho organization, and third, that defendant worked as a "lieutenant" in the Kalasho organization during 1988, delivering cocaine on behalf of the organization. We consider these additional references either too isolated or too general to undermine the trial court's ruling concerning double jeopardy. The transcripts from defendant's trial and other hearings also fail to provide reasons for reversing the ruling of the trial court. In fact, the transcripts provide support for its finding that the state and federal indictments were made

possible by a joint state-federal task force investigation of the drug conspiracy.

The other parties named in each indictment were also strikingly similar. Defendant and coconspirator Basam Jarges were charged in both indictments. Six others named as participants, but not charged, in the state indictment were charged in the federal indictment. A witness at defendant's trial in state court was also named in the federal indictment. The significant overlap bolsters the trial court's conclusion that the state and federal prosecutions arose out of the same transaction.

B

We next review the trial court's application of the second prong of the *Cooper* double jeopardy test: Whether the federal prosecution satisfied Michigan's interest in prosecuting defendant under § 7401(2)(a)(i). *Cooper, supra* at 461. In *Cooper,* the Supreme Court noted three factors relevant to this issue:

> [W]hether the maximum penalties of the statutes involved are greatly disparate, whether some reason exists why one jurisdiction cannot be entrusted to vindicate fully another jurisdiction's interests in securing a conviction, and whether the differences in the statutes are merely jurisdictional or are more substantive. [*Id.*]

These factors are nonexclusive; other factors favoring a defendant's constitutional right are appropriately considered. *People v Gay,* 407 Mich 681, 695; 289 NW2d 651 (1980).

With respect to the first factor, only a great disparity in the sentences authorized by the state and federal drug delivery statutes would suffice to allow a subsequent prosecution in Michigan. *Peo-*

ple v Formicola, 407 Mich 293, 298; 284 NW2d 334 (1979). The maximum penalty to be considered is the potential statutory sentence, not the actual sentence. *Gay, supra* at 695. Here, the maximum penalty under the federal charge, 21 USC 841(b)(1)(A)(ii), was life imprisonment. The maximum penalty under state law is the same. Section 7401(2)(a)(i). Although the Michigan penalty differs in being mandatory, that does not make the sentences "greatly disparate." In theory, the potential maximum punishments are the same. See *Gay, supra* at 697.

With respect to the second factor, there is no reason why the federal government cannot be entrusted to vindicate fully Michigan's interest in securing a conviction. The fact that a conviction was never obtained on the drug-delivery charge is irrelevant. What is relevant is the fact that the federal government had the ability to prosecute defendant on that charge. *People v Tyler,* 100 Mich App 782, 791; 300 NW2d 411 (1980). That the prosecutor agreed to dismiss the drug-delivery charge during plea negotiations can be ascribed to a variety of alternatives within a district attorney's discretion but, we surmise, not to a lack of commitment to combat drug crimes, the same commitment that fueled the state prosecution.

Finally, with respect to the third factor, the only difference between the statutes in this case is the amount of cocaine required for conviction—five kilograms under 21 USC 841(b)(1)(A)(ii) and 650 grams under § 7401(2)(a)(i). This alone does not constitute a substantive difference.[2] Clearly, a con-

[2] Obviously, the federal quantum is significantly greater—in fact, about eight times greater—than the amount required for conviction under the Michigan statute. The reverse argument—i.e., that dealers are subject to life imprisonment more readily under Michigan law—is not on point here.

viction under the Michigan statute is supported by a conviction under the federal statute.

The trial court believed that the "policy and reasoning behind Michigan's statute makes [sic] it substantively different than the federal statutes." The court noted that, unlike Michigan, Congress allowed for the possibility of rehabilitation. However, this reasoning ignores the rule in *Gay, supra,* regarding maximum penalties. The "policy and reasoning" of the Michigan statute is reflected in the maximum sentence, which, we have concluded, is not "greatly disparate" from the sentence under the federal statute.

We conclude that the federal prosecution satisfied Michigan's interest in prosecuting defendant under MCL 333.7401(2)(a)(1); MSA 14.15(7401)(2)(a)(1). Accordingly, defendant's conviction violates the Double Jeopardy Clause of the Michigan Constitution. Because of our holding on this issue, we need not address the remainder of defendant's arguments. Suffice it to say, we find them all meritless.

Reversed.

REEVES v CINCINNATI, INC (AFTER REMAND)

Docket No. 142550. Submitted October 4, 1994, at Detroit. Decided February 6, 1995, at 9:35 A.M.

Hezekiah and Alice Reeves brought an action in the Wayne Circuit Court against Cincinnati, Inc., and Addy-Morand Machinery Company, the manufacturer and dealer respectively of a power press sold to General Motors Corporation, Hezekiah's employer. The plaintiffs sought damages arising out of the amputation of Hezekiah's fingers, pleading products liability claims under the theories of negligent design, implied warranty, and failure to warn. At the close of the plaintiffs' proofs, the trial court, Henry J. Szymanski, J., directed the jury to return a verdict for the defendants. The Court of Appeals, HOLBROOK, JR., P.J., and SHEPHERD and D. L. SULLIVAN, JJ., reversed with respect to the claim based on the theory of defective design, but affirmed with respect to the claims based on the theory of failure to warn. 176 Mich App 181 (1989). The Supreme Court denied leave to appeal. 434 Mich 895 (1990). On remand, the trial court, Michael J. Connor, J., determined that the holding of the Court of Appeals that on retrial "the question of failure to warn need not be submitted to the jury" gave it discretion to determine whether to submit that question to the jury, allowed the previously adjudicated claims based on the theory of failure to warn to go to the jury, and permitted the plaintiffs to submit to the jury a new claim based on the theory of failure to warn. The jury found for the defendants with respect to the claim based on the theory of defective design, but found that defendant Cincinnati, Inc., had breached its duty to warn and to update users of its equipment. The trial court denied Cincinnati, Inc.'s motion for judgment notwithstanding the verdict. Cincinnati appealed.

The Court of Appeals *held:*

REFERENCES

Am Jur 2d, Appeal and Error §§ 744-751; Products Liability § 333.

Manufacturer's or seller's duty to give warning regarding product as affecting his liability for product-caused injury. 76 ALR2d 9.

Erroneous decision as law of the case on subsequent appellate review. 87 ALR2d 271.

Products liability: industrial presses. 8 ALR4th 70.

1. The prior opinion of the Court of Appeals clearly intended to preclude retrial of the adjudicated claims based on the theory of failure to warn. Accordingly, the trial court erred in deciding that it had been granted discretion to allow those claims to be submitted to the jury on retrial. A judgment for defendant Cincinnati, Inc., with respect to the previously adjudicated claims based on the theory of failure to warn should have been entered.

2. The trial court abused its discretion in refusing to grant defendant Cincinnati, Inc.'s motion for judgment notwithstanding the verdict with respect to the added claim based on the theory of failure to warn, because that claim was based on an alleged duty to warn of a latent defect in the press and the jury found that there were no latent defects. Clearly, in the absence of a defect, there can be no duty to warn of a defect and no failure to warn of a defect.

3. A manufacturer of a product has no duty to provide to purchasers of the product notices concerning new, updated, or improved safety devices relating to the product. Accordingly, the trial court should have granted judgment notwithstanding the verdict with respect to the claim based on the theory that defendant Cincinnati, Inc., had a duty to update its customers.

Reversed and remanded.

1. APPEAL — LAW OF THE CASE.

The doctrine of law of the case provides that a ruling of an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue as long as it is unaffected by the opinion of a higher court; the rule applies without regard to the correctness of the determination and even if there has been an intervening or contemporaneous change in the law.

2. PRODUCTS LIABILITY — DUTY TO WARN — SUBSEQUENT IMPROVEMENTS.

A manufacturer of a product has no duty to provide to purchasers of the product notices concerning new, updated, or improved safety devices relating to the product.

Paskin, Nagi & Baxter, P.C. (by *Jeannette A. Paskin* and *Daniel J. Seymour*), for the plaintiffs.

Harvey, Kruse, Westen & Milan, P.C. (by *Dennis M. Goebel* and *Steven D. Brock*), for Cincinnati, Inc.

AFTER REMAND

Before: HOOD, P.J., and TAYLOR and D. A. SERVITTO,* JJ.

TAYLOR, J. This is the second appeal in this products liability case. Previously, plaintiffs appealed from the grant of a directed verdict for both Cincinnati, Inc., and Addy-Morand Machinery Company at the close of plaintiffs' proofs. The trial court ruled that plaintiffs' proofs were insufficient to support their claims of design defect and failure to warn. On appeal in *Reeves v Cincinnati, Inc,* 176 Mich App 181; 439 NW2d 326 (1989), this Court reversed the trial court's grant of a directed verdict with respect to the claim based on the theory of defective design, holding that a rational trier of fact could have found for plaintiffs. *Id.* at 190. However, this Court affirmed the directed verdict with regard to the claims based on the theory of failure to warn. *Id.* Plaintiffs unsuccessfully sought leave to appeal to the Supreme Court. 434 Mich 895 (1990). Following a trial on remand, the jury found for defendant Cincinnati with respect to the claim of design defect, but found that Cincinnati had breached its duty to warn and its duty to update users of its equipment. Cincinnati unsuccessfully sought judgment notwithstanding the verdict. Cincinnati appeals, and we reverse.

Before the second trial, Cincinnati moved to preclude plaintiffs from presenting their theory of failure to warn. Cincinnati relied on this Court's statement: "In the event of retrial, the question of failure to warn need not be submitted to the jury." *Id.* at 190. Ruling for the plaintiffs, the trial court interpreted this language as allowing the trial

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

court discretion concerning the issue whether to submit to the jury the theory of failure to warn. The trial court determined that the previously adjudicated claims based on the theory of duty to warn should be presented to the jury because this Court had considered it only "in passing" and paid "very little attention" to that issue. Further, the trial court also allowed plaintiffs to submit to the jury a new claim based on the theory of duty to warn. Plaintiff's new claim concerned Cincinnati's duty to warn of a latent defect in the single solenoid valve system. The trial court erroneously allowed plaintiffs to present the previously adjudicated claims and the new claim on the ground that subsequent case law changed the law with regard to failure to warn. Cincinnati argues that the trial court committed error by allowing plaintiffs to present their claims based on the theory of failure to warn. We agree.

The doctrine of law of the case holds that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue. *Poirier v Grand Blanc Twp (After Remand),* 192 Mich App 539, 546; 481 NW2d 762 (1992). Thus, a decision of an appellate court is controlling at all subsequent stages of the litigation as long as it is unaffected by a higher court's opinion. *Johnson v White,* 430 Mich 47, 53; 420 NW2d 87 (1988). Further, a question of law decided by an appellate court will not be decided differently on a subsequent appeal in the same case where the facts remain materially the same. *Muilenberg v Upjohn Co,* 169 Mich App 636, 641; 426 NW2d 767 (1988). Indeed, this rule pertains without regard to the correctness of the prior determination. *Id.* The doctrine applies even if there has been an intervening or contemporaneous change in the law. *People v Russell,* 149

Mich App 110, 117-118; 385 NW2d 613 (1985). The reason for the rule is the need for finality of judgment and the want of jurisdiction in an appellate court to modify its own judgments except on rehearing. *Muilenberg, supra* at 641; *Johnson, supra.* Accordingly, because the facts in this case remained materially the same, the law of the case precluded presenting to the jury claims based on the theory of duty to warn; to allow presentation of that theory was error.

The trial court's error arose from an incorrect reading of this Court's prior opinion. Rather than reading the stylistic phrase "need not" in a context that showed it to be tantamount to "shall not," the trial court isolated that phrase in the opinion, took it out of context, and concluded that this Court granted the trial court discretion regarding whether to submit to the jury the issue of duty to warn. However, the trial court's interpretation is not warranted by a reading of this Court's prior opinion taken in context. Our indication that the question "need not" be submitted in the event of retrial was based on the determination that Cincinnati had no duty to warn in the first place. *Reeves, supra* at 190. The trial court's reading was not in keeping with this state's established judicial policy that the doctrine of law of the case is a bright-line rule to be applied virtually without exception. See *Russell, supra* at 114.

In view of this Court's decision in the prior appeal, the trial court erred in submitting the duty to warn theories to the jury regardless of subsequent development in the case law. *Id.*

Furthermore, the trial court abused its discretion in denying Cincinnati's motion for judgment notwithstanding the verdict with respect to the claim based on the duty to warn of a latent defect in the single solenoid valve. Because the jury

found that the press was not defectively designed, there was no latent defect about which Cincinnati possibly could have had a duty to warn.

Cincinnati further argues that the court erred in allowing the jury to consider the claim that it had a duty to continue to provide General Motors with notices concerning new, updated, or improved safety devices for the press that it had sold to General Motors in 1950. In the special verdict form, the jury found that Cincinnati breached its "duty to update users" of its equipment. No such duty is recognized in Michigan.

In a case analogous to the instant case, this Court held that although a manufacturer has a duty to warn of latent defects, there is no duty to cure, repair, or modify such latent defects. *Gregory v Cincinnati, Inc,* 202 Mich App 474, 482-483; 509 NW2d 809 (1993). While not expressly addressing whether a manufacturer has a continuing duty to "update" a purchaser concerning state of the art safety devices for products that had not been considered to be defective when manufactured and sold, such a holding concerning "the duty to update" would follow logically from the *Gregory* opinion's reasoning. If a manufacturer is not required to cure a defect in the circumstance of a latent defect, a manufacturer who produces products without defects, latent or otherwise, certainly cannot be required to provide to previous purchasers notices of updated features. Indeed, where no duty to warn exists, none can be said to continue.

The policy rationale for this position was set out well in *Lynch v McStome & Lincoln Plaza Ass'n,* 378 Pa Super 430, 441; 548 A2d 1276 (1988):

> The clear effect of imposing such a duty would be to inhibit manufacturers from developing improved designs that in any way affect the safety of

> their products, since the manufacturer would then be subject to the onerous, and oftentimes impossible, duty of notifying each owner of the previously sold product that the new design is available for installation, despite the fact that the already sold products are, to the manufacturer's knowledge, safe and functioning properly.

The Pennsylvania Superior Court continued by indicating that, as a policy matter, where the product in question had been under the control of the purchaser for a number of years, it is

> clearly more appropriate to impose a duty to insure that the product is functioning properly or to update the design of the product in the light of new technology on [the parties in control of the product] rather than on the manufacturer who relinquished control years ago. [*Id.* at 441-442.]

Therefore, the trial court erred in failing to grant Cincinnati's motion for judgment notwithstanding the verdict with respect to the claim based on the "updating" theory.

Finally, we agree with Cincinnati that the trial court was without jurisdiction to tax costs incurred by plaintiffs in the prior appeal. *Bloemsma v Auto Club Ins Ass'n (After Remand),* 190 Mich App 686, 692-693; 476 NW2d 487 (1991). The record indicates that the trial court awarded plaintiffs $10,382.60 in costs incurred by plaintiffs in the first appeal. On remand, we order that this amount be stricken from the total costs awarded to plaintiffs.

Reversed and remanded to the circuit court for entry of a judgment for defendant Cincinnati, Inc.

MIDDLETON v PAROLE BOARD (ON REMAND)

Docket No. 152139. Submitted January 19, 1995, at Grand Rapids. Decided February 6, 1995, at 9:40 A.M.

Robert L. Middleton, serving a sentence of life imprisonment for second-degree murder, brought an action for mandamus in the Court of Appeals against the parole board, seeking an order directing the board to conduct a public hearing concerning parole for him. The Court of Appeals denied relief. The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for plenary consideration. 439 Mich 995 (1992).

On remand, the Court of Appeals *held:*

MCL 791.234(6); MSA 28.2304(6) and MCL 791.244(2)(f)-(h); MSA 28.2314(2)(f)-(h) do not require the parole board to conduct a public hearing concerning parole for a prisoner until after the board decides to proceed toward a grant of parole. Notwithstanding the plaintiff's assertions that the board had informed him that parole would be considered after he completed twenty years of his sentence and that the board had begun an investigation of his case for parole, the board has yet to decide to proceed toward a grant of parole to the plaintiff. Accordingly, no public hearing is required at this time.

Relief denied on complaint for mandamus.

PAROLE — PAROLE BOARD — PUBLIC HEARINGS.

A public hearing by the parole board concerning parole for a prisoner is not required by statute until after an initial decision by the board to proceed toward a grant of parole (MCL 791.234[6], 791.244[2][f]-[h]; MSA 28.2304[6], 28.2314[2][f]-[h]).

Robert L. Middleton, in propria persona.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Thomas A. Kulick,* Assistant Attorney General, for the defendant.

REFERENCES

Am Jur 2d, Pardon and Parole § 87.

See ALR Index under Parole, Probation, and Pardon.

ON REMAND

Before: SAWYER, P.J., and BANDSTRA and R. B. BURNS,* JJ.

SAWYER, P.J. This is an original action for mandamus. We initially denied relief on plaintiff's complaint by an order dated September 19, 1991. However, plaintiff thereafter sought leave to appeal to the Supreme Court and the Supreme Court, in lieu of granting leave, vacated this Court's order and remanded the matter for plenary consideration. *Middleton v Parole Board,* 439 Mich 995 (1992). On plenary consideration, we again deny plaintiff's complaint.

According to plaintiff, he was convicted in 1968 of murder in the second degree, MCL 750.317; MSA 28.549, and thereafter sentenced to serve life in prison. After a July 1983 parole interview, a member of the parole board recommended that plaintiff serve at least twenty years before being given meaningful parole consideration. Plaintiff further alleges that in 1988 the parole board did vote to proceed with the investigation of his case toward parole. However, plaintiff's case has never been brought on for a public hearing, a required step before a prisoner serving a life term may be granted parole. Plaintiff claims that he is entitled to a public hearing. We disagree.

The parole of a prisoner serving a life term is governed by the provisions of MCL 791.234(6); MSA 28.2304(6), which currently provides as follows:[1]

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

[1] The provisions of the statute have changed somewhat since plaintiff initially filed his complaint for mandamus. However, those changes do not affect the outcome of this case and the same result

> A prisoner under sentence for life or for a term of years, other than a prisoner sentenced for life for murder in the first degree or sentenced for life or for a minimum term of imprisonment for a major controlled substance offense, who has served 10 calendar years of the sentence in the case of a prisoner sentenced for a crime committed before October 1, 1992, or who has served 15 calendar years of the sentence in the case of a prisoner sentenced for a crime committed on or after October 1, 1992, is subject to the jurisdiction of the parole board and may be released on parole by the parole board, subject to the following conditions:
>
> (a) One member of the parole board shall interview the prisoner at the conclusion of 10 calendar years of the sentence and every 5 years thereafter until such time as the prisoner is paroled, discharged, or deceased. The interview schedule prescribed in this subdivision applies to all prisoners to whom this subsection is applicable, whether sentenced before, on, or after the effective date of the 1992 amendatory act that amended this subdivision.
>
> (b) A parole shall not be granted a prisoner so sentenced until after a public hearing held in the manner prescribed for pardons and commutations in sections 44(2)(f) to (h) and 45. Notice of the public hearing shall be given to the sentencing judge, or the judge's successor in office, and parole shall not be granted if the sentencing judge, or the judge's successor in office, files written objections to the granting of the parole within 30 days of receipt of the notice of hearing. The written objections shall be made part of the prisoner's file.

The public hearing provisions referred to in the above statute are contained in MCL 791.244(2)(f)-(h); MSA 28.2314(2)(f)-(h), which provides as follows:

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would be reached regardless of whether we analyze the current version of the statute or the version that existed when plaintiff's complaint was filed.

(f) Conduct a public hearing not later than 90 days after making a decision to proceed with consideration of a recommendation for the granting of a reprieve, commutation, or pardon. The public hearing shall be held before a formal recommendation is transmitted to the governor. One member of the parole board who will be involved in the formal recommendation may conduct the hearing, and the public shall be represented by the attorney general or a member of the attorney general's staff.

(g) At least 30 days before conducting the public hearing, provide written notice of the public hearing by mail to the attorney general, the sentencing trial judge, and the prosecuting attorney, or their successors in office, and each victim who requests notice pursuant to the crime victim's rights act, Act No. 87 of the Public Acts of 1985, being sections 780.751 to 780.834 of the Michigan Compiled Laws.

(h) Conduct the public hearing pursuant to the rules promulgated by the department. Except as otherwise provided in this subdivision, any person having information in connection with the pardon, commutation, or reprieve shall be sworn as a witness. A person who is a victim shall be given an opportunity to address and be questioned by the parole board at the hearing or to submit written testimony for the hearing. In hearing testimony, the parole board shall give liberal construction to any technical rules of evidence.

The essence of plaintiff's argument is that, because the parole board determined that plaintiff would be given meaningful parole consideration after having served twenty years of his sentence and because the parole board decided to continue the investigation into granting plaintiff parole, he is entitled to the public hearing outlined in the statute above and, ultimately, parole if the facts adduced at the hearing support that decision. We disagree.

The flaw in plaintiff's reasoning is that the requirement of a public hearing does not establish a right for the prisoner; rather, the requirement establishes a restriction on the authority of the parole board. That is, the statute does not establish a public hearing to ensure that a prisoner is fully considered for parole, but establishes a public hearing as a means of preventing the parole board from *granting* parole without a full consideration of the facts involved.

This is reflected by the provisions of the first sentence of MCL 791.244(2)(f); MSA 28.2314(2)(f).[2] Under that initial provision, the public hearing is held after the parole board makes a decision to proceed with consideration of recommending a reprieve, commutation, or pardon with respect to the prisoner's serving a term of life imprisonment without parole, or to parole a prisoner serving a parolable life term. Thus, the case is presented in a posture of the parole board's having determined that clemency or parole should be granted, but a public hearing must be held before that recommendation of clemency may be transmitted to the governor or before parole can be granted.

For the above reasons, we hold that the parole board is not obligated to hold a public hearing until after it decides to proceed with parole.[3] In other words, the parole board is under no obligation to hold a public hearing unless it initially determines that it desires to parole the prisoner, in which case a public hearing must be held before

[2] It should be noted that MCL 791.244; MSA 28.2314 directly concerns the procedures to be employed in considering the grant of a reprieve, commutation, or pardon for a person serving a sentence of life imprisonment without parole. The public hearing provisions of that statute, however, are adopted by MCL 791.234; MSA 28.2304 for use in considering paroles of prisoners serving parolable life terms.

[3] Of course, the final determination to parole a prisoner is subject to the parole board's determination following that hearing; otherwise, the public hearing would be rendered a nullity.

parole may be granted. The prisoner has no right to a public hearing absent the parole board's decision to hold one.

To the extent that plaintiff argues that the parole board created a contractual obligation to conduct a public hearing by informing plaintiff that it would give meaningful parole consideration after plaintiff served twenty years of his sentence or by investigating in detail the prospects of parole, that argument is obviously without merit. No such contract exists.

Relief on the complaint for mandamus is denied. Defendant may tax costs.

STANDARD FEDERAL SAVINGS BANK v GENESEE COUNTY

Docket No. 159462. Submitted December 20, 1994, at Detroit. Decided February 6, 1995, at 9:45 A.M.

Standard Federal Savings Bank redeemed a parcel of realty that had a state equalized value of over $1,000 and that had been deeded to the state following a tax sale ordered by the Genesee Circuit Court. To redeem the property, Standard Federal paid the delinquent taxes and the additional penalty provided in MCL 211.131e(3); MSA 7.190(3)(3) of fifty percent of the tax upon which foreclosure had been made. Standard Federal thereafter petitioned the Tax Tribunal for a refund by Genesee County of the penalty paid. The Tax Tribunal granted summary disposition for Standard Federal and ordered a refund. Genesee County appealed. The Court of Appeals allowed the Attorney General to intervene.

The Court of Appeals *held:*

1. Section 131e(3) requires payment of the penalty for a redemption following the expiration of the redemption period provided by MCL 211.131c(1); MSA 7.190(1)(1), which allows redemption at any time before the first Tuesday in November following the vesting of title in the state. For property with a state equalized value of $1,000 or more, the redemption period of § 131c is extended by § 131e(1) until owners of a significant property interest in the land have been notified of a hearing before the Department of Treasury. In this case, Standard Federal redeemed the parcel at issue before notification of a hearing before the Department of Treasury. Accordingly, the redemption period of § 131c(1), as extended by § 131e(1), had not expired and no penalty was due pursuant to § 131e(3).

2. Contrary to the Attorney General's assertion, the Tax Tribunal had jurisdiction to decide the penalty issue inasmuch as the penalty necessarily is related to the actual delinquent taxes, interest, and special assessment fees that must be paid in order to redeem the property.

Affirmed.

REFERENCES

Am Jur 2d, State and Local Taxation § 860.

See ALR Index under Fines, Penalties, and Forfeitures.

TAXATION — TAX SALE REDEMPTIONS — PENALTIES.

An additional penalty of fifty percent of the tax upon which foreclosure was made may not be imposed for redemption of property that has a state equalized value of $1,000 or more and that has been deeded to the state following a tax sale until owners of a significant property interest in the land have been notified of a hearing before the Department of Treasury (MCL 211.131c[1], 211.131e[1],[3]; MSA 7.190[1][1], 7.190[3][1],[3]).

Mason, Steinhardt, Jacobs & Perlman (by *Jonathan B. Frank*), for the petitioner.

Richard M. Barron, for the respondent.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Thomas J. Emery* and *Roland Hwang,* Assistant Attorneys General, for the Attorney General.

Before: DOCTOROFF, C.J., and T. G. KAVANAGH* and R. C. LIVO,** JJ.

DOCTOROFF, C.J. In this case of first impression, we decide at what point in time the payment of an additional penalty of fifty percent of the tax upon which foreclosure was made becomes necessary in order to redeem property pursuant to MCL 211.131e(3); MSA 7.190(3)(3). We hold that payment of the penalty under MCL 211.131e(3); MSA 7.190(3)(3) is necessary upon expiration of the redemption period set forth in MCL 211.131c(1); MSA 7.190(1)(1), as extended by MCL 211.131e(1); MSA 7.190(3)(1), and affirm the Tax Tribunal's grant of summary disposition in favor of petitioner Standard Federal Savings Bank.

The facts are undisputed. The property in question went to tax sale in May 1990 pursuant to

* Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1994-7.

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

MCL 211.60; MSA 7.104 because of delinquent 1987 taxes. Thereafter, it was deeded to the State of Michigan pursuant to MCL 211.67a; MSA 7.112(1).

Petitioner Standard Federal Savings Bank purchased and redeemed the property on November 27, 1991, pursuant to MCL 211.131e(1); MSA 7.190(3)(1). The state equalized value of the property is greater than $1,000. At the time of the closing, petitioner paid taxes and penalties to respondent Genesee County in the amount of $1,237,789.62. Of this amount, $102,823.20 represented a fifty percent penalty imposed under MCL 211.131e(3); MSA 7.190(3).

Petitioner filed this action seeking a return of the penalty. Petitioner filed a motion for summary disposition, arguing that because it redeemed the property before it received notice of a hearing before the Department of Treasury, it was improper to impose the fifty percent penalty.

Respondent argued that because petitioner redeemed the property after the first Tuesday in November following the vesting of title in the state, the penalty was properly imposed.

The Tax Tribunal ruled in favor of petitioner and ordered reimbursement of the fifty percent penalty.

MCL 211.131e(3); MSA 7.190(3)(3) imposes a penalty on the redemption of property as follows:

> *Following expiration of the redemption periods provided by section 131c,* property may be redeemed up to 30 days following the date of hearing provided by this section by the payment of the amounts provided for in subsection (4) and in section 131c(1), plus an additional penalty of 50% of the tax upon which foreclosure was made. . . . [Emphasis added.]

The redemption period provided by MCL 211.131c(1); MSA 7.190(1)(1) is as follows:

> Parcels at any time *before the first Tuesday in November following the vesting of title in the state* may be redeemed by the payment to the county treasurer of all amounts due on the lands as delinquent taxes and special assessments that had been assessed . . . . [Emphasis added.]

This redemption period is extended by MCL 211.131e(1); MSA 7.190(3)(1) with regard to property with a state equalized value of over $1,000:

> *The redemption period* on those lands deeded to the state pursuant to section 67a that have a state equalized value of $1,000.00 or more *shall be extended until owners of a significant property interest in the lands have been notified of a hearing before the department of treasury.* . . . [Emphasis added.]

On appeal, petitioner argues that the redemption period of § 131c(1) as referred to in § 131e(3) includes the extension of that period by § 131e(1) and that the penalty therefore is properly imposed only when the property is redeemed after notification of a hearing before the Department of Treasury. Petitioner further argues that because it redeemed the property before notification of the hearing, the penalty was improperly imposed.

Respondent replies that the penalty provided in § 131e(3) is properly imposed on expiration of the redemption period set forth in § 131c(1) (after the first Tuesday in November of 1991), notwithstanding the extension of that redemption period by § 131e(1).

Because reasonable minds can differ concerning the meaning of the statute with regard to the timing of the imposition of the fifty percent penalty, judicial construction of the statute is appro-

priate. *Dep't of Social Services v Brewer,* 180 Mich App 82, 84; 446 NW2d 593 (1989).

We construe the statute as follows. The phrase "Following the expiration of the redemption periods provided by section 131c" in MCL 211.131e(3); MSA 7.190(3)(3) refers to the redemption period provided by section 131c *as extended by section 131e(1).* Every phrase, clause, and word of a statute must be given effect. *Gebhardt v O'Rourke,* 444 Mich 535, 542; 510 NW2d 900 (1994); *Jenkins v Great Lakes Steel Corp,* 200 Mich App 202, 209; 503 NW2d 668 (1993). To hold as respondent urges would be to render § 131e(1) without meaning or function.

Because petitioner redeemed the property before notification of a hearing before the Department of Treasury—before the expiration of the redemption period set forth in § 131c(1), as extended by § 131e(1)—petitioner was not subject to the penalty of $102,823.20. Petitioner is entitled to reimbursement of this amount.

Intervenor Attorney General asserts that the Tax Tribunal lacked jurisdiction to interpret the penalty provision and to order refund of the penalty where the tax sale was conducted pursuant to an order of the circuit court. The Attorney General argues that an appeal from the circuit court judgment should be pursued in the appellate courts.

The penalty imposed herein for redemption of properties after a certain date necessarily is related to the actual delinquent taxes, interest, and special assessment fees that must be paid in order to redeem the property. MCL 211.131c(3); MSA 7.190(1)(3). The tribunal possessed jurisdiction to decide the instant action. *Xerox Corp v Oakland Co,* 191 Mich App 433; 478 NW2d 702 (1991).

Affirmed.

PEOPLE v GROVE

Docket No. 161031. Submitted October 6, 1994, at Marquette. Decided February 6, 1995, at 9:50 A.M.

Richard W. Grove pleaded guilty in the Delta Circuit Court, Robert E. Goebel, J., to one count of fourth-degree criminal sexual conduct. He agreed to plead guilty in exchange for dismissal of one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct and the prosecutor's promise to recommend that his sentence not exceed one year in the county jail. The trial court took the plea under advisement and ordered the preparation of a presentence investigation report. After reviewing the report, the court rejected the plea agreement and the guilty plea. Following a jury trial regarding two counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct, the defendant was convicted of one count of second-degree criminal sexual conduct. The court, Dean J. Shipman, J., imposed a sentence of forty months' to fifteen years' imprisonment. The defendant appealed.

The Court of Appeals *held:*

1. A trial court's discretion to refuse to accept a guilty plea is contingent on the terms of the parties' plea agreement. A trial court retains the option to reject a defendant's guilty plea only when the plea agreement includes a specific sentence agreement. The court may not reject a guilty plea based on a plea agreement that includes a sentence recommendation by the prosecutor but must, instead, state the sentence that it finds to be appropriate and give the defendant an opportunity to accept that sentence or withdraw the guilty plea.

2. The trial court abused its discretion in refusing to accept the defendant's plea of guilty of one count of fourth-degree criminal sexual conduct. The conviction of second-degree criminal sexual conduct must be reversed and the case must be remanded to the trial court. On remand, the trial court must permit the defendant to plead guilty of fourth-degree criminal

REFERENCES

Am Jur 2d, Criminal Law §§ 484, 486.

See ALR Index under Guilty Plea.

sexual conduct in exchange for a sentence consistent with the terms of the parties' previous plea agreement. If the trial court elects to reject the recommended sentence, it must state the sentence it finds appropriate and give the defendant the opportunity to affirm or withdraw his guilty plea.

Reversed and remanded.

CRIMINAL LAW — PLEA BARGAINS — GUILTY PLEAS — SENTENCE AGREEMENTS — SENTENCE RECOMMENDATIONS.

A trial court's discretion to refuse to accept a guilty plea is contingent on the terms of the parties' plea agreement; a trial court may reject a defendant's guilty plea only where the plea agreement includes an agreement for a specific sentence; a trial court may not reject a guilty plea where the plea agreement includes a sentence recommendation by the prosecutor but, instead, must state the sentence that it finds to be appropriate and give the defendant the opportunity to accept that sentence or withdraw the guilty plea (MCR 6.302[C][3]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Thomas L. Smithson,* Prosecuting Attorney, and *Steven B. Flancher,* Assistant Attorney General, for the people.

Lester O. Pollak, for the defendant on appeal.

Before: GRIFFIN, P.J., and SAWYER and R. L. ZIOLKOWSKI,* JJ.

GRIFFIN, P.J. Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced to forty months' to fifteen years' imprisonment. Defendant now appeals as of right. We reverse.

On August 2, 1991, defendant pleaded guilty to one count of fourth-degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5). Defendant agreed to plead guilty to the charge in exchange for the prosecutor's promise to recommend that

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

his sentence not exceed one year in the county jail. In addition, the prosecutor agreed to dismiss one count of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of second-degree criminal sexual conduct. The trial court took the plea agreement under advisement and ordered the preparation of a presentence investigation report (PSIR). On October 8, 1991, the trial court rejected the plea agreement and underlying guilty plea after reviewing the PSIR:

> The Court has had the benefit of reading the presentence report, and I've had a conference with counsel and Mr. Ayotte of the corrections department in chambers. I noted to them that I had read the defendant's version of the incident, as well as the victim's version, and had read her recommendation. I noted that there was a wide disparity between the victim's version of what had happened, the length of time it had gone on, versus that of the victim [sic]. I noted the victim recommended prison time and the cap as recommended by the prosecutor would not allow for prison time. I indicated that I thought I had the discretion, having taken the plea under advisement, and needed to first rule on whether or not I would accept the guilty plea. I indicated in chambers that it was not my intent to accept the guilty plea. I do not feel it would be in the interest of justice. I feel that there is such a wide disparity between what the victim claims had happened, as opposed to what the defendant claimed had happened, and the victim's desire of a prison term that it would not be fair and in the interest of justice to accept this matter plea bargained to fourth degree.

Following the trial court's refusal to accept defendant's guilty plea, he was tried on two counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct.

The narrow issue we address on appeal is

whether a trial court is able to exercise its discretion to refuse to accept a guilty plea underlying a plea agreement that includes a prosecutorial sentence recommendation.

In resolving this issue, we find dispositive the interplay between MCR 6.301(B) and MCR 6.302(C)(3). MCR 6.301(B) provides that "[a] defendant may enter a plea of nolo contendere only with the consent of the court." The staff comments to MCR 6.301(B) set forth the history of this provision and its intended purpose:

> Subrule (B) is a modification of a provision in former 6.101(F). The former rule provided that the court's consent was required before a defendant would be permitted to plead guilty or nolo contendere. Subrule (B) has deleted the requirement for the court's consent to a plea of guilty. The consent provision in the former rule has been construed as giving the trial court the discretion to refuse to accept a guilty plea because of disagreement with the plea bargain agreed to by the prosecutor and the defendant. See *People v Ott,* 144 Mich App 76 (1985). *Accordingly, deletion of the consent provision indicates that the trial court may not refuse to accept a guilty plea based solely on disagreement with the wisdom of the plea, of the charge, or of the plea bargain, unless the bargain is conditioned on the court's agreement to some provision, such as sentence disposition. See 6.302(C)(3).* As is noted in subrule (A), however, the court may refuse to accept a plea based on noncompliance with a requirement in these rules. [Emphasis added.]

In contrast, MCR 6.302(C)(3) incorporates and clarifies the sentence-bargaining procedures articulated in *People v Killebrew,* 416 Mich 189, 206-212; 330 NW2d 834 (1982), regarding a trial court's options when faced with a plea agreement that

includes a specific sentence disposition or a prosecutorial sentence recommendation:

> (3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may
>
> (a) reject the agreement; or
>
> (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or
>
> (c) accept the agreement without having considered the presentence report; or
>
> (d) take the plea agreement under advisement.
>
> If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement.

Although not addressed by MCR 6.302(C)(3), this Court in *People v Siebert,* 201 Mich App 402, 410-411; 507 NW2d 211 (1993), lv gtd 446 Mich 865 (1994), set forth the substantive distinctions recognized in *Killebrew* between a plea agreement that includes a specific sentence disposition and one containing a prosecutorial sentence recommendation:

> A sentence recommendation is but a recommendation, without agreement by the court. *Killebrew* at 208. There is no promise of a specific sentence, and the court's sentencing discretion is completely unfettered. The court may accept the guilty plea, yet refuse to be bound by the sentence recommendation. The only restriction, set forth both in

> *Killebrew* and in the court rule, is that if the court does not follow the sentence recommendation, the defendant must be given an opportunity to withdraw the guilty plea. A sentence agreement is, however, an agreement for a specific sentence. Under *Killebrew,* the court has the option of accepting the plea and imposing the agreed-upon sentence, or rejecting the plea. *Killebrew* at 207. *Killebrew* took great care to distinguish sentence agreements from sentence recommendations and did not state an option of accepting a plea involving a sentence agreement and imposing a different sentence subject to the defendant's affirmance of the plea, as is the case with a sentence recommendation.

On the basis of *Killebrew* and our reading of the staff comments to MCR 6.301(B), we find unpersuasive the people's argument that MCR 6.302(C)(3) gives a trial court the discretion to refuse to accept a defendant's guilty plea. Unlike MCR 6.301(B), MCR 6.302(C)(3) refers to a trial court's acceptance or rejection of a plea agreement rather than the underlying guilty plea itself. Further, although we recognize that MCR 6.302(C)(3) allows a trial court to reject a plea agreement based upon a prosecutorial sentence recommendation, it is silent regarding the underlying plea.

In our view, both *Killebrew* and the staff comments to MCR 6.301(B) recognize that a trial court's discretion to refuse to accept an underlying guilty plea is contingent on the terms of the parties' plea agreement. Under the sentence-bargaining procedures articulated in *Killebrew,* a trial court retains the option to reject a defendant's underlying guilty plea only when the plea agreement includes a specific sentence disposition. In contrast, *Killebrew* requires a trial court that rejects a plea agreement that includes a sentence recommendation to state the sentence that it finds

to be appropriate and give the defendant the opportunity to withdraw the guilty plea. See also *People v Cobbs,* 443 Mich 276, 282; 505 NW2d 208 (1993). In short, neither *Killebrew* nor MCR 6.302(C)(3) gives a trial court the discretion to reject a guilty plea underlying a plea agreement that includes a prosecutorial sentence recommendation.

Further support for this position is found in the staff comments to MCR 6.301(B). The staff comments indicate that a trial court may exercise its discretion to refuse to accept a guilty plea only when the plea agreement "is conditioned on the court's agreement to some provision, such as sentence disposition." As noted in *Killebrew,* the chief distinction between a sentence recommendation and a sentence agreement is that a prosecutorial "recommendation" does not bind the court. Thus, unlike a plea agreement where a defendant agrees to plead guilty in exchange for a specific sentence disposition, a prosecutorial sentence recommendation does not require mutual agreement by the court.

In summary, we conclude that the trial court abused its discretion in refusing to accept defendant's plea of guilty of one count of fourth-degree criminal sexual conduct. We reverse defendant's conviction of second-degree criminal sexual conduct and remand the case to the circuit court. On remand, we instruct the trial court to permit defendant to plead guilty of fourth-degree criminal sexual conduct in exchange for the terms of the parties' previous plea agreement. If the trial court elects to reject the recommended sentence, then it must state the sentence it finds appropriate and give defendant the opportunity to affirm or withdraw his guilty plea.

Our resolution of this issue renders it unneces-

sary to address defendant's remaining issues on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

In re POWERS

Docket No. 170851. Submitted October 19, 1994, at Grand Rapids. Decided February 6, 1995, at 9:55 A.M.

The Department of Social Services petitioned the Montcalm County Probate Court to take jurisdiction of Kayla Marie Powers, the minor child of Rodney Powers and Nikki Lynn Strayer, an unmarried couple. The DSS alleged that Powers would abuse Kayla like he abused Aaron Strayer, Nikki Strayer's son by another man. The court, Edward L. Skinner, J., pursuant to a jury verdict, took jurisdiction of Kayla and placed her with the DSS. The court thereafter terminated Rodney Powers' parental rights to Kayla. Rodney Powers appealed.

The Court of Appeals *held:*

1. The allegations set forth in the petition and the testimony in support of those allegations more than sufficiently established probable cause for the probate court's jurisdiction.

2. Anticipatory neglect or abuse, the proposition that how a parent treats one child is probative of how that parent may treat another child, as enunciated in *In re Dittrick,* 80 Mich App 219 (1977), provides an appropriate basis for invoking probate court jurisdiction under MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2).

3. MCL 712A.19b(3)(b)(1); MSA 27.3178(598.19b)(3)(b)(1), which provides that the rights of a parent to a child may be terminated if the child or a sibling of the child has suffered physical or sexual abuse by the parent and there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home, is not a proper ground for terminating Rodney Powers' parental rights to Kayla on the basis of his abuse of Aaron inasmuch as Rodney is not the father of Aaron, nor is he a person legally responsible for Aaron's care.

4. MCL 712A.19b(3)(c)(1); MSA 27.3178(598.19b)(3)(c)(1), which provides that the rights of a parent to a child may be terminated if the parent was a respondent in a child protective

REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 49.

See ALR Index under Children.

proceeding, if 182 days or more have elapsed since the issuance of an initial dispositional order, and if the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the condition will be rectified within a reasonable time considering the age of the child, is a proper basis for terminating Rodney Powers' parental rights to Kayla. Another ground for termination of those rights is MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g), which provides that parental rights may be terminated if the parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.

5. There was clear and convincing evidence to support the termination of Rodney Powers' parental rights to Kayla. The probate court therefore did not abuse its discretion in terminating those rights.

Affirmed.

PARENT AND CHILD — ANTICIPATORY NEGLECT OR ABUSE — PROBATE COURT JURISDICTION.

Anticipatory neglect or abuse, i.e., how a parent treats one child is probative of how that parent may treat another child, provides an appropriate basis for invoking the jurisdiction of the probate court over a child whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity of a parent, is an unfit place in which to live (MCL 712A.2[b][2]; MSA 27.3178[598.2][b][2]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Larry Hachman,* Prosecuting Attorney, *Andrea A. Evanski,* Assistant Prosecuting Attorney, for the Department of Social Services

Arney E. Mustonen, for Rodney Powers.

Thomas L. Wilson, for Kayla M. Powers.

Before: MURPHY, P.J., and G. S. ALLEN* and H. A. BEACH,** JJ.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1994-7.

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

G. S. ALLEN, J. In this case the parties ask us to determine whether the *Dittrick* doctrine, as set forth in *In re Dittrick,* 80 Mich App 219; 263 NW2d 37 (1977), applies only to parents who abuse or neglect *their own children.* The issue raised is one of first impression. We conclude that the principle of anticipatory neglect (or abuse) should be extended to a live-in boyfriend who has abused a sibling of a child, and affirm the decision of the probate court.

Respondent Rodney Powers appeals as of right the July 1, 1992, order of the Montcalm County Probate Court determining jurisdiction and the October 26, 1993, order of that court terminating parental rights to respondent's daughter, Kayla Marie Powers (born June 29, 1992). The court's termination of parental rights was based on MCL 712A.19b(3)(b)(i); MSA 27.3178(598.19b)(3)(b)(i) (a sibling of the child has suffered physical injury caused by a parent), MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i) (the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that they will be rectified within a reasonable time), and MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g) (the parent, without regard to intent, fails to provide proper care or custody and there is no reasonable expectation that the parent will be able to do so within a reasonable amount of time).

Respondent, the live-in boyfriend of Nikki Lynn Strayer, lived with Strayer and her infant son, Aaron Strayer (born March 19, 1991) from the date Aaron was five or six months old until Aaron was removed from Strayer's care on December 26, 1991, by order of the Montcalm County Probate Court. The grounds for Aaron's removal were Strayer's inability to care properly for Aaron and respondent Powers' violent conduct toward Aaron

resulting in severe injuries to Aaron's leg when Powers removed Aaron from his crib.[1]

Following Aaron's removal, respondent continued to live with Strayer, who some six months later, on June 29, 1992, gave birth to Kayla Marie Powers. It is undisputed that Johnnie Lee Archer is the father of Aaron, and that respondent Powers is the father of Kayla. It is also undisputed that Strayer was not married to either Archer or Powers.

On July 1, 1992, the Department of Social Services petitioned the Montcalm County Probate Court for jurisdiction over Kayla. The petition alleged, inter alia, that Strayer could not be and was not a suitable parent for Aaron, that Strayer was neglectful or abusive to Aaron, and that Kayla would be subjected to the same improper care that was given to Aaron.

At the conclusion of the hearing on July 1, 1992, the probate court found that in light of the severe injuries to Aaron, coupled with Strayer's lack of readiness to care for Kayla, there was a substantial risk of harm to Kayla should she remain with Strayer. However, the court made no specific findings regarding respondent Powers. The probate court authorized the petition, placed Kayla with the DSS, and ordered supervised visitation of Kayla by Strayer and Powers.

On August 4, 1992, the DSS amended its petition to include allegations against respondent Powers that Powers was cruel to Aaron in that he had picked up the child in a harsh manner when he knew Aaron's leg was caught in the side of the crib. It was also alleged that Strayer had stated that respondent can be violent. The DSS further alleged that pursuant to the *Dittrick* doctrine, the

[1] *In re Strayer,* unpublished opinion per curiam of the Court of Appeals, decided January 19, 1995 (Docket No. 171046).

care of one child may be imported to all children living in the household. See *Dittrick, supra* at 222.

On August 19, 1992, a jury trial was held in the probate court to determine whether the allegations in the amended complaint were true, and whether the probate court should take jurisdiction over Kayla with respect to respondent Powers. At the close of the prosecution's proofs, respondent Powers moved for a directed verdict on the ground that MCL 712A.19b(3)(b)(i); MSA 27.3178(598.19b)(3)(b)(i) did not apply to him. Powers argued that the statute does not apply to a person who is not a parent of the abused or neglected sibling (i.e., Aaron) or was not a party to the proceedings involving the abused or neglected sibling. The court ruled that respondent Powers was Aaron's custodian, and in such role acted as a surrogate father. The court ruled that Powers was a "parent" to Aaron under MCR 5.903(12). The court further found that because Powers was a parent to Aaron, the *Dittrick* doctrine did apply to him.

On August 20, 1992, after less than one hour of deliberations, the jury returned with a finding of probate court jurisdiction over Kayla with respect to both Strayer and Powers. On August 25, 1992, the probate court ordered Kayla placed under its jurisdiction and placed her with the DSS.

On September 14, 1992, a dispositional hearing was held in the probate court, and all parties agreed that to encourage bonding and appropriate parenting, respondent Strayer and Kayla would be placed in the same foster care home, and respondent Powers would be given weekly visitation rights. However, at a probate court review hearing held on March 8 and 11, 1993, proofs disclosed that Strayer had moved out of the foster care home and was again living with Powers. Review hearings conducted on May 5 and June 16, 1993,

continued to disclose that neither Strayer nor Powers was making more than "very minimal" progress in correcting the conditions that led to probate court jurisdiction, and that Powers appeared "barely able to care for himself let alone a child." On July 28, 1993, the DSS petitioned for termination of Strayer's and Powers' parental rights to Kayla.

At an October 6, 1993, hearing on the petition, extensive testimony was presented by all parties. On October 26, 1993, the probate court terminated respondent Powers' parental rights to Kayla. Respondent Powers raises three grounds for reversal.

I

Respondent first argues that the July 1, 1992, order of the probate court taking jurisdiction was in error. However, respondent's brief contains no citation in support of such a claim. All that is offered to support respondent's first argument is the flat statement that "at no point in the transcript does it state that there is probable cause to authorize the petition against Rodney Powers."

We find that the allegations set forth in the DSS' petition and the testimony in support of those allegations (in particular the testimony of witness Patricia Kuhn) more than sufficiently established probable cause for the court's jurisdiction.

Further, a probate court's jurisdiction in parental rights cases can be challenged only on direct appeal, not by a collateral attack. *In re Hatcher,* 443 Mich 426, 439; 505 NW2d 834 (1993). In the instant case, respondent neither directly appealed the probate court's exercise of jurisdiction nor requested a rehearing of this issue during the time the court had jurisdiction over the child or within twenty days after the order terminating parental

rights was entered. MCL 712A.21; MSA 27.3178(598.21); *Hatcher, supra* at 436. Accordingly, respondent no longer has the ability to challenge the probate court's exercise of jurisdiction. *Id.* at 444.

II

Respondent argues that the probate court erred in applying the *Dittrick* doctrine because: (1) the doctrine applies only to change of custody situations, not to probate court jurisdiction, and (2) respondent was not a party to the proceedings involving Aaron and was not the parent, custodian, or caretaker of the child (Aaron) who was actually abused and neglected.

Respondent cites no case law or other authority in support of his first argument. Consequently, the issue is effectively abandoned. *People v Hunter,* 202 Mich App 23, 27; 507 NW2d 768 (1993). However, this Court need not rely on abandonment because respondent's first argument lacks substantive merit. The *Dittrick* doctrine stems from *In re Dittrick, supra,* and related cases[2] standing for the proposition that how a parent treats one child is certainly probative of how that parent may treat other children. The doctrine and supporting case law is otherwise known as anticipatory neglect. This jurist was the author of *In re Dittrick.* At pages 222-223, that opinion squarely provides that "probate court jurisdiction in such matters" is acquired pursuant to statute when any child under age seventeen is found within the county:

(2) whose home or environment, by reason of

[2] *In re LaFlure,* 48 Mich App 377; 210 NW2d 482 (1973); *In re Futch,* 144 Mich App 163; 375 NW2d 375 (1984); *In re Andeson,* 155 Mich App 615; 400 NW2d 330 (1986); *In re Parshall,* 159 Mich App 683; 406 NW2d 913 (1987).

> neglect, cruelty, drunkenness, criminality or depravity *on the part of a* parent, guardian *or other custodian,* is an unfit place for such child to live in. [MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2). Emphasis added.]

Consistent with *Dittrick,* we find that the principle of anticipatory neglect (or, in this case, anticipatory abuse) may provide an appropriate basis for invoking probate court jurisdiction.[3]

We find respondent's second argument, that *Dittrick* does not apply because he was "not a party to" the proceedings involving Aaron, to be disingenuous. Respondent became tangentially involved in those proceedings when he was cited as the person responsible for Aaron's injuries. Proofs in the case of *In re Strayer,* unpublished opinion per curiam of the Court of Appeals, decided January 19, 1995 (Docket No. 171046), and in the instant case, clearly identified respondent as the individual who abused young Aaron.

However, respondent's argument that *Dittrick* does not apply because he was not Aaron's "parent" presents a more serious question. *Dittrick, supra,* and all the cases cited at n 2, *supra,* involved situations where the respondent was the parent of both the children involved. Thus, on this issue, respondent presents an issue of first impression.

Respondent's rights were terminated pursuant to the following provisions of MCL 712A.19b(3); MSA 27.3178(598.19b)(3):

> The court may terminate the parental rights of a *parent* to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

[3] In *Dittrick,* we concluded that the probate court lacked jurisdiction because the DSS' petition for temporary custody was filed before the child was born. However, in the instant case the DSS waited until Kayla was born before filing its petition.

* * *

(b) The child *or a sibling of the child* has suffered physical or sexual abuse under . . . the following circumstances:

(i) *A parent's act* caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in *the parent's* home.

* * *

(c) *The parent* was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . . the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child.

* * *

(g) The *parent,* without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that *the parent* will be able to provide proper care and custody within a reasonable time considering the age of the child. [Emphasis added.]

The probate court terminated respondent's parental rights pursuant to three separate statutory provisions, MCL 712A.19b(3)(b)(i), (c)(i), and (g); MSA 27.3178(598.19b)(3)(b)(i), (c)(i), and (g). However, respondent's argument here addresses only the applicability of subsection 3(b)(i).

The probate court found subsection 3(b)(i) applicable after determining that respondent should be considered the "parent" of Aaron because of respondent's role as Aaron's custodian. The court relied upon the definition of "parent" set forth in

MCR 5.903(12), which includes a child's custodian.[4] We find that the court erred when it ruled that respondent was Aaron's parent for purposes of subsection 3(b)(i) because, contrary to MCR 5.903(12), nothing in the proofs disclosed that respondent Powers ever was "legally responsible" for Aaron. However, this Court will not reverse a trial court's decision if the right result is reached for the wrong reason. *Paul v Bogle,* 193 Mich App 479, 492; 484 NW2d 728 (1992).

This is a difficult case because of two competing considerations. Common sense dictates that the principle of anticipatory abuse discussed in *Dittrick, supra,* should also apply in this case despite the fact that respondent Powers was not the father, guardian, or legal custodian of the previously abused child (Aaron). On the other hand, a decision to terminate parental rights must be in accordance with a specific statutory provision under MCL 712A.19b(3); MSA 27.3178(598.19b)(3). In order to apply subsection 3(b)(i) of the statute to this case, there would have to be a determination that respondent Powers was a "parent" of the previously abused child. Although it may be in the best interests of the children of this state to construe subsection 3(b)(i) to apply to a live-in boyfriend such as respondent Powers, the plain language of the statute indicates that the Legislature could not have intended such an interpretation when it enacted the statute.[5]

While we find that subsection 3(b)(i) does not

[4] Under the court rule, the word "parent" means "a person who is legally responsible for the control and care of the minor, including a mother, father, guardian, or custodian, other than a custodian of a state facility, a guardian ad litem, or a juvenile court-ordered custodian." MCR 5.903(12).

[5] Interestingly, this Court also was faced with a question of legislative intent in *Dittrick, supra* at 223, concerning whether the probate court could take jurisdiction over an unborn child.

strictly apply to this case, we find that the *Dittrick* doctrine should not be limited to situations where parents abuse or neglect *their own children.* The doctrine of anticipatory neglect or abuse should be extended to guarantee the protection of a child who is not yet born, i.e., because of the past conduct of another person, there is good reason to fear that the second child, when born, will also be neglected or abused. As in *Dittrick, supra* at 223, we again urge the Legislature to consider appropriate amendments of the Probate Code in the best interests of the children of this state.

In this case, while our expansion of the principle of anticipatory abuse may not fit precisely within MCL 712A.19b(3)(b)(i); MSA 27.3178(598.19b)(3)(b)(i), we might look to another statutory provision, MCL 712A.19b(3)(i); MSA 27.3178(598.19b)(3)(i), for further guidance. Applying subsection 3(i) to this case, when the probate court terminated respondent Powers' parental rights to Kayla, the parental rights to Kayla's sibling, Aaron, had already been terminated. Further, also pursuant to the statute, there was abundant evidence that prior attempts to rehabilitate respondent Powers were unsuccessful. While there is again some question about legislative intent when applying subsection 3(i) to this case involving a live-in boyfriend, we find that this provision also permits the drawing of inferences based upon the history of the child's home environment.

However, regardless of the applicability of subsections 3(b)(i) and 3(i), the probate court also terminated respondent Powers' parental rights pursuant to MCL 712A.19b(3)(c)(i) and (g); MSA 27.3178(598.19b)(3)(c)(i) and (g). At the very least, respondent's prior abusive activity toward Aaron would certainly be relevant to his ability to provide proper care and custody for Kayla under

subsection 3(g). Further, subsection 3(c)(i) also provides an independent basis for terminating respondent's parental rights.

In the instant case, Aaron was a sibling of Kayla, sharing the same mother (Strayer). Proofs at the preliminary and adjudicative hearings disclosed that respondent Powers was living with Strayer and nine-month-old Aaron when Aaron sustained multiple fractures of the left leg, that respondent admitted he may have caused the fractures, and that when respondent would tend to Aaron when he was crying, Aaron would scream at his highest pitch. Proofs further showed that at the time Kayla was born, Strayer and Powers had resumed living together and that neither Strayer nor Powers was making satisfactory progress in being able to provide for Kayla.

To hold, as urged by respondent, that the *Dittrick* doctrine applies only to parents who abuse or neglect their own children is contrary both to the mandate that the statute be liberally construed, MCL 712A.1(2); MSA 27.3178(598.1)(2), and to the rule that the purpose of child protective proceedings is to protect the child. *In re Marin,* 198 Mich App 560, 564; 499 NW2d 400 (1993).

III

Lastly, respondent contends that the probate court erred in finding that sufficient proofs were presented to terminate respondent's parental rights to Kayla. In particular, respondent avers that although there may be some circumstantial evidence to support the probate court's findings, this Court will, on review of the record, be left with a firm and definite conviction that the probate court made a mistake. To the contrary, the probate judge's fourteen-page opinion leaves us with a firm conviction that he made no mistake.

Dr. Donald Boyd, a psychologist, testified that respondent Powers suffered from the following problems: (1) a closed-head injury; (2) episodic substance abuse; (3) major depressive episodes (intermittent); and (4) developmental disability.

Pam Robinson, respondent's therapist, agreed with Dr. Boyd that respondent had difficulty planning and cognitively organizing complex tasks, and she expressed concern over Powers' parenting ability.

Parenting instructor Diana Surrell testified that Powers was not able to follow instructions, had a low frustration level, and became upset when Kayla cried. Respondent argues that Dr. Boyd and Pam Robinson agreed that respondent had the ability to improve if he was persistent in his efforts. However, our reading of their testimony indicates that it would take too long at the slow rate at which respondent was progressing. All witnesses agreed that despite his (slow) progress, respondent was not capable of adequately parenting a child.

Finally, our review of respondent's own testimony indicates that respondent lacked the capacity to care adequately for Kayla. Accordingly, we hold that the probate court did not abuse its discretion in terminating respondent's parental rights.

Affirmed.

SAGINAW GENERAL HOSPITAL v CITY OF SAGINAW

Docket No. 163177. Submitted November 15, 1994, at Lansing. Decided February 6, 1995, at 10:00 A.M.

Saginaw General Hospital petitioned the Tax Tribunal, seeking a determination that its child care center for the exclusive use of hospital employees and the real estate on which it is located is exempt from ad valorem taxation by the City of Saginaw because it is property used for hospital or public health purposes. The tribunal ruled that the tax exemption for property used for hospital or public health purposes, MCL 211.7r; MSA 7.7(4-o), did not apply to the child care center or the real estate. The petitioner appealed.

The Court of Appeals *held:*

The Tax Tribunal erred as a matter of law in ruling that the child care center and the real estate was not exempt from taxation under MCL 211.7r; MSA 7.7(4-o). The child care center qualifies for an exemption from taxation as property used for hospital or public health purposes. The center advances the hospital's goal of providing more cost-efficient health care and the hospital's overall mission. The child care center aids the hospital in maintaining a fully staffed hospital and providing adequate medical personnel.

Reversed.

Braun Kendrick Finkbeiner (by *Scott C. Strattard*), for the petitioner.

Dorothea Johnson, Chief Assistant City Attorney, for the respondent.

Before: WEAVER, P.J., and CORRIGAN and C. D. CORWIN,* JJ.

CORRIGAN, J. In this case of first impression, petitioner Saginaw General Hospital appeals as of

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

right from a judgment of the Tax Tribunal denying tax exempt status for the Saginaw Hospital Child Care Center (the Center). We hold that the Tax Tribunal erred as a matter of law in ruling that petitioner's child care center and the real estate on which it is located was not exempt from ad valorem taxation as property used for hospital or public health purposes, MCL 211.7r; MSA 7.7(4-o).

I. UNDERLYING FACTS

Petitioner Saginaw General Hospital, a Michigan nonprofit corporation, owns and operates a freestanding child care center for the exclusive use and benefit of hospital employees. In 1990, respondent City of Saginaw assessed and levied taxes on the Center, including the building and real estate. After unsuccessful appeals to the board of review in 1990, 1991, and 1992, the hospital petitioned the Tax Tribunal, claiming that the Center was exempt from taxation under the hospital or public purpose exemption, MCL 211.7r; MSA 7.7(4-o), to the General Property Tax Act, 1893 PA 206, MCL 211.1 *et seq.*; MSA 7.1 *et seq.* The parties submitted a stipulated statement of facts for the Tax Tribunal's consideration. In relevant part, the parties agreed:

> 16. The nurses, hospital personnel and other health care professionals are often required to work evening and night shifts, weekends and holidays and such scheduling requirements make it extremely difficult for these individuals to secure adequate child care.
>
> 17. The Hospital surveyed the child care services available in the Saginaw region and determined there was an acute shortage of child care to cover 7:00 A.M. starting times, weekends, holidays, eve-

nings, twelve hour shifts and availability on short notice.

* * *

19. The lack of the necessary child care had resulted in the Hospital experiencing increased turnover, absenteeism and tardiness, and had made it difficult for the Hospital to staff unusual and holiday shifts.

20. The turnover and absenteeism resulting from the lack of adequate child care required the Hospital to expend substantial funds for recruitment and overtime pay.

* * *

22. The Center allows the Hospital to utilize part-time employees, and thus realize a savings in overtime pay, to fill vacancies in a given shift by allowing the Hospital to call in the part-time employees on short notice.

23. The Hospital's decision to open the Center was based upon its review of the data available to it at the time and its conclusion that the Center would reduce Hospital personnel costs, reduce absenteeism, turnover and tardiness and would increase the certainty and efficiency of scheduling.

* * *

28. Prior to the opening of the Center, the Hospital's employees relied upon part-time and full-time baby-sitters, and dispersed daycare centers. The Hospital's employees often were unable to report for work at the Hospital due to an emergency or unexpected circumstances pertaining to child care.

After a hearing, the Tax Tribunal denied petitioner's request. It ruled that use of hospital property for child care purposes does not qualify as a hospital or public health purpose.

II. THE HOSPITAL OR PUBLIC HEALTH EXEMPTION

The sole question raised on appeal is whether

the Center qualifies for an exemption from taxation as property used for "hospital or public health purposes." In the absence of fraud, this Court reviews a decision of the Tax Tribunal to determine whether the tribunal erred in applying the law or adopted a wrong principle.[1] *Michigan Bell Telephone Co v Dep't of Treasury,* 445 Mich 470, 476; 518 NW2d 808 (1994). We hold that the Tax Tribunal erred as a matter of law in interpreting MCL 211.7r; MSA 7.7(4-o). The Center is property used for hospital or public health purposes and is therefore exempt from taxation.

In general, tax exemption statutes are to be strictly construed in favor of the taxing authority. *Michigan United Conservation Clubs v Lansing Twp,* 423 Mich 661, 664; 378 NW2d 737 (1985); *Ladies Literary Club v Grand Rapids,* 409 Mich 748, 753-754; 298 NW2d 422 (1980). "However, this rule does not mean that we should give a strained construction which is adverse to the Legislature's intent." *United Conservation Clubs, supra* at 665.

MCL 211.7r; MSA 7.7(4-o) provides:

> The real estate and building of a clinic erected, financed, occupied, and operated by a nonprofit corporation or by the trustees of health and welfare funds is exempt from taxation under this act, if the funds of the corporation or the trustees are derived solely from payments and contributions under the terms of collective bargaining agreements between employers and representatives of employees for whose use the clinic is maintained. *The real estate with the buildings and other property located on the real estate on that acreage,*

[1] Generally, this Court also reviews the tribunal's findings of fact for support by competent, material, and substantial evidence on the whole record. *Michigan Bell Telephone Co v Dep't of Treasury,* 445 Mich 470, 476; 518 NW2d 808 (1994). However, the Tax Tribunal did not make findings of fact because the parties stipulated the facts of this case.

> *owned and occupied by nonprofit trust and used for hospital or public health purposes is exempt from taxation under this act,* but not including excess acreage not actively utilized for hospital or public health purposes and real estate and dwellings located on that acreage used for dwelling purposes for resident physicians and their families. [Emphasis added.]

In granting a tax exemption to a hospital, only those facilities that are reasonably necessary for the competent operation of the hospital should receive tax exempt status. *Memorial Child Care v Dep't of Revenue,* 238 Ill App 3d 985; 604 NE2d 530 (1992) (use of the hospital child care facility was for a purpose reasonably necessary to the efficient administration of the hospital and therefore tax exempt); *Immanuel, Inc v Bd of Equalization of Douglas Co,* 222 Neb 405; 384 NW2d 266 (1986) (on-site hospital child care facility held tax exempt because it was reasonably necessary to the competent administration of the hospital).

Before the Center opened, petitioner had experienced substantial difficulty in fully staffing the hospital with necessary medical personnel. This personnel problem resulted from the absence of child care facilities in the Saginaw area capable of servicing the extraordinary child care needs of hospital employees. Physicians and nurses had been unable to secure adequate child care because they routinely were required to work emergency, weekend, holiday, and night shifts. As a result, the hospital experienced high turnover rates, tardiness, and frequent absenteeism among its employees. By providing in-hospital child care, the hospital has successfully alleviated these problems. Indeed, it seems to be undisputed that the Center advances the hospital's goal of providing more cost-efficient health care to the people of Saginaw.

Nevertheless, the Tax Tribunal denied petitioner's request because the provision of child care, standing alone, does not constitute a "hospital" or "public health" purpose. The Tax Tribunal erred in failing to consider that petitioner's child care center served to advance the hospital's overall mission. Petitioner opened the Center to mitigate its increasing difficulties in maintaining a fully staffed hospital. Thus, the Center does not merely provide child care, it allows the hospital to staff its round-the-clock shifts. The hospital does not operate the Center for the mere convenience of its employees, but because it is necessary to provide adequate medical personnel.

We consider the entire hospital facility, including the property in question, in determining whether a hospital or public health purpose is served. See, generally, anno, *Exemption from real-property taxation of residential facilities maintained by hospital for patients, staff, or others,* 61 ALR4th 1105, 1108. (Where a statutory provision makes the use of the property the test of exemption, the question is whether the primary use is reasonably necessary for fulfilling, or is reasonably incident to, the primary purpose of the organization claiming the exemption.)

Taken to its logical conclusion, the Tax Tribunal's stand-alone analysis would deny tax exempt status to a variety of hospital functions that do not involve direct patient care. Areas of the hospital used for administrative purposes, the hospital cafeteria, and even visitor waiting rooms might be denied tax exemptions. Analyzed alone, these hospital operations would not qualify as hospital or health care purposes. Yet, all these hospital functions are reasonably necessary to the competent, efficient operation of Saginaw General Hospital.

The Tax Tribunal also analogized the child care facility with the statutory exclusion from tax exempt status of real estate used for dwelling purposes for resident physicians and their families. We think that analysis was mistaken. The origin of the hospital or public health exemption is found in 1952 PA 54, which amended the charitable exemption to the General Property Tax Act, 1893 PA 206, MCL 211.7; MSA 7.7. In *Oakwood Hosp Corp v State Tax Comm,* 374 Mich 524; 132 NW2d 634 (1965), our Supreme Court ruled that dwellings owned by a hospital for use by resident physicians and their families qualified as property used for hospital or public health purposes. The Legislature swiftly amended the hospital or public health exemption to exclude physician dwellings in 1966 PA 320. The physician dwellings exclusion is not implicated in this case because the Tax Tribunal did not conclude that the Center fell within that exclusion to the exemption. Rather, it ruled that the Center did not fall within the general scope of the exemption for hospital or public health purposes.

Under the maxim "*expressio unius est exclusio alterius,*" the express mention of one thing in a statute implies the exclusion of other similar things. *United States Fidelity & Guaranty Co v Amerisure Ins Co,* 195 Mich App 1, 6; 489 NW2d 115 (1992). The Legislature has not acted to exclude on-site child care from tax exempt status. The Tax Tribunal should not add exclusions, but should faithfully apply the statutory test.

The Tax Tribunal erred in ruling that the Saginaw Hospital Child Care Center does not qualify as tax exempt property.

Reversed.

WEAVER, P.J., did not participate

BAKER v WASTE MANAGEMENT OF MICHIGAN, INC

Docket Nos. 156441, 163677. Submitted November 10, 1994, at Detroit. Decided February 7, 1995, at 9:00 A.M.

Marvin Baker and others brought an action in the Wayne Circuit Court against Waste Management of Michigan, Inc., and several other trash haulers, Compost Systems, Inc., the Western Townships Utilities Authority, and Canton Township and several other municipalities, alleging nuisance relating to a composting facility operated by Compost Systems with equipment leased from the authority and that accepted yard waste transported by defendant trash haulers from defendant municipalities. The court, John H. Gillis, Jr., J., granted summary disposition for the trash haulers, the municipalities, and the authority. The plaintiffs filed two appeals from the orders of summary disposition. The appeals were consolidated.

The Court of Appeals *held:*

1. The Western Townships Utilities Authority is a governmental agency created pursuant to statute and is immune from tort liability where, as here, it is engaged in the discharge of a governmental function.

2. The *trespass-nuisance exception to governmental immunity* does not bar defendants municipalities and authority from raising governmental immunity as a defense in the absence of a showing by the plaintiffs that these defendants had control over the alleged nuisance or were under a statutory duty to abate the nuisance.

3. The trial court did not err in ruling that the municipal defendants were engaged in a governmental function in operating a solid-waste management system, as authorized by statute, and in complying with a statutory requirement to seek alternatives to the disposal of yard waste in landfills or the incineration of such waste. Additionally, the plaintiffs failed to allege

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REFERENCES

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 97, 159, 168.

State's immunity from tort liability as dependent on governmental or proprietary nature of function. 40 ALR2d 927.

Comment Note.—Municipal immunity from liability for torts. 60 ALR2d 1198.

facts in support of their claim that these defendants were engaged in a proprietary function.

4. Summary disposition was properly granted for defendant trash haulers in the absence of a showing by the plaintiffs that these defendants controlled the alleged nuisance.

Affirmed.

1. GOVERNMENTAL IMMUNITY — TRESPASS-NUISANCE.

A direct trespass upon, or the interference with the use or enjoyment of, land that results from a physical intrusion caused by, or under the control of, a governmental entity gives rise to a trespass-nuisance claim that is not barred by governmental immunity from tort liability.

2. NUISANCE — CONTROL.

A defendant who creates a nuisance, owns or controls the property from which a nuisance arose, or employs another to do work that the defendant knows is likely to create a nuisance may be found to have control over the nuisance; a governmental defendant that is under a statutory duty to abate a nuisance also may be found to have control over the nuisance.

3. GOVERNMENTAL IMMUNITY — PROPRIETARY FUNCTION.

A plaintiff, in claiming the proprietary function exception to governmental immunity, must allege that the primary purpose of the governmental activity was to produce a pecuniary profit and that the activity was not normally supported by taxes or fees.

Donnelly W. Hadden, for Marvin Baker et al.

Cooper, Fink & Zausmer, P.C. (by *David H. Fink* and *Michael L. Caldwell*), for Waste Management of Michigan, Inc., City of Farmington, and City of Farmington Hills.

Pear Sperling Eggan & Muskovitz, P.C. (by *Andrew M. Eggan*), for Materials Clearance, Inc.

Hemming, Polaczyk & Cronin, P.C. (by *Timothy L. Cronin*), for Plymouth Township and Canton Township.

Foster, Swift, Collins & Smith, P.C. (by *William*

K. Fahey and *Paul J. Millenbach*), for Western Townships Utilities Authority.

Eric J. Colthurst, for Canton Waste Recycling.

Vandeveer Garzia (by *Pamela L. Abbott*), for Northville Township.

Before: WAHLS, P.J., and CAVANAGH and N. J. LAMBROS,* JJ.

PER CURIAM. In these consolidated appeals, plaintiffs appeal as of right from orders granting summary disposition in favor of defendants. We affirm.

Defendants, the charter townships of Canton, Plymouth, and Northville, and the cities of Farmington and Farmington Hills, contracted with defendants, the waste-hauling companies Canton Waste Recycling Co., Industrial Materials Clearance, Inc., and Waste Management of Michigan, Inc., to haul yard waste to a composting facility in Canton. The facility was operated by defendant Compost Systems, Inc., on land leased from Canton Township, and utilized composting equipment leased from defendant Western Townships Utilities Authority (WTUA). Plaintiffs are a citizens group and various individuals who live or work in the vicinity of the composting facility.

Unpleasant odors emanated from the composting facility. For that reason, plaintiffs filed suit against defendants, alleging nuisance and a violation of the Michigan Environmental Protection Act (MEPA), MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.*

The court granted summary disposition in favor of defendant municipalities on the basis of govern-

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

mental immunity, and in favor of defendant waste haulers on the ground that they did not have ownership or control over the facility. Plaintiffs now appeal. Defendant Compost Systems, Inc., is not a party to this appeal, and the MEPA claim is no longer at issue.

I

A

We first consider whether the WTUA is an entity that is entitled to governmental immunity from tort liability. This presents a question of law that we review de novo. *Rapistan Corp v Michaels,* 203 Mich App 301, 306; 511 NW2d 918 (1994).

Pursuant to MCL 691.1407(1); MSA 3.996(107)(1), a governmental agency that is engaged in the discharge of a governmental function is immune from tort liability. For purposes of that provision, a governmental agency is "the state, political subdivisions, and municipal corporations." MCL 691.1401(d); MSA 3.996(101)(d). A municipal corporation is "any city, village, township or charter township, or any combination thereof, when acting jointly." MCL 691.1401(a); MSA 3.996(101)(a). A political subdivision is "any municipal corporation, . . . township, charter township, . . . or any combination thereof, when acting jointly, and any district or authority authorized by law or formed by 1 or more political subdivisions." MCL 691.1401(b); MSA 3.996(101)(b).

The charter townships of Plymouth, Canton, and Northville formed the WTUA pursuant to MCL 124.281 *et seq.*; MSA 5.2769(51) *et seq.*, which provides for the establishment of sewage-disposal, water-supply, and solid-waste management system authorities.

Applying the above definitions, the WTUA is a political subdivision, and possibly also a municipal corporation, that is entitled to governmental immunity. The lower court's ruling in this respect was not erroneous.

B

Next, we consider whether the trespass-nuisance exception to governmental immunity bars the municipalities and the WTUA from raising the defense of governmental immunity.

Our Supreme Court recognized the trespass-nuisance exception to governmental immunity in *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139; 422 NW2d 205 (1988). Trespass-nuisance is defined as "a direct trespass upon, or the interference with the use or enjoyment of, land that results from a physical intrusion caused by, or under the control of, a governmental entity." *Id.* at 145; see *Continental Paper & Supply Co, Inc v Detroit,* 205 Mich App 404, 407-408; 521 NW2d 844 (1994).

The dispute in this case concerns the element of control. Control may be found where the defendant creates the nuisance, owns or controls the property from which the nuisance arose, or employs another to do work that he knows is likely to create a nuisance. *Continental Paper, supra; Stemen v Coffman,* 92 Mich App 595, 598; 285 NW2d 305 (1979). It may also be found where the governmental defendant is under a statutory duty to abate the nuisance. *McSwain v Redford Twp,* 173 Mich App 492, 498-499; 434 NW2d 171 (1988).

Plaintiffs have not alleged facts that would show that defendants created or were under a statutory obligation to abate the nuisance, controlled the

property where the nuisance arose,[1] or employed another to do work that they knew was likely to create a nuisance. Plaintiffs' claim, that defendants could have withheld the delivery of yard waste to the site, is simply insufficient to establish control over the nuisance, particularly in light of their acknowledgment that others could have continued to send yard waste to the facility. In other words, because defendants' withholding of waste would not necessarily have eliminated the nuisance, defendants may not be considered to have had control over the nuisance.

Accordingly, the trial court properly found inapplicable the trespass-nuisance exception to governmental immunity.

C

Plaintiffs next argue that the municipal defendants are not entitled to immunity because they were engaged in a proprietary, and not a governmental, function.

This argument is unpersuasive. A governmental function is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. MCL 691.1401(f); MSA 3.996(101)(f); *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567, 591; 363 NW2d 641 (1984); *Adam v Sylvan Glynn Golf Course,* 197 Mich App 95, 97; 494 NW2d 791 (1992). This definition should be broadly applied; there need only be some constitutional, statutory, or other legal basis for the activity in which the governmental agency is engaged. *Adam, supra.*

Defendants were expressly authorized to operate

[1] Plaintiffs have abandoned the question whether defendant Canton Township controlled the property through ownership by failing to address the issue.

a solid-waste management system, MCL 124.282(1); MSA 5.2769(52)(1), and were impliedly required to seek an alternative to the disposal of yard waste in landfills or by incineration, MCL 299.418a; MSA 13.29(18a). We conclude that in so doing, they were engaged in a governmental function.

Furthermore, plaintiffs failed to allege facts that would justify the application of the proprietary function exception to governmental immunity, *Wade v Dep't of Corrections,* 439 Mich 158, 163; 483 NW2d 26 (1992), because they did not allege both that the primary purpose of the governmental activity was to produce a pecuniary profit and that the activity was not normally supported by taxes or fees. *Ross, supra; Adam, supra.* That the composting facility may have been engaged in operating a business for profit does not establish that the municipal defendants were doing the same.

Consequently, the trial court properly ruled that the municipal defendants were engaged in a governmental function.

D

For the above reasons, summary disposition in favor of defendant municipalities was proper under MCR 2.116(C)(7) (claim barred by governmental immunity).

II

Finally, plaintiffs assert that summary disposition was improper because a question of fact existed with respect to whether defendants knew or should have known of the nuisance condition to which they were contributing.

Because summary disposition was properly

granted in favor of the municipal defendants on the basis of governmental immunity, we need address this issue only with respect to defendant waste haulers.

Regardless of whether a factual question existed concerning defendant waste haulers' knowledge of the nuisance, there was no factual question concerning their control over the nuisance: they did not own or control the property from which the nuisance arose, did not create the nuisance, and did not employ another to do work that they knew or should have known was likely to create a nuisance. *Stemen, supra;* see *Gelman Sciences, Inc v Dow Chemical Co,* 202 Mich App 250, 252; 508 NW2d 142 (1993); *Bleeda v Hickman-Williams & Co,* 44 Mich App 29, 35; 205 NW2d 85 (1972).

Thus, summary disposition was properly granted in favor of defendant waste haulers under MCR 2.116(C)(10) (no genuine issue of material fact).

Affirmed.

In re RAMON

Docket No. 175825. Submitted December 21, 1994, at Lansing. Decided February 7, 1995, at 9:05 A.M. Leave to appeal sought.

In February 1991, the Eaton Circuit Court, Thomas S. Eveland, J., entered a judgment in a paternity action declaring Mark A. Pena to be the father of Alexander M. Ramon, ordering Pena to pay support and the expenses of childbirth, awarding Pena visitation rights, and granting care, custody, and control of the child to Lisa Ramon, the mother. Lisa subsequently died in an automobile accident, and the Eaton County Probate Court, James L. Theophelis, J., appointed as temporary guardians of the child Bernie and Narcisa Ramon, the child's maternal grandparents. Pena sought in the Eaton Circuit Court a change in custody of the child pursuant to the court's continuing jurisdiction in the paternity action. The Ramons responded to Pena's petition and filed their own petition for sole care, custody, and control of their grandson. On November 3, 1993, the probate court entered an "Order for Temporary Court Structured Guardianship Plan," which made the Ramons guardians of the child and imposed certain obligations on Pena. Following the November 29, 1993, amendment of the Child Custody Act that expanded the class of persons eligible to bring a custody action to include grandparents, MCL 722.26c(1); MSA 25.312(6c)(1), the Ramons filed a motion in the circuit court that it assume jurisdiction of the proceedings, that it award them custody of the child, and that it order an investigation by the friend of the court concerning their suitability for custody of the child. Because of the existing guardianship proceeding in the probate court, Judge Theophelis was assigned pursuant to MCL 722.26b(5); MSA 25.3121(6b)(5) to serve as a circuit judge to hear the child custody action. Following a hearing, Judge Theophelis determined that the Ramons' guardianship pursuant to the November 3 order of the probate court was tantamount to a statutory limited guardianship pursuant to MCL 700.424a(1); MSA 27.5424(1)(1) and held that because Pena had complied with the requirements of the guardianship plan, the Ramons, pursuant to MCL 722.26b(2); MSA 25.312(6b)(2), lacked standing to bring an action for custody of the child. Judge

Theophelis awarded sole legal and physical custody of the child to Pena. The Ramons appealed.

The Court of Appeals *held:*

A limited guardianship is a creature of statute. MCL 700.424a(1); MSA 27.5424(1)(1) contemplates a guardianship that arises out of a mutual agreement, trust, and cooperation between the limited guardian and the parent or parents of a child. The November 3 order of the probate court did not arise out of any mutual agreement involving trust and reliance between the Ramons and Pena, and Pena did not agree to a voluntary suspension of his parental rights. Accordingly, the circuit court erred in determining that the November 3 guardianship order was a limited guardianship pursuant to MCL 700.424a(1); MSA 27.5424(1)(1) and erred in holding that the Ramons were barred from seeking custody of the child pursuant to the Child Custody Act. The Ramons are entitled to a child custody hearing pursuant to MCL 722.23; MSA 25.312(3).

Reversed and remanded.

Barry L. Furgason, for Bernie and Narcisa Ramon.

Raymond J. Reynolds, for Mark A. Pena.

Before: FITZGERALD, P.J., and GRIBBS and M. J. TALBOT,* JJ.

PER CURIAM. Bernie and Narcisa Ramon appeal as of right from the order of the Eaton Circuit Court that granted sole legal and physical custody of Alexander Michael Ramon, their grandson, to Mark A. Pena, the child's natural father out of wedlock, upon a finding that they lacked standing to bring an action for custody. We reverse and remand.

According to a paternity complaint filed on January 12, 1990, by the Department of Social Services on behalf of Lisa Ramon, Alexander was born out of wedlock on August 3, 1989, to Lisa and Pena. Pena initially contested paternity, but subse-

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

quently acknowledged paternity after blood tests failed to exclude him as the child's father. On February 19, 1991, the circuit court issued a judgment declaring Pena to be the child's father, ordering him to pay support and the expenses of childbirth, awarding him visitation rights, and granting care, custody, and control of the child to Lisa. According to evidence adduced at the February 4, 1994, hearing of the Ramons' custody request, it appears that for approximately the first two years of his young life the child lived with Lisa in the home of her parents, the Ramons, and after that time resided with Lisa in an apartment, although continuing to have close contact with the Ramons.

Unfortunately, Lisa Ramon was killed in an automobile accident on September 14, 1993. The child thereafter resided with the Ramons. Because nobody had legal custody of the child after Lisa's death, on September 23, 1993, the Eaton County Probate Court appointed the Ramons the child's temporary guardians.

On September 29, 1993, Pena moved in the circuit court for a change of custody. On that same date, the circuit court referred the matter to the friend of the court for an investigation regarding Pena's qualifications for caring for the child. The Ramons responded to Pena's custody petition on October 12, 1993, and on that same date petitioned the circuit court for the sole care, custody, and control of the child.

On November 29, 1993, the Child Custody Act, specifically MCL 722.26c(1); MSA 25.312(6c)(1), was amended to expand the class of persons eligible to bring a custody action as follows:

> A third person may bring an action for custody of a child if the court finds either of the following:

(a) Both of the following:

(i) The child was placed for adoption with the third person under the adoption laws of this or another state, and the placement order is still in effect at the time the action is filed.

(ii) After the placement, the child has resided with the third person for a minimum of 6 months.

(b) All of the following:

(i) The child's biological parents have never been married to one another.

(ii) The child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under court order.

(iii) The third person is related to the child within the fifth degree by marriage, blood, or adoption.

Pursuant to this new legislation, on January 3, 1994, the Ramons filed a motion in the circuit court that it assume jurisdiction over the proceedings, that it award them custody of the child, and that it order a friend of the court investigation of their suitability for the child's custody. Pena replied on January 11, 1994, contesting the Ramons' custody petition. Pena argued that the probate court's November 3, 1993, "Order for Temporary Court Structured Guardianship Plan" was a de facto "limited guardianship placement plan" under MCL 722.26b(2); MSA 25.312(6b)(2), that precluded petitioners from having standing to file the petition for custody. MCL 722.26b(2); MSA 25.312(6b)(2) provides:

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 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.

Probate Judge James L. Theophelis was assigned to serve as a circuit judge to hear the child custody action. MCL 722.26b(5); MSA 25.312(6b)(5). Following a hearing on January 4, 1994, Judge Theophelis determined that petitioners' guardianship was tantamount to a statutory limited guardianship and that the only viable issue was whether Pena had substantially complied with the probate court's temporary guardianship plan. Answering that question affirmatively, Judge Theophelis determined that the Ramons lacked standing under MCL 722.26b(2); MSA 25.312(6b)(2) to contest custody, and awarded sole legal and physical custody of the child to respondent.

The Ramons challenged the circuit court's failure to grant them standing pursuant to § 6c(1)(b) and do not challenge specifically the circuit court's determination that standing was barred by MCL 722.26b(2); MSA 25.312(6b)(2). Pursuant to MCR 7.216(A)(7), we reverse the circuit court's finding that the Ramons were limited guardians whose standing to bring an action for custody was barred by § 6b(2).

A limited guardianship is strictly a creature of statute. MCL 700.424a(1); MSA 27.5424(1)(1) specifies that a limited guardianship must be created as follows:

> Beginning on the effective date of the amendatory act that added section 424b, the court may appoint a limited guardian for an unmarried minor under this section upon the petition of the parent or parents if all of the following are met:
>
> (a) The parents with custody of the minor consent or, in the case of only 1 parent having custody of the minor, the sole parent consents to the appointment of a limited guardian.
>
> (b) The parent or parents voluntarily consent to the suspension of their parental rights.

(c) The court approves a limited guardianship placement plan agreed to by both of the following parties:

(i) The parents with custody of the minor or, in the case of only one parent having custody of the minor, the sole parent who has custody of the minor.

(ii) The person or persons who the court will appoint as limited guardian of the minor.

Clearly, the probate court's November 3, 1993, order did not constitute a *statutory* limited guardianship, because it was not created pursuant to the statute's requirements.[1] The question presented, therefore, is whether Judge Theophelis correctly denied the Ramons standing on the ground that the November 3 order was *tantamount* to a statutory limited guardianship. We find that he did not.

Considering § 424a(1) in pari materia with § 6b(2), it is apparent that the latter section was designed to preclude any possibility of betrayal by a statutory limited guardian appointed pursuant to § 424a. In other words, the crux of § 424a is *mutual* agreement, trust, and cooperation between the limited guardian and the custodial parent(s). In furtherance thereof, the parents consent to the appointment of a limited guardian and to the suspension of their parental rights, and a limited guardianship placement plan is agreed upon by the parents and the proposed limited guardian. If, after following the procedures outlined in § 424a(1), the limited guardian could then utilize the guardianship as a mechanism for attempting to gain custody of the child pursuant to § 6b(1), a parent would be reluctant to agree to a limited guardianship. Consequently, the Legislature wisely provided that a *statutory* limited guardian had

[1] This fact is uncontested by both parties and the circuit court.

standing to seek custody of the minor child over whom he had been appointed only if the parent had not complied substantially with a limited guardianship placement plan.

The events culminating in the probate court's November 3, 1993, order granting temporary custody differ significantly from those that typically result in a statutory limited guardianship. Here, the Ramons already had custody of the child, there was no agreement of trust and reliance between the Ramons and Pena, and Pena did not voluntarily consent to suspension of his parental rights in reliance upon a limited guardianship placement plan. Plainly, the factual and philosophical bases upon which the probate court's November 3 order were premised differ fundamentally from the voluntary, cooperative nature of a § 424a(1) limited guardianship. Hence, we cannot say that the Ramons' attempt to gain custody under the Child Custody Act constituted a subversion of a good-faith agreement such as that implicit in a statutory limited guardianship. Judge Theophelis therefore erroneously equated his November 3 order with a § 424a(1) limited guardianship and incorrectly invoked § 6b(2) to bar petitioners' action.[2]

Reversed and remanded to the circuit court for a custodial hearing pursuant to the Child Custody Act, MCL 722.23; MSA 25.312(3).

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[2] In light of our resolution, we need not determine whether an individual who satisfies the requirements for standing under § 6c(1)(b) can be precluded by § 6b(2) from bringing an action for custody of a child if that individual also happens to be the child's limited guardian.

LEMON v CITY OF LANSING

Docket No. 153163. Submitted December 6, 1994, at Lansing. Decided February 7, 1995, at 9:10 A.M.

Merl F. Lemon was injured during the course of his employment by the City of Lansing and received worker's compensation benefits based on his average weekly wage. He began receiving an employer-sponsored disability pension and the city coordinated the pension payments with the worker's compensation payments and reduced the worker's compensation payment. Lemon filed a petition for a hearing, alleging improper coordination of his disability benefits. A magistrate found that the city had reduced Lemon's weekly compensation payment on a dollar-for-dollar basis and that § 292.25 of the City of Lansing's administration code did not mandate a dollar-for-dollar offset. The city appealed and the Worker's Compensation Appellate Commission affirmed with modification. The WCAC found that, because no section of the city's pension plan precluded coordination, MCL 418.354(1)(d); MSA 17.237(354)(1)(d) applied. The WCAC agreed that the city's dollar-for-dollar offset was not appropriate, but held that the city could coordinate the after-tax amount of the disability pension as provided in MCL 418.354(1)(d); MSA 17.237(354)(1)(d). Lemon appealed by leave granted.

The Court of Appeals *held:*

1. The WCAC erred in finding that the city's pension plan did not contain a provision precluding coordination. Section 292.25 of the city's administration code clearly provides for a reduction in the disability retirement benefit so that the combination of the worker's compensation benefit and the disability benefit does not exceed the employee's final rate of compensation. The inclusion of § 292.25 in the administration code indicates that the city intended that payments under the plan not be coordinated pursuant to MCL 418.354; MSA 17.237(354).

2. The magistrate correctly interpreted § 292.25 and found that Lemon was entitled to receive both types of benefits to the extent that the total payment did not exceed Lemon's final rate of compensation. The decision of the WCAC is reversed and the magistrate's decision is reinstated.

Reversed.

Rapaport, Pollok, Farrell & Waldron, P.C. (by *Mark S. Farrell*), for the plaintiff.

Alvan P. Knot, City Attorney, and *Billie J. O'Berry,* Assistant City Attorney, for the defendant.

Before: MCDONALD, P.J., and FITZGERALD and W. J. GIOVAN,* JJ.

PER CURIAM. Plaintiff Merl Lemon appeals by leave granted a decision entered on May 8, 1992, by the Worker's Compensation Appellate Commission affirming with modification the decision of a magistrate and allowing coordination of benefits. We reverse.

This case presents an issue of first impression involving interpretation of MCL 418.354; MSA 17.237(354) and § 292.25 of defendant City of Lansing's administration code. On January 4, 1984, plaintiff was injured during the course of his employment by defendant. Plaintiff received worker's compensation benefits in the amount of $229.92 a week. His benefit was based on his average weekly wage of $369.06.

On August 21, 1987, plaintiff began receiving an employer-sponsored disability pension in the amount of $314.01 a month. Defendant coordinated the pension payments with plaintiff's worker's compensation payments and reduced plaintiff's compensation payment to $162.64 a week.

Plaintiff filed a petition for a hearing, alleging that defendant failed to properly coordinate his disability benefits. Plaintiff died in March 1989; nevertheless, the case proceeded and was submitted on stipulated facts.

In a decision mailed on January 8, 1991, the

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

magistrate found that defendant reduced plaintiff's weekly compensation payment on a dollar-for-dollar basis. The magistrate noted that subsection 354(1)(d) permits the coordination of

> [t]he after-tax amount of the pension or retirement payments received or being received pursuant to a plan or program established or maintained by the same employer from whom benefits under section 351, 361, or 835 are received, if the employee did not contribute directly to the pension or retirement plan or program. Subsequent increases in a pension or retirement program shall not affect the coordination of these benefits.

Pursuant to subsection 354(14), defendant had the option to not coordinate benefits:

> This section does not apply to any payments received or to be received under a disability pension plan provided by the same employer which plan is in existence on March 31, 1982. Any disability pension plan entered into or renewed after March 31, 1982 may provide that the payments under that disability pension plan provided by the employer shall not be coordinated pursuant to this section.

The magistrate found that § 292.25 of defendant's administration code applied in this case. That section reads in pertinent part:

> During the workers' compensation period, the member's disability retirement allowance shall not exceed the difference between the member's final compensation and workers' compensation converted to an annual basis.

The magistrate concluded that this section authorized a method of paying worker's compensation benefits and disability pension benefits concur-

rently, without coordination, as authorized by subsection 354(14). Section 292.25 of the administration code provided that during a period in which worker's compensation benefits were paid, the employee's disability retirement benefits could not exceed the difference between the employee's final compensation and his worker's compensation. Section 292.25 also provided that the disability retirement benefit and the worker's compensation benefit would offset each other so that the employee did not draw benefits in excess of his normal rate of pay. The magistrate concluded that § 292.25 did not mandate a dollar-for-dollar offset.

Defendant appealed, and in a decision entered on May 8, 1992, the WCAC affirmed with modification. The WCAC agreed with the magistrate's conclusion that defendant's dollar-for-dollar offset was not appropriate, but emphasized that the magistrate's decision did not negate defendant's right to coordinate benefits. The WCAC found that, because no section of defendant's pension plan precluded coordination, subsection 354(1)(d) applied. The WCAC concluded that defendant could not coordinate benefits on a dollar-for-dollar basis, but could coordinate the after-tax amount of the disability pension as provided in subsection 354(1)(d).

On appeal, plaintiff argues that the WCAC erred in applying subsection 354(1)(d) in this case. Plaintiff contends that defendant's pension plan clearly allows for a method of payment that does not require the type of coordination provided in subsection 354(1)(d). Section 292.25 of defendant's administration code provides for payment of the full worker's compensation benefit with a reduction of the disability retirement benefit to prevent receipt of a combined benefit in excess of the employee's final rate of pay. Plaintiff reasons that because worker's compensation benefits are always less

than the normal rate of pay, reducing that payment by the amount of a pension benefit pursuant to subsection 354(1)(d) would further lower the benefit level.

We conclude that plaintiff's position has merit and reverse the WCAC's decision. The WCAC erred in finding that defendant's pension plan did not contain a provision precluding coordination. Section 292.25 of defendant's administration code does not refer specifically to subsection 354(1)(d); however, defendant's code section clearly provides for a reduction in the disability retirement benefit so that the combination of the worker's compensation benefit and the disability benefit does not exceed the employee's final compensation. The inclusion of § 292.25 in defendant's code indicates that defendant intended that payments under the plan not be coordinated pursuant to § 354. To find to the contrary, as did the WCAC, is to render § 292.25 superfluous.

The magistrate correctly interpreted § 292.25 and found that plaintiff was entitled to receive both types of benefits to the extent that the total payment did not exceed his final rate of compensation. We reverse the WCAC's decision and reinstate the magistrate's decision.

LEVERE v AETNA CASUALTY & SURETY COMPANY

Docket No. 157755. Submitted September 13, 1994, at Detroit. Decided February 7, 1995, at 9:15 A.M. Leave to appeal sought.

Michael LeVere and others brought an action in the Genesee Circuit Court against Aetna Casualty & Surety Company, seeking a declaration that they were covered for personal liability under an Aetna homeowner's insurance policy that was in effect some fifteen years earlier and of which neither the plaintiffs nor the defendants could provide a copy. The court, Thomas C. Yeotis, J., granted summary disposition for the plaintiffs. Aetna appealed.

The Court of Appeals *held:*

The plaintiffs sufficiently established the existence of a homeowner's policy with evidence indicating that they had obtained an Aetna policy when they purchased their home, that they did not let the policy lapse, that the policy had not been canceled, that the mortgage records showed that the home was insured by Aetna, and that an Aetna homeowner's policy would not have been issued if it did not include personal liability coverage of at least $25,000.

Affirmed.

Goodman, Eden, Millender & Bedrosian (by *Richard A. Soble*), for the plaintiffs.

Richard L. Alger, Jr., for the defendant.

Before: HOOD, P.J., and BRENNAN and J. A. FULLERTON,* JJ.

PER CURIAM. Defendant appeals as of right a circuit court order granting plaintiffs' motion for summary disposition in this action for a declaratory judgment. We affirm.

Cindy Nichol filed suit against plaintiffs in May

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

1990 for damages resulting from an injury that occurred in May 1976 when she was five years old. Nichol alleged that plaintiff Michael LeVere, then twelve years old, asked her to hold onto one end of a spool of wire. He then threw the spool over an electrical line, causing shock and burns to Cindy. Plaintiffs Gerald LeVere and Gail Blue were Michael's parents.

Plaintiffs notified defendant Aetna Casualty & Surety Company of the filing of Nichol's claim. At first, Aetna provided an attorney to represent plaintiffs. However, in March 1991, plaintiffs were told that Aetna had been unable to locate their policy and that they should retain their own counsel. In May 1991, plaintiffs filed the instant action for a declaratory judgment, seeking to determine their rights to insurance coverage.

Each of the parties filed a motion for summary disposition under MCR 2.116(C)(10), claiming that there was no genuine issue of fact regarding the existence and terms of a homeowner's insurance policy between them. Plaintiffs' motion included affidavits and documentary evidence in support of the existence of the policy, but did not include the actual policy itself. Specifically, plaintiffs established that they had purchased their home in 1974 and had obtained a homeowner's insurance policy from Aetna that did not lapse and was not canceled. A loan statement for their mortgage indicated under the heading "Hazard Insurance" that plaintiffs had a $30,000 policy with Aetna. Further indication of a $30,000 homeowner's policy appeared in a document issued in 1977 by the mortgagee to Employee Transfer Company, which was charged with selling plaintiffs' home. The agent responsible for the policy stated in an affidavit that an Aetna homeowner's policy would have been sold in 1976 only if it included property loss

coverage, contents loss coverage, and personal liability protection of at least $25,000, which was corroborated by an admission by defendant. The agent also acknowledged that the policy number in question was an Aetna homeowner's policy. The affidavit was silent regarding whether the agency had any records of the policy. However, the agency's name was listed on the loan statement beside the Aetna policy notation.

Defendant contested the existence of a policy at the time of the injury, relying on an affidavit that it could not locate the actual policy in its records and alleging the plaintiffs had produced insufficient evidence to establish the terms of the policy. At the hearing on plaintiffs' motion for summary disposition, defense counsel stated that the policy, if it existed at all, would have been destroyed around 1978 (which means that defendant would have been unable to produce the policy even if suit had been instituted within the normal three-year period of limitation).

The trial court found that plaintiffs had established the existence of a policy of insurance with Aetna for the period in which the underlying tort occurred and that the policy provided personal liability protection in the amount of $25,000.

Defendant urges us to reverse the trial court ruling in light of this Court's holding in *Star Steel Supply Co v United States Fidelity & Guaranty Co,* 186 Mich App 475; 465 NW2d 17 (1990). While *Star Steel* supports defendant's position, we believe it was wrongly decided. In *Star Steel,* the defendant insurance company was unable to produce records of an alleged products liability policy in the plaintiff's name because any such policy would have been destroyed after five years. *Id.* at 479. In support of the existence of such a policy,

the plaintiff produced evidence very similar to the affidavits and documentary evidence presented here. See *id.* at 477-478. However, the trial judge ordered summary judgment in favor of the insurance company stating, "I'm pretty convinced myself that there was a policy here from everything I've seen, and it was with USF&G, but what was the policy and what were the terms are the real issue." *Id.* at 481. This Court affirmed. One judge dissented, noting that an issue of fact existed because the plaintiff had offered evidence that the insurer's agent had issued a products liability insurance policy to the plaintiff and that the extent of coverage, though not specifically known, was at least $500,000. *Id.* at 482-483 (MCDONALD, J.).

We find the dissent in *Star Steel* persuasive and also that the facts in this case are stronger. Plaintiffs have presented evidence that they had a homeowner's insurance policy and that the amount of such coverage would have been at least $25,000 for personal liability. In addition, defendant has relied solely on the parties' inability to produce the disputed policy to avoid summary disposition. Whereas the dissent in *Star Steel* found a genuine issue of material fact, we believe the evidence here justifies the trial court's decision to go one step further and order summary disposition for plaintiffs.

Defendant also argues that plaintiffs failed to provide sufficient notice of their potential claim following Nichol's injury. Because defendant raises this argument for the first time on appeal, the issue lies outside the scope of appellate review. *Deal v Deal,* 197 Mich App 739, 741; 496 NW2d 403 (1993).

Affirmed.

ABDUR-RA'OOF v DEPARTMENT OF CORRECTIONS

Docket No. 161428. Submitted January 17, 1995, at Lansing. Decided February 7, 1995, at 9:20 A.M.

Cleophus Khalid Abdur-Ra'oof and Abdul-Jalil Danfodio, prison inmates and members of the Islamic faith, brought an action in the Ingham Circuit Court against the Department of Corrections, alleging that the defendant's implementation of a policy directive that prevented the plaintiffs from attending certain religious services violated their rights under the Free Exercise Clause of the First Amendment of the United States Constitution. The directive provided that because the working day in institutions is intended to approximate that of the world outside prison, released time from work assignments for personal interest activities, including religious services, would not be permitted. The trial court, James R. Giddings, J., granted the plaintiffs' motion for summary disposition, finding that the policy directive, as implemented, was arbitrary and irrational. The court ordered the defendant not to enforce the directive in such a way as to prevent attendance at the services. The defendant appealed.

The Court of Appeals *held:*

1. The policy directive, as implemented, is neither arbitrary nor irrational and does not violate the plaintiffs' constitutional rights.

2. In balancing the constitutional rights of prisoners against the legitimate objectives of incarceration, deference is to be given to the considered judgment of the prison administrators. Prison regulations alleged to infringe on constitutional rights are judged under a reasonableness test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights. When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. The ques-

REFERENCES

Am Jur 2d, Penal and Correctional Institutions §§ 27, 41, 43, 121.

Supreme Court's views as to prisoner's right to free exercise of religion under Federal Constitution's First Amendment. 96 L Ed 2d 736.

tion is whether the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.

3. The Department of Corrections' officials could reasonably determine that to permit inmates to leave their assignments for medical or dental care, psychiatric or substance abuse counseling, and prisoner representation activities would pose neither a security risk nor a threat of disruption and would not interfere with the attempt to simulate actual working conditions, while to allow release to attend religious services or for other personal reasons might indeed have such potential.

Reversed.

1. PRISONS AND PRISONERS — CONSTITUTIONAL LAW.

Deference is to be given to the considered judgment of prison administrators in balancing the constitutional rights of prisoners against the legitimate objectives of incarceration.

2. PRISONS AND PRISONERS — CONSTITUTIONAL LAW — PRISON REGULATIONS.

Prison regulations alleged to infringe on constitutional rights are judged under a reasonableness test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights; a regulation is valid if it is reasonably related to legitimate penological interests; the question is whether the logical connection between a regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.

Cleophus Khalid Abdur-Ra'oof and Abdul-Jalil Danfodio, in propria persona.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Allan J. Soros,* Assistant Attorney General, for the defendant.

Before: CAVANAGH, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM. Defendant Department of Corrections (DOC) appeals as of right from an order of the circuit court prohibiting it from implementing a policy directive in such a way as to prevent plain-

tiff prisoners from attending certain religious services. We reverse.

The following facts are taken from the parties' stipulated facts.

Plaintiffs are Muslims. The Islamic faith is a religion recognized by the DOC. In 1983, Muslim prisoners were authorized to attend Friday afternoon Juma'ah prayer services and two congregational services, Eid-al-Fitrah and Eid-al-Adha, subject to certain conditions. In 1987, that authorization was effectively rescinded by the implementation of Policy Directive PD-BCF-64.01, which provides in part as follows:

> Beyond the State observed holidays, institutions shall not make provisions for the observance of religious holydays [sic]. Since the working day in institutions is intended to approximate that of the world of work outside prison, released time from work assignments for personal interest activities, including religious services or other activities, will not be permitted.

The circuit court found that the policy directive, as implemented, was arbitrary and irrational and ordered the DOC not to enforce it in such a way as to prevent attendance at the above services. This Court stayed the circuit court's order pending the outcome of this appeal.

The issue on appeal is whether the policy directive impermissibly infringed on plaintiffs' constitutional rights under the Free Exercise Clause of the First Amendment of the United States Constitution.

The leading case in this context is *O'Lone v Estate of Shabazz,* 482 US 342; 107 S Ct 2400; 96 L Ed 2d 282 (1987), where the United States Supreme Court held that prison regulations that

prevented Muslim inmates from attending Juma'ah services did not violate the inmates' right to the free exercise of religion. The inmates concerned were low-security prisoners who were assigned to outside work details. Because permitting the inmates to attend Juma'ah services proved to be burdensome and posed something of a security risk, prison officials issued a policy memorandum that prohibited inmates assigned to outside work details from returning to the prison during the day except for emergency reasons.

The Supreme Court balanced the constitutional rights of prisoners against the legitimate objectives of incarceration, noted that deference is to be given to the considered judgment of the prison administrators who are charged with and trained in the running of penal institutions, and concluded that "prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Id.* at 349. The Court held that " 'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.' " *Id.,* quoting *Turner v Safley,* 482 US 78, 89; 107 S Ct 2254; 96 L Ed 2d 64 (1987).

The circuit court distinguished the present case from *O'Lone.* It concluded that the DOC's refusal to permit attendance at religious services was arbitrary because, unlike the prisoners in *O'Lone,* the inmates, who were not assigned to outside work details, were allowed to leave their work assignments for certain nonemergency reasons.

We believe that this distinction is insignificant. Under *O'Lone* and *Turner* the question is whether the logical connection between the regulation and the asserted goal is so remote as to render the

policy arbitrary or irrational. *O'Lone, supra* at 351; *Turner, supra* at 89-90.

In this case, DOC officials could reasonably determine that to permit inmates to leave their assignments for medical or dental care, psychiatric or substance abuse counseling, or prisoner representation activities would pose neither a security risk nor a threat of disruption and would not interfere with the attempt to simulate actual working conditions, while to allow release to attend religious services or for other personal reasons might indeed have such potential.

We conclude that the policy directive, as implemented, is neither arbitrary nor irrational and it does not violate plaintiffs' constitutional rights.

Reversed.

MARIIN v FLEUR, INC

Docket No. 168486. Submitted October 6, 1994, at Marquette. Decided February 21, 1995, at 9:00 A.M. Leave to appeal sought.

David P. Mariin brought an action in the Delta Circuit Court against Fleur, Inc., and William Tardiff, seeking damages for injuries sustained when Mariin, a police officer, was assaulted by Tardiff, a patron in a bar operated by Fleur, Inc. The assault occurred while Mariin was off duty and socializing at the bar. The trial court, Dean J. Shipman, J., granted summary disposition for Fleur, Inc., with regard to Mariin's dramshop action against it, finding that the fireman's rule, which provides that fire fighters and police officers may not recover damages for injuries arising out of the risks inherent in their respective professions where the cause of the injury arises from the reason for the officer's presence, prevented any recovery. The plaintiff appealed by leave granted.

The Court of Appeals *held:*

The fireman's rule does not preclude the plaintiff's dramshop action against the bar. The fireman's rule does not apply because the plaintiff's presence at the scene of the injury was not occasioned by his duties as a police officer.

Reversed and remanded.

Stupak & Bergman, P.C. (by *Frank A. Stupak, Jr.*), for the plaintiff.

McGinty, Jakubiak, Frankland, Hitch & Henderson, P.C. (by *Vittorio E. Porco*), for Fleur, Inc.

Before: GRIFFIN, P.J., and SAWYER and R. L. ZIOLKOWSKI,* JJ.

SAWYER, J. Plaintiff appeals by leave granted from an order of summary disposition for defen-

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

dant Fleur, Inc., with regard to plaintiff's dramshop action. We reverse.

This case involves an assault on plaintiff by defendant William Tardiff at Wally's Bar, operated by defendant Fleur, Inc. Plaintiff has been employed for a number of years as a police officer with the Gladstone Public Safety Department and was off duty socializing with other off-duty officers at Wally's Bar. A few years before the present incident, Tardiff had been arrested by plaintiff during a raid on some teen-agers having a drinking party. According to plaintiff, thereafter "bad blood" existed between Tardiff and himself. On a number of occasions, Tardiff expressed his animosity toward plaintiff and other Gladstone officers whenever he met them on city streets.

During the incident in question, Tardiff made verbal threats to plaintiff and grabbed his shirt. While attempting to extricate himself from Tardiff's grasp, plaintiff fell backwards over a barstool and sustained injury to his left arm, including a torn rotator cuff that subsequently required surgery.

Thereafter, plaintiff instituted the present action against Tardiff and Wally's Bar, the latter being based on the dramshop act, MCL 436.22; MSA 18.993. The trial court granted summary disposition for Wally's Bar, concluding that suit was prevented under the so-called fireman's rule. The action against Tardiff is not at issue in this appeal.

The only question presented for our consideration is whether the fireman's rule precludes plaintiff's dramshop action against Wally's Bar. We conclude that it does not. The fireman's rule was adopted by the Supreme Court in *Kreski v Modern Wholesale Electric Supply Co,* 429 Mich 347; 415 NW2d 178 (1987). Simply put, the fireman's rule provides that fire fighters and police officers may

not recover damages for injuries arising out of the risks inherent in their respective professions. *Id.* at 351. However, we do not believe that the rule is applicable to the case at bar.

The *Kreski* Court, *id.* at 358, formulated the fireman's rule as follows:

> While the rule may have slightly different permutations among the states, its most basic formulation is that a fire fighter or police officer may not recover damages from a private party for negligence in the creation of the reason for the safety officer's presence.

The final portion of that definition is of particular importance here, namely, that the rule applies to negligence in the creation of the reason for the officer's presence. This theme is reiterated later in *Kreski, id.* at 368, where the Court says the following:

> Fire fighters and police officers often arrive at unpredictable times and may enter portions of the premises not open to the public. Prosser & Keeton [Torts (5th ed)], § 61, p 431. *Generally, the occasion for their presence is an emergency. Id.* While it is true that situations arise in which the need for fire fighters or police officers are [sic] predictable, their appearance at a specific time or place is not. *Pearson v Canada Contracting Co, Inc,* 232 Va 177 [184-185]; 349 SE2d 106, 111 (1986). Thus, it is an unreasonable burden on landowners to require them to prepare their premises for the arrival of police officers or fire fighters. [Emphasis added.]

It should be noted, however, that the Court did not limit application of the fireman's rule to premises liability claims. The Court, *supra* at 376, noted that the rule was broader than the landowner/occupier context:

> We agree that the fireman's rule should not be limited to a landowner/occupier context. While the rule is partially based on protecting landowners and occupiers from an undue burden of keeping their premises safe for fire fighters and police officers, that is simply one component of the rule. The major underpinning of the rule is that the job of safety officers is to confront risks generally caused by negligence, and thus, as a matter of policy, the safety officers may not recover damages for injuries arising out of negligence in causing the reason for their presence.

Finally, the Court, *id.* at 372-373, noted that the fireman's rule does not allow a person to act with impunity, rather it only insulates a defendant from liability for injuries to a public safety officer that arise out of the inherent dangers of the profession:

> The scope of the rule adopted today includes negligence in causing the incident requiring a safety officer's presence and those risks inherent in fulfilling the police or fire fighting duties. Of course, this does not include all risks encountered by the safety officer. The fireman's rule is not a license to act with impunity, without regard for the safety officer's well-being. The fireman's rule only insulates a defendant from liability for injuries arising out of the inherent dangers of the profession.

The Supreme Court revisited the fireman's rule in *Woods v City of Warren,* 439 Mich 186; 482 NW2d 696 (1992). In *Woods, id.* at 193, the Court reiterated that the focus of the fireman's rule is on whether the injuries stem directly from the officer's duties:

> As *Kreski*'s articulation of the fireman's rule rationale indicates, the analytical focus must be on

> whether the injury stems directly from an officer's police functions. If the circumstances indicate that it does, the fireman's rule applies. If the circumstances indicate otherwise, it likely does not.

Furthermore, the *Woods* Court, *supra* at 194, went on to note that the *Kreski* decision had left open the question whether various exceptions to the fireman's rule should be recognized, indicating that the fireman's rule must be applied flexibly to avoid a rigid and formalistic application in circumstances the rule was not intended to address:

> Plaintiff's next argument asserts that *Kreski* apparently recognizes several "exceptions" to the fireman's rule. It did not. The *Kreski* Court did indicate that the rationale of the fireman's rule might not apply in every circumstance involving an injury to a safety officer. It suggested, for instance, that buildings open to the public might justify a different result and that injuries resulting from intentional torts might also justify disregarding the fireman's rule. The Court did not, however, establish that those circumstances prevented application of the fireman's rule. It merely used them to indicate its willingness to apply the rule flexibly as circumstances required. That the *Kreski* Court chose this language to avoid rigid and formalistic adjudication does not mean it intended to defeat application of the fireman's rule when otherwise justified.

With these principles in mind, we reach the conclusion that the case at bar does not present a case that falls within the application of the fireman's rule. First, we note that there is some difference between application of the rule with regard to plaintiff's suit against Wally's Bar and an application against defendant Tardiff himself. Tardiff was involved in an intentional tort, an assault on plaintiff, with plaintiff being injured

while attempting to extricate himself from that assault. This Court has held that the fireman's rule does not apply to intentional abuse directed at a police officer, such as misconduct by a suspect resisting arrest. See *Stehlik v Johnson,* 204 Mich App 53, 57; 514 NW2d 508 (1994). However, with respect to Wally's Bar, the theory of liability is a violation of the dramshop act, not an intentional tort such as assault.[1]

However, with respect to the dramshop claim, we believe it is important to return to the basic formulation of the fireman's rule, namely, that there cannot be liability for injuries arising out of the inherent dangers of the profession where the cause of the injury arises from the reason for the officer's presence. In the case at bar, it might be said that it is an inherent danger of law enforcement that an arrestee may harbor ill will against the arresting officer and, at some point thereafter, attack the officer. However, what is missing in the present case is a showing that the officer's presence at the scene of the injury was occasioned by his duties as a police officer. That is, plaintiff was not at Wally's Bar because he was answering a police call. Rather, he was socializing there while off duty. It might be appropriate to apply the fireman's rule had plaintiff been injured while responding on duty to a bar brawl at Wally's Bar or, for example, while rendering assistance to the bar in an attempt to eject Tardiff because of his intoxicated condition and his refusal to leave. However, that is not what happened here. Plaintiff was not summoned to Wally's Bar to act as a

[1] Of course, there allegedly would be a connection between the violation of the dramshop act and the assault, namely, that the bar's serving of a visibly intoxicated person, thus increasing the level of intoxication, contributed to the intoxicated person's assaultive behavior.

police officer. He was present at the bar as a private citizen and it is merely fortuitous that there was also present someone at the bar who harbored ill will toward plaintiff because of his profession. Accordingly, because it was not any conduct by Tardiff, or anyone else, at Wally's Bar that occasioned plaintiff's presence there, we conclude that the fireman's rule does not apply under the facts of this case to plaintiff's dramshop claim against Wally's Bar.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

ARNOLD v DARCZY

Docket No. 150511. Submitted November 2, 1994, at Detroit. Decided February 21, 1995, at 9:05 A.M.

Keith Arnold brought an action in the St. Clair Circuit Court against Danielle Darczy and Judaline Darczy, seeking damages for injuries sustained in a motorcycle accident. A jury returned a verdict for the plaintiff and awarded him damages of $100,000. The court, James T. Corden, J., granted the plaintiff a new trial or additur in the amount of $150,000. The defendants appealed.

The Court of Appeals *held:*

The trial court did not abuse its discretion in granting additur or a new trial. The verdict was inadequate because uncontroverted evidence, which the jury ignored, indicated that an award of future damages was warranted. However, remand for recomputation of additur is necessary because the trial court improperly considered the pretrial settlement negotiations and the mediation evaluation in computing the amount of additur and failed to cite trial evidence in support of its finding that $250,000 was the lowest amount of damages the evidence would support.

Affirmed in part, reversed in part, and remanded.

MICHAEL J. KELLY, J., dissenting, stated that, rather than reversing the amount of additur, the Court of Appeals should remand for a hearing at which both sides would present evidence of the lowest appropriate amount of additur, after which the trial court could adjust additur as necessary.

1. MOTIONS AND ORDERS — ADDITUR — NEW TRIAL.

The grant or denial of a motion for additur or a new trial rests in the trial court's discretion and will not be reversed on appeal in the absence of an abuse of discretion.

REFERENCES

Am Jur 2d, Damages §§ 1030, 1031; New Trial §§ 394, 408; Trial § 1890.

Court's power to increase amount of verdict or judgment over either party's refusal or failure to consent to addition. 56 ALR2d 213.

2. MOTIONS AND ORDERS — ADDITUR — SETTLEMENT NEGOTIATIONS — MEDIATION EVALUATIONS.

A trial court, when computing additur, may not consider pretrial settlement negotiations or mediation evaluations (MRE 408; MCR 2.403[N][2]).

3. MOTIONS AND ORDERS — ADDITUR.

Additur set by a trial court must be the lowest the evidence will support (MCR 2.611[E]).

Ronald J. Allen, for the plaintiff.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. (by *Rosalind Rochkind* and *Millard Becker, Jr.*), for the defendants.

Before: FITZGERALD, P.J., and MICHAEL J. KELLY and E. R. POST,* JJ.

FITZGERALD, P.J. A trial was held in this case solely to decide the issue of damages incurred by plaintiff as a result of a motorcycle accident for which defendants admitted liability. A jury returned a verdict in the amount of $100,000. Plaintiff moved for a new trial or additur, claiming that the jury verdict ignored the permanent nature of his injuries and failed to compensate him for future damages. The trial court granted a new trial or additur in the amount of $150,000. Defendants now appeal by leave granted. We affirm in part, reverse in part, and remand.

Defendants first contend that the trial court's decision to grant additur was an abuse of discretion. We disagree. An appellate court must accord due deference to the trial court's decision regarding the grant or denial of additur and should reverse the trial court's decision only if an abuse of discretion is shown. *Palenkas v Beaumont Hosp,* 432 Mich 527, 531; 443 NW2d 354 (1989); *McMil-*

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

lan v Auto Club Ins Ass'n, 195 Mich App 463, 467; 491 NW2d 593 (1992). The proper consideration in granting or denying additur is whether the jury award is supported by the evidence. *Id.* Additionally, trial courts have discretion in granting a new trial, and appellate courts will not interfere absent a palpable abuse of discretion. *Id.*

Here, the trial court justified its award of additur on the ground that uncontroverted evidence warranted an award of future damages. The record reveals that the evidence with regard to scarring and lingering swelling was uncontroverted and was ignored by the jury.[1] The verdict was therefore inadequate and the trial court properly exercised its discretion in granting a new trial or additur. MCL 600.6098; MSA 27A.6098; *Burtka v Allied Integrated Diagnostic Services, Inc,* 175 Mich App 777, 780; 438 NW2d 342 (1989).

However, the trial court improperly considered pretrial settlement negotiations and a mediation evaluation in computing additur. Evidence of settlement negotiations is inadmissible to prove either liability or the amount of damages. MRE 408. Further, mediation evaluations may not be considered by the trier of fact in assessing damages. MCR 2.403(N)(2). Because settlement negotiations and mediation evaluations are generally inadmissible as evidence of damages, it follows that trial courts lack discretion to consider settlement proposals and mediation evaluations when computing additur under MCR 2.611(E), which provides that any additur set by the court must be the lowest the *evidence* will support. See, e.g., *Precopio v*

[1] The trial court also found that the evidence with respect to a deformity and a limp was uncontroverted. A review of the medical testimony presented at trial, however, reveals that this finding is clearly erroneous. On remand, the trial court is not to consider such evidence in computing additur.

Detroit, 415 Mich 457, 473-474; 330 NW2d 802 (1982). Here, the trial court did not cite any trial evidence in support of its finding that $250,000 is the lowest amount of damages the evidence would support. Consequently, reversal of the amount of additur is required, and the case is remanded to the trial court for proper consideration of the evidence in computing additur.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

E. R. POST, J., concurred.

MICHAEL J. KELLY, J. *(dissenting).* Rather than reverse the amount of additur, I would remand to the trial court for a hearing during which both sides could present evidence establishing the lowest appropriate amount of additur. The trial court could then compare the amounts awarded in other similar personal injury cases and adjust the additur if necessary. I would retain jurisdiction.

GOODALL v WHITEFISH HUNTING CLUB

Docket No. 168860. Submitted October 4, 1994, at Marquette. Decided February 21, 1995, at 9:10 A.M.

Little Nubbin Hunting Club, Inc., brought an action in the Delta Circuit Court against Whitefish Hunting Club and others, seeking an injunction prohibiting the defendants from blocking access to roads that crossed the defendants' property, claiming a right to use those roads by prescriptive easement. Dale Goodall and other members of Little Nubbin were substituted as parties plaintiff. The defendants argued that because their property was registered under the provisions of the Commercial Forest Act, MCL 320.301 *et seq.*; MSA 13.221 *et seq.*, which requires that such lands be open to the public for hunting and fishing, and because the plaintiffs' use of the roadways had been for the purpose of reaching hunting and fishing areas open to the public, the use was permissive and thus an easement by prescription could not arise. The trial court, Dean J. Shipman, J., granted summary disposition for the defendants on that basis. The plaintiffs appealed, and the defendants cross appealed.

The Court of Appeals *held:*

Any use of land registered pursuant to the Commercial Forest Act involving activities directly related to hunting and fishing, including the use of motor vehicles to reach hunting and fishing areas, no matter how long continued, cannot give rise to a prescriptive easement. To permit such use to ripen into an enforceable easement would conflict with the spirit and purpose of the Commercial Forest Act.

Affirmed.

Peterson, Beauchamp, DeGrand, Reardon & Hall, P.C. (by *Daniel R. DeGrand*), for the plaintiffs.

Kendricks, Bordeau, Adamini, Keefe, Smith, Girard & Seavoy, P.C. (by *Dennis H. Girard*), for the defendants.

Before: GRIFFIN, P.J., and SAWYER and R. L. ZIOLKOWSKI,* JJ.

GRIFFIN, P.J. Plaintiffs appeal and defendants cross appeal an order of the circuit court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) regarding plaintiffs' claim of prescriptive easement. The circuit court determined that members of the public cannot acquire prescriptive easement rights over lands registered under the Commercial Forest Act (CFA), MCL 320.301 *et seq.*; MSA 13.221 *et seq.*, because the lands are open to the public for hunting and fishing purposes. We affirm.

I

In 1966, plaintiffs Dale Goodall, Gary Goodall, Richard Woiderski, and James Woiderski purchased a tract of property in Masonville Township in Delta County. Their predecessors in interest to the property were Charlotte and Lynn Levernier. In November 1978, the property was transferred by plaintiffs to the Little Nubbin Hunting Club, Inc., of which all plaintiffs are members.[1] The property is located in the same township in Delta County as defendants' respective parcels of land.

On October 21, 1992, plaintiffs brought the instant action, seeking injunctive relief regarding their alleged prescriptive easements over defendants' property. In their complaint, plaintiffs alleged that they used various roads and trails over defendants' property since 1966. Plaintiffs used

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

[1] The Little Nubbin Hunting Club, Inc., was the original party plaintiff in the instant action. However, in an order entered on February 9, 1993, the trial court granted defendants' motion for summary disposition under MCR 2.116(C)(8) and dismissed it from the action. Nevertheless, the trial court allowed the corporation to substitute its members as appropriate party plaintiffs.

these roads to drive to various hunting sites located on federal forest land and privately owned lands that were registered under the CFA.

No one interfered with plaintiffs' use of the property until it was purchased by defendants in 1990 and 1991. Following the purchase, plaintiffs alleged that defendants "unlawfully" attempted to block their access to the roads over defendants' property. Plaintiffs claimed that they acquired by prescription easements in gross over defendants' property through their open, continuous, notorious, hostile, and adverse use of the land.

On June 8, 1993, a hearing was held with respect to defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). At the hearing, defendants raised two arguments. First, defendants argued that Michigan law prohibits the public from obtaining an easement in gross with respect to public lands. Further, defendants claimed that plaintiffs' complaint failed to state a claim for prescriptive or adverse use for the requisite fifteen-year period. Defendants asserted that any use of their property by plaintiffs was permissive after 1972 when it was opened to the general public for hunting and fishing purposes under the CFA. The trial court agreed with defendants' second argument and dismissed plaintiffs' claim of prescriptive easement.

II

At issue in this case is whether the registration of land under the CFA precludes the establishment of a prescriptive easement as a matter of law. Section 10 of the CFA, MCL 320.310; MSA 13.230, forbids the owner of commercial forestland from denying the general public the privilege of hunting

or fishing. Before amendment by 1993 PA 70, § 10(1)[2] provided:

> The owner of land listed as a commercial forest shall not make use of that land in a manner which would be prejudicial to its development as a commercial forest and shall not use the land for industrial, recreational, or other commercial purposes, nor enjoy exclusive privileges as to hunting and fishing upon the land. However, the general public shall be accorded the privilege of hunting and fishing on all lands listed as commercial forest except if the lands are closed to hunting or fishing, or both, by order of the natural resources commission or by an act of the legislature. Exploration for mineral deposits shall be permitted on land listed under this act. If commercial mineral deposits are discovered and extraction is to be undertaken, the lands affected shall be removed from the provisions of this act and penalties paid pursuant to section 7.

As a general rule, an easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years. *Marr v Hemenny,* 297 Mich 311; 297 NW 504 (1941); *Dyer v Thurston,* 32 Mich App 341, 343; 188 NW2d 633 (1971); MCL

[2] 1993 PA 70 amended this section to read:

> Except as provided in this section, the owner of a commercial forest shall not use that land in a manner that is prejudicial to its development as a commercial forest, use the land for agricultural, mineral extraction except as provided in this section, grazing, industrial, developed recreational, residential, resort, commercial, or developmental purposes, or deny the general public the privilege of hunting and fishing on commercial forestland unless the land is closed to hunting or fishing, or both, by order of the commission of natural resources or by an act of the legislature. [MCL 320.310(1); MSA 13.230(1).]

Although we apply the language of this section as it was before the 1993 amendment, we note no substantive change that would affect the present issue.

600.5801; MSA 27A.5801. A use is "adverse" when it would entitle the landowner to a cause of action against the trespasser:

> The term "hostile" as employed in the law of adverse possession is a term of art and does not imply ill will. Nor is the claimant required to make express declarations of adverse intent during the prescriptive period. Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder. See *Rose v Fuller,* 21 Mich App 172; 175 NW2d 344 (1970); also, 25 Am Jur 2d, Easements and Licenses, § 51, pp 460-461. [*Mumrow v Riddle,* 67 Mich App 693, 698; 242 NW2d 489 (1976).]

In arguing for an easement by prescription, plaintiffs rely heavily upon an administrative regulation promulgated under the CFA that permits a landowner to forbid activities other than hunting and fishing. 1987 AACS, R 299.2605a provides in pertinent part that "[t]he owner of listed land may restrict, through posting, activities other than public hunting and fishing" and "[f]ences and gates do not disqualify land from listing if the owner allows public entry for hunting and fishing."

We agree that 1987 AACS, R 299.2605a clearly allows a landowner to erect gates or fences across roadways or to ban motor vehicles from his property. All that is required under the CFA is that the public be allowed access to the land for hunting and fishing purposes.

In the present case, plaintiffs' use of defendants' roads was related directly to the CFA's protected activity of hunting and fishing. The CFA clearly was designed to encourage the landowner to allow

open access to his property for purposes of hunting and fishing. Permitting prescriptive easements to be created if motor vehicles are used to gain access to such lands would conflict with the spirit and purpose of the act.

Principles of equity and public policy compel this result. We are persuaded by the following arguments advanced by defendants in their brief:

> It is contrary to the intent of the CFA to require landowners to hold their land open for public use, and to then allow loss of a part of their ownership rights as a result of claimed adverse use in excess of fifteen (15) years. The CFA grants monetary incentive for landowners to register their land under the act for periods of 20 years or longer. MCLA 320.307; MSA 13.230 [sic, MSA 13.227]. Consequently, compliance with the act for at least this twenty (20) year period would render all CFA lands subject to prescriptive easement claims, such as those now made. It is against public policy and the intent of the CFA to allow easement by prescription to be claimed in these situations.

Finally, in a somewhat analogous context, we note the Legislature has decided that a claim of adverse possession against state lands is against public policy and, therefore, will not be recognized. MCL 600.5821(1); MSA 27A.5821(1), see *Gorte v Dep't of Transportation,* 202 Mich App 161; 507 NW2d 797 (1993).

For these reasons, we affirm and hold that with respect to activities directly related to hunting and fishing, prescriptive easements may not arise with respect to lands registered under the CFA. In view of our disposition, we find it unnecessary to address the remaining issues.

Affirmed.

PEOPLE v NIX (AFTER REMAND)

Docket No. 156242. Submitted December 14, 1994, at Lansing. Decided February 21, 1995, at 9:15 A.M.

Terressa Nix was tried before a jury in the Oakland Circuit Court on charges of felony murder and premeditated murder. The court, Fred M. Mester, J., directed a verdict of acquittal, but stayed the entry of the order of acquittal and did not dismiss the jury pending an appeal by the prosecution. The Court of Appeals, in an order, reversed with respect to the felony murder charge and remanded for further proceedings. The defendant was retried and convicted of involuntary manslaughter by a new jury after the original jurors were dismissed for insufficient memory of the prior proceedings. The defendant appealed.

After remand, the Court of Appeals *held:*

Once a court enters a final judgment of acquittal based on a directed verdict, even if granted on an erroneous foundation, the defendant's constitutional protections against double jeopardy prohibit an appeal or a retrial. Double jeopardy is not avoided by the staying of the entry of the order of acquittal or by the retention of the original jury while the prosecution pursues an appeal.

Reversed.

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — DIRECTED VERDICTS OF ACQUITTAL.

Double jeopardy bars an appeal or a retrial following a directed verdict of acquittal, regardless of the propriety of the grant of the directed verdict of acquittal (US Const, Am V; Const 1963, art 1, § 15).

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

REFERENCES

Am Jur 2d, Criminal Law § 262.

Conviction from which appeal is pending as bar to another prosecution for same offense. 61 ALR2d 1224.

Supreme Court's views as to application, in state criminal prosecutions, of double jeopardy clause of Federal Constitution's Fifth Amendment. 95 L Ed 2d 924.

Casey, Solicitor General, *Richard Thompson,* Prosecuting Attorney, *Joyce F. Todd,* Chief, Appellate Division, and *Richard H. Browne,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Norris J. Thomas, Jr.*), for the defendant on appeal.

AFTER REMAND

Before: TAYLOR, P.J., and GRIFFIN and W. G. SCHMA,* JJ.

TAYLOR, P.J. Defendant appeals as of right her conviction of and sentence for involuntary manslaughter, MCL 750.321; MSA 28.553. Defendant was tried before a jury on charges of first-degree felony murder and first-degree premeditated murder. Upon defendant's motion, the trial court ordered a directed verdict of acquittal, concluding that defendant owed the victim no legal duty and, therefore, could not be convicted of either charge as a matter of law. The trial court stayed the order to allow an appeal by the prosecutor. This Court reversed and remanded on the felony murder charge. The trial court recalled the original jury but dismissed it for manifest necessity after determining that the jurors had insufficient memory of the proceedings. Defendant was retried and convicted by a new jury. We reverse.

Although defendant raises a number of issues in this appeal, one is dispositive. Defendant's conviction constitutes a violation of her constitutional protections against double jeopardy. US Const, Am V; Const 1963, art I, § 15. Once a court enters a final judgment of acquittal based on a directed

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

verdict, even if granted on an erroneous foundation, the defendant's double jeopardy protections prohibit appeal or retrial. *Fong Foo v United States*, 369 US 141, 143; 82 S Ct 671; 7 L Ed 2d 629 (1962). The question presented in this appeal is whether a trial court may avoid application of double jeopardy by staying entry of the order granting the directed verdict pending an appeal by the prosecutor. We conclude that such a procedural device cannot be used as a means of avoiding defendant's constitutional protection against double jeopardy.

The character of the order appealed from in this case is critical in determining the double jeopardy question. The order states:

> IT IS ORDERED that, as a matter of law, Defendant owed no legal duty to the victim and therefore could not be convicted of either charge as a matter of law.
>
> IT IS FURTHER ORDERED that entry of the directed verdict and all further proceedings in the trial are STAYED until August 2, 1991, to permit the prosecution to seek appellate review of this legal ruling.
>
> * * *
>
> IT IS FURTHER ORDERED that the jury is not discharged, but instead is ordered to return to their daily lives while the trial is adjourned and until summoned by this Court to return for completion of the proceedings, and is instructed that they are to continue to refrain from discussing this case, reading about this case . . . .

Although the court couched the order as a simple legal question and made an effort to avoid double jeopardy problems by keeping the original jury empaneled, the legal import of this holding was a directed verdict of acquittal. The court found that the prosecutor failed to establish an essential ele-

ment of his case. The court judged defendant's case on the merits and made a finding of insufficiency. This is precisely the type of ruling that is not appealable. *United States v Martin Linen Supply Co,* 430 US 564, 575-576; 97 S Ct 1349; 51 L Ed 2d 642 (1977). See also *Sanabria v United States,* 437 US 54; 98 S Ct 2170; 57 L Ed 2d 43 (1978). It is this resolution on the merits, rather than the trial court's label of its action, that must be considered. *Martin Linen, supra* at 571; see also *United States v Scott,* 437 US 82, 96; 98 S Ct 2187; 57 L Ed 2d 65 (1978).

We are mindful that there is case law allowing prosecutors to appeal from dispositive orders. However, those cases are distinguishable from the instant case because no final determination of guilt or innocence had been made in those cases. *Scott, supra* at 97-99. For example, in *Scott,* the Supreme Court held that a prosecutor's appeal of an order of dismissal based on prejudice for preindictment delay did not violate the defendant's protections against double jeopardy because the dismissal was not based on a finding regarding the defendant's criminal culpability. *Id.* at 98-99. Similarly, in *People v Conte,* 104 Mich App 73; 304 NW2d 485 (1981), the prosecutor was allowed to appeal an interlocutory evidentiary ruling that resulted in dismissal. The evidentiary ruling did not address the criminal culpability of the defendant; instead, it considered only the voluntariness of the confession. By contrast, in the instant case, the trial court considered defendant's criminal culpability in its order. The court determined that there was no duty, and that determination is final. *Scott, supra.* Thus, retrial of this matter placed defendant twice in jeopardy for a single offense.

Reversed.

PEOPLE v MABEN

Docket No. 166856. Submitted January 19, 1995, at Grand Rapids. Decided February 21, 1995, at 9:20 A.M. Leave to appeal sought.

Lester Maben pleaded guilty in the Berrien Circuit Court, Casper O. Grathwohl, J., of larceny from a person and was sentenced to 2½ to 10 years of imprisonment, to be served consecutively to the sentence for which he was on parole at the time of the larceny. The defendant appealed his sentence.

The Court of Appeals *held:*

1. No authority exists in support of the defendant's claim that the scoring of fifteen points for Prior Record Variable 6 (prior relationship to criminal justice system) of the Michigan Sentencing Guidelines and the imposition of a consecutive sentence pursuant to MCL 768.7a(2); MSA 28.1030(1)(2) constitutes impermissible "double counting."

2. The scoring of points under both PRV 6 and PRV 2 (prior low severity felony convictions) likewise does not constitute double counting because the variables serve different purposes. Prior Record Variable 2 reflects a policy decision that a longer sentence is warranted when the offender has a prior felony conviction, and PRV 6 is indicative of a determination that a subsequent offense is even more egregious if committed while the offender is on parole.

Affirmed.

1. SENTENCES — SENTENCING GUIDELINES — PRIOR RELATIONSHIP TO CRIMINAL JUSTICE SYSTEM — PAROLEES — CONSECUTIVE SENTENCING.

A sentencing court, when computing under the sentencing guidelines a sentence that, by statute, must be imposed consecutively to the sentence from which the offender was on parole at the time of the offense for which sentence is to be imposed, may assess points under Prior Record Variable 6 (prior relationship to criminal justice system) on the basis of the offender's parole status (MCL 768.7a[2]; MSA 28.1030[1][2]).

REFERENCES

Am Jur 2d, Criminal Law §§ 527, 552.

See ALR Index under Sentence and Punishment.

2. SENTENCES — SENTENCING GUIDELINES — PRIOR LOW SEVERITY FELONY CONVICTIONS — PRIOR RELATIONSHIP TO CRIMINAL JUSTICE SYSTEM.

A sentencing court, when computing under the sentencing guidelines a sentence to be imposed on an offender who was on parole at the time of the offense, may assess points under both Prior Record Variable 2 (prior low severity felony convictions) and Prior Record Variable 6 (prior relationship to criminal justice system) where the offense for which parole was granted is among the felonies enumerated in PRV 2.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Dennis M. Wiley,* Prosecuting Attorney, and *Mary Malesky,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Anne Yantus*), for the defendant on appeal.

Before: SAWYER, P.J., and BANDSTRA and R. B. BURNS,* JJ.

BANDSTRA, J. Defendant pleaded guilty to larceny from a person, MCL 750.357; MSA 28.589, and was sentenced to 2½ to 10 years in prison. Defendant now appeals his sentence as of right and we affirm.

Defendant first argues that he is entitled to resentencing because the trial court improperly scored fifteen points under Prior Record Variable (PRV) 6 of the Michigan Sentencing Guidelines when the parole status that accounted for that scoring was already a factor that required a mandatory consecutive sentence under statute. PRV 6 provides that fifteen points must be assessed against an offender if, at the time of the instant offense, the defendant was on parole. Michigan Sentencing Guidelines (2d ed, 1988), p 97. In addi-

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

tion, MCL 768.7a(2); MSA 28.1030(1)(2) provides that a person who commits a felony while on parole from a sentence for a previous offense shall receive a sentence for the subsequent offense that runs consecutively to the sentence imposed for the previous offense. *People v Young,* 206 Mich App 144, 154; 521 NW2d 340 (1994).

To adopt defendant's argument that impermissible "double counting" occurred when the trial court scored points under PRV 6 and also imposed a consecutive sentence under the statute would have broad consequences. PRV 6 is included in the scoring for every offense contained in the sentencing guidelines and the effect would be to repeal all these provisions. We see no reason to reach that extreme result.

When PRV 6 (formerly PRV 7) was first adopted in 1983, points were to be scored against an offender even if the offender's situation required consecutive sentencing. We presume that, when MCL 768.7a(2); MSA 28.1030(1)(2) was amended effective June 1, 1988, to expand consecutive sentencing situations, the Legislature was aware of former PRV 7 and its negative effect on an offender who was on parole. See *K & K Woodworking, Inc v MESC,* 206 Mich App 515, 519; 522 NW2d 694 (1994). Similarly, when the sentencing guidelines were subsequently revised, effective October 1, 1988, it is presumed that the sentencing guidelines committee was aware of the amended consecutive sentencing statute. Cf. *K & K Woodworking, supra.* Quite simply, the sentencing guidelines committee and the Legislature, each knowing of the other's actions, separately decided to penalize offenders already on parole in different manners. Defendant cites no authority to say this was wrong, and we are aware of none. See *People v Hunter,* 202 Mich App 23, 27; 507 NW2d 768

(1993). To ignore either the guidelines or the consecutive sentencing statute would be erroneous. Thus, the trial court properly applied both penalties.

Defendant next argues that assessing points under both PRV 2 and PRV 6 is, in effect, assessing points twice for the same misconduct. We disagree. Points are assessed under PRV 2 because of an offender's prior felony history. PRV 2 thus reflects the legitimate policy decision that a longer sentence is warranted because it is not the first time that the offender was in trouble with the law. PRV 6 serves a different purpose. It recognizes that a subsequent offense is even *more* egregious if it was committed while the offender was still on or was just recently on parole, probation, or otherwise involved with the criminal justice system. In *People v Vonins (After Remand),* 203 Mich App 173, 176; 511 NW2d 706 (1993), this Court addressed this issue and held that the scoring of points under both PRV 2 and 6 was not impermissible "double counting." The trial court's assessment of points for both variables was proper.

Affirmed.

SAWYER, P.J. I concur in the result only.

PAULITCH v DETROIT EDISON COMPANY

Docket No. 151032. Submitted October 11, 1994, at Detroit. Decided February 21, 1995, at 9:25 A.M.

Adolph J. Paulitch brought an action in the Wayne Circuit Court against the Detroit Edison Company, alleging that the defendant engaged in age discrimination in violation of the Civil Rights Act in failing to promote him to a position for which he had applied. The jury awarded the plaintiff damages and the court, Paul S. Teranes, J., entered a judgment consistent with the verdict. The defendant appealed. The plaintiff cross appealed, claiming the trial court erred in declining to award prejudgment interest with regard to that portion of the award pertaining to future damages.

The Court of Appeals *held:*

1. The plaintiff established a prima facie case of age discrimination. The plaintiff proved by a preponderance of the evidence that the defendant's purported reason for not promoting the plaintiff was a mere pretext.

2. The verdict was supported by adequate evidence and was not against the great weight of the evidence.

3. The trial court properly denied the defendant's motions for remittitur or a new trial.

4. The defendant failed to carry its burden of proof regarding the plaintiff's alleged failure to mitigate damages. The award for future lost wages was proper. The trial court properly denied the defendant's motions for a new trial or judgment notwithstanding the verdict.

5. The plaintiff is entitled to prejudgment interest on his award of future damages from the date of the filing of the complaint. The trial court's denial of the plaintiff's motion for prejudgment interest must be reversed. The reference to "future damages" in MCL 600.6013; MSA 27A.6013, which states that "interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment," is not applicable to this case because "future damages,"

REFERENCES

Am Jur 2d, Interest and Usury § 60; Job Discrimination § 2953.
See ALR Index under Interest on Money; Labor and Employment.

as defined in MCL 600.6301; MSA 27A.6301, must result from a personal bodily injury and no such injury was involved in this matter.

Affirmed in part and reversed in part.

1. CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — MITIGATION OF DAMAGES.

An offer of employment by a defendant-employer to a plaintiff-employee who has been a victim of employment discrimination must be free from conditions before the employee's failure to accept the offer may be considered to be a failure to mitigate damages.

2. JUDGMENTS — PREJUDGMENT INTEREST — WORDS AND PHRASES — FUTURE DAMAGES.

The term "future damages" in the statute providing that interest shall not be allowed on future damages from the date of the filing of the complaint to the date of the entry of the judgment refers to damages arising from a personal bodily injury (MCL 600.6013, 600.6301; MSA 27A.6013, 27A.6301).

Van Benschoten, Hurlburt, Tsiros & Allweil, P.C. (by *Mandel I. Allweil*), for the plaintiff.

Frederic E. Champnella and *Jane K. Souris,* for the defendant.

Before: WEAVER, P.J., and CONNOR and J. F. KOWALSKI,* JJ.

CONNOR, J. A jury awarded plaintiff $359,000 in damages after finding that defendant had discriminated against him on the basis of his age when it failed to promote him in violation of the Civil Rights Act, MCL 37.2202; MSA 3.548(202). Defendant appeals as of right, claiming insufficient evidence, among other things. Plaintiff cross appeals, claiming the trial court improperly declined to award prejudgment interest on future damages. We affirm in part and reverse in part.

Plaintiff began working for defendant in 1964, as

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

a substation operator. Over the years, plaintiff applied numerous times for the position of central system supervisor. In 1986, plaintiff, who was fifty years old at the time, interviewed for the position. He was not promoted to the position. Plaintiff testified at trial that, during the interview, he was told repeatedly that the job for which he was applying is a "young man's job." Plaintiff presented other evidence that defendant appeared to favor younger individuals for the position and showed that no one over the age of forty-five ever had been promoted to the position.

Defendant first argues that the trial court erred in denying its motions for a directed verdict and judgment notwithstanding the verdict because there was insufficient evidence to support the jury's findings. We disagree. After reviewing the record, we find that the elements for proving a claim of discrimination were met. *Manning v Hazel Park,* 202 Mich App 685, 696; 509 NW2d 874 (1993).

Plaintiff showed that defendant was predisposed to discriminate on the basis of age and acted on that predisposition. Plaintiff was in a protected class at the time, between the ages of forty and seventy, and he testified that the chief system supervisor told him that plaintiff's proximity to retirement was a factor in his decision not to promote plaintiff. Further, plaintiff testified that during his interviews in 1986, he was asked why a person his age would want such a stressful job. Accordingly, plaintiff established a prima facie case of age discrimination. *McDonald v Union Camp Corp,* 898 F2d 1155, 1160-1161 (CA 6, 1990).

Defendant's purported reason for not promoting plaintiff was that testing procedures indicated he was not as well qualified for the position as other applicants. However, our review of the record

reveals that plaintiff carried his burden of proving by a preponderance of the evidence that this purported reason was a mere pretext. *Manning, supra,* 696. Not only were portions of the testing procedures strictly subjective, but one of the candidates selected for the system supervisor position scored below plaintiff on the test. This person, who was promoted in spite of his lower score, is ten years younger than plaintiff.

Viewing the evidence in a light most favorable to plaintiff, we find the jury's verdict is supported by adequate evidence. *Price v Long Realty, Inc,* 199 Mich App 461, 472; 502 NW2d 337 (1993).

Defendant's claim that the jury's verdict is against the great weight of the evidence is also without merit. After reviewing the record, we find that evidence existed regarding plaintiff's emotional damages, including his testimony that his relationships with his wife and friends suffered after he was passed over for the promotion. As such, the verdict is not against the overwhelming weight of the evidence. *Heshelman v Lombardi,* 183 Mich App 72, 76; 454 NW2d 603 (1990); *Brunson v E & L Transport Co,* 177 Mich App 95, 106; 441 NW2d 48 (1989). Similarly, we find that the trial court did not abuse its discretion in denying defendant's motions for remittitur or a new trial. *Palenkas v Beaumont Hosp,* 432 Mich 527, 532; 443 NW2d 354 (1989). Because evidence of emotional damage was presented at trial, and the award was comparable to awards in similar cases, the trial court properly deferred to the jury and denied defendant's motions. *Id.; Brunson, supra,* 106.

Defendant's claim that plaintiff failed to mitigate his damages is unpersuasive. Defendant argues that if plaintiff had not withdrawn from consideration in 1989, he would have been offered

the position of central system supervisor at that time. Consequently, defendant contends, plaintiff's claim for past lost wages was barred from the date of the withdrawal. We disagree. Because plaintiff actually was never offered the job of central system supervisor, plaintiff was not in a position to refuse the job. Rather, the evidence showed that plaintiff withdrew his name from consideration to avoid the embarrassment of being denied the promotion again. We find defendant has failed to carry its burden of proof regarding plaintiff's alleged failure to mitigate damages. *Brooks v Rose,* 191 Mich App 565, 570; 478 NW2d 731 (1991). Under these circumstances, it was reasonable for plaintiff to believe that, if defendant intended to offer him the supervisor position in 1989, it would have done so, rather than simply accepting his withdrawal from consideration. *Hughes v Park Place Motor Inn, Inc,* 180 Mich App 213, 220; 446 NW2d 885 (1989).

Defendant's final claim, that plaintiff should not have been awarded future lost wages, is also without merit. Defendant contends that it made plaintiff an unconditional job offer a few days before the trial began. Contrary to defendant's argument, however, the job offer extended to plaintiff was not unconditional and plaintiff did not reject it. Rather, the offer was made on the eve of trial and remained open for only ten days. When plaintiff failed to act within that period, defendant withdrew the offer. An offer of employment by a defendant-employer to an employee who was a victim of discrimination must be free from conditions. *Dep't of Civil Rights ex rel Cornell v Edward W Sparrow Hosp Ass'n,* 423 Mich 548, 568; 377 NW2d 755 (1985). Because the offer was rescinded by defendant, the jury could find that the offer was conditional. Plaintiff did not fail to mitigate his dam-

ages, and the trial court properly denied defendant's motions for a new trial or judgment notwithstanding the verdict. *Rasheed v Chrysler Motors Corp,* 196 Mich App 196, 206; 493 NW2d 104 (1992).

Plaintiff's cross appeal appears to present a conflict in the interpretation of MCL 600.6013; MSA 27A.6013. Strict construction of the statute directs that plaintiff is entitled to prejudgment interest on his award of future damages. Consequently, we reverse the trial court's denial of plaintiff's motion for prejudgment interest.

Section 6013 of the Revised Judicature Act stated, in part, at all times relevant to this appeal:

> Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section, except that for complaints filed on or after October 1, 1986, interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, "future damages" means that term as defined in section 6301. [MCL 600.6013; MSA 27A.6013.]

Plaintiff argues that the reference to future damages is not applicable to this case because future damages, as defined in § 6301, must result from a personal bodily injury. MCL 600.6301; MSA 27A.6301. Because this case involved a civil rights violation, plaintiff contends he is entitled to prejudgment interest on the money judgment from the date of the filing of the complaint, as provided by § 6013. We agree.

Panels of this Court appear to have split on this issue. In *Goins v Ford Motor Co,* 131 Mich App 185, 203; 347 NW2d 184 (1983), this Court ruled that the type of damages awarded by a jury was not dispositive with regard to the question of

interest. This Court adopted the *Goins* reasoning in *Om-El Export Co, Inc v Newcor, Inc,* 154 Mich App 471, 480-481; 398 NW2d 440 (1986). The *Goins* Court reasoned that prejudgment interest should be applied to the entire award because the statute, MCL 600.6013; MSA 27A.6013, did not distinguish between past and future damages.[1]

In another case, however, this Court held that the plaintiff was not entitled to prejudgment interest pursuant to MCL 600.6013; MSA 27A.6013 from the time the complaint was filed with regard to service fees payable after the complaint was filed. *Central Michigan Univ Faculty Ass'n v Stengren,* 142 Mich App 455, 461; 370 NW2d 383 (1985). And in *Bruno v Detroit Institute of Technology,* 51 Mich App 593, 600, n 1; 215 NW2d 745 (1974), this Court held that if future damages are not reduced to their present value at the time of the complaint, then an award of prejudgment interest on future damages would grant the plaintiff a double benefit. In the instant case, the jury did not receive an instruction regarding present value of future damages, and the judgment contained no reduction.

The definition of future damages is set forth in MCL 600.6301(a); MSA 27A.6301(a):

> "Future damages" means damages arising from personal injury which the trier of fact finds will accrue after the damage findings are made and includes damages for medical treatment, care and custody, loss of earning, loss of earning capacity, loss of bodily function, and pain and suffering.

We find there can be no interpretation of this plain language other than that a plaintiff is enti-

[1] The exception regarding future damages was added to § 6013 in 1986, 1986 PA 178.

tled to prejudgment interest when the suit does not result from a personal bodily injury.[2]

Affirmed in part and reversed in part.

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[2] We are sympathetic to defendant's position for the following reasons. First, this Court has repeatedly held that the purpose of prejudgment interest is to compensate the prevailing party for the delay in recovering money damages. *Farmers Ins Group v Lynch,* 186 Mich App 537, 538; 465 NW2d 21 (1990); *Dep't of Treasury v Central Wayne Co Sanitation Authority,* 186 Mich App 58, 61; 463 NW2d 120 (1990); *McDaniel v Macomb Co Bd of Road Comm'rs,* 169 Mich App 474, 477; 426 NW2d 747 (1988). There is no delay in paying plaintiff money to which he became entitled only as a result of the jury verdict. Second, although the amended Revised Judicature Act did define future damages as only applying to personal bodily injury, MCL 600.6301; MSA 27A.6301, the Legislature distinguished between prejudgment interest on future damages and other damages. However, we believe that any modifications of this system should originate with the Legislature, not the courts.

OAKLAND COUNTY PROBATE COURT v DEPARTMENT OF SOCIAL SERVICES

Docket No. 157569. Submitted October 19, 1994, at Lansing. Decided February 21, 1995, at 9:30 A.M.

The Oakland County Probate Court petitioned the Oakland Circuit Court for a review of a hearing referee's decision that a child that the probate court had taken jurisdiction over and had ordered to be placed with the respondent Department of Social Services at either one of two specific foster care centers was not eligible for federal Aid to Dependent Children-Foster Care (ADC-F) benefits. The court, Gene Schnelz, J., reversed the referee's ruling, finding that the federal statutory scheme did not require exclusive control by the DSS over the child's placement in order to allow ADC-F benefits to be applied to the child. The DSS appealed, arguing that the federal statutes required it to have the sole responsibility for both the placement and the care of the child in order for the federal money to be applied to the child.

The Court of Appeals *held:*

In order for ADC-F benefits to apply to a foster child's placement and care, the probate court must make a ruling placing the child in the custody of the DSS, but the order must leave the DSS with the sole responsibility for both the placement and the care of the foster child.

2. The DSS' sole responsibility with respect to placement and care does not interfere with a probate court's case overview responsibility under 42 USC 675(5)(C).

3. The referee's decision was supported by competent, material, and substantial evidence and is not contrary to law. The circuit court's order must be reversed and the referee's ruling must be reinstated.

Reversed.

SOCIAL SERVICES — AID TO DEPENDENT CHILDREN-FOSTER CARE — DEPARTMENT OF SOCIAL SERVICES.

The Department of Social Services must have the sole responsibil-

REFERENCES

Am Jur 2d, Welfare Laws § 25.
See ALR Index under Foster Children.

ity for both the placement and the care of a child who is potentially eligible for federal Aid to Dependent Children-Foster Care assistance before the child may be found eligible for such assistance; a child is not eligible for such assistance where a probate court order places the child in the custody of the DSS but does not leave the DSS with the sole responsibility for both the placement and the care of the child (42 USC 672[a]).

William P. Bartlam, Probate Counsel, for the Oakland County Probate Court.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Robert S. Welliver,* Assistant Attorney General, for the Department of Social Services.

Before: NEFF, P.J., and MARILYN KELLY and P. R. JOSLYN,* JJ.

NEFF, P.J. Respondent Department of Social Services appeals as of right the circuit court's order determining that federal Aid to Dependent Children-Foster Care (ADC-F) benefits could be applied to a foster child's care even where the probate court assumed responsibility for the placement of the child. We reverse.

I

A

Petitioner Oakland County Probate Court argues that it may order the placement of children in specific foster care facilities without jeopardizing the children's ADC-F benefits. The DSS disagrees, arguing that, under the relevant federal statutes, it must have the sole responsibility for placement and care of the children in order for the federal money to apply.

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

B

After taking jurisdiction over the child in the underlying action, the Oakland County Probate Court ordered the child to be placed with the DSS at either one of two specific foster care centers. Because of the specificity of this order, the DSS then informed the probate court that the child was not eligible for ADC-F benefits.

The Oakland County Probate Court appealed this determination to the Social Services Bureau of Administrative Hearings pursuant to MCL 400.9; MSA 16.409 and MCL 400.37; MSA 16.437. The hearing referee determined that the child was not eligible for the federal benefits.[1] The Oakland County Probate Court appealed that decision by petitioning the circuit court for review.

The circuit court reversed the administrative ruling, determining that the federal statutory scheme did not require exclusive control by the DSS over placement in order to allow ADC-F benefits to be applied to foster children.

II

Our standard of review of administrative decisions is the same as that of the circuit court. *Powers v Dep't of Social Services,* 179 Mich App 416; 446 NW2d 505 (1989). We conduct that review to determine whether the administrative decision was supported by competent, material, and substantial evidence and whether it was contrary to law. *Id.*

[1] As noted in Judge SHEPHERD's concurring opinion in *Craven v Dep't of Social Services,* 132 Mich App 673, 678-679; 347 NW2d 782 (1984), this dispute has to do with which entity, the DSS or the county, will pay the benefits, not whether the child will be denied benefits. The question revolves around where the financial burden will fall, depending on which entity has control over the services provided to the child.

A

The federal government has provided, in 42 USC 672, eligibility standards for determining when ADC-F benefits may be awarded. That statute provides, in part:

> (a) Each State with a plan approved under this part shall make foster care maintenance payments (as defined in section 675(4) of this title) under this part with respect to a child who would meet the requirements of section 606(a) of this title or of section 607 of this title but for his removal from the home of a relative (specified in section 606(a) of this title), if
>
> (1) the removal . . . was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child . . . ;
>
> (2) such child's *placement and care are the responsibility of (A) the State agency administering the State plan* . . . . [Emphasis added.]

B

This Court dealt with similar issues, and construed similar rules, in *Craven v Dep't of Social Services,* 132 Mich App 673; 347 NW2d 782 (1984). In *Craven,* the probate court issued various orders requiring cosupervision between the probate court and the DSS with respect to the care of certain foster children. In holding that ADC-F benefits would not apply to these children, this Court determined that the relevant federal statutes and rules "can only be reasonably interpreted as meaning that the sole responsibility for placement and care of a child must rest with the state agency (DSS)." *Id.* at 678.

We agree with this Court's reasoning in *Craven.*

The federal statute clearly draws the lines of authority. We hold that in order for ADC-F benefits to apply to a foster child's placement and care, the probate court must make a ruling placing the child in the custody of the DSS, but the order must leave the DSS with the sole responsibility for the placement and care of the foster child. 42 USC 672(a).

In relying on *Craven,* we disagree with the Oakland County Probate Court's argument that *Craven* can be distinguished on the basis that it dealt with the care of the child as opposed to the placement of the child. Both the statute and *Craven* speak in terms of the "child's placement *and* care," and we find no basis to separate the two issues. See 42 USC 672(a)(2); *Craven, supra* at 678. The DSS loses sole authority when either its power to place a child or its power to care for a child, or both, is restricted.

C

We also conclude that the DSS' sole responsibility with respect to placement and care does not interfere with a probate court's case overview responsibility under 42 USC 675(5)(C). Again, a probate court's responsibility is limited to making the general determination of whether the child is to stay within the system. The DSS, on the other hand, is responsible for determining where the care is to be given and the nature of that care.

D

Because we conclude the administrative decision was supported by competent, material, and substantial evidence and is not contrary to law, we

reverse the circuit court's order granting petitioner's requested relief and reinstate the hearing referee's ruling. See *Powers, supra* at 419.

Reversed.

PEOPLE v BARCLAY

Docket No. 138671. Submitted March 17, 1994, at Detroit. Decided February 21, 1995, at 9:35 A.M.

Kamania K. Barclay was convicted by a jury in the Recorder's Court for the City of Detroit, Leonard Townsend, J., of two counts of armed robbery, two counts of assault with intent to murder, and one count of arson. The defendant was sentenced to concurrent terms of life imprisonment for the armed robbery convictions, terms of thirty to sixty years for the assault convictions, and a term of 80 to 120 months for the arson conviction. The defendant appealed by leave granted.

The Court of Appeals *held:*

1. Because the defendant failed to move for a new trial or seek an evidentiary hearing with respect to his claim that he was denied effective assistance of counsel, appellate review of that claim is limited to the record. The record shows that the defendant agreed to be represented at the preliminary examination by the same attorney as his codefendant. Trial counsel, contrary to the defendant's claim, moved to suppress the in-court identification of the defendant. Defense counsel's decision not to move for a separate trial did not result in any prejudice to the defendant, inasmuch as the defenses were not antagonistic. Accordingly, the record fails to support the claim of ineffective assistance of counsel.

2. The trial court properly admitted the preliminary examination testimony of the complainant who died before trial. Defense counsel had the opportunity, and took that opportunity, to cross-examine the witness at the preliminary examination. Accordingly, the defendant's right to confrontation was not denied.

3. The evidence that the defendant and his codefendants intentionally had doused with gasoline the candle store that they had just robbed and had fled from the store without making any effort to make sure that their victims in the store

REFERENCES

Am Jur 2d, Evidence §§ 560, 562.

Admissibility of evidence of lineup identification as affected by allegedly suggestive lineup procedures. 39 ALR3d 487.

were safe when an explosion occurred as the result of a lighted candle in the store was sufficient to establish beyond a reasonable doubt the crime of assault with intent to murder.

4. The fact that a witness was unable to identify the defendant at a pretrial corporeal lineup did not render inadmissible the subsequent in-court identification of the defendant by that witness. The prior failure to identify the defendant is relevant to the credibility of the in-court identification, not its admissibility.

5. The reasons articulated on the record by the trial court for imposing sentences that exceeded the sentences calculated under the sentencing guidelines, i.e., that the guidelines range was grossly inadequate and that the victims had been burned badly and were scarred permanently, were not sufficient to justify the court's departure from the recommended sentences. Accordingly, the case must be remanded for resentencing for the armed robbery and assault convictions.

Convictions affirmed, but remanded for resentencing.

E. C. PENZIEN, J., concurring in the affirmance of the convictions but dissenting from the remand for resentencing, stated that the reasons given by the trial court for departing from the guidelines were sufficient and that the sentences imposed were proportionate to the crimes involved. Further, to hold that the sentences were disproportionate and to remand for resentencing without indicating what sentence would be proportionate leaves the trial court without the guidance necessary to impose a proper sentence.

CRIMINAL LAW — IDENTIFICATION TESTIMONY — PRETRIAL IDENTIFICATION — CREDIBILITY.

The fact that a witness was unable to identify a defendant at a pretrial corporeal lineup does not render inadmissible the subsequent in-court identification of the defendant by that witness; the failure to identify a defendant at a pretrial lineup is relevant to the credibility of the in-court identification, not to its admissibility.

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 *Karen M. Woodside,* Assistant Prosecuting Attorney, for the people.

George A. Chatman, for the defendant.

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

JANSEN, P.J. Defendant was convicted, following a jury trial in the Recorder's Court for the City of Detroit, of two counts of armed robbery, MCL 750.529; MSA 28.797, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of arson, MCL 750.73; MSA 28.268. Subsequently, he was sentenced to concurrent terms of life imprisonment for the armed robbery convictions, thirty to sixty years for the assault convictions, and 80 to 120 months for the arson conviction. Defendant appeals by delayed leave granted. We affirm his convictions, but remand for resentencing.

Defendant first argues that he was denied effective assistance of counsel. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced the defendant so as to deprive him of a fair trial. *People v Pickens,* 446 Mich 298, 309; 521 NW2d 797 (1994). Defendant did not move for a new trial or an evidentiary hearing on this basis below. Failure to so move forecloses appellate review unless the record contains sufficient detail to support defendant's claims, and, if so, review is limited to the record. *People v Armendarez,* 188 Mich App 61, 74; 468 NW2d 893 (1991).

Defendant's first claim, that he was denied effective assistance of counsel at the preliminary examination because he and his codefendant were represented by the same attorney, is not supported by the record. Our review of the preliminary examination transcript reveals that defendant specifi-

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

cally acknowledged any potential conflict and indicated that he still wished to be represented by that attorney. Defendant cannot now predicate error where he acquiesced to counsel's representation. "To hold otherwise would allow defendant to harbor error as an appellate parachute." *People v Shuler,* 188 Mich App 548, 552; 470 NW2d 492 (1991).

Defendant's other claims also are contradicted by the record. Contrary to defendant's assertion, defense counsel did move to suppress the in-court identification of defendant, but that motion was denied by the trial court. Further, regarding the issue of severance, defense counsel agreed that defendant would be tried before the same jury as his codefendants. Defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v McCurdy,* 185 Mich App 503, 507; 462 NW2d 775 (1990). In any event, we find that the defenses were not antagonistic because codefendant Lodrick Parker's statement to the police did not incriminate defendant. Defendant was not entitled to a separate trial. *People v Harris,* 201 Mich App 147, 152-153; 505 NW2d 889 (1993). Accordingly, on the basis of the record before us, defendant was not denied effective assistance.

Defendant next argues that the admission of the deceased complainant's preliminary examination testimony at trial violated his right to confrontation. We first note that defendant did not object to the admission at trial of the preliminary examination testimony of Charles Byrd, except for that portion of the testimony concerning Byrd's identification of defendant as a participant. Therefore, this issue is reviewed only to the extent that a substantial right of defendant's was affected. MRE 103(a)(1). Because Byrd was deceased at the time of

trial, his preliminary examination testimony was admissible. MRE 804(b)(1). Further, the preliminary examination transcript reveals that defense counsel had the opportunity to cross-examine Byrd and exercised the opportunity to do so. Defendant's right to confrontation was not denied.

Defendant next argues that there was insufficient evidence to support his convictions of assault with intent to murder. When determining whether sufficient evidence was presented to sustain a conviction, a court must review 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 Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Warren (After Remand),* 200 Mich App 586, 588; 504 NW2d 907 (1993). Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of the offense. The intent to kill may be proven by inference from any facts in evidence. *Id.*

Taken in a light most favorable to the prosecution, we find that there was sufficient evidence to sustain defendant's convictions of two counts of assault with intent to murder. The evidence revealed that defendant and his two codefendants entered a religious candle shop on January 11, 1990, in the City of Detroit. Codefendant Parker ordered the cashier, Geraldine Anderson, at gunpoint to open the cash register and lie on the floor. Defendant then doused the store with gasoline. Both people in the store were ordered to lie down and avert their eyes. Because there were several

burning candles at the time, an explosion ensued before defendant or his codefendants actually lit the gasoline. However, the gasoline was poured intentionally throughout the store, and, after the explosion, defendant and his codefendants fled from the store and did not make any effort to see that the two people in the store were safe. The two victims in the store were badly burned.

On the basis of defendant's actions in intentionally pouring gasoline in the store, knowing that there were lit candles in the store, and in fleeing from the store immediately after the explosion, we find that the elements of assault with intent to murder, including the intent to kill, were proven beyond a reasonable doubt.

Defendant next argues that he was denied a fair trial because of the trial court's failure to sever his trial from that of his codefendants. However, defense counsel agreed before trial that severance would not be necessary. As we have stated, defendant may not assign error on appeal to an act that his own counsel deemed proper at trial. *McCurdy, supra,* p 507.

Defendant next claims that the trial court erred in failing to suppress the in-court identification of defendant by Byrd. The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk,* 443 Mich 289, 303; 505 NW2d 528 (1993). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

The need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive. *People v Laidlaw,* 169 Mich App 84, 92; 425 NW2d 738 (1988); *People v Syakovich,* 182 Mich App 85, 89; 452 NW2d 211 (1989).

At no point has defendant argued that the lineup procedure was improper or unduly suggestive. Rather, defendant's argument is premised on the fact that Byrd did not identify defendant at a pretrial corporeal lineup, but identified him in court (at the preliminary examination) as the man who poured the gasoline in the store. The fact that Byrd did not identify defendant at the lineup did not render his subsequent in-court identification inadmissible. *Id.* Rather, this was a credibility issue that was properly before the jury to determine. The trial court did not commit clear error in allowing the in-court identification testimony.

Finally, defendant argues that his sentence violates the principle of proportionality. Although defendant does not argue specifically whether his sentences for the assault convictions or the armed robbery convictions violate the principle of proportionality, our review of the record leads us to conclude that defendant's sentences for both armed robbery (life) and assault with intent to murder (thirty to sixty years) violate the principle of proportionality. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990).

The recommended sentences under the sentencing guidelines for the assault convictions were seven to fifteen years. The trial court exceeded the guidelines range, stating that the range was grossly inadequate and that the victims were burned badly and were scarred permanently. Although lengthy sentences for both the armed robbery and assault convictions may be warranted in this case, we find that the trial court's reasons for exceeding the guidelines range were not sufficient in light of the substantial departure. Further, the trial court failed to complete a Sentencing Information Report (SIR) departure form. *People v Fleming,* 428 Mich 408, 428; 410 NW2d 266 (1987).

Accordingly, we remand this case for resentencing with regard to the armed robbery and assault convictions. Should the trial court exceed the guidelines range, it must articulate both on the record and on the SIR factors not included within the guidelines range or factors not accounted for adequately by the guidelines. *Fleming, supra,* p 428; *Milbourn, supra,* pp 657, 660.

Defendant's convictions are affirmed, but the case is remanded for resentencing with respect to the convictions of armed robbery and assault with intent to murder. We do not retain jurisdiction.

HOLBROOK, JR. J., concurred.

E. C. PENZIEN, J. *(concurring in part and dissenting in part).* I agree that the defendant's convictions in this cause should be affirmed. I respectfully disagree with the majority's decision to remand this case for resentencing. I further am of the opinion that when an appellate court remands a case for resentencing on the theory that the sentence imposed is lacking in proportionality, the appellate court is duty-bound to state the limits of proportionality as viewed by the appellate court.

REVERSAL REQUIRES GUIDANCE

The majority has concluded with very little discussion that the sentence imposed by the trial court in this case is lacking in proportionality. Clearly, the majority does not conclude that the sentences were too short. The majority concludes that the sentences were too long to be proportional. This is a pronouncement of law, not an exercise of discretion. If the majority, in fact, knows as a matter of law that the sentences are too long to be proportional, then it must know how long is too long.

By refusing to set forth in its opinion the upper limit of proportionality in this case, the majority (along with the panel of almost every other appellate opinion in this area) avoids its responsibility to state the law applicable to this case and makes impossible of attainment one of the goals the Supreme Court enunciated in *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990), i.e., to reduce from previous levels the subjectivity of the standards of appellate review of sentences.

When an appellate court refuses to enunciate the upper or lower limits of proportionality of the sentence in a particular case, the court merely fosters a continuation of the subjective standards previously utilized in appellate review of sentences. The majority does not articulate its reasons for believing that the sentences in this case are lacking in proportionality, because it cannot articulate those reasons. The process is, by its nature, subjective, and the only way in which subjectivity can be reduced is by the process of appellate court opinions stating precisely what are the upper and lower limits of proportionality in cases with specific facts.

The process of simply remanding for resentencing, without a statement concerning the limits of proportionality in an individual case, does a grave disservice to the victims of crime, to the taxpayers who must fund endless sentencing and appellate proceedings, to the process itself, and to the public's interest in maintaining a judiciary in whom the public may continue to have confidence.

Every time the victim is compelled to appear in court and to be concerned about the finality of the judicial process involving an assailant, the victim suffers enormous emotional torment. If it is necessary that the victims be tormented further because the law has not been obeyed, it is not unreason-

able to expect the appellate courts to state precisely what the law is. The law cannot be stated precisely in this area without a statement of the upper limit or lower limit of proportionality of the sentence in the given case.

The majority remands this case to the trial court for resentencing without the least bit of guidance to assist the trial court in determining what this appellate panel or some other appellate panel will consider to be proportional. Clearly, the trial court thought it was imposing a sentence proportional to the crime and the defendant. Indeed, this writer believes that it would be virtually impossible to find a majority of citizens in any community in this state who would believe that the sentences imposed in this case were too long, given the horrendous nature of the crimes and the utter contempt for human life and suffering displayed by this defendant.

What, then, is the trial court in this case to do on resentencing. Obviously, it must cast out its previously conceived concepts of proportionality because, by order of this Court, its previous concept of proportionality has been ruled unlawful. The majority of this panel of this Court has spoken, and obedience to its order is both proper and in the complete interest of an ordered society. However, without guidance from this Court with respect to what is proportional, the bewildered trial court must cast about for some standard unknown to it. It is left essentially to guess, to conjecture, to speculate, and, finally, to consider factors that are utterly foreign to a proper determination of the case, such as whether it should impose a sentence low enough so that the victims can be spared further torment at the hands of the state.

Giving consideration to the further torment of

the victims, trial courts are driven to impose a sentence sufficiently low that no appellate court could conceivably think it to be disproportionate. If a trial court rejects that approach, it is absolutely without boundaries or adequate guidelines. Slavishly following the sentencing guidelines is not an appropriate response. As the trial court noted in this case, the guidelines are "grossly inadequate" to the task presented by this particular case. If the trial court rejects slavish obedience to the sentencing guidelines, it will find itself again without any guidelines that will tell it what the law requires under the facts of this particular case. It will again exercise its best judgment, and it runs a fifty-fifty chance of further appellate reversals. The case may be assigned to another panel of the Court of Appeals, and that panel will again exercise its unfettered instincts of proportionality. If the second round of appeals results in yet another reversal with yet another opinion finding lack of proportionality but without specific limits, the Court of Appeals in all likelihood will remand the case for resentencing before another judge.

If the new judge's opinion with respect to proportionality is similar to that of the previous judge, yet another appellate reversal is at least as likely as not. At each round, it becomes more and more likely that the sentencing court will consider the torment suffered by the victim by the endless rounds of appeal and reversal and make sure that the defendant is released at a sufficiently early date to meet anyone's standards. The concept of proportionality thus is replaced by the concept of the lowest common denominator. The victim's torment will be no less, but at least the victim will no longer be called to court harboring some false hope that justice will be done.

The cost of this endless round of appeals must be borne by someone. Because there is no limitless revenue stream in any system, the unnecessary allocation of funds to one process compels the unnecessary rationing of funds for another. Every dollar expended for attorneys on both sides, for the operation of courts, the preparation of transcripts, the preparation of new presentence reports, and the many other costs involved in the process of endless resentencing and appellate review is a dollar that is not available for health care, for education, for economic expansion, for housing, feeding, and clothing the poor and helpless, for cleaning our heavily tarnished environment, for prevention of crime, and for other worthy and needy purposes, It is well and good for an appellate court to substitute its unfettered judgment of proportionality for that of the fettered judgment of the trial judge. That is the law of this state as currently promulgated by the Michigan Supreme Court. But to do so in a fashion that needlessly wastes vitally needed resources is both unnecessary and unwise.

Our Supreme Court as leader of our one court of justice has expended considerable efforts to promote a favorable public perception of the judiciary. Sentencing guidelines are indeed one part of that effort. The rule announced in *Milbourn* is another. In the judgment of this writer, nothing can destroy more quickly a favorable public perception of the judiciary than for a judge to say "I know what the law is, but I will not tell." By refusing to state what the upper limits of proportionality in this case are, the majority is saying to the trial court, "You have made a mistake. You must do it again, but you must guess. We will not tell."

THE SENTENCE WAS PROPORTIONAL

The defendant in this case went with two others

to a store in broad daylight. They were armed with guns. Clearly, part of the plan was to take any money found in the store and to rob at gunpoint any person found in the store. For the mere purpose of gaining control over somebody else's money, the defendant and his confederates also clearly planned to avoid apprehension for their offense by burning alive all present in the building. There, of course, exists the other reasonable hypothesis that the defendant and his associates were engaging in these activities purely for personal enjoyment. To whichever end, the defendant and his confederates carried cans of gasoline into the store and spread it around after completing their robberies. By chance, the gasoline was ignited before the defendants could set it afire when its fumes reached a burning candle. The defendant was burned mildly in the process. His two victims were burned alive. They did not die in the flames, but they were scarred and maimed for life. The defendant's cold-hearted attitude toward these victims and others who might have been there continues, as far as the record in this case shows, to this day. When apprehended, the defendant did not rest simply on his constitutional rights to remain silent. He boldly lied about his involvement. So far as this record shows, he has never expressed the slightest remorse for his action or the slightest concern about the welfare of his victims.

One of the victims, who was permanently disfigured and lost the use of his hands, subsequently was murdered, and his torment in this world ended so that he will not have to attempt to comprehend why thirty years in prison is considered a disproportionately long sentence for the crime committed against him. The other victim continued to be in great pain at the time the

presentence report was prepared, more than ten months after the crime. She had suffered numerous skin grafts. She had been hospitalized for three months, followed by daily nurse visits for six weeks. She had been fitted for an acrylic face mask and gloves, and her heart problems had worsened. This victim has not died and will be required to attempt to comprehend not only why her plea that the defendant should never get out of prison should fall on deaf ears, but also why the trial court has been determined to have violated the law by imposing a sentence of thirty years and a sentence of life for one of the most heinous crimes imaginable.

It is not surprising that the majority fails to articulate its reasons for concluding that these sentences violate the principle of proportionality. The defendant's counsel was reduced to the recitation of platitudes in his effort to do so. That is not because appellate counsel or the majority are inarticulate. It is because it is impossible to articulate why something is or is not proportional when there is no adequate guide. Under presently existing legal requirements, the only adequate guide can be the recitation of particular facts and the determination with respect to specific limits of proportionality in a series of reported cases. Once that body of law has been established, then we will be able to articulate why something is or is not proportional.

The majority comments that the trial court's reasons for exceeding the guidelines' range were not sufficient in light of the substantial departure. However, the majority is clearly saying more than that a better articulation would result in affirmance. The majority has said that under no circumstances can this defendant receive a sentence like that which he did receive for the crimes that

he committed. It may, therefore, seem of little assistance to comment on the guidelines here. However, a little assistance may be better than none.

The trial court said that the guidelines as applied to the peculiar facts of this case were "grossly inadequate." It is difficult to conceive of a better description. The guidelines were most assuredly grossly inadequate to the task of defining a proportional sentence for this particular case. The guidelines may be helpful in many cases, but there are, mercifully, not many cases like the one at bar.

The trial court here was compelled to score the guidelines for assaults, a range of activity that is extremely broad. The fact that the court was required to use the assault guidelines was merely a matter of chance. It was clearly the defendant's plan to hold at gunpoint everybody in the store until their money and the store's money could be taken, after which they were to be burned alive until they were dead. Their deaths were prevented by the bravery of an off-duty police officer who risked his own life to save the lives of the defendant's intended murder victims. If the defendant's plan had been carried out as he wished, the trial court would have been scoring on a homicide guideline. Depending on what view the court took of the facts, the defendant would have received an offense variable score of between 190 and 205 points. The offense variables go off the grid at fifty points. Thus, the defendant's offense variable points would have been approximately four times the maximum offense variable points used in computing the guideline. In addition, as noted below, Prior Offense Variable 7 would have been scored twenty points. The grid would have proposed a guideline of 144 months to 300 months or a life sentence. In this case, the trial court imposed a

minimum of 360 months with respect to two of the offenses and life sentences with respect to the other two.

The offense of assault with intent to murder, which requires the judge to score pursuant to the assault guidelines, requires no injury whatsoever. It can be established even if the defendant makes the assault but changes his mind and decides not to carry out his intent. In the case at bar, the defendant's actions made his crime actually much more like the crimes that generally fall into the homicide grid. He did everything possible to bring himself into that grid. He was simply unsuccessful because of pure chance, and a very slim chance at that. What, indeed, are the chances that a passerby coming by that store at that particular moment would have the presence of mind and the unbounded courage and the training to enter a raging inferno to save the lives of fellow human beings.

Certainly, the life sentences imposed here do not fall outside the homicide guidelines, and the modest twenty percent departure on the term of years guides easily is justified. For example, the homicide offense variables score twenty-five points for aggravated physical injury, but they give absolutely no consideration to the kind of injuries imposed here, which is to say burning alive. They give no consideration at all to the torment the victims had to suffer before they were burned by being held at gunpoint while they smelled the odor of the gasoline being spread around the store. They give no consideration to the fact that this was a crime well planned in advance or that the defendant conspired with others to commit the crime, that he had no concern for what happened to the victims, and that he had boldly lied about his participation in the events, and they give no

consideration to the grievous pain, suffering, and emotional torment suffered by the victims, or to the fact that the defendant clearly would have killed or tried to kill anyone else who was present in the store at the time.

Turning to the guidelines specifically applicable to this case, the assault guidelines, examination discloses that the trial court was quite correct in describing the guidelines as "grossly inadequate" to the task presented. It should first be noted that the trial court scored the guidelines modestly, indeed. For example, he might very well have scored OV 2 as fifty points for excessive brutality rather than twenty-five points for undescribed bodily injury. However, either way the scoring went, the defendant went off the Offense Variable grid. The trial court scored him at fifty-five Offense Variable points whereas it might well have scored him at eighty points.

Also, the trial court scored the defendant zero points under PRV 7, although the guidelines provide that a person convicted of two or more felony counts should be scored twenty points under PRV 7. This failure could not affect the sentence in this case, because the grid maximum does not change.

In the scoring of PRV 7, the guidelines give no consideration whatsoever to the nature of the multiple convictions. The guidelines provide for an identical PRV 7 scoring whether the concurrent or subsequent conviction is for murder or for uttering and publishing an insufficient funds check. Thus, these guidelines give no reasonable consideration whatsoever to the fact that the defendant committed two armed robberies, two assaults with intent to murder, an arson, and perhaps other felonies all at the same time.

The assault guidelines provide for a score of fifteen points because the defendant carried a

firearm and pointed it toward one of his victims. But they give no consideration whatsoever to the fact that the defendant also carried a can of gasoline with the intent to burn up his victims.

The assault guidelines provide for a scoring of points for bodily injury, for subjecting a person to terrorism, or for treating a person with excessive brutality, but they give no points or no consideration to the specific facts that the defendant tried to kill his victims, that he tried to do so in one of the most heinous ways possible, that the victims were subjected to the horrifying experience of helplessly waiting to be burned alive, and that the victim who survived must endure pain the rest of her life. Myriad other results of the defendant's acts could be cited. For example, what is the effect of these acts on those who love the victims. The guidelines care not.

The assault guidelines give ten points for the involvement of two or more victims. They provide for a score of one hundred points where there are two or more deaths. But there is little moral difference between having two or more deaths and having two or more persons who almost are burned to death and would have been burned to death but for the slim chance that prevented it in this case.

The assault guidelines provide points for being a leader in a multiple offender situation, but they give no points for being an eager and equal participant.

The assault guidelines give consideration for bodily injury, but they make no differentiation between a small scratch and being maimed, horribly disfigured, and tormented for life.

The assault guidelines give no consideration to the fact that the defendant participated eagerly in this well-thought-out plan. They give no considera-

tion to the fact that the defendant boldly lied about his involvement and showed no concern whatsoever for the grievous and horrible injuries inflicted on his victims. They give no consideration whatsoever to the fact that the defendant intended to kill whoever fell under his shadow. These are but some of the concerns that are not reflected in the guidelines, and clearly there are others.

The trial court said the guidelines were "grossly inadequate" to assist in the task presented to it. It is possible that the trial court could have used more words to describe the reasons for departing from the guidelines. It could not have been more accurate.

If it were not for the respected opinion of my colleagues on this panel, I would not have thought that the sentences imposed in this case were even arguably disproportionate.

I would affirm the defendant's convictions and his sentences.

In re RETURN OF FORFEITED GOODS

(PEOPLE v MIERZEJEWSKI)

Docket No. 170171. Submitted July 6, 1994, at Lansing. Decided February 21, 1995, at 9:40 A.M.

Dale R. Mierzejewski was charged in the St. Clair Circuit Court with possession with intent to deliver less than twenty-five grams of cocaine. At the time of his arrest, the arresting officers seized cash and jewelry that was in the defendant's possession. The defendant was given notice of an intent to seek forfeiture of the property, and the property was forfeited pursuant to the automatic administrative forfeiture provision of MCL 333.7523(1)(d); MSA 14.15(7523)(1)(d) when the defendant failed to file a timely claim for the goods. Later, when the criminal charge came to trial, the prosecution agreed to a dismissal of the criminal charge. Defense counsel moved for return of the property seized by the police, to which the prosecutor responded that "[a]ny property that is not clearly contraband or drug paraphernalia will be returned." Thereafter, the prosecutor refused to return the cash and jewelry on the basis that the property had been forfeited to the county. The trial court, Ernest F. Oppliger, J., ordered the return of the cash and jewelry on the ground that the defendant's motion for the return of the property had been consented to by the prosecutor and that the defendant had not received actual notice that those items had been forfeited. The prosecutor appealed.

The Court of Appeals *held:*

The prosecutor by consenting on the record in open court to the defendant's motion to return any property that was not clearly contraband or drug paraphernalia became bound to return the cash and jewelry, because those items clearly were neither contraband nor drug paraphernalia. The prosecutor had apparent authority to bind the county when he made his consent in open court to the return of the goods. There was

REFERENCES

Am Jur 2d, Compromise and Settlement § 11; Prosecuting Attorneys §§ 20, 23.

See ALR Index under Compromise and Settlement.

sufficient consideration to support the prosecutor's promise to return the goods.

Affirmed.

MACKENZIE, J., dissenting, stated that the trial court erred in ordering the return of the cash and jewelry on the basis of the failure to give the defendant actual notice of the fact that the property had been forfeited, because there is no statutory requirement that such notice be given. Further, there is nothing in the record indicating that the prosecutor was authorized as an agent of the government to make promises concerning the disposition of property that had been forfeited or to decide unilaterally that the property should be given away, and, if such authority did exist, there was no consideration given in exchange for the prosecutor's promise. The defendant's only recourse for seeking the return of the property was to have filed a timely claim in the forfeiture proceedings, which he failed to do.

COMPROMISE AND SETTLEMENT — FORFEITED GOODS — PROSECUTORS — APPARENT AUTHORITY.

An agreement or consent by a prosecutor made on the record in open court to a defendant's motion to return the property of the defendant that had been the subject of the automatic administrative forfeiture provision of the controlled substances provisions of the Public Health Code is binding and enforceable against the county holding such forfeited goods (MCL 333.7523[1][d]; MSA 14.15[7523][1][d]; MCR 2.507[H]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Elwood L. Brown,* Prosecuting Attorney, and Timothy K. Morris, Assistant Prosecuting Attorney, for the people.

McIntosh, McColl, Carson, McNamee, Strickler & Rickel (by *Nancy Bates Rickel*), for the defendant.

Before: GRIFFIN, P.J., and MACKENZIE and F. X. O'BRIEN,* JJ.

GRIFFIN, P.J. The people appeal as of right from

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

an order of the circuit court for the return of property seized from defendant. We affirm.

On January 23, 1992, defendant, along with two other occupants of a motel room, was arrested for possession with intent to deliver less than twenty-five grams of cocaine. Two gold bracelets, $3,420.77 in cash, and three gold chains were seized from defendant by the arresting officers. At the conclusion of the August 10, 1993, hearing to dismiss defendant's possession with intent deliver charge, the following colloquy occurred between defense counsel and the prosecutor:

> *Ms. Bates:* Your Honor, with regard to the dismissal we would like to make a motion for the return of the property seized pursuant to the statute MCLA 600.4706.
>
> *Mr. Morris:* Any property that is not clearly contraband or drug paraphernalia will be returned.

MCR 2.507(H) is controlling in this matter. MCR 2.507(H) provides as follows:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

An agreement or consent made in open court by the parties or their attorneys is binding on the parties. MCR 2.507(H); *Reed v Citizens Ins Co of America,* 198 Mich App 443, 448; 499 NW2d 22 (1993); *Michigan Bell Telephone Co v Sfat,* 177 Mich App 506, 515; 442 NW2d 720 (1989). We find the above record sufficient to establish that the

prosecutor entered into a valid stipulation for the return of the seized property by consenting to defendant's motion in open court. Because the cash and gold jewelry were not drug paraphernalia or *clearly* contraband, the prosecutor was bound by the parties' agreement to return the property. MCR 2.507(H); *Michigan Bell, supra.*

Further, we find unpersuasive the dissent's unsupported view that the prosecutor's "promise" to return the seized property was not binding on the county. An agreement between counsel, subsequently denied by the parties, is binding under principles of apparent authority when it was made in open court. *Nelson v Consumers Power Co,* 198 Mich App 82, 89-90; 497 NW2d 205 (1993). Under *Nelson* and MCR 2.507(H), it is simply irrelevant whether the prosecutor specifically was authorized to return the property in the present case. We conclude that a prosecutor is "cloaked" with the apparent authority to settle all claims connected with a matter upon which the other party is entitled to rely. We see no reason to distinguish this case from the other occasions in which we routinely have enforced specifically a prosecutor's promise.

Finally, we disagree with the dissent that there was insufficient consideration to support the parties' agreement. Defense counsel's implied-in-fact agreement to withdraw her motion after the prosecutor promised to return defendant's property was clearly a sufficient quid pro quo to bind the parties. Accordingly, we conclude that the trial court did not err in ordering the return of the seized property.

Affirmed.

F. X. O'BRIEN, J., concurred.

MACKENZIE, J. *(dissenting).* I disagree with the

majority's conclusion that the prosecution in this case should be ordered to return certain forfeited property that had been seized from defendant when he and two other occupants of a motel room were arrested for possession with intent to deliver cocaine.

The majority has chosen to treat this case as a simple matter of a "promise" to return seized evidence. In so doing, they completely ignore two fundamental facts: (1) that the property involved had been the subject of administrative forfeiture proceedings, and (2) that defendant had relinquished his rights to the property and thus was not in a position to seek its return.

The forfeiture provisions of the controlled substances act require that, following a seizure of property, the government must give notice to the owner that the property has been seized and that the government intends to seek its forfeiture. MCL 333.7523(1)(a); MSA 14.15(7523)(1)(a). Any person claiming an interest in the property may file a claim and bond with the government within twenty days after receiving the notice. MCL 333.7523(1)(c); MSA 14.15(7523)(1)(c). Upon the filing of a claim, the government must transmit the matter to the prosecutor or other government attorney, who must institute forfeiture proceedings promptly after the expiration of the twenty-day period. *Id.* These forfeiture proceedings are in rem civil proceedings, brought against the property, and are independent of any criminal prosecution. *In re Forfeiture of $15,232,* 183 Mich App 833, 836; 455 NW2d 428 (1990); *In re Forfeiture of $53,* 178 Mich App 480, 496; 444 NW2d 182 (1989).

If no claim is filed within the twenty-day period, in rem civil forfeiture proceedings are not instituted. Instead, the automatic administrative forfei-

ture provision of MCL 333.7523(1)(d); MSA 14.15(7523)(1)(d) is triggered:

> If no claim is filed or bond given within the 20-day period as described in subdivision (c), the . . . government . . . shall declare the property forfeited . . . .

In this case, a return of service shows that on January 23, 1992, before defendant was released from police custody, he was personally served with a "Notice of Intent to Forfeit Property" regarding the seized cash and jewelry. Defendant did not file a claim and bond during the following twenty days. Accordingly, the county declared the property administratively forfeited.

On February 21, 1992, the prosecutor's office sent a "Notice of Forfeiture" to defendant informing him that the money and jewelry were now the county's property. Defendant, however, never received this notification, presumably because it was sent to 3519 Cherry rather than defendant's correct address at 2519 Cherry.

Defendant eventually was charged with possession with intent to deliver, and trial was scheduled for August 10, 1993. On that date, however, the trial court granted the prosecutor's motion to dismiss the case because his witnesses—the other occupants of the motel room where defendant was arrested—planned to exercise their Fifth Amendment rights. Upon dismissal, defendant requested the return of his property. The prosecutor responded that "[a]ny property that is not clearly contraband or drug paraphernalia will be returned."

When the prosecutor failed to return the money and jewelry, defendant filed a "Motion to Enforce Return of Seized Property." Following a hearing,

the trial court granted the motion and ordered that the property be returned to defendant. The basis for this ruling was that defendant did not receive the misaddressed February 21, 1992, notice that the property had been forfeited administratively. It is this ruling from which the prosecutor appeals.

I agree with the prosecutor that the trial court erred in its ruling. Clearly, under the controlled substances act the government must notify the owners of seized property that if the owners do not file a claim and bond within twenty days, the property will be declared forfeited. MCL 333.7523(1)(a); MSA 14.15(7523)(1)(a). However, there is no similar requirement that, upon the expiration of the twenty-day period, the owners must be notified that administrative forfeiture has taken place. Because the government was not required to send defendant the February 21, 1992, "Notice of Forfeiture," defendant was not entitled to the return of the money and jewelry on the basis of his nonreceipt of such a notice. The trial court committed clear legal error in ordering the return of the property on that basis.

The majority avoids the result required under the controlled substances act by adopting defendant's suggestion that he is entitled to the return of the forfeited property on the basis of the prosecutor's "promise" at the August 10, 1993, proceedings. I cannot agree. First, the forfeited goods legally had become the property of the government. There is nothing in the record indicating that the prosecutor was authorized as an agent of the government to make promises concerning the disposition of its property. Nor is there anything suggesting that the prosecutor was empowered to decide unilaterally that the property should be given away. Absent such authorization, the county

should not be bound by the prosecutor's "promise." Second, even if the prosecutor possessed such authority, his "promise" cannot be considered binding, because defendant rendered no consideration in exchange for the promise. Third, neither the government nor the prosecutor had a legal obligation to give the property to defendant. He was not entitled to the return of the property pursuant to MCL 600.4706; MSA 27A.4706, because that statute does not apply to forfeitures related to controlled substances offenses. See MCL 600.4701; MSA 27A.4701.

Defendant was not without recourse once his property was seized; all he had to do was file a claim and bond to protect his rights to the cash and jewelry. Rather than pursuing the matter, however, defendant chose to sit on his rights and allow the statutory period to expire. In enacting MCL 333.7523(1)(c); MSA 14.15(7523)(1)(c), the Legislature has made it clear that claimants wishing to avoid forfeiting their property rights must file a claim and bond within twenty days of receipt of notice of the government's intent to seek forfeiture. The statutory scheme leaves no room for an erstwhile property owner with a change of heart to demand subsequently the return of what is no longer his. In my view, by failing to file a timely claim for the money and jewelry, defendant voluntarily relinquished his property rights in favor of the county and, therefore, was not entitled to its return. Accordingly, I would reverse.

FOX v OGEMAW COUNTY

Docket No. 156257. Submitted September 9, 1994, at Grand Rapids. Decided February 21, 1995, at 9:45 A.M. Leave to appeal sought.

Mary K. Fox and others brought an action in the Ogemaw Circuit Court against Ogemaw County and the Ogemaw County Drain Commissioner, seeking, along with other relief, damages for impairment of the value of the plaintiffs' property when a dam that the defendants were required to maintain burst and allowed Flowage Lake to drain. The defendants raised the affirmative defense of governmental immunity. The plaintiffs responded that the defense of governmental immunity was not available because the failure to keep the dam in good repair and to rebuild the dam immediately constituted the creation of a nuisance by the defendants. The trial court, Carl L. Horn, J., denied the defendants' motion for summary disposition and, following a bench trial, entered a judgment for Mary Fox, the only remaining plaintiff, of $36,950. The defendants appealed.

The Court of Appeals *held:*

1. The loss of the lake water from the plaintiff's real estate, by definition, was not an invasion of her property and, therefore, did not constitute a trespass such as would establish the trespass-nuisance exception to governmental immunity. Neither the exposure of tree stumps nor the reversion of the lake bottom to its natural lakeless state, with the consequent restoration of an insect habitat, constituted a trespass-nuisance.

2. Assuming that there is a nuisance per se exception to governmental immunity, the return of the plaintiff's property to its original lakeless state is neither intrinsically unreasonable nor a condition that is dangerous at all times and under all circumstances and, thus, would not constitute a nuisance per se.

Reversed.

GRIFFIN, J., dissenting, stated that the condition created by

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REFERENCES

Am Jur 2d, Municipal, County, School, and State Tort Liability § 160.

Comment Note.—Municipal immunity from liability for torts. 60 ALR2d 1198.

the collapse of the dam unreasonably interfered with the plaintiff's use and enjoyment of her property and constituted a nuisance that is not subject to the defense of governmental immunity. The nuisance constituted an unconstitutional governmental taking of the property without compensation.

NUISANCE — GOVERNMENTAL IMMUNITY — TRESPASS-NUISANCE — NUISANCE PER SE — DAMS.

The draining of an artificial lake as the result of the failure of a governmental body to maintain the dam that created the lake and thereby to allow the area where the lake had been to return to its original natural state does not constitute either a trespass-nuisance or nuisance per se such as will defeat a claim of governmental immunity by the governmental body in an action by adjoining property owners for diminution of property values because of the absence of the lake (MCL 691.1407[1]; MSA 3.996[107][1]).

Jensen, Smith & Gilbert, P.C. (by *Jill K. Smith*), for the plaintiff.

Richard L. Alger, Jr., for the defendants.

Before: MACKENZIE, P.J., and GRIFFIN and M. J. TALBOT,* JJ.

MACKENZIE, P.J. Defendants appeal as of right from a judgment that found them liable to plaintiff Mary K. Fox (hereinafter plaintiff) in the amount of $36,950 for creating a nuisance. We reverse.

In order to establish a claim that falls within the nuisance exception to governmental immunity, plaintiff had to prove the existence of a trespass-nuisance or (although a majority of the Supreme Court has yet to decide the question) a nuisance per se. *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139; 422 NW2d 205 (1988); *Li v Feldt (After Second Remand),* 439 Mich 457; 487 NW2d 127 (1992).

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

Plaintiff's trial testimony established that she was the developer of several lakefront lots on an inland lake known as Flowage Lake. Flowage Lake was an artificial lake created by damming a section of the Rifle River. In 1985, the dam, which was maintained by defendants, gave way, and Flowage Lake was completely drained. Drainage of the lake exposed tree stumps and allowed mosquitoes and flies to breed. As a result of this lawsuit, defendants agreed to rebuild the dam. However, while the lake was drained, the value of plaintiff's lots was diminished. Plaintiff testified that she sold several lots at reduced prices because the lake had been drained.

On these facts, the trial court clearly erred in finding defendants liable for creating a nuisance. The Supreme Court has defined a trespass-nuisance as "a direct trespass upon, or the interference with the use or enjoyment of, land that results from a physical intrusion caused by, or under the control of, a governmental entity." *Hadfield, supra,* p 145. The loss of the lake water from plaintiff's real estate, by definition, was not an invasion of her property and, therefore, did not constitute a trespass. *Peterman v Dep't of Natural Resources,* 446 Mich 177, 207; 521 NW2d 499 (1994). Similarly, the exposure of existing tree stumps was not an invasion of the property and thus not a trespass. Plaintiff argues that the presence of insects constitutes a trespass, citing *Trowbridge v Lansing,* 237 Mich 402; 212 NW 73 (1927). However, a close reading of that case confirms that the Supreme Court's most recent characterization of that case was as a case primarily involving the production of pervasive sickening odors. See *Peterman, supra,* p 206. Here, there was no evidence of such pervasive, sickening odors. Furthermore, we decline to hold that the reversion of

the property to its naturally lakeless state, and the consequent restoration of insect habitat, constituted a trespass-nuisance.

Assuming the existence of a nuisance per se exception to governmental immunity, see *Li, supra,* we also conclude that the trial court's finding of a nuisance was clearly erroneous. A nuisance per se is "an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained." *Li, supra,* pp 476-477 (opinion of CAVANAGH, C.J.). "[U]nlike the nuisance in fact, nuisance per se is not predicated on the want of care, but is unreasonable by its very nature." *Hadfield, supra,* p 208 (opinion of BOYLE, J.). The return of plaintiff's property to its natural state, lacking an artificial lake, is not intrinsically "unreasonable," nor does it constitute a condition that is dangerous at all times and under all circumstances.

From a review of the trial transcript, it is apparent that the "nuisance" proven by plaintiff was that, until the dam was repaired and the area once again artificially flooded, her real estate could not be marketed and sold as lakefront property. Because plaintiff failed to establish either a trespass-nuisance or a nuisance per se, the trial court clearly erred in finding defendants liable to her for damages; they were immune from liability under § 7(1) of the governmental tort liability act, MCL 691.1407(1); MSA 3.996(107)(1).

Reversed.

M. J. TALBOT, J., concurred.

GRIFFIN, J. *(dissenting).* I respectfully dissent. The lower court did not clearly err in finding a nuisance and in assessing damages against defen-

dants. The condition created as a result of the collapse of the dam unreasonably interfered with plaintiff's use and enjoyment of her property. The damage to plaintiff's property was serious and substantial. Irrespective of how the nuisance is categorized, I would hold that there is no governmental immunity in this instance. In my view, plaintiff has pleaded and proved a nuisance for which she is entitled to compensation by virtue of the "taking" clauses of the Michigan Constitution, Const 1963, art 10, § 2, and the United States Constitution, US Const, Am V and Am XIV.

While I would construe § 7 of the governmental immunity statute, MCL 691.1407; MSA 3.996(107), as coextensive with the taking clauses, see *Yarrick v Kent City,* 180 Mich App 410, 416-422; 447 NW2d 803 (1989), vacated 435 Mich 866 (1990) (GRIFFIN, J., concurring in part and dissenting in part), I recognize that a majority of the Supreme Court has adopted a historical common-law approach in determining exceptions to immunity under § 7 of the statute. *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139; 422 NW2d 205 (1988); *Li v Feldt (After Second Remand),* 439 Mich 457; 487 NW2d 127 (1992). However, neither *Hadfield* nor *Li* dealt with immunity exceptions based upon constitutional guarantees.

In *In re Urban Renewal, Elmwood Park Project,* 376 Mich 311, 315-316; 136 NW2d 896 (1965), the Supreme Court summarized various conditions for which the government has been held liable for damages under the taking clauses:

> Appellant concedes that generally the "taking" is construed in its literal sense, that is, after verdict is confirmed, the deed executed and award paid; but contends that there are unusual situations where the action of the city or other govern-

mental body is such as to amount to a taking of private property, even though there is no eminent domain proceeding, and that in such situations compensation is given for the taking when it occurs. He cites *Pearsall v Board of Supervisors of Eaton County,* 74 Mich 558 [42 NW 77 (1889)], a road closing case;[2] *Ranson v City of Sault Ste Marie,* 143 Mich 661 [107 NW 439 (1906)], a similar case in which the city restricted access to plaintiff's property; *Grand Trunk Western Railroad Co v City of Detroit,* 326 Mich 387 [40 NW2d 195 (1949)], a case where the city attempted to reduce the value of land by restrictive zoning; and *Long v City of Highland Park,* 329 Mich 146 [45 NW2d 10 (1950)], a similar zoning case.

Appellee concedes that in cases where property has been flooded because of public construction, the use and enjoyment of land reduced because of ear-rending noise of jet propulsion flights, or where ingress and egress has been made impossible by highway improvements, a taking will be held to have occurred. *Cereghino v State Highway Commission,* 230 Or 439; 370 P2d 694 [(1962)]; *Bacon v United States,* 295 F2d 936 [(Ct Cl, 1961)]; *Johnson v Airport Authority of the City of Omaha,* 173 Neb 801; 115 NW2d 426 [(1962)].

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[2] "The term 'taking' should not be used in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and applied to land only; but it should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto. . . .

"If the public take any action which becomes necessary to subserve public use, and valuable rights of an individual are thereby interfered with, and damaged or destroyed, he is entitled to the compensation which the Constitution gives therefor, and such damage or destruction must be regarded as a 'taking.'" (p 561.)

Later, in *Hart v Detroit,* 416 Mich 488, 500; 331 NW2d 438 (1982), the Supreme Court reiterated that a total conversion of property is not necessary for the occurrence of a "taking":

> We agree that a "taking" of property may be the end result of serious injury to and diminution in the value of real property. *Thom v State Highway Comm'r,* 376 Mich 608; 138 NW2d 322 (1965). "Taking" is a term of art with respect to the constitutional right to just compensation and does not necessarily mean the actual and total conversion of the property. Whether a "taking" occurs for which compensation is due depends on the facts and circumstances of each case. *Thom, supra; Heinrich v Detroit,* 90 Mich App 692; 282 NW2d 448 (1979).

While in many cases against the government the plaintiff pleads both "nuisance" and an unconstitutional taking, see, e.g., *Jones v East Lansing-Meridian Water & Sewer Authority,* 98 Mich App 104; 296 NW2d 202 (1980), I do not believe that such alternative pleadings necessarily are required, particularly in this instance in which the government's continuation of the nuisance resulted in the partial taking of the plaintiff's property.

The majority concludes that governmental defendants are immune from liability because there was no physical intrusion or invasion of plaintiff's property. I disagree with this factual assertion[1] and find unpersuasive the majority's attempt to

[1] The evidence of nuisance adduced at trial included the following portions of plaintiff's testimony:

> *Q.* Did you have the opportunity to look at the lake after the dam had failed?
>
> *A.* Absolutely.
>
> *Q.* Would you describe to the judge how it looked?
>
> *A.* It was a horrible sight, all those fish flopping around. We were just fortunate that no one was killed there.
>
> *Q.* Were you ever—did you ever observe any problem with insects since the dam had failed?
>
> *A.* Yes.
>
> *Q.* What problems were there?

distinguish *Trowbridge v Lansing,* 237 Mich 402; 212 NW 73 (1927).

More importantly, the premise that a governmental entity cannot be liable for damages absent a physical invasion is legally erroneous. In *Tamulion v State Waterways Comm,* 50 Mich App 60; 212 NW2d 828 (1973), the plaintiffs sued the state for damages to plaintiffs' property after the state constructed breakwaters at the entrance of a Lake Superior harbor. The state dumped tons of jagged rocks and boulders along the plaintiffs' beach in an effort to remedy erosion created by the breakwater. The rocks and debris made access to the lake from the plaintiffs' property virtually impossible. In *Tamulion,* this Court held that the plaintiffs' were entitled to compensation against the

A. Mosquitoes, flies, little chi-chi flies, I believe they call them, get into the people's homes.

Q. Was there a problem with odor?

A. Yes, terrible.

Q. Would you describe what the lake bed looked like?

A. After it went out there were fish lying all around plus the muck in there and the stumps sticking out of there, and it was a mess.

Q. Have the fish been cleaned up since the dam failed?

A. Yes.

Q. Would you describe what the lake looks like today?

A. Today it's still a mess. I understand the DNR seeded that with rye, and I don't believe they have been back since; so it is just all weedy.

Q. Have the stumps been cleared?

A. No, they haven't.

Q. To your knowledge, has anything been done to abate any insect problem?

A. To my knowledge, no.

Q. Would children or anyone be able to play or have any type of activity in the lake bed?

A. I wouldn't want my children playing in it.

Q. Why not?

A. Because I think it is dangerous the way it is.

Q. Why is it dangerous the way it is?

A. With all those stumps sticking out of there, and those weeds are about that tall (indicated). A child could get lost out in there. . . .

state for the partial taking of their property, despite the fact that no direct physical invasion of the plaintiffs' land had occurred.

Later, *Tamulion* was followed by this Court in *Jones, supra.* In *Jones,* a group of Meridian Township residents sued the defendant township, claiming that the township's wells unreasonably interfered with the plaintiffs' private wells, causing the plaintiffs to suffer loss of water, low water pressure, excessive pumping, and other well problems. The plaintiffs alleged that the defendant's conduct was both a nuisance and an unconstitutional taking. On appeal, this Court found that the township's conduct was unreasonable and that the plaintiffs were entitled to damages under either theory. After finding sufficient evidence of nuisance, we stated:

> Plaintiffs also sued on the theory that the actions of the Authority constituted a taking in violation of the Fifth and Fourteenth Amendments of the Federal Constitution and Article 10, Section 2 of Michigan's Constitution. We find this theory equally plausible on the facts of this case. A victim of a taking is entitled to just compensation for the value of the property taken under both the Michigan and United States Constitutions. *Tamulion v State Waterways Comm,* 50 Mich App 60, 66; 212 NW2d 828 (1973). Moreover, it is not necessary that there be a direct physical invasion of the property to invoke the constitutional protection against taking without compensation; it is sufficient that the private property has been impressed into serving a public use, *Tamulion, supra,* 67.
>
> The trial court found neither a taking nor a nuisance, noting that the slight interference defendants caused over a period of five years created neither of those situations. Since we have already determined defendants' interference to be unreasonable, we disagree. Defendants did impress

> plaintiffs' private property into serving a public use by unreasonably interfering with plaintiffs' subterranean water rights. The trial court erred in ruling to the contrary. [*Jones, supra* p 110.]

Finally, in *Electro-Tech, Inc v H F Campbell Co,* 433 Mich 57, 91, n 38; 445 NW2d 61 (1989), the Supreme Court cited *Tamulion, supra,* with approval for the proposition that the governmental immunity statute does not bar claims arising out of an unconstitutional taking. As stated by the Supreme Court, "[s]ince the obligation to pay just compensation arises under the constitution and not in tort, the immunity doctrine does not insulate the government from liability." *Id.*

On the basis of the above authorities, I would affirm and hold that the lower court did not clearly err in finding a recoverable nuisance and in assessing damages. By operation of the taking clauses of both the Michigan and United States Constitutions, defendants are not immune from liability for the nuisance they have created.

THRIFTY ROYAL OAK, INC v CITY OF ROYAL OAK

Docket Nos. 154019, 154065, 154960. Submitted August 11, 1994, at Detroit. Decided February 21, 1995, at 9:50 A.M.

Thrifty Royal Oak, Inc., and Meijer, Inc., each filed in the Tax Tribunal a petition challenging property tax assessments by the City of Royal Oak for the years 1981 through 1991. The tribunal reduced the assessments for the years 1981 through 1988 and ordered a refund of excess taxes paid and accrued interest. The parties thereafter agreed to reduce the assessments for the years 1989 through 1991, and the tribunal entered a consent judgment ordering a refund for those years. In each of the years at issue, the petitioners, as allowed by the Royal Oak city charter, had paid one-half of their summer taxes on July 31 and the other half on October 31. In calculating the petitioners' refunds, the city computed interest on the excess taxes from October 31 of each year in question until the date the refunds were paid. The petitioners challenged the city's interest calculation in the tribunal, which determined that prejudgment interest correctly was calculated from October 31 of each year, but that postjudgment interest was calculated incorrectly because accrued prejudgment interest was excluded from the calculation of postjudgment interest. Each petitioner appealed concerning prejudgment interest, and the city and the Royal Oak Public Schools appealed concerning postjudgment interest. The appeals were consolidated.

The Court of Appeals *held:*

1. MCL 205.737(4); MSA 7.650(37)(4) provides that a sum determined by the Tax Tribunal to have been paid unlawfully shall bear interest from the date of the payment to the date of the judgment and the judgment shall bear interest to the date of its payment. Where, as here, taxes can be paid in installments, an installment that exceeds what lawfully can be collected in that installment includes an unlawful portion that, when refunded, must include prejudgment interest pursuant to § 37(4). The tribunal erred in determining that the petitioners

REFERENCES

Am Jur 2d, State and Local Taxation §§ 845, 1068, 1069.
See ALR Index under Interest on Money; Taxes.

were not entitled to prejudgment interest on installments paid on July 31 of the years at issue.

2. Prejudgment interest is part of the judgment for purposes of computing postjudgment interest under § 37(4). The tribunal correctly determined that the city erred in excluding prejudgment interest from the calculation of postjudgment interest.

Affirmed in part, reversed in part, and remanded for recalculation of prejudgment interest.

1. TAXATION — REAL PROPERTY TAXES — INSTALLMENTS — UNLAWFUL TAX PAYMENTS.

Where a municipality grants taxpayers the right to pay taxes in installments, any sum collected in a single installment that exceeds the amount required by local ordinance is an unlawful tax payment (MCL 205.737[4]; MSA 7.650[37][4]).

2. TAXATION — REAL PROPERTY TAXES — TAX TRIBUNAL — REFUNDS — INTEREST.

Where a municipality allows a taxpayer to pay a real property tax assessment in two equal installments and the Tax Tribunal subsequently reduces the assessment and orders a refund of excess taxes, prejudgment interest is to be computed from the date of each installment on half of the total excess, rather than being computed from the date of the second installment on the entire excess (MCL 205.737[4]; MSA 7.650[37][4]).

3. 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 the 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 the 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 *Michael B. Shapiro* and *Samina Hurst*), for Thrifty Royal Oak, Inc., and Meijer, Inc.

Shifman & Carlson, P.C. (by *Burton R. Shifman* and *John A. Carlson*), and *Lawrence Doyle,* City Attorney, for City of Royal Oak.

Shifman & Carlson, P.C. (by *Burton R. Shifman* and *John A. Carlson*), for Royal Oak Public Schools.

Before: CORRIGAN, P.J., and WAHLS and P. J. MACERONI,* JJ.

CORRIGAN, P.J. In these consolidated tax appeals, petitioners Thrifty Royal Oak, Inc., and Meijer, Inc., appeal as of right orders of the Tax Tribunal denying their motions to determine prejudgment interest on their tax refunds in MTT Docket Nos. 56028 and 127667. Respondents City of Royal Oak and Royal Oak Public Schools also appeal as of right the tribunal's order granting petitioners' motion to determine postjudgment interest in Docket No. 56028.

We reverse in part and affirm in part. We hold that the Tax Tribunal erred in construing MCL 205.737(4); MSA 7.650(37)(4) with regard to the meaning of "unlawful" taxes, but correctly ruled that prejudgment interest is part of a judgment under § 37(4).

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Petitioners own property in Royal Oak, Michigan. Respondent City of Royal Oak assessed and levied taxes on petitioners' property. In separate petitions filed in 1981 and 1989, petitioners challenged the city's assessment for the years 1981 through 1991. In May 1991, the Tax Tribunal reduced petitioners' assessment for the tax years 1981 through 1988 and ordered a refund of excess taxes paid and accrued interest.[1] The parties thereafter agreed to reduce the assessment for the years 1989, 1990, and 1991. In March 1992, the tribunal entered a consent judgment ordering a tax refund for those years. Pursuant to the Tax Tribunal's judgments in both cases, the city corrected the tax rolls and refunded the overpaid taxes.

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

[1] The parties appealed the judgment. Pursuant to a stipulation and order, the appeals were dismissed with prejudice.

In calculating the amount of petitioners' refunds, the city computed simple interest on the excess taxes from October 31 of each year in question until the date the city paid the refunds.[2] Petitioners disputed the city's method of calculating interest and filed motions in the Tax Tribunal seeking a determination of interest on their tax refunds pursuant to the May 1991 and March 1992 orders.

In both Docket Nos. 56028 and 127667, petitioners objected to the city's calculation of interest on the ground that the city did not compute prejudgment interest from the date of payment. Pursuant to the Charter of the City of Royal Oak, ch 11, § 6, taxpayers may pay summer property taxes in two installments. Generally, summer property taxes are due on July 1 and may be paid without penalty or interest until July 31. However, taxpayers have the right to pay one-half of their taxes on or before July 31 and the remainder on October 31 without incurring penalty or interest. For each of the years at issue, petitioners took advantage of this policy and paid one-half of their tax liability on July 31 and the remainder on October 31. As a result, petitioners contended, interest should have accrued on the July excess payments for each tax year. Petitioners also asserted that the city erred in computing postjudgment interest on the tax refund pursuant to the May 1991 order. The city computed postjudgment interest on the excess taxes, excluding accrued prejudgment interest.

The Tax Tribunal denied petitioners' motions in both cases with regard to the issue of prejudgment

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[2] The one exception to this practice occurred in tax year 1981. In that year, because petitioners' July tax installment exceeded their *total* summer tax liability by $872, the city calculated interest on the $872 from July 31, 1981. The city calculated the remaining excess payment made on October 31, 1981, from that date until the date of refund. See n 7, *infra*.

interest[3] because it concluded that none of the July installments were unlawfully paid taxes. The tribunal granted petitioners' motion on the issue of postjudgment interest[4] because it determined that judgments under § 37(4) include prejudgment interest as well as excess tax payments. Petitioners appealed the orders pertaining to prejudgment interest in both cases and respondents appealed the order granting petitioners' motion concerning postjudgment interest. The three appeals have been consolidated for review.

This Court reviews a decision of the Tax Tribunal to determine whether the tribunal erred in applying the law or adopted a wrong principle.[5] *Michigan Bell Telephone Co v Dep't of Treasury,* 445 Mich 470, 476; 518 NW2d 808 (1994). We generally defer to the Tax Tribunal's interpretation of a statute that it is delegated to administer. *Xerox Corp v Oakland Co,* 191 Mich App 433, 442; 478 NW2d 702 (1991). The issues presented in this appeal turn solely on the Tax Tribunal's interpretation of MCL 205.737(4); MSA 7.650(37)(4), which provides in part:

> 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.

In reviewing the tribunal's interpretation of this section, we adhere to the general rule that

[3] Prejudgment interest is the interest that accrues from the date an unlawful tax payment is made until the date of judgment.

[4] Postjudgment interest is the interest that accrues on a judgment until the tax refund is paid.

[5] Generally, this Court also reviews the tribunal's findings of fact for support by competent, material, and substantial evidence on the whole record. *Michigan Bell Telephone Co v Dep't of Treasury,* 445 Mich 470, 476; 518 NW2d 808 (1994). However, the facts of this case were not in dispute.

ambiguities in the language of a tax statute must be resolved in favor of the taxpayer. *Michigan Bell, supra* at 477.

II. PREJUDGMENT INTEREST

Petitioners claim that the Tax Tribunal erred in determining the date prejudgment interest on petitioners' tax refunds began to accrue. We agree. The city computed interest on the tax refunds from October 31 of each year at issue.[6] Petitioners objected to the city's method of calculating interest, claiming that interest also accrued, at least in part, on the July installments. However, the tribunal found that the July installments did not constitute "unlawfully paid" taxes within the meaning of § 37(4). The tribunal limited the definition of an unlawfully paid sum to those amounts paid in excess of the taxpayers' total tax liability. Because the petitioners' July installments had not exceeded their total tax liability in any year except 1981, the tribunal denied petitioners' motion for the years 1982 through 1991. The Tax Tribunal erred as a matter of law in its interpretation of MCL 205.737(4); MSA 7.650(37)(4). Moreover, the Tax Tribunal's decision deviates from established Michigan Tax Tribunal precedent.

In *Copco Steel & Engineering v Detroit,* unpublished opinion per curiam of the Court of Appeals, decided April 1, 1988 (Docket No. 90418), a factually identical case, this Court affirmed the decision of the Tax Tribunal. In *Copco,* the tribunal had ruled that where a city grants taxpayers the right to pay taxes in installments, any sum collected in a single installment that exceeds the amount required by local ordinance is an unlawful tax payment under § 37(4). *Copco Steel & Engineering v Detroit,* 4 MTTR 75 (Docket No. 57151, October 29,

[6] See n 2, *supra.*

1985). As such, a taxpayer may pay an unlawful sum, even though it has not fully discharged its tax liability. We adopt the Tax Tribunal's interpretation of § 37(4) in *Copco.* The unlawful nature of a tax payment may be determined by comparing the required payment for each installment with the actual payment. Where the actual payment exceeds the required payment, the taxpayer has paid an unlawful sum and is entitled to interest on that sum under § 37(4).

In this case, petitioners paid excess taxes with each July installment for the years in question. As noted, the Royal Oak city charter grants taxpayers the right to pay their summer taxes in two installments, half in July and half in October. After paying taxes in this manner from 1981 through 1991, petitioners successfully challenged their assessment and received a reduction, resulting in lower taxes. In light of the corrected assessment, petitioners' original installments, both in July and October, exceeded one-half of its total lawful tax burden.[7] If the assessment had been correct during the years in question, the installment payments required under the city charter would have been

[7] The following table indicates the differences in amounts petitioners owed and the amounts actually paid under the two installment payment schedule available to Royal Oak taxpayers.*

Year	Total lawful taxes due	Lawful taxes due as of:		Taxes actually paid as of:	
		7/31	10/31	7/31	10/31
1981	150,520	75,260	75,260	151,392	151,392
1982	146,298	73,149	73,149	127,397	127,397
1983	156,215	78,108	78,108	136,033	136,033
1984	178,619	89,310	89,310	137,908	137,908
1985	200,822	100,411	100,411	143,880	143,880
1986	257,388	128,694	128,694	157,056	157,056
1987	273,694	136,847	136,847	149,037	149,037
1988	284,524	142,262	142,262	145,755	145,755
1989	312,225	156,113	156,113	192,113	192,113
1990	302,321	151,161	151,161	185,739	185,739
1991	300,746	150,373	150,373	184,771	184,771

* Numbers are rounded to nearest whole dollar amount.

significantly less. Petitioners therefore paid excessive taxes in both July and October of the years at issue. Under § 37(4), those excess payments constitute unlawful sums and bear interest from the date of payment. The Tax Tribunal erred in calculating prejudgment interest as a matter of law.

III. INTEREST ON JUDGMENT

Respondent claims that the tribunal erred in calculating the interest on the judgment by including prejudgment interest as part of the judgment. We disagree. In *Southfield Western, Inc v Southfield,* 206 Mich App 334; 520 NW2d 721 (1994), this Court rejected respondents' interpretation of § 37(4). *Southfield* held that prejudgment interest is part of the judgment itself under § 37(4) in addition to the excess tax payments. As a result, the Tax Tribunal correctly calculated postjudgment interest on the accrued prejudgment interest and the excess taxes.

Affirmed in part, reversed in part, and remanded to the Tax Tribunal to correct the calculation of prejudgment interest on petitioners' tax refunds in accordance with this opinion. We do not retain jurisdiction.

SPECIAL ORDERS

Order Entered December 19, 1994:

PEOPLE v BORDASH, Docket No. 163671. Reported *ante*, 1. The judges of this Court having been polled pursuant to Administrative Order No. 1994-4, and the result of the poll being that eighteen judges opposed convening a special panel, and five were in favor, it is ordered that a special panel shall not be convened.

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1. The authority of an agent to bind a principal may be either actual or apparent; actual authority may be either express or implied, with implied authority being that authority the agent believes the agent possesses; apparent authority arises where acts and appearances lead a third person reasonably to believe that an agency relationship exists; apparent authority must be traceable to the principal and may not be established by the agent's acts and conduct alone. *Alar v Mercy Mem Hosp,* 208 Mich App 518.

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1. A surety that has incurred liability on a surety bond as a result of the principal's failure to appear in court as ordered is not released from liability by the principal's incarceration in the same jurisdiction where the incarceration either ends before the date of default or commences after the date of default. *In re Surety Bond,* 208 Mich App 369.
2. A bondsman generally is relieved of responsibility on a surety bond once the principal is sentenced for the offense for which the bond was posted; however, a judgment may be entered against the bondsman where the conditions of the surety bond are breached before the principal's case is finally determined and sentence is imposed. *In re Surety Bond,* 208 Mich App 369.

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1. The Legislature, in enacting § 31 of the Motor Bus Transportation Act, incorporated into state law certain sections of the federal motor carrier safety regulations; where a conflict exists between § 31 and provisions of the Handicappers' Civil Rights Act, which act predates § 31, the Legislature is deemed to have repealed the Handicappers' Civil Rights Act to the extent of the conflict (49 CFR 391.41; MCL 37.1101 *et seq.*, 474.131; MSA 3.550[101] *et seq.*, 9.1675[31]). *Shirilla v Detroit,* 208 Mich App 434.

EMPLOYMENT DISCRIMINATION.

2. An offer of employment by a defendant-employer to a plaintiff-employee who has been a victim of employment discrimination must be free from conditions before the employee's failure to accept the offer may be considered to be a failure to mitigate damages. *Paulitch v Detroit Edison Co,* 208 Mich App 656.

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1. The rule of the Civil Service Commission that prohibits civil servants from engaging in partisan political activities during those times that they, pursuant to the terms of a collective bargaining agreement, are released from their regular workplaces for participation in union-related activities or business while continuing to be compensated by the state does not deny such civil servants their constitutional rights of free speech and free association, is not by its terms vague and overbroad in the constitutional sense, and does not deny such civil servants their constitutional rights of equal protection and due process (Const 1963, art 1, §§ 2, 3, 5, 17; Civil Service Commission Rule 1-5.7). *AFL-CIO v Civ Ser (Aft Rem),* 208 Mich App 479.

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1. An agreement or consent by a prosecutor made on the record in open court to a defendant's motion to return the property of the defendant that had been the subject of the automatic administrative forfeiture provision of the controlled substances provisions of the Public Health Code is binding and enforceable against the county holding such forfeited goods (MCL 333.7523[1][d]; MSA 14.15[7523][1][d]; MCR 2.507[H]). *In re Return of Forfeited Goods,* 208 Mich App 689.

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1. Double jeopardy does not preclude retrial after discharge of a jury for inability to agree or for some other overruling necessity. *People v Booker (Aft Rem),* 208 Mich App 163.
2. A trial court's determinations concerning whether state and federal prosecutions arose out a single criminal transaction and whether a state's interests in the prosecution of an individual are substantially distinct from the interests of the federal government in prosecuting the individual are reviewed de novo; the trial court's findings of fact are reviewed for clear error. *People v Mezy,* 208 Mich App 545.
3. A determination whether a federal prosecution satisfies a state's interests in prosecuting an individual requires consideration whether the maximum penalties of the respective statutes involved are greatly disparate, whether some reason exists why the federal government cannot be entrusted to vindicate fully the state's interests in securing a conviction, and whether

CONSTITUTIONAL LAW—Cont'd

the differences in the statutes are merely jurisdictional or are substantive. *People v Mezy,* 208 Mich App 545.

4. Double jeopardy bars an appeal or a retrial following a directed verdict of acquittal, regardless of the propriety of the grant of the directed verdict of acquittal (US Const, Am V; Const 1963, art 1, § 15). *People v Nix (Aft Rem),* 208 Mich App 648.

DUE PROCESS.

5. In analyzing a plaintiff's claim that an ordinance of a municipality interferes with its business in violation of the constitutional guarantee of due process, the ordinance will be found to comport with due process where it is rationally related to a legitimate governmental purpose. *Peninsula Sanitation v Manistique,* 208 Mich App 34.

MUNICIPAL CORPORATIONS.

6. Ordinances are presumed to be valid and courts have a duty to construe an ordinance as being constitutional, unless it is clearly apparent that the ordinance is unconstitutional. *Peninsula Sanitation v Manistique,* 208 Mich App 34.

7. A party challenging the constitutionality of an ordinance has the burden of proving the invalidity of the ordinance; where the legislative judgment is supported by any facts either known or that reasonably could be assumed, although such facts may be debatable, the legislative judgment must be accepted. *Peninsula Sanitation v Manistique,* 208 Mich App 34.

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1. It is well-settled that attorney fees are not allowed, either as costs or as damages, unless recovery of those fees is authorized expressly by statute, by court rule, or by a recognized court-made exception; attorney fees are not authorized by statute or court rule where there has been a breach of contract by a fire insurance company arising out of the bad-faith handling of a fire insurance claim, and there is neither a recognized court-made exception to the general rule nor any strong public policy reason to fashion such an exception under those circumstances. *Burnside v State Farm,* 208 Mich App 422.

MEDIATION SANCTIONS.

2. Future damages in a jury verdict should not be reduced to their present value for the purpose of determining whether mediation sanctions should be awarded; while future damages should be so reduced for the purpose of entry of an order of judgment, the court rule governing mediation sanctions refers to a comparison of the verdict, not the order of judgment, with the mediation evaluation (MCR 2.403[O]). *Frank v Kibbe & Associates,* 208 Mich App 346.
3. Assessable costs and interest as used in the court rule relating to the determination of mediation sanctions means the interest that properly can be assessed pursuant to the statute governing interest on a judgment and, thus, may not be assessed on that portion of the verdict that represents future damages; however, the period for which the interest may be calculated is that permitted by the court rule rather than that permitted by the statute; thus, interest may be calculated for the period from the filing of the complaint to the date of the mediation evaluation (MCR 2.403[O][3]; MCL 600.6013; MSA 27A.6013). *Frank v Kibbe & Associates,* 208 Mich App 346.
4. An aggregate verdict for the purpose of the court rule dealing with the granting of mediation sanctions is more favorable than an aggregate mediation evaluation only if the verdict exceeds the mediation evaluation by more than ten percent (MCR 2.403[O][4]). *Frank v Kibbe & Associates,* 208 Mich App 346.

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2. The fourteen-day, thirty-five-day, and seventy-seven-day time limits pertaining to arraignments, pretrial conferences, and trials, respectively, contained in subsections 625b(1) and (2) of the Vehicle Code are directory only; therefore, not only must there be a timely motion to dismiss on the basis of a violation of the statutory time limit, with any resulting dismissal being without prejudice to the reinstitution of charges, but, if the trial court denies the motion for dismissal, the issue properly can be preserved only by pursuing an interlocutory appeal; the defendant may not rely upon such issues where the appeal occurs after trial, conviction, and sentence (MCL 257.625b[1],[2]; MSA 9.2325[2][1],[2]). *People v Yarema,* 208 Mich App 54.

BREAKING AND ENTERING.
3. The statute making criminal the entering of a dwelling without permission does not require that permission to enter be obtained from each of the enumerated entities; permission to enter from any of the designated entities, such as an owner, is sufficient (MCL 750.115; MSA 28.310). *People v D'Angelo,* 208 Mich App 417.
4. Where the prosecution offers evidence of breaking and entering with intent to commit assault with intent to commit murder, assault with intent to inflict great bodily harm, or felonious assault, unanimity by the jury is required regarding the question whether the defendant committed breaking and entering, but not regarding the question of which of the three assaultive felonies the defendant intended to commit. *People v Ferguson,* 208 Mich App 508.

EVIDENCE.
5. The results of a preliminary breath test administered shortly after a defendant's arrest may be admitted as impeachment evidence in a trial of a charge of being a disorderly person where the defendant has testified to not being intoxicated. *City of Westland v Okopski,* 208 Mich App 66.

IDENTIFICATION TESTIMONY.
6. The fact that a witness was unable to identify a defendant at a pretrial corporeal lineup does not render inadmissible the subsequent in-court identification of the defendant by that witness; the failure to identify a defendant at a pretrial lineup is relevant to the credibility of the in-court identification, not to its admissibility. *People v Barclay,* 208 Mich App 670.

JURY.
7. If a juror expresses disagreement with a verdict when polled, the trial court may discontinue the poll and order further

CRIMINAL LAW—Cont'd
deliberations by the jury or declare a mistrial and discharge the jury with the consent of the defendant or after determining that the jury is deadlocked or that manifest necessity exists for declaring a mistrial (MCR 2.512[B][3], 6.420[C]). *People v Booker (Aft Rem),* 208 Mich App 163.

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8. A jury's submission to a court of questions relating to evidentiary matters before a case has been sent to the jury is not sufficient to establish that the jury has engaged in improper deliberations such that there exists a manifest necessity that the court sua sponte order a mistrial. *People v Rutherford,* 208 Mich App 198.

ON-THE-SCENE IDENTIFICATIONS.
9. Police officers may conduct an on-the-scene identification without the presence of counsel promptly after a crime, except where the police have very strong evidence that the person stopped is the culprit or where the police have made a valid arrest of the suspect for a separate crime, unless the police have more than a mere suspicion that the suspect was responsible for the crime to which the identification pertains. *People v Miller,* 208 Mich App 495.

PLEA BARGAINS.
10. A trial court's discretion to refuse to accept a guilty plea is contingent on the terms of the parties' plea agreement; a trial court may reject a defendant's guilty plea only where the plea agreement includes an agreement for a specific sentence; a trial court may not reject a guilty plea where the plea agreement includes a sentence recommendation by the prosecutor but, instead, must state the sentence that it finds to be appropriate and give the defendant the opportunity to accept that sentence or withdraw the guilty plea (MCR 6.302[C][3]). *People v Grove,* 208 Mich App 574.

PREINDICTMENT AND PREARREST DELAY.
11. Dismissal of criminal charges is warranted as a result of unjustified preindictment or prearrest delay where the defendant shows substantial prejudice to the defendant's right to a fair trial and intent by the prosecution to gain a tactical advantage. *People v White,* 208 Mich App 126.

RIGHT AGAINST SELF-INCRIMINATION.
12. The right against compelled self-incrimination includes the right to be informed by the police of attempted contacts by retained counsel; failure by the police to so inform a suspect renders invalid any subsequent waiver of the right to remain silent and the right to counsel (Const 1963, art 1, § 17). *People v Bender,* 208 Mich App 221.

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DEFENSES—*See*
WORKER'S COMPENSATION 4

DELAY IN PAYMENT—*See*
INSURANCE 5

DELINQUENT TAXES—*See*
TAXATION 1, 2

DEPARTMENT OF SOCIAL SERVICES—*See*
SOCIAL SERVICES 1

DIABETIC PERSONS—*See*
MASTER AND SERVANT 1

DIRECTED VERDICTS OF ACQUITTAL—*See*
CONSTITUTIONAL LAW 3

DISABILITY PENSION BENEFITS—*See*
WORKER'S COMPENSATION 2

DISCIPLINARY CREDITS—*See*
SENTENCES 1

DISCLOSURES—*See*
GARNISHMENT 1

DISCOVERY—*See*
PRETRIAL PROCEDURE 1

DISMISSAL—*See*
CRIMINAL LAW 2, 11

DISPOSAL OF SOLID WASTE—*See*
MUNICIPAL CORPORATIONS 1

DIVORCE.

ALIMONY.

1. A circuit court deciding whether alimony should be awarded considers principles similar to those that govern property divisions; the main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Hanaway v Hanaway,* 208 Mich App 278.

ATTORNEY FEES.

2. Attorney fees in a divorce action, generally awarded only as necessary to enable a party to prosecute or defend the action, may be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of the litigation; furthermore, a party should not be required to satisfy attorney fees out of assets relied on for support. *Hanaway v Hanaway,* 208 Mich App 278.

PROPERTY DIVISION.

3. The Court of Appeals, in an appeal from a circuit court's

DIVORCE—Cont'd
division of marital property in a divorce action, reviews the findings of fact for clear error and decides whether the division was fair and equitable in light of the facts; property disposition rulings will be affirmed unless the Court of Appeals is left with a firm conviction that the division was inequitable. *Hanaway v Hanaway,* 208 Mich App 278.
4. Factors to be considered by a circuit court in dividing marital property in a divorce action include: the source of the property; the parties' contribution toward its acquisition, as well as to the general marital estate; the duration of the marriage; the needs and circumstances of the parties; the parties' ages, health, life status, and earning abilities; the cause of the divorce, as well as past relations and conduct between the parties; and general principles of equity; in addition, the court may consider the interruption of the personal career or education of either party. *Hanaway v Hanaway,* 208 Mich App 278.
5. The value to be given to fault in deciding the division of property in a divorce case and the extent to which particular actions are to be regarded as fault contributing to the breakdown of a marriage are matters left to the trial court's discretion, subject to the requirement that the division not be inequitable. *Hanaway v Hanaway,* 208 Mich App 278.
6. A party's attempt to conceal assets is only one of many facts a circuit court must weigh in considering an equitable division of marital property, and it does not give rise to any automatic sanction. *Hanaway v Hanaway,* 208 Mich App 278.
PROPERTY SETTLEMENTS.
7. *Dobrzenski v Dobrzenski,* 208 Mich App 514.

DOUBLE JEOPARDY—*See*
CONSTITUTIONAL LAW 1-4
CRIMINAL LAW 8
WEAPONS 1

DUE PROCESS—*See*
CONSTITUTIONAL LAW 5
DIVORCE 7

DUTY—*See*
NEGLIGENCE 2

DUTY TO DISCLOSE INFORMATION—*See*
MASTER AND SERVANT 2

DUTY TO REPORT—*See*
STATUTES 1

DUTY TO WARN—*See*
PRODUCTS LIABILITY 1, 2

EASEMENTS.

PRESCRIPTIVE EASEMENTS.

1. Use, no matter how long continued, of land registered pursuant to the Commercial Forest Act for activities directly related to hunting and fishing cannot ripen into a prescriptive easement (MCL 320.301 *et seq.*; MSA 13.221 *et seq.*). *Goodall v Whitefish Hunt Club,* 208 Mich App 642.

ECONOMIC DEVELOPMENT CORPORATION ACT—*See* PUBLIC UTILITIES 5

EMPLOYER TORT LIABILITY—*See* WORKER'S COMPENSATION 4

EMPLOYMENT DISCRIMINATION—*See* CIVIL RIGHTS 2

ENTRUSTMENT PROVISION—*See* SALES 1

EQUAL PROTECTION—*See* CHILDREN BORN OUT OF WEDLOCK 1
CIVIL SERVICE 1

EVIDENCE.

See, also, CRIMINAL LAW 5; INSURANCE 6.

ADMISSIBILITY.

1. A perfect chain of custody is not required for the admission of cocaine and other relatively indistinguishable items of real evidence; such evidence may be admitted where the absence of a mistaken exchange, contamination, or tampering has been established to a reasonable degree of probability or certainty; once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility. *People v White,* 208 Mich App 126.

LETTERS.

2. Items properly addressed and placed in the mail are presumed to reach their destination. *Crawford v Michigan,* 208 Mich App 117.

NO-CONTEST PLEAS.

3. *Akyan v Auto Club (On Reh),* 208 Mich App 271.

WITNESSES.

4. A presumption that missing evidence would be adverse to a party having control of that evidence arises where the party having control does not produce the evidence; a relative of a party who does not live in the same household as the party is not deemed to be within the control of the party for the purpose of the presumption in the absence of evidence that the party has actual control of the witness. *Isagholian v Transamerica Ins,* 208 Mich App 9.

EXCLUSIVE REMEDY—*See* WORKER'S COMPENSATION 5, 6

EXECUTION.

QUASHING WRITS OF EXECUTION.

1. A court that has granted a writ of execution may quash the writ at its discretion; a writ of execution should be quashed if it would be illegal or inequitable to permit its further use or enforcement; a court should vacate any execution involving fraud, unfairness, injustice, or oppressiveness. *Schmidt v Bretzlaff,* 208 Mich App 376.

EXEMPTIONS FROM TAXATION—*See*
TAXATION 3

FAILURE TO PRODUCE—*See*
EVIDENCE 4

FAULT—*See*
DIVORCE 5

FEDERAL AND STATE PROSECUTIONS—*See*
CONSTITUTIONAL LAW 2
CONTROLLED SUBSTANCES 1

FEDERAL MOTOR CARRIER SAFETY REGULATIONS—*See*
CIVIL RIGHTS 1

FELONY-FIREARM—*See*
WEAPONS 1

FINANCING STATEMENTS—*See*
SECURED TRANSACTIONS 1, 2

FINES—*See*
SENTENCES 3

FIRE INSURANCE—*See*
COSTS 1

FIREMAN'S RULE—*See*
NEGLIGENCE 3

FORCED SALES—*See*
TAXATION 5

FOREIGN JUDGMENTS—*See*
JUDGMENTS 1

FORESEEABILITY—*See*
INTOXICATING LIQUORS 1

FORFEITED GOODS—*See*
COMPROMISE AND SETTLEMENT 1

FORFEITURE—*See*
BAIL 1, 2

FORMER EMPLOYEES—*See*
MASTER AND SERVANT 2

FREE SPEECH AND ASSOCIATION—*See*
CIVIL SERVICE 1

FURNISHING LIQUOR TO MINORS—*See*
INTOXICATING LIQUORS 1

FUTURE DAMAGES—*See*
COSTS 2, 3
JUDGMENTS 4

GAMBLING DEBTS—*See*
JUDGMENTS 1

GAMING—*See*
JUDGMENTS 1

GARNISHMENT.

DISCLOSURES.

1. Facts stated in a garnishee defendant's disclosure must be accepted as true unless the plaintiff timely has served interrogatories or a notice of deposition, or another party has filed a pleading or motion denying the accuracy of the disclosure (MCR 3.101[J][1] [now (L)(1)], [M][2]). *Alyas v Ill Emp Ins of Wausau,* 208 Mich App 324.

GOVERNMENTAL FUNCTION—*See*
PUBLIC UTILITIES 5

GOVERNMENTAL IMMUNITY.

See, also, NUISANCE 2.

HIGHWAY EXCEPTION.

1. Brine that forms after deicing salt is spread on a highway and that later freezes is part of the natural accumulation of ice and snow; the state has no obligation to remove natural accumulations of ice and snow on highways (MCL 691.1402; MSA 3.996[102]). *Dykstra v Transporation Dep't,* 208 Mich App 390.

HIGHWAYS.

2. The highway exception to governmental immunity extends liability only to the traveled portion of the roadbed actually designed for public vehicular travel; excluded from the exception are specific installations whose only rational purposes narrowly service the unique needs of pedestrians (MCL 691.1402; MSA 3.996[102]). *Fortunate v Dep't of Trans,* 208 Mich App 467.

INTENTIONAL TORTS.

3. A governmental agency, as an employer, may not raise govern-

GOVERNMENTAL IMMUNITY—Cont'd
mental immunity as a defense to an intentional tort claim brought by an employee for a work-related injury (MCL 418.131[1], 691.1407[1]; MSA 17.237[131][1], 3.996[107][1]). *Madison v Detroit,* 208 Mich App 356.

PROPRIETARY FUNCTION.
4. A plaintiff, in claiming the proprietary function exception to governmental immunity, must allege that the primary purpose of the governmental activity was to produce a pecuniary profit and that the activity was not normally supported by taxes or fees. *Baker v Waste Mgt of Mich,* 208 Mich App 602.

TRESPASS-NUISANCE.
5. A direct trespass upon, or the interference with the use or enjoyment of, land that results from a physical intrusion caused by, or under the control of, a governmental entity gives rise to a trespass-nuisance claim that is not barred by governmental immunity from tort liability. *Baker v Waste Mgt of Mich,* 208 Mich App 602.

GUILTY PLEAS—*See*
CRIMINAL LAW 1, 10

HANDICAPPERS' CIVIL RIGHTS ACT—*See*
CIVIL RIGHTS 1

HARMLESS ERROR—*See*
TAXATION 8

HIGHWAY EXCEPTION—*See*
GOVERNMENTAL IMMUNITY 1

HIGHWAYS—*See*
GOVERNMENTAL IMMUNITY 2

HOMICIDE.
MANSLAUGHTER.
1. A jury, in returning a verdict of manslaughter, must specify whether the conviction is for voluntary or involuntary manslaughter because the offenses are separate and distinct, are provable by substantially different evidence, and involve different degrees of culpability and severity of punishment. *People v Booker (Aft Rem),* 208 Mich App 163.

SECOND-DEGREE MURDER.
2. *People v Johnson (On Reh),* 208 Mich App 137.

HOSPITALS.
See, also, TAXATION 3.

CERTIFICATES OF NEED.
1. A provision in a former section of the Public Health Code relative to the issuance of certificates of need required the Department of Public Health to adopt a state medical facilities

HOSPITALS—Cont'd

plan that set forth the criteria and guidelines by which the determination of need would be made; the failure of the department to adopt a state medical facilities plan as required by statute rendered any determination concerning a certificate of need a violation of the statutory procedural limitations of its discretion (MCL 333.22132; MSA 14.15[22132], now repealed). *West Bloomfield Hosp v Need Bd,* 208 Mich App 393.

IDENTIFICATION TESTIMONY—*See*
CRIMINAL LAW 6

IMPEACHMENT—*See*
CRIMINAL LAW 5

IMPLIED CONTRACTS—*See*
CONTRACTS 1

IMPOUNDMENT—*See*
LARCENY 1, 2

INDEMNITY.

CONTRACTS.

1. Indemnity contracts should be construed to ascertain and give effect to the intentions of the parties; such intentions are ascertained by considering the language used in the contract, as well as the situation of the parties and the circumstances surrounding the contract; an indemnity clause should be interpreted to give a reasonable meaning to all its provisions. *MSI Construction v Corvo Iron,* 208 Mich App 340.

INDISTINGUISHABLE ITEMS OF REAL EVIDENCE—*See*
EVIDENCE 1

INJUNCTIONS.

PREREQUISITES.

1. There are three prerequisites to obtaining injunctive relief: justice must require that the court grant the injunction, there must be no adequate remedy at law, and there must be a real and imminent danger of irreparable injury. *Peninsula Sanitation v Manistique,* 208 Mich App 34.

INSOLVENT INSURERS—*See*
INSURANCE 4

INSTALLATIONS FOR PEDESTRIANS—*See*
GOVERNMENTAL IMMUNITY 2

INSTALLMENTS—*See*
TAXATION 6

INSURANCE.

ACTIONS.

1. *Lee v Auto-Owners Ins (On Rem),* 208 Mich App 207.

AUTOMOBILES.

2. The term "occupying" as used in the uninsured motorist coverage of an automobile insurance policy is to be interpreted broadly so as to include not only those who are actually inside or in contact with the vehicle but also those who had been occupying the insured vehicle immediately before an injury arising out of the use or repair of the same vehicle; a person standing near a disabled vehicle parked off the roadway and who had been within the vehicle ten or fifteen minutes earlier may be occupying the vehicle for the purpose of the uninsured motorist coverage of an insurance policy that limits such coverage to those who are occupying the insured vehicle and that defines "occupying" as meaning "in or upon or entering into or alighting from." *Gentry v Allstate Ins Co,* 208 Mich App 109.

3. It is irrelevant for the purpose of recovery of no-fault personal injury protection benefits whether an injured person was an occupant of a motor vehicle where the injury occurred when, while stuck off the roadway, the vehicle in which the person previously had been a passenger is struck by another vehicle, causing the stuck vehicle to slide into the injured person while that person was standing near the stuck vehicle awaiting the arrival of a tow vehicle. *Gentry v Allstate Ins Co,* 208 Mich App 109.

NO-FAULT.

4. *Mapes v ACIA,* 208 Mich App 5.

5. A no-fault insurer's unreasonable refusal or delay in the payment of personal or property insurance benefits may provide the basis for an award of costs, including reasonable attorney fees, to the insured; a refusal or delay in payment by an insurer is not unreasonable where it is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty; a trial court's finding of unreasonable refusal or delay will not be reversed on appeal unless it is clearly erroneous (MCL 500.3148[1]; MSA 24.13148[1]). *McCarthy v Auto Club Ins,* 208 Mich App 97.

POLICIES.

6. *LeVere v Aetna,* 208 Mich App 622.

INTENTIONAL TORTS—*See*
GOVERNMENTAL IMMUNITY 3
WORKER'S COMPENSATION 6

INTENTIONAL TORTS EXCEPTION—*See*
WORKER'S COMPENSATION 5

INTEREST—*See*
COSTS 3
TAXATION 7, 11

INTOXICATING LIQUORS.

FURNISHING LIQUOR TO MINORS.

1. Criminal or violent acts are not foreseeable results of serving alcoholic beverages to underage persons; accordingly, guest host liability can not arise as a result of the criminal or violent acts of an intoxicated underage person (MCL 436.33; MSA 18.1004). *Rogalski v Tavernier,* 208 Mich App 302.

INTOXICATION—*See*
CRIMINAL LAW 5

JUDGES.

ASSIGNMENT OF FORMER JUDGES.

1. Former judges, regardless of age, may be assigned by the Supreme Court to perform judicial duties for limited periods or specific assignments; the age limit of no more than seventy years that applies to the election or appointment of judges does not apply to the assignment of former judges (Const 1963, art 6, §§ 19, 23). *People v Booker (Aft Rem),* 208 Mich App 163.

JUDGMENTS.

See, also, TAXATION 11.

FOREIGN JUDGMENTS.

1. Michigan public policy against contracts made in furtherance of gambling renders a foreign judgment based upon an underlying gambling debt unenforceable in the courts of Michigan (MCL 600.2939[3], 691.1154[2]; MSA 27A.2939[3], 27.955[4][2]). *Int'l Recovery System v Gabler,* 208 Mich App 49.

MEDIATION.

2. A party who rejects a mediation award must pay the opposing party's actual costs, including attorney fees, unless the rejecting party improves its position at trial by receiving a jury award that exceeds the mediation award by more than ten percent; a rejecting party that does not improve its position at trial with regard to the issues submitted to arbitration but succeeds at trial by receiving an award that exceeds the mediation award by more than ten percent with regard to an issue that was not submitted to mediation is not entitled to mediation sanctions (MCR 2.403[0]). *McCarthy v Auto Club Ins,* 208 Mich App 97.

3. A court determining whether a party who rejected a mediation award has improved its position at trial by receiving a jury award that exceeds the mediation award by more than ten percent, therefore entitling the rejecting party to an award of actual costs, including attorney fees, may not consider any part of the jury award that is an award for expenses that have not yet been incurred because such an award does not constitute a money judgment (MCR 2.403[0]). *McCarthy v Auto Club Ins,* 208 Mich App 97.

PREJUDGMENT INTEREST.

4. The term "future damages" in the statute providing that interest shall not be allowed on future damages from the date

JUDGMENTS—Cont'd
of the filing of the complaint to the date of the entry of the judgment refers to damages arising from a personal bodily injury (MCL 600.6013, 600.6301; MSA 27A.6013, 27A.6301). *Paulitch v Detroit Edison Co,* 208 Mich App 656.

JUDICIAL CONSTRUCTION—*See*
INDEMNITY 1
STATUTES 2, 3

JUDICIAL REVIEW—*See*
COURTS 1

JURY—*See*
CRIMINAL LAW 7
HOMICIDE 1

JURY INSTRUCTIONS—*See*
CRIMINAL LAW 4
TRIAL 1

JURY QUESTIONS—*See*
CRIMINAL LAW 8

LAND CONTRACTS—*See*
VENDOR AND PURCHASER 1

LARCENY.
AUTOMOBILES.
1. An impoundment agent holding an automobile that has been impounded by the police pursuant to statute because of abandonment has a sufficient possessory interest in the vehicle to make a taking of the vehicle from the impoundment lot without the agent's permission a larceny (MCL 257.252a, 750.356; MSA 9.1952[1], 28.588). *People v Sheldon,* 208 Mich App 331.
2. The value of an automobile taken from an impoundment agent holding the vehicle in impoundment because it had been abandoned is, for the purpose of the bringing of a charge of larceny, the value of the towing and storage services to which the impoundment agent is entitled by statute (MCL 257.252g; MSA 9.1952[7]). *People v Sheldon,* 208 Mich App 331.

LAW OF THE CASE—*See*
APPEAL 1

LETTERS—*See*
EVIDENCE 2

LIMITATION PERIODS—*See*
INSURANCE 4

LIMITED GUARDIANS—*See*
PARENT AND CHILD 2

MAILING PRESUMPTION—*See*
EVIDENCE 2

MANDATORY TERM OF IMPRISONMENT—*See*
SENTENCES 1

MANIFEST NECESSITY—*See*
CRIMINAL LAW 8

MANSLAUGHTER—*See*
HOMICIDE 1

MASTER AND SERVANT.

DIABETIC PERSONS.

1. The Code of Federal Regulations places a blanket prohibition on the employment in motor carrier driving positions of diabetic persons requiring insulin and makes no exception for a person who, despite a diabetic condition, is able to perform the job safely; the section of the code that contains the prohibition was incorporated into state law with the enactment of § 31 of the Motor Bus Transportation Act (49 CFR 391.41; MCL 474.131; MSA 9.1675[31]). *Shirilla v Detroit,* 208 Mich App 434.

DUTY TO DISCLOSE INFORMATION.

2. Michigan law recognizes an employer's qualified privilege to divulge information about a former employee to a prospective employer; the conditional privilege is not a legal obligation requiring employers to disclose adverse information concerning a former employee but, rather, is an imperfect obligation of a moral or social character. *Murdock v Higgins,* 208 Mich App 210.

WHISTLEBLOWERS' PROTECTION ACT.

3. *Dolan v Continental Airlines,* 208 Mich App 316.

MEDIATION—*See*
JUDGMENTS 2, 3

MEDIATION EVALUATIONS—*See*
MOTIONS AND ORDERS 2

MEDIATION SANCTIONS—*See*
COSTS 2-4

MISTRIAL—*See*
CRIMINAL LAW 8

MITIGATION OF DAMAGES—*See*
CIVIL RIGHTS 2

MORE FAVORABLE VERDICTS—*See*
COSTS 4

MOTIONS AND ORDERS.

ADDITUR.

1. The grant or denial of a motion for additur or a new trial rests in the trial court's discretion and will not be reversed on appeal in the absence of an abuse of discretion. *Arnold v Darczy,* 208 Mich App 638.
2. A trial court, when computing additur, may not consider pretrial settlement negotiations or mediation evaluations (MRE 408; MCR 2.403[N][2]). *Arnold v Darczy,* 208 Mich App 638.
3. Additur set by a trial court must be the lowest the evidence will support (MCR 2.611[E]). *Arnold v Darczy,* 208 Mich App 638.

PARTIES.

4. A trial court may grant permissive intervention where a timely application is made, the applicant's claim or defense and the main action have a common question of law or fact, and no prejudice or delay to the original parties will result; the routine granting of motions to intervene in a case in which a judgment favorable to the intervenors has already been entered, without questioning the timeliness of such motions, constitutes an abuse of discretion; a timely application is an application that is made before an adjudication of the case on the merits (MCR 2.209[B]). *Dean v Dep't of Corrections,* 208 Mich App 144.

MOTOR BUS TRANSPORTATION ACT—*See*
CIVIL RIGHTS 1
MASTER AND SERVANT 1

MOTOR CARRIER DRIVING POSITIONS—*See*
MASTER AND SERVANT 1

MOTOR VEHICLES—*See*
EASEMENTS 1

MUNICIPAL CORPORATIONS.

See, also, CONSTITUTIONAL LAW 5-7; PUBLIC UTILITIES 1.

CONTRACTS.

1. Considerations of public health provide sufficient justification for a municipality's granting of an exclusive contract for the collection of solid waste; waste collection is an aspect of the police power of a municipality that concerns the legitimate goal of ensuring the proper disposition of solid waste. *Peninsula Sanitation v Manistique,* 208 Mich App 34.

NAME CHANGES—*See*
SECURED TRANSACTIONS 2

NEGLIGENCE.

See, also, WORKER'S COMPENSATION 4.

CAUSATION.

1. Circumstantial proof of causation must facilitate reasonable inferences of causation, not mere speculation. *Garabedian v Beaumont Hosp,* 208 Mich App 473.

NEGLIGENCE—Cont'd

DUTY.

2. An individual generally has no duty to protect another who is endangered by a third person's conduct; however, a duty of reasonable care may arise where the individual stands in a special relationship with either the victim or the third party; the determination whether a duty-imposing special relationship exists in a particular case involves ascertaining whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control over self-protection. *Murdock v Higgins,* 208 Mich App 210.

POLICE OFFICERS.

3. *Mariin v Fleur, Inc,* 208 Mich App 631.

NEW TRIAL—*See*
MOTIONS AND ORDERS 1

NO-CONTEST PLEAS—*See*
EVIDENCE 3

NO-FAULT—*See*
INSURANCE 3-5
WORKER'S COMPENSATION 7

NUISANCE.

CONTROL.

1. A defendant who creates a nuisance, owns or controls the property from which a nuisance arose, or employs another to do work that the defendant knows is likely to create a nuisance may be found to have control over the nuisance; a governmental defendant that is under a statutory duty to abate a nuisance also may be found to have control over the nuisance. *Baker v Waste Mgt of Mich,* 208 Mich App 602.

GOVERNMENTAL IMMUNITY.

2. The draining of an artificial lake as the result of the failure of a governmental body to maintain the dam that created the lake and thereby to allow the area where the lake had been to return to its original natural state does not constitute either a trespass-nuisance or nuisance per se such as will defeat a claim of governmental immunity by the governmental body in an action by adjoining property owners for diminution of property values because of the absence of the lake (MCL 691.1407[1]; MSA 3.996[107][1]). *Fox v Ogemaw Co,* 208 Mich App 697.

NUISANCE PER SE—*See*
NUISANCE 2

OCCUPANTS—*See*
INSURANCE 3

OCCUPYING A VEHICLE—*See*
INSURANCE 2

OFFICIAL DUTIES—*See*
STATUTES 3

ON-THE-SCENE IDENTIFICATIONS—*See*
CRIMINAL LAW 9

ORDINANCES—*See*
CONSTITUTIONAL LAW 5-7

OWNERSHIP—*See*
LARCENY 1

OWNERSHIP INTERESTS—*See*
PUBLIC UTILITIES 1

PARENT AND CHILD.

ANTICIPATORY NEGLECT OR ABUSE.

1. Anticipatory neglect or abuse, i.e., how a parent treats one child is probative of how that parent may treat another child, provides an appropriate basis for invoking the jurisdiction of the probate court over a child whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity of a parent, is an unfit place in which to live (MCL 712A.2[b][2]; MSA 27.3178[598.2][b][2]). *In re Powers,* 208 Mich App 582.

CHILD CUSTODY ACT.

2. *In re Ramon,* 208 Mich App 610.

PARKING LOTS—*See*
WORKER'S COMPENSATION 3

PAROLE.

PAROLE BOARD.

1. A public hearing by the parole board concerning parole for a prisoner is not required by statute until after an initial decision by the board to proceed toward a grant of parole (MCL 791.234[6], 791.244[2][f]-[h]; MSA 28.2304[6], 28.2314[2][f]-[h]). *Middleton v Parole Bd (On Rem),* 208 Mich App 563.

PAROLE BOARD—*See*
PAROLE 1

PAROLEES—*See*
SENTENCES 4

PARTIES—*See*
MOTIONS AND ORDERS 4

PAYMENT—*See*
TAXATION 1

PENALTIES—*See*
TAXATION 10

PERMISSION TO ENTER PREMISES—*See*
CRIMINAL LAW 3

PERMISSIVE INTERVENTION—*See*
MOTIONS AND ORDERS 4

PERSONAL INJURY PROTECTION BENEFITS—*See*
INSURANCE 3

PLEA BARGAINS—*See*
CRIMINAL LAW 10

PLEADINGS—*See*
WORKER'S COMPENSATION 6

POLICE OFFICERS—*See*
NEGLIGENCE 3

POLICE POWERS—*See*
MUNICIPAL CORPORATIONS 1

POLICIES—*See*
INSURANCE 6

POLITICAL ACTIVITIES—*See*
CIVIL SERVICE 1

POLLING OF JURY—*See*
CRIMINAL LAW 7

POSSESSION OF SHORT-BARRELED SHOTGUN—*See*
WEAPONS 1

POSSESSORY INTEREST—*See*
LARCENY 1

PREEXISTING DUTIES—*See*
CONTRACTS 1

PREINDICTMENT AND PREARREST DELAY—*See*
CRIMINAL LAW 11

PREJUDGMENT INTEREST—*See*
JUDGMENTS 4

PREJUDICE—*See*
CRIMINAL LAW 2

PRELIMINARY BREATH TESTS—*See*
CRIMINAL LAW 5

PREREQUISITES—*See*
INJUNCTIONS 1

PRESCRIPTIVE EASEMENTS—*See*
EASEMENTS 1

PRESUMPTIONS—*See*
EVIDENCE 4

PRETRIAL CONFERENCES—*See*
CRIMINAL LAW 2

PRETRIAL IDENTIFICATION—*See*
CRIMINAL LAW 6

PRETRIAL PROCEDURE.
DISCOVERY.
1. Summary disposition may be appropriate before the expiration of a discovery deadline where further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Crawford v Michigan,* 208 Mich App 117.

PRIOR LOW SEVERITY FELONY CONVICTIONS—*See*
SENTENCES 5

PRIOR RELATIONSHIP TO CRIMINAL JUSTICE SYSTEM—*See*
SENTENCES 4, 5

PRISON REGULATIONS—*See*
PRISONS AND PRISONERS 1

PRISONS AND PRISONERS.
CONSTITUTIONAL LAW.
1. Deference is to be given to the considered judgment of prison administrators in balancing the constitutional rights of prisoners against the legitimate objectives of incarceration. *Abdur-Ra'oof v Corrections Dep't,* 208 Mich App 626.
2. Prison regulations alleged to infringe on constitutional rights are judged under a reasonableness test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights; a regulation is valid if it is reasonably related to legitimate penological interests; the question is whether the logical connection between a regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. *Abdur-Ra'oof v Corrections Dep't,* 208 Mich App 626.

PROBABLE CAUSE—*See*
SEARCHES AND SEIZURES 1, 2

PROBATE COURT—*See*
COURTS 1

PROBATE COURT JURISDICTION—*See*
PARENT AND CHILD 1

PROBATION—*See*
SENTENCES 3

PRODUCTS LIABILITY.
See, also, WORKER'S COMPENSATION 7.
DUTY TO WARN.
1. A manufacturer of a product has no duty to provide to purchasers of the product notices concerning new, updated, or improved safety devices relating to the product. *Reeves v Cincinnati, Inc (Aft Rem),* 208 Mich App 556.
SIMPLE TOOLS.
2. *Viscogliosi v Montgomery Elevator,* 208 Mich App 188.

PROPERTY DIVISION—*See*
DIVORCE 3-6

PROPERTY SETTLEMENTS—*See*
DIVORCE 7

PROPRIETARY FUNCTION—*See*
GOVERNMENTAL IMMUNITY 4

PROSECUTORS—*See*
COMPROMISE AND SETTLEMENT 1

PROXIMATE CAUSE—*See*
TORTS 1

PRUDENT INVESTMENT TEST—*See*
PUBLIC UTILITIES 2

PUBLIC HEALTH—*See*
MUNICIPAL CORPORATIONS 1

PUBLIC HEARINGS—*See*
PAROLE 1

PUBLIC SERVICE COMMISSION—*See*
PUBLIC UTILITIES 3

PUBLIC UTILITIES.
MUNICIPAL CORPORATIONS.
1. A franchise by a municipal corporation granted to an electric utility permitting the utility to place its facilities and equipment within the municipality subject to the municipality's ordinances and regulations creates a right of way but does not create an ownership interest for which the utility is entitled to compensation if the municipality in the reasonable exercise of its police power decides to terminate the right of way by vacating the street or alley. *Detroit Edison Co v Detroit,* 208 Mich App 26.

PUBLIC UTILITIES—Cont'd

RATES.

2. The prudent investment test may be used in determining utility rates; the test provides that a utility may be compensated for prudent investments at their actual cost when made, regardless of whether the investments, in hindsight, prove to be necessary or beneficial. *ABATE v PSC,* 208 Mich App 248.

3. The Public Service Commission is not bound by any particular method or formula in exercising its legislative function of determining just and reasonable rates; the commission may consider all lawful elements in determining rates (MCL 460.557; MSA 22.157). *ABATE v PSC,* 208 Mich App 248.

4. A public utility has a right to a just and reasonable rate of return on its investment and may not be limited to rates that are so insubstantial as to be confiscatory. *ABATE v PSC,* 208 Mich App 248.

RELOCATION OF UTILITY EQUIPMENT.

5. The costs of relocating equipment owned by an electric utility as the result of a municipality's vacation of streets and alleys for eventual conveyance of the property to a private party for a public purpose, undertaken pursuant to the Economic Development Corporations Act, must be borne by the utility, because vacation of the streets and alleys under those circumstances is an exercise of the city's governmental function (MCL 125.1601 *et seq.*; MSA 5.3520[1] *et seq.*). *Detroit Edison Co v Detroit,* 208 Mich App 26.

QUASHING WRITS OF EXECUTION—*See*
EXECUTION 1

RATES—*See*
PUBLIC UTILITIES 2-4

REAL PROPERTY—*See*
TAXATION 4, 5

REAL PROPERTY TAXES—*See*
TAXATION 6, 7

REDEMPTION—*See*
TAXATION 2

REFUNDS—*See*
TAXATION 7

REIMBURSEMENT—*See*
WORKER'S COMPENSATION 7, 8

RELOCATION OF UTILITY EQUIPMENT—*See*
PUBLIC UTILITIES 5

REMANDS FOR RESENTENCING—*See*
SENTENCES 2

REPEAL BY IMPLICATION—*See*
STATUTES 2

RETROACTIVITY—*See*
WORKER'S COMPENSATION 8

RIGHT AGAINST SELF-INCRIMINATION—*See*
CRIMINAL LAW 12

RIGHTS OF WAY—*See*
PUBLIC UTILITIES 1

RIGHT TO COUNSEL—*See*
CRIMINAL LAW 9, 12

SALE FOR DELINQUENCY—*See*
TAXATION 8

SALES.

WATERCRAFT.

1. The entrustment provision of the Uniform Commercial Code, under which any entrusting of possession of goods to a merchant who deals in goods of that kind gives the merchant the power to transfer all rights of the entruster to a buyer in the ordinary course of business, is preempted by the watercraft certificates of title act to the extent the entrustment provision conflicts with the act, which provides that a person acquiring a watercraft from its owner does not acquire any right, title, claim, or interest in the watercraft until, among other things, the person is issued a certificate of title to the watercraft (MCL 440.2403[2], 281.1204[1]; MSA 19.2403[2], 18.1288[4][1]). *Jerry v Second Nat'l Bank,* 208 Mich App 87.

SALES-COMPARISON OR MARKET APPROACH—*See*
TAXATION 4

SEARCHES AND SEIZURES.

SEARCH WARRANTS.

1. Where an affidavit in support of a search warrant shows that an identified individual has received, or anticipates receiving, specific contraband through the mail at a particular location, there is probable cause to believe that other contraband or evidence of the crime will be found at that location. *People v Brake,* 208 Mich App 233.
2. A magistrate, in considering whether there is a substantial basis for issuance of a search warrant, must examine the totality of the circumstances to determine whether a fair probability exists that specific evidence of a crime will be found in a particular place. *People v Brake,* 208 Mich App 233.

SEARCH WARRANTS—*See*
SEARCHES AND SEIZURES 1, 2

SECOND-DEGREE MURDER—*See*
HOMICIDE 2

SECURED TRANSACTIONS.
FINANCING STATEMENTS.
1. To be effective in extending a secured transaction financing statement, a continuation statement must be filed not more than six months before the date on which the five-year period of the financing statement is to expire; substantial compliance with the statutory time requirement will not be effective in extending a financing statement in the absence of proof that the filing officer through some affirmative course of action induced the secured party to believe that its actions were in compliance with the statutory requirement (MCL 440.9403[3]; MSA 19.9403[3]). *NBD Bank v Timberjack, Inc,* 208 Mich App 153.
2. A secured party that changes its name is not required to file a new or amended financing statement to reflect the name change; accordingly, a secured party operating under a new name does not need to amend or to refile a financing statement to reflect the name change, nor does it need to file a written statement of assignment when it files its continuation statement. *NBD Bank v Timberjack, Inc,* 208 Mich App 153.

SENTENCE AGREEMENTS—*See*
CRIMINAL LAW 10

SENTENCE RECOMMENDATIONS—*See*
CRIMINAL LAW 10

SENTENCES.
CONTROLLED SUBSTANCES.
1. Except for the allowance of lifetime probation, a defendant convicted of violating §§ 7401(2)(a) or 7403(2)(a) of the controlled substances act is subject to a mandatory term of imprisonment, regardless of the length of the minimum and maximum sentence imposed; the sentencing court may deviate downwardly from the mandatory sentences if it finds there are substantial and compelling reasons; an individual subject to such a mandatory term of imprisonment may not receive a reduction in the term of imprisonment imposed as a result of disciplinary credits or any other type of sentence credit reduction (MCL 333.7401[2][a][i]-[iv], [3], [4], 333.7403[2][a][i]-[iv]; MSA 14.15[7401][2][a][i]-[iv], [3], [4], 14.15[7403][2][a][i]-[iv]). *Dean v Dep't of Corrections,* 208 Mich App 144.
COURT OF APPEALS.
2. Where a criminal case is remanded by the Court of Appeals because the entire sentence is invalid, every aspect of the sentence is before the sentencing judge de novo, unless the order of remand indicates otherwise. *People v Williams (Aft Sec Rem),* 208 Mich App 60.
PROBATION.
3. The amount of fines to be imposed as a condition of probation

SENTENCES—Cont'd

rests in the discretion of the sentencing court and is not limited to the maximum fine set by the statute under which the conviction was obtained (MCL 771.3[2][b]; MSA 28.1133[2][b]). *People v Oswald,* 208 Mich App 444.

SENTENCING GUIDELINES.

4. A sentencing court, when computing under the sentencing guidelines a sentence that, by statute, must be imposed consecutively to the sentence from which the offender was on parole at the time of the offense for which sentence is to be imposed, may assess points under Prior Record Variable 6 (prior relationship to criminal justice system) on the basis of the offender's parole status (MCL 768.7a[2]; MSA 28.1030[1][2]). *People v Maben,* 208 Mich App 652.

5. A sentencing court, when computing under the sentencing guidelines a sentence to be imposed on an offender who was on parole at the time of the offense, may assess points under both Prior Record Variable 2 (prior low severity felony convictions) and Prior Record Variable 6 (prior relationship to criminal justice system) where the offense for which parole was granted is among the felonies enumerated in PRV 2. *People v Maben,* 208 Mich App 652.

SENTENCING GUIDELINES—*See*
SENTENCES 4, 5

SETTLEMENT NEGOTIATIONS—*See*
MOTIONS AND ORDERS 2

SILICOSIS, DUST DISEASE, AND LOGGING INDUSTRY COMPENSATION FUND—*See*
WORKER'S COMPENSATION 8

SIMPLE TOOLS—*See*
PRODUCTS LIABILITY 2

SOCIAL SERVICES.

AID TO DEPENDENT CHILDREN-FOSTER CARE.

1. The Department of Social Services must have the sole responsibility for both the placement and the care of a child who is potentially eligible for federal Aid to Dependent Children-Foster Care assistance before the child may be found eligible for such assistance; a child is not eligible for such assistance where a probate court order places the child in the custody of the DSS but does not leave the DSS with the sole responsibility for both the placement and the care of the child (42 USC 672[a]). *Oakland Probate Court v DSS,* 208 Mich App 664.

APPOINTMENTS OF COUNTY DIRECTORS OF SOCIAL SERVICES.

2. The procedures set by statute for the selection and appointment of directors of county departments of social services apply to all such appointments; employment preference rules promulgated by the state civil service commission for the displacement

SOCIAL SERVICES—Cont'd
of employees by other employees with more seniority in cases of reductions in staff do not apply to the selection and appointment of directors of county departments of social services (MCL 400.45[5]; MSA 16.445[5]). *Co Bd of Social Services v DSS,* 208 Mich App 402.

SPECIAL ASSESSMENTS—*See*
TAXATION 9

SPECIAL RELATIONSHIPS—*See*
NEGLIGENCE 2

STANDARD OF REVIEW—*See*
CONSTITUTIONAL LAW 1
COURTS 1

STANDING—*See*
PARENT AND CHILD 2

STATE MEDICAL FACILITIES PLAN—*See*
HOSPITALS 1

STATUTES.
CHILD PROTECTION ACT.
1. The section of the Child Protection Act regarding the duty of certain individuals to report suspected child abuse or neglect applies only to persons responsible for a child's health or welfare who know of abuse of that specific child (MCL 722.623[1]; MSA 25.248[3][1]). *Murdock v Higgins,* 208 Mich App 210.

JUDICIAL CONSTRUCTION.
2. The fundamental rules of statutory construction generally preclude construction of a time limit for performance of an official duty as being mandatory, absent language expressly precluding performance of such duty after the specified time. *People v Yarema,* 208 Mich App 54.
3. Where it is clear that a statute conflicts with an earlier enacted provision, the Legislature is deemed to have repealed the prior statute to the extent of the conflict. *Shirilla v Detroit,* 208 Mich App 434.

SUBSEQUENT IMPROVEMENTS—*See*
PRODUCTS LIABILITY 1

SUFFICIENCY OF EVIDENCE—*See*
HOMICIDE 2

SUMMARY DISPOSITION—*See*
PRETRIAL PROCEDURE 1

SURETY BONDS—*See*
BAIL 1, 2

TABLES—*See*
WORKER'S COMPENSATION 1

TAXATION.

DELINQUENT TAXES.

1. The payment of back taxes is not effective until the payment is received by the treasurer's office (MCL 21.153; MSA 3.661). *Crawford v Michigan,* 208 Mich App 117.
2. The General Property Tax Act provides that the taxes on any lands returned as delinquent may be paid to the county treasurer at any time before the day of the tax sale (MCL 211.106; MSA 7.160). *Crawford v Michigan,* 208 Mich App 117.

HOSPITALS.

3. *Saginaw Gen Hosp v Saginaw,* 208 Mich App 595.

REAL PROPERTY.

4. The sales-comparison or market approach to determination of the true cash value of a parcel of realty for purposes of assessment indicates true cash value by analyzing recent sales of similar properties, comparing them with the subject property, and adjusting the sale prices of the comparable properties to reflect differences between the properties. *Samonek v Norvell Twp,* 208 Mich App 80.
5. Forced sales of similar properties may not be considered in determining the true cash value of a parcel of realty for assessment purposes; sales of similar properties at auction may be considered in determining true cash value when those sales have become a common method of acquisition in the jurisdiction for the class of property being valued, provided that the auction sales are not part of a liquidation of the sellers' assets in bankruptcy and the sellers are able to use common marketing techniques to obtain the usual selling prices for the properties (MCL 211.27[1]; MSA 7.27[1]). *Samonek v Norvell Twp,* 208 Mich App 80.

REAL PROPERTY TAXES.

6. Where a municipality grants taxpayers the right to pay taxes in installments, any sum collected in a single installment that exceeds the amount required by local ordinance is an unlawful tax payment (MCL 205.737[4]; MSA 7.650[37][4]). *Thrifty Royal Oak, Inc v Royal Oak,* 208 Mich App 707.
7. Where a municipality allows a taxpayer to pay a real property tax assessment in two equal installments and the Tax Tribunal subsequently reduces the assessment and orders a refund of excess taxes, prejudgment interest is to be computed from the date of each installment on half of the total excess, rather than being computed from the date of the second installment on the entire excess (MCL 205.737[4]; MSA 7.650[37][4]). *Thrifty Royal Oak, Inc v Royal Oak,* 208 Mich App 707.

SALE FOR DELINQUENCY.

8. A harmless-error-type analysis applies to claims regarding nonprejudicial irregularities in form or substance with regard to a tax assessed upon any property or the sale therefor (MCL 211.99; MSA 7.153). *Crawford v Michigan,* 208 Mich App 117.

TAXATION—Cont'd

SPECIAL ASSESSMENTS.

9. *Storm v Wyoming,* 208 Mich App 45.

TAX SALE REDEMPTIONS.

10. An additional penalty of fifty percent of the tax upon which foreclosure was made may not be imposed for redemption of property that has a state equalized value of $1,000 or more and that has been deeded to the state following a tax sale until owners of a significant property interest in the land have been notified of a hearing before the Department of Treasury (MCL 211.131c[1], 211.131e[1],[3]; MSA 7.190[1][1], 7.190[3][1],[3]). *Standard Federal v Genesee Co,* 208 Mich App 569.

TAX TRIBUNAL.

11. 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 the 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 the entry of the judgment to the date of the satisfaction of the judgment (MCL 205.737[4]; MSA 7.650[37][4]). *Thrifty Royal Oak, Inc v Royal Oak,* 208 Mich App 707.

TAX SALE REDEMPTIONS—*See*
TAXATION 10

TAX TRIBUNAL—*See*
TAXATION 7, 11

TERMINATION OF EMPLOYMENT—*See*
MASTER AND SERVANT 3

THIRD PARTIES—*See*
NEGLIGENCE 2

TIME LIMITS—*See*
STATUTES 3

TIMELY APPLICATION—*See*
MOTIONS AND ORDERS 4

TORTS.

BREACH OF PROFESSIONAL CONFIDENCE.

1. A breach of a professional confidence must be a proximate cause of the plaintiff's loss in order to be actionable; proof of two separate elements is required to show proximate cause: cause in fact and legal cause; an injury that would have occurred regardless of the breach cannot be said to have been proximately caused by the breach. *Alar v Mercy Mem Hosp,* 208 Mich App 518.

TRESPASS-NUISANCE—*See*
GOVERNMENTAL IMMUNITY 5
NUISANCE 2

TRIAL.
See, also, CRIMINAL LAW 2.
JURY INSTRUCTIONS.
1. It is error for a trial court to instruct a jury with regard to an issue that is not sustained by the evidence or established by the pleadings. *Murdock v Higgins,* 208 Mich App 210.

TRUE CASH VALUE—*See*
TAXATION 4, 5

UNIFORM COMMERCIAL CODE—*See*
SALES 1
SECURED TRANSACTIONS 1, 2

UNINSURED MOTORIST COVERAGE—*See*
INSURANCE 2

UNINSURED MOTORISTS—*See*
INSURANCE 4

UNLAWFUL TAX PAYMENTS—*See*
TAXATION 6

UNPAID INTEREST—*See*
WORKER'S COMPENSATION 8

USE OF STREETS AND ALLEYS—*See*
PUBLIC UTILITIES 1

USURY—*See*
VENDOR AND PURCHASER 1

VACATION OF STREETS—*See*
PUBLIC UTILITIES 5

VAGUENESS—*See*
CIVIL SERVICE 1

VALUE—*See*
LARCENY 2

VEHICLE CODE—*See*
CRIMINAL LAW 2

VENDOR AND PURCHASER.
LAND CONTRACTS.
1. A land contract with a rate of interest that exceeds the maximum allowed by statute for a portion of the land contract

VENDOR AND PURCHASER—Cont'd
is not usurious if the combined interest rates yield an effective rate that does not exceed the statutory maximum (MCL 438.31c[6]; MSA 19.15[1c][6]). *Mills v Pesetsky,* 208 Mich App 190.

VERDICTS—*See*
HOMICIDE 1

VISITATION BY GRANDPARENTS—*See*
CHILDREN BORN OUT OF WEDLOCK 1

WAIVER—*See*
CRIMINAL LAW 1

WATERCRAFT—*See*
SALES 1

WATERCRAFT CERTIFICATES OF TITLE ACT—*See*
SALES 1

WEAPONS.
DOUBLE JEOPARDY.
1. The Legislature intended to authorize multiple convictions for felony-firearm and possession of a short-barreled shotgun where a different offense is used as the underlying felony for the felony-firearm conviction (MCL 750.224b, 750.227b; MSA 28.421[2], 28.424[2]). *People v Booker (Aft Rem),* 208 Mich App 163.

WHISTLEBLOWERS' PROTECTION ACT—*See*
MASTER AND SERVANT 3

WITNESSES—*See*
EVIDENCE 4

WORDS AND PHRASES.
See, also, JUDGMENTS 4.
PUBLIC PLACE.
1. A social hall that can be rented by the general public, and thus is a building where the members of the public can go for entertainment, is a public place for the purpose of an ordinance prohibiting intoxication in a public place, even when the hall is being used for a private function that is not open to the general public. *City of Westland v Okopski,* 208 Mich App 66.

WORKER'S COMPENSATION.
AVERAGE WEEKLY WAGE.
1. *Radecki v Worker's Comp Dir,* 208 Mich App 19.
COORDINATION OF BENEFITS.
2. *Lemon v Lansing,* 208 Mich App 617.

WORKER'S COMPENSATION—Cont'd

COURSE OF EMPLOYMENT.

3. *Simkins v GMC (On Rem),* 208 Mich App 453.

EMPLOYER TORT LIABILITY.

4. The common-law action of an employee against an employer permitted under the Worker's Disability Compensation Act where the employer is not insured pursuant to the act does not act as an election of remedies, but rather imposes common-law liability in addition to, not as a substitute for, worker's compensation benefits; in such a common-law action, negligence is an element of the employee's cause of action against the employer, the employee's negligence is a defense to the action only to the extent that the employee's negligence is wilful, and the damages recoverable by the employee are not limited to that which is payable as benefits under the Worker's Disability Compensation Act (MCL 418.641[2]; MSA 17.237[641][2]). *Smeester v Pub-N-Grub, Inc (On Rem),* 208 Mich App 308.

EXCLUSIVE REMEDY.

5. *Agee v Ford Motor Co,* 208 Mich App 363.

6. An employee pleads an intentional tort within the meaning of the exclusive remedy provision of the Worker's Disability Compensation Act by alleging that there was a specific danger known to the employer that was certain to result in an injury and the employer required the employee to work in the face of that danger (MCL 418.131[1]; MSA 17.237[131][1]). *Golec v Metal Exchange Corp,* 208 Mich App 380.

NO-FAULT.

7. *Gibson v American Motors,* 208 Mich App 470.

SILICOSIS, DUST DISEASE, AND LOGGING INDUSTRY COMPENSATION FUND.

8. The provision of 1994 PA 97 amending a provision of the Worker's Disability Compensation Act relative to exclusions from the reimbursement requirements imposed on the Silicosis, Dust Disease, and Logging Industry Compensation Fund is to be given retroactive effect (MCL 418.531, 418.801; MSA 17.237[531], 17.237[801]). *Bridge Auth v Silicosis Fund,* 208 Mich App 460.

WORKPLACE INJURIES—*See*
GOVERNMENTAL IMMUNITY