MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN COURT OF APPEALS

FROM

July 7, 1992 to September 8, 1992

WILLIAM F. HAGGERTY
REPORTER OF DECISIONS

VOLUME 195

FIRST EDITION

ROCHESTER, NEW YORK
LAWYERS COOPERATIVE PUBLISHING,
a division of Thomson Legal Publishing Inc.
1993

Copyright 1992, by Richard H. Austin, Secretary of State for the State of Michigan, Official Advance Sheets, Vol. 195 No. 1 and No. 2
Copyright 1993, by Richard H. Austin, Secretary of State for the State of Michigan

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



COURT OF APPEALS

CHIEF JUDGE

	TERM EXPIRES JANUARY 1 OF
MARTIN M. DOCTOROFF, BIRMINGHAM	1993

CHIEF JUDGE PRO TEM

WILLIAM B. MURPHY, GRAND RAPIDS	1995

JUDGES

DONALD E. HOLBROOK, JR., LANSING	1997
MICHAEL J. KELLY, BLOOMFIELD HILLS	1995
BARBARA B. MACKENZIE, PETOSKEY	1997
MYRON H. WAHLS, DETROIT	1993
HAROLD HOOD, DETROIT	1997
ROMAN S. GRIBBS, DETROIT	1995
JOHN H. SHEPHERD, SOUTHFIELD	1997
JOSEPH B. SULLIVAN, GROSSE POINTE PARK	1993
DAVID H. SAWYER, GRAND RAPIDS	1993
ELIZABETH A. WEAVER, GLEN ARBOR	1993
GARY R. MCDONALD, SAGINAW	1995
THOMAS J. BRENNAN, DEARBORN	1995
MARK J. CAVANAGH, ROCHESTER HILLS	1997
RICHARD ALLEN GRIFFIN, TRAVERSE CITY	1997
MARILYN J. KELLY, BLOOMFIELD HILLS	1995
JANET T. NEFF, GRAND RAPIDS	1995
MAUREEN P. REILLY, GROSSE POINTE PARK	1997
KATHLEEN JANSEN, MOUNT CLEMENS	1995
E. THOMAS FITZGERALD, OWOSSO	1997
MICHAEL J. CONNOR, GROSSE POINTE FARMS	1993
CLIFFORD W. TAYLOR, EAST LANSING	1993
MAURA D. CORRIGAN, GROSSE POINTE PARK	1993

CHIEF CLERK: ELLA WILLIAMS, LANSING

ASSISTANT CLERKS: HENRY L. HENSON, DETROIT
KAREN Z. PARKER, GRAND RAPIDS
LINDA C. RAGLAND-SHERER, LANSING
THOMAS J. RASDALE, DEWITT

DEPUTY CLERK: CAROLE J. BRYDE, LANSING

RESEARCH DIRECTOR: CARL L. GROMEK, LANSING

COMMISSIONERS:
JOHN H. STENGER, LANSING
MARILYN MORRIS WANGER, LANSING
ALLAN S. FALK, LANSING
NELSON S. LEAVITT, EAST LANSING
GLEN M. BIS, ANN ARBOR
CRYSTAL L. MILLER, LANSING
WILLIAM W. SIDWELL, LANSING

SUPREME COURT

Chief Justice

	Term Expires January 1 of
MICHAEL F. CAVANAGH, East Lansing	1999

Associate Justices

CHARLES L. LEVIN, Detroit	1997
JAMES H. BRICKLEY, Traverse City	1997
PATRICIA J. BOYLE, Detroit	1999
DOROTHY COMSTOCK RILEY, Grosse Pointe Farms	1993
ROBERT P. GRIFFIN, Traverse City	1995
CONRAD L. MALLETT, Jr., Detroit	1993

Commissioners

ALOYSIUS J. LYNCH, Chief Commissioner

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

State Court Administrator: MARILYN K. HALL, Lansing

Clerk: CORBIN R. DAVIS, Lansing

Crier: DAVID G. PALAZZOLO, Williamston

Reporter of Decisions: WILLIAM F. HAGGERTY, East Lansing

TABLE OF CASES REPORTED

N.B.: In cases decided on or after November 1, 1990, both the date *and* the time of decision appear in the syllabus to indicate controlling authority consistent with Supreme Court Administrative Order No. 1990-6—REPORTER.

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

A

	PAGE
Adams, People v	267
Aetna Casualty & Surety Co, Bernthal v	501
Allstate Ins Co v Castanier	630
Allstate Ins Co v Dep't of Ins	538
Allstate Ins Co, Keiser v	369
Alpena Friend of the Court *ex rel* Paul v Durecki	635
Alterman v Provizer, Eisenberg, Lichtenstein & Pearlman, PC	422
Alvin v Simpson	418
American Community Mutual Ins Co v Comm'r of Ins	351
Amerisure Ins Co, United States Fidelity & Guaranty Co v	1
Appicelli, Blase v	174
Applekamp v Applekamp	656
Auto Club Ins Ass'n, McMillan v	463
Auto Club Ins Ass'n v McMillan	463
Automobile Club of Michigan Committee For Lower Rates Now v Secretary of State (On Remand)	613

PAGE

Auto-Owners Ins Co v Titan Indemnity Corp 428

B

Barrymore's (C J), Witt v ... 517
Bauermeister, Nugent v ... 158
Bedker v Domino's Pizza, Inc ... 725
Bennett, People v ... 455
Bernthal v Aetna Casualty & Surety Co ... 501
Berry v J & D Auto Dismantlers, Inc ... 476
Black v Dep't of Social Services ... 27
Blase v Appicelli ... 174
Botsford General Hosp v Citizens Ins Co ... 127
Boyer, Gavulic v ... 20
Budget Rent A Car Systems, Inc, National Indemnity Co v ... 186
Byrd, People v ... 600

C

Castanier, Allstate Ins Co v ... 630
Chambers, People v ... 118
Cherry v State Farm Mutual Automobile Ins Co ... 316
China Twp Clerk, Van Horn v ... 610
Citizens Ins Co, Botsford General Hosp v ... 127
Citizens Ins Co of America, Davis v ... 323
City of Detroit v Kallow Corp ... 227
City of Flint, Consumers Power Co v ... 295
City of Southgate, Downriver Plaza Group v 192
City of White Cloud, Trout Unlimited, Muskegon-White River Chapter v ... 343
C J Barrymore's, Witt v ... 517
Clinton Twp, Jeffrey v ... 260
Coleman v Gurwin ... 8
Comm'r of Ins, American Community Mutual Ins Co v ... 351
Community Emergency Medical Service, Inc, Pavlov v ... 711
Constantineau v DCI Food Equipment, Inc ... 511

PAGE

Consumers Power Co v City of Flint 295

D

Davis v Citizens Ins Co of America 323
Davis v Link, Inc 70
DCI Food Equipment, Inc, Constantineau v .. 511
Demers, People v 205
Demman v Demman 109
Dep't of Ins, Allstate Ins Co v 538
Dep't of Social Services, Black v 27
Dep't of Transportation, Niggeling v 163
Dep't of Treasury, Mooahesh v 551
Derr v Murphy Motor Freight Lines 333
Detroit (City of) v Kallow Corp 227
Director of Bureau of Workers' Disability Compensation v Durant Enterprises, Inc .. 626
Domino's Pizza, Inc, Bedker v 725
Downriver Plaza Group v City of Southgate 192
Dunham, Vermilya v 79
Durant Enterprises, Inc, Director of Bureau of Workers' Disability Compensation v 626
Durecki, Alpena Friend of the Court *ex rel* Paul v 635

E

Erbes, Richmond Twp v 210
Everett v Everett 50

F

Fiorillo, People v 701
First of Michigan Corp, Webb v 470
Flint (City of), Consumers Power Co v 295

G

Gavulic v Boyer 20
Gebhardt v O'Rourke 506
Gibbs v Smock (On Rehearing) 450
Ginther v Zimmerman 647
Governor, House Speaker v 376

PAGE

Governor, Michigan Environmental Protection Foundation v ... 376
Governor, Michigan United Conservation Clubs v ... 376
Green v Jerome-Duncan Ford, Inc ... 493
Gurwin, Coleman v ... 8

H

Hacienda Mexican Restaurants of Kalamazoo Corp v Hacienda Franchise Group, Inc ... 35
Hall, People v ... 460
Hartford Accident & Indemnity, Marquis v (On Remand) ... 286
House Speaker v Governor ... 376
Howard v White ... 590

I

In re Rosebush ... 675
In re Washburn Estate ... 42
Ins (Dep't of), Allstate Ins Co v ... 538

J

J & D Auto Dismantlers, Inc, Berry v ... 476
Jeffrey v Clinton Twp ... 260
Jerome-Duncan Ford, Inc, Green v ... 493
Johnson, People v ... 571
Jones, People v ... 65

K

Kallow Corp, City of Detroit v ... 227
Keiser v Allstate Ins Co ... 369

L

Lawson, People v ... 76
League General Ins Co, Wilson v ... 705
Link, Inc, Davis v ... 70
Lyons, People v ... 248

M

Magnuson v Zadrozny ... 581

PAGE
Makowski v Towles 106
Marquis v Hartford Accident & Indemnity (On Remand) 286
McCarthy & Associates, Inc v Washburn 42
McMillan v Auto Club Ins Ass'n 463
McMillan, Auto Club Ins Ass'n v 463
McNeil v Quines 199
Meram Construction, Inc, Precision Pipe & Supply, Inc v 153
Meretta v Peach 695
Michaels, People v 91
Michigan Environmental Protection Foundation v Governor 376
Michigan United Conservation Clubs v Governor 376
Michigan Veterans' Facility, Winklepleck v 523
Mooahesh v Dep't of Treasury 551
Murphy Motor Freight Lines, Derr v 333

N

National Indemnity Co v Budget Rent A Car Systems, Inc 186
Naylor, Schultes v 640
Niggeling v Dep't of Transportation 163
Nothelfer, United Services Automobile Ass'n v 87
Nugent v Bauermeister 158

O

Orion Twp v State Tax Comm 13
O'Rourke, Gebhardt v 506

P

Passeno, People v 91
Pavlov v Community Emergency Medical Service, Inc 711
Peach, Meretta v 695

PAGE
People v Adams 267
People v Bennett 455
People v Byrd 600
People v Chambers 118
People v Demers 205
People v Fiorillo 701
People v Hall 460
People v Johnson 571
People v Jones 65
People v Lawson 76
People v Lyons 248
People v Michaels 91
People v Passeno 91
People v Puroll 170
People v Reynolds 182
People v Rush 434
People v Shafer 596
People v Smith 147
People v Spearman 434
People v Stone 600
People v Taylor 57
People v Vettese 235
Precision Pipe & Supply, Inc v Meram Construction, Inc 153
Provizer, Eisenberg, Lichtenstein & Pearlman, PC, Alterman v 422
Puroll, People v 170

Q

Quines, McNeil v 199

R

Reynolds, People v 182
Richmond Twp v Erbes 210
Rosebush, *In re* 675
Rospatch Corp Employee Benefit Plan, Wolverine Mutual Ins Co v 302

PAGE
Rowell v Security Steel Processing Co 578
Rush, People v 434

S

Schultes v Naylor 640
Secretary of State, Automobile Club of Michigan Committee For Lower Rates Now v (On Remand) 613
Security Steel Processing Co, Rowell v 578
Shafer, People v 596
Simpson, Alvin v 418
Skinner v Square D Co 664
Smith, People v 147
Smith v Swarthout 486
Smock, Gibbs v (On Rehearing) 450
Social Services (Dep't of), Black v 27
Southgate (City of), Downriver Plaza Group v 192
Spearman, People v 434
Square D Co, Skinner v 664
State Farm Mutual Automobile Ins Co, Cherry v 316
State Tax Comm, Orion Twp v 13
Stone, People v 600
Swarthout, Smith v 486

T

Taylor, People v 57
Tilley v Tilley 309
Titan Indemnity Corp, Auto-Owners Ins Co v 428
Towles, Makowski v 106
Transportation (Dep't of), Niggeling v 163
Treasury (Dep't of), Mooahesh v 551
Trout Unlimited, Muskegon-White River Chapter v City of White Cloud 343

U

United Services Automobile Ass'n v Nothelfer 87

PAGE

United States Fidelity & Guaranty Co v Amerisure Ins Co 1

V

Van Horn v China Twp Clerk 610
Vermilya v Dunham 79
Vettese, People v 235
Voukatidis v Voukatidis 338

W

Washburn, McCarthy & Associates, Inc v 42
Washburn Estate, *In re* 42
Webb v First of Michigan Corp 470
White, Howard v 590
White Cloud (City of), Trout Unlimited, Muskegon-White River Chapter v 343
Wilson v League General Ins Co 705
Winklepleck v Michigan Veterans' Facility .. 523
Witt v C J Barrymore's 517
Wolverine Mutual Ins Co v Rospatch Corp Employee Benefit Plan 302
Workers' Disability Compensation (Director of Bureau of), Durant Enterprises, Inc v 626

Z

Zadrozny, Magnuson v 581
Zimmerman, Ginther v 647

88 CASES

CASES RELEASED OUT OF SEQUENCE

April 9, 1992

People v Taylor 57

April 10, 1992

Bernthal v Aetna Casualty & Surety Co 501

PAGE

People v Hall 460

April 22, 1992

Davis v Link, Inc 70

April 28, 1992

Director of Bureau of Workers' Disability Compensation v Durant Enterprises, Inc .. 626

April 30, 1992

Berry v J & D Auto Dismantlers, Inc 476

May 13, 1992

People v Jones 65
Smith v Swarthout 486

May 14, 1992

Auto Club Ins Ass'n v McMillan 463
McMillan v Auto Club Ins Ass'n 463

May 21, 1992

Allstate Ins Co v Castanier 630

May 27, 1992

Webb v First of Michigan Corp 470

June 2, 1992

Schultes v Naylor 640

June 9, 1992

Green v Jerome-Duncan Ford, Inc 493

June 16, 1992

Alpena Friend of the Court *ex rel* Paul v Durecki 635

COURT OF APPEALS CASES

UNITED STATES FIDELITY & GUARANTY COMPANY v AMERISURE INSURANCE COMPANY

Docket No. 139129. Submitted May 5, 1992, at Marquette. Decided July 7, 1992, at 9:00 A.M. Leave to appeal sought.

United States Fidelity & Guaranty Company brought an action in the Marquette Circuit Court against Reliance Insurance Company and Amerisure Insurance Company, under automobile no-fault insurance policies issued by the defendants, seeking reimbursement of benefits paid to its insured for damages to a building resulting from a collision involving automobiles insured by the defendants. The court, Edward A. Quinnell, J., denied Amerisure's motion for summary disposition based on the one-year limitation period for bringing actions for no-fault property protection benefits, holding that notice by the plaintiff to Amerisure of the existence of its claim tolled the running of the statutory period. Amerisure appealed by leave granted.

The Court of Appeals *held:*

The fact that the no-fault act specifically provides that the limitation period for actions for personal protection benefits may be tolled but includes no provision with respect to tolling the limitation period for actions for property protection benefits evidences a legislative intent that notice of a claim for property protection benefits will not toll the running of the one-year period within which an action for those benefits must be brought. Because more than twenty-one months elapsed between the time of the accident and the time the plaintiff filed its complaint, the action is barred.

Reversed.

INSURANCE — NO-FAULT INSURANCE — PROPERTY PROTECTION BENEFITS — LIMITATION OF ACTIONS.

Notice to a no-fault insurer of a claim for property protection benefits does not toll the running of the statutory one-year

REFERENCES

Am Jur 2d, Automobile Insurance §§ 340. *et seq.*; Limitation of Actions §§ 138 *et seq.*

See the Index to Annotations under Automobile Insurance; Limitations of Actions.

period of limitation for bringing an action for such benefits (MCL 500.3145[2]; MSA 24.13145[2]).

Weber, Swanson & Dettmann (by *Keith E. Swanson*), for the plaintiff.

Weitek & Summers (by *Michael G. Summers*), for Amerisure Insurance Company.

Before: GRIFFIN, P.J., and WEAVER and MCDONALD, JJ.

PER CURIAM. Defendant Amerisure Insurance Company appeals by leave granted an order denying its motion for summary disposition based on the statute of limitations. The trial court held the one-year statute of limitations contained in MCL 500.3145(2); MSA 24.13145(2) was tolled by notice letters sent to Amerisure by plaintiff within the limitation period. We reverse.

On March 26, 1989, a car owned by Timothy Romback, and insured under a no-fault automobile policy issued by Amerisure, was involved in a collision with a car owned by Becky Swanson. As a result of the collision, the Romback car left the roadway and struck and damaged a building owned by Salvatore T. Sarvello, doing business as Tudy's Market. Ms. Swanson's vehicle was insured by defendant Reliance Insurance Company, and the building and its contents were covered by a casualty insurance policy issued by plaintiff.

Mr. Sarvello made a claim against plaintiff for property damage and loss of income and use. Plaintiff investigated and adjusted the damage claim. By checks dated September 13, 1989, plaintiff paid Mr. Sarvello $53,201.05 for damage to the building and its contents. However the negotiations with respect to the claims for loss of income bogged down, and plaintiff did not tender its check

for $9,093.50 to Mr. Sarvello for those claims until late September or early October 1990.

By letter dated September 12, 1989, the firm adjusting plaintiff's loss notified Amerisure of the intention to seek subrogation under the property protection insurance benefits provisions of Mr. Romback's no-fault insurance policy:

> As you know, we have been handling this claim in behalf of U.S.F. & G. Insurance Companies who provided a business owners policy for Salvatore Sarvello, dba Tudy's Market struck by your insureds vehicle on the above captioned date of loss.
>
> We are getting close to settling this loss with the Sarvello's and wanted to make you aware that subrogation papers will be forthcoming in the near future. In the event you would like somebody to check out the premises for your own satisfaction, please advise so that arrangements can be made at a later date and time.
>
> It appears that this loss once the business interruption has been resolved will be somewhere in the area of $70,000.00. I thought for that kind of money, it would be advisable to inform you as to the status concerning this matter to date.

On December 18, 1989, plaintiff's adjustor once again contacted Amerisure by letter:

> Please consider this letter to be formal written notice regarding the pending subrogation claim of U.S.F. & G. Insurance Companies who insured Tudy's Market damaged by your policyholder on the above captioned date of loss. Written notice is made in compliance with the Michigan No Fault law, more specifically MCL 500.3145.
>
> We are still in the process of working out the loss of income claim with the owners of Tudy's Market, and therefore will be in touch once we have resolved this matter with them to perfect the final subrogation amount with you.

By letter dated October 1, 1990, plaintiff again notified Amerisure of the claim:

> We had previously informed you on September 12th, 1989, and December 18th, 1989 that we would be forwarding documentation relative to the subrogation claim once settlement had been made with the owners of Tudy's Market.
>
> We have not been able to agree on a loss of income claim with the Sarvello's, however we have tendered a check payable to them for $9,093.50 which we feel is representative of the loss of income claim which can be documented.
>
> In addition to that, we are including copies of the Proofs of Loss for the building, and business personal property claim which total $53,201.05. Adding that to the loss of income claim, the total damages paid to the owners of Tudy's Market comes to $62,294.55.
>
> Since your insured's vehicle collided with a second vehicle operated by Becky Swanson, we hereby make claim for 50% of the property claim for $31,147.28 at this time.

Amerisure, by letter dated October 16, 1990, refused to pay, citing § 3145(2) of the Insurance Code, MCL 500.3145(2); MSA 24.13145(2), which provides that an "action for recovery of property protection insurance benefits shall not be commenced later than 1 year after the accident."

On January 2, 1991, plaintiff filed this action for subrogation and reimbursement by both Amerisure and Reliance of the claims paid to Mr. Sarvello. Reliance and Amerisure filed a motion for summary disposition, claiming that more than twenty-one months had elapsed since the accident and, therefore, the complaint was untimely. The trial court denied Amerisure's motion, having determined that the statute had been tolled from the time the plaintiff had given notice of the claim

until the time Amerisure formally had denied liability. Amerisure applied for leave to appeal, which was granted. We now reverse.

Subsections 1 and 2 of § 3145 of the no-fault statute set forth the time limits for suits seeking no-fault benefits for personal and property protection insurance benefits:

> (1) An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. . . .
>
> (2) An action for recovery of property protection insurance benefits shall not be commenced later than 1 year after the accident.

Defendant argues that because the Legislature specifically provided for tolling of the limitation period for recovery of personal protection insurance benefits, it specifically intended to omit any tolling provision with respect to actions for recovery of property protection insurance benefits. We find this reasoning persuasive.

When statutory language is clear and unambiguous, judicial interpretation to vary the plain meaning of the statute is precluded. The Legislature must have intended the meaning it plainly expressed, and the statute must be enforced as written. *Frasier v Model Coverall Service, Inc,* 182 Mich App 741, 744; 453 NW2d 301 (1991). The

maxim "*expressio unius est exclusio alterius*," the expression of one thing is the exclusion of another, means that the express mention of one thing in a statute implies the exclusion of other similar things. *Feld v Robert & Charles Beauty Salon,* 174 Mich App 309, 313; 435 NW2d 474 (1989), rev'd on other grounds 435 Mich 352; 459 NW2d 279 (1990). While this maxim is only a tool, we note that the Legislature is presumed to act with knowledge of appellate court statutory interpretations, *Gordon Sel-Way, Inc v Spence Bros, Inc,* 438 Mich 488, 505; 475 NW2d 704 (1991). Although Michigan and federal case law provides precedent for the principle that limitation statutes are not entirely rigid, allowing judicial tolling under certain circumstances, *American Pipe & Construction Co v Utah,* 414 US 538, 559; 94 S Ct 756; 38 L Ed 2d 713 (1974), we find that the Legislature did not intend to allow tolling under the property protection section of this statute.

In reaching our conclusion, we first note that the Michigan Supreme Court has affirmatively determined that tolling does apply to the one-year-back rule of § 3145(1). *Welton v Carriers Ins Co,* 421 Mich 571; 365 NW2d 170 (1984); *Lewis v Detroit Automobile Inter-Ins Exchange,* 426 Mich 93, 100-101; 393 NW2d 167 (1986). Under that provision, the tolling depends upon a triggering event sufficient to have started the tolling. For example, a notice of injury was held insufficient to trigger tolling in *Welton* because it did not inform the insurer of the expenses incurred, whether the expenses were covered losses, and whether the claimant would in fact file a claim.

A panel of this Court subsequently addressed whether a tolling provision exists under § 3145(2). The Court in *Preferred Risk Mutual Ins Co v State Farm Mutual Auto Ins Co,* 123 Mich App 416; 333 NW2d 303 (1983), held that § 3145(2) is tolled from

the time the insurance company is notified of the claim until the company formally denies it. The Court did not determine what type of notice triggers the tolling. See also *Norfolk & W R Co v Auto Club Ins Ass'n,* 894 F2d 838, 843 (CA 6, 1990), where the Sixth Circuit Court of Appeals, relying in part on *Preferred Risk,* determined that tolling may be triggered by events that amount to more than simple notice of a claim.

Our examination of the plain language of § 3145(2) leads us to conclude that the Legislature, by omitting notice and tolling provisions in that section, which deals with property damage benefits, while including them in § 3145(1), which deals with personal injury benefits, did so intentionally. We find no tolling under the facts of this case. Although plaintiff as early as September 1989 had paid the bulk of the total claim, it made no specific claim against Amerisure until October 1990. Plaintiff neither informed Amerisure that it had paid much of the claim nor provided Amerisure with proof of loss or demand for payment for the claims involving the building and its contents. Instead, plaintiff chose to delay the making of a formal claim until after it had completely resolved all of Mr. Sarvello's claims against it, including the $9,093.50 claim for loss of income. By this time, however, more than eighteen months had elapsed since the accident. Therefore, even if there were tolling of the statute of limitations between the date of the making of a specific claim and the date of defendant's denial of liability, that tolling would not save this action from operation of the statute of limitations.

For the foregoing reasons, the trial court's denial of Amerisure's motion for summary disposition is reversed.

Reversed.

COLEMAN v GURWIN

Docket No. 132220. Submitted June 10, 1992, at Detroit. Decided July 7, 1992, at 9:05 A.M. Leave to appeal sought.

Carol D. Coleman brought a legal malpractice action against E. Donald Gurwin in the Wayne Circuit Court, alleging that, in declining to represent her in a wrongful discharge action she was considering against an employer in Wayne County, he had transmitted from his office in Oakland County to her residence in Washtenaw County incorrect advice concerning the statute of limitations for wrongful discharge, causing her to miss the deadline for filing that action. The defendant moved for a change of venue, arguing that venue was proper only in Washtenaw or Oakland Counties. The court, Robert J. Colombo, Jr., J., denied the motion. The defendant appealed by leave granted.

The Court of Appeals *held:*

In a legal malpractice action in which it is claimed that the attorney's conduct prevented the client from bringing an action for which the attorney was retained or consulted, the client must establish that, absent the act or omission asserted, the client would have prevailed on the claim. Because the client essentially must prevail in two distinct suits, the lost claim is part of the cause of action for legal malpractice, and venue properly lies where the cause of action for the lost claim arose, or where all or part of the cause of action for legal malpractice arose. In this case, venue is proper in any of the counties.

Affirmed.

VENUE — LEGAL MALPRACTICE ACTIONS.

Venue for a legal malpractice action, if it is based on an allegation that the attorney's conduct prevented the client from bringing an action for which the attorney was retained or consulted, properly lies where the cause of action for the lost claim arose, or where all or part of the cause of action for legal malpractice arose.

REFERENCES

Am Jur 2d, Venue §§ 15 *et seq.*

See the Index to Annotations under Venue.

Blaske & Blaske, P.C. (by *Thomas H. Blaske*), for the plaintiff.

William E. Wade, for the defendant.

Before: FITZGERALD, P.J., and CAVANAGH and NEFF, JJ.

PER CURIAM. In this legal malpractice case, defendant appeals by leave granted from an order of the Wayne Circuit Court denying his motion to change venue improperly laid. We affirm.

FACTS

Plaintiff, who resides in Washtenaw County, was discharged from her employment with Detroit Public Schools in Wayne County. Plaintiff subsequently contacted defendant E. Donald Gurwin regarding a potential wrongful discharge action against the school system. Defendant had four meetings with plaintiff in his Oakland County office. By letter dated July 31, 1987, defendant informed plaintiff that he would not represent her because it was his opinion that there was no liability on the part of the school system. In declining the case, defendant allegedly gave incorrect advice to plaintiff regarding the applicable statute of limitations.[1]

On June 29, 1990, defendant filed a motion to change venue improperly laid, arguing that no part of the cause of action for legal malpractice arose in Wayne County. Defendant alleged that plaintiff's injuries arose in either Oakland County or Washtenaw County.

At a hearing on defendant's motion, plaintiff

[1] Plaintiff alleged that had she been properly advised regarding the correct statute of limitations she would have had an opportunity to seek alternative representation on her claim.

argued that a part of her legal malpractice action was to prove the underlying action, which occurred in Wayne County. The trial court agreed with plaintiff that her cause of action required adjudication of the underlying suit and denied the motion. Therefore, part of the cause of action arose in Wayne County, and venue was properly laid in Wayne County.

I

If venue is improperly laid, it must be changed upon a motion to do so. MCR 2.223(A)(1). An action for legal malpractice is a tort claim and its venue is controlled by MCL 600.1629; MSA 27A.1629. Under § 1629(1)(a), venue is proper where all or part of a cause of action arises, not merely at the situs of an injury.[2] *Lorencz v Ford Motor Co,* 439 Mich 370, 375; 483 NW2d 844 (1992). This Court reviews a trial court's decision regarding venue to determine whether the trial court clearly erred in ruling that venue was proper. *Marsh v Walter L Couse & Co,* 179 Mich App 204, 207; 445 NW2d 204 (1989).

II

In an action for legal malpractice, the plaintiff must establish (1) the existence of an attorney-client relationship, (2) the acts that are alleged to have constituted negligence, (3) that the negli-

[2] MCL 600.1629(1)(a); MSA 27A.1629(1)(a) provides:

> (a) A county in which all or part of the cause of action arose and in which either of the following apply is a proper county in which to try the action:
> (i) The defendant resides, has a place of business, or conducts business in that county.
> (ii) The registered office of a defendant corporation is located in that county.

gence was a proximate cause of the injury, and (4) the fact and extent of the injury alleged.[3] *Lowman v Karp,* 190 Mich App 448, 451; 476 NW2d 428 (1991); *Basic Food Industries, Inc v Grant,* 107 Mich App 685, 690; 310 NW2d 26 (1981).

In cases such as this one, where an attorney's conduct prevents the client from bringing a contemplated action, we believe that an additional element is intertwined with the requirement of establishing proximate causation and damages. In *Basic Foods, supra,* this Court discussed the "suit within a suit" requirement:

> The factor which has occasioned most difficulty to clients attempting to charge attorneys with liability for negligence in connection with litigation has been the necessity of proving that the damages claimed resulted from the alleged misconduct. The recovery sought is usually the value of the claim in suit in the proceeding in which the negligent act occurred, if the client was a plaintiff in that action, or, if he was a defendant, the amount of the judgment imposed upon him, and, in accordance with general rules as to proximate cause, it is generally held that before such recovery can be had the client must establish that, absent the act or omission complained of, the claim lost would have been recovered or the judgment suffered avoided. Accordingly, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a

[3] *Basic Food Industries v Grant,* 107 Mich App 685; 310 NW2d 26 (1981), established the elements of a legal malpractice action. Under element three, *Basic Food* used the language "the proximate cause." This Court has consistently used such language in obiter dictum. See, e.g., *Lowman v Karp,* 190 Mich App 448, 451; 476 NW2d 428 (1991), *Stockler v Rose,* 174 Mich App 14, 25; 436 NW2d 70 (1989); *Adell v Sommers, Schwartz, Silver & Schwartz, PC,* 170 Mich App 196, 204; 428 NW2d 26 (1988). However, in *Ignotov v Reiter,* 425 Mich 391, 400, 402, n 1; 390 NW2d 614 (1986) (BOYLE, J., concurring and RILEY, J., dissenting), Justices BOYLE and RILEY opined that the proper language should be "a proximate cause" to conform with established law. *Kirby v Larson,* 400 Mich 585, 605; 256 NW2d 400 (1977). We agree that the proper language is "a proximate cause."

single proceeding. [107 Mich App 691, citing 45 ALR2d 5, § 2, p 10.]

In addition to proving negligence, plaintiff must show that but for her attorney's negligence she would have been successful in the original litigation; in effect, she must prevail in two distinct suits. This suit within a suit concept has vitality only in a limited number of situations, such as where an attorney's negligence prevents the client from bringing an action, where the attorney's failure to appear causes judgment to be entered against the client or where the attorney's negligence prevents an appeal from being perfected. In such cases, the underlying action constitutes at least a part of the cause of action for legal malpractice. Venue would therefore be proper in the county where the underlying action occurred, as well as in any jurisdiction where a part of the cause of action arose.[4] *Lorencz, supra,* p 375. The trial court did not err in denying defendant's motion to change venue.

Affirmed.

---

[4] Venue would also be proper in Oakland County, where the attorney-client relationship was conducted, and in Washtenaw County, where the erroneous advice was received.

ORION TOWNSHIP v STATE TAX COMMISSION

Docket No. 132724. Submitted June 9, 1992, at Lansing. Decided July 7, 1992, at 9:10 A.M. Leave to appeal sought.

Orion Township petitioned the Oakland Circuit Court for review of a State Tax Commission decision reversing the township's denial of an industrial facilities tax exemption certificate to General Motors Corporation. The court, Robert L. Templin, J., reversed the decision of the tax commission, determining that the items of personal property for which the exemption was sought were replacement facilities that, pursuant to MCL 207.551 *et seq.*; MSA 7.800(1) *et seq.*, were not entitled to exemption. The court also ordered General Motors to pay the taxes at issue. General Motors appealed.

The Court of Appeals *held:*

1. MCL 207.552(3); MSA 7.800(2)(3) defines "replacement facility" as industrial property that is intended to replace or restore obsolete industrial property on contiguous or the same land, or on vacant noncontiguous land located within the same plant rehabilitation district as the obsolete property. In this case, the tax commission and the circuit court correctly concluded that the items for which the exemption was sought were replacement facilities that, pursuant to statute, were not entitled to exemption. The tax commission, however, erred in determining that General Motors nonetheless should be granted a partial exemption because it had been the policy of the tax commission to grant such exemptions. The circuit court correctly reversed that decision of the commission.

2. The circuit court, having no power to levy or collect taxes, should not have ordered General Motors to pay the disputed taxes. Instead, it should have remanded the case to the tax commission with instructions to add the disputed property to the tax rolls for collection of taxes and applicable interest.

Affirmed and remanded.

Eric J. McCann, P.C. (by *Eric J. McCann* and *Leon B. Jukowski*), for Orion Township.

Collins, Blaha & Slatkin (by *Gary J. Collins* and

Anne P. Schierloh), for Lake Orion Community Schools.

Honigman Miller Schwartz & Cohn (by *Robert A. Fineman* and *Michael B. Shapiro*), for General Motors Corporation.

Before: GRIBBS, P.J., and HOOD and C. W. SIMON, JR.,* JJ.

PER CURIAM. Respondent General Motors Corporation appeals as of right from the August 22, 1990, order of the Oakland Circuit Court reversing the decision of the State Tax Commission and ordering GM to pay taxes to petitioners Orion Township and Lake Orion Community Schools. We affirm the trial court's determination, but remand to the tax commission for implementation of the proper relief.

In 1980, the township created an "industrial development district" (IDD) comprised of 597 acres of property owned by GM. Pursuant to the creation of this district and the operation of 1974 PA 198, currently codified at MCL 207.551 *et seq.*; MSA 7.800(1) *et seq.*, GM was granted, with respect to its construction of a new plant, a tax exemption, known commonly as an industrial facilities exemption certificate (IFEC), in the amount of $440,224,000, which was subsequently increased to $538,746,000. In 1987, GM sought an additional twelve-year IFEC covering personal property intended to replace obsolete equipment at its plant property that it valued in the amount of $29,700,000. The township denied GM's application and, on a remand from the tax commission, stated as its reasons the fact that the property constituted primarily "replacement facilities," which did not entitle GM to an exemption in an IDD.

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

The tax commission, on appeal, determined that $5,908,904 of the property installed by GM, and the function it performed, was entirely new to the plant and, because that property did not constitute "replacement facilities," accordingly entitled GM to an IFEC in that amount. The tax commission also determined that the remaining $23,791,096 of the property constituted "replacement facilities." While the tax commission noted its longstanding administrative interpretation that "replacement facilities" within an IDD were not eligible for an IFEC, and that GM was accordingly not entitled to an exemption, it also noted that its prior practice resulted in IFECs being granted even where the "replacement facility" was located in an IDD. Accordingly, the tax commission concluded:

> As a result of the above, even though the Commission feels that the property in issue is a "Replacement Facility" and that an exemption certificate should not be approved because the property is located in an Industrial Development District, to deny the certificate on those grounds would run contrary to past practice and constitute administrative discrimination. Absent judicial direction, the Commission feels that it is constrained to overrule the denial of the application by Orion Township.

The township appealed this decision to the Oakland Circuit Court in accordance with the Administrative Procedures Act, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* The circuit court reversed the decision of the tax commission, finding that the property that constituted a "replacement facility," in the amount of $23,791,096, did not entitle GM to an IFEC and ordering GM to pay petitioners, as "the respective taxing units," the taxes not paid on that amount.

On appeal, GM first argues that the property constituted a "new facility" under the act and accordingly entitled it to an exemption within an IDD. Under the Administrative Procedures Act, the circuit court reviews the findings of the tax commission, like those of all administrative agencies, to ensure that its decision was supported by competent, material, and substantial evidence on the whole record. This Court utilizes an identical standard. *Blue Water Isles Co v Dep't of Natural Resources,* 171 Mich App 526, 531; 431 NW2d 53 (1988).

Under MCL 207.552(3); MSA 7.800(2)(3), a "replacement facility" is defined as industrial property that is intended to replace or restore obsolete industrial property either on contiguous or the same land, or on vacant noncontiguous land located within the same "plant rehabilitation district" (PRD) of the local governmental unit. Under MCL 207.552(4); MSA 7.800(2)(4), "new facility" is defined as "new industrial property other than a replacement facility to be built in a plant rehabilitation district or industrial development district." The primary distinction between classification of property as a "replacement facility" and as a "new facility" is the manner in which the tax is calculated and, as a result, the amount of the industrial facilities tax due. See MCL 207.564; MSA 7.800(14).

In this matter, GM agreed before the tax commission that the property that the tax commission ultimately determined constituted a "replacement facility" was intended to replace older property, previously located within the same facility, and performed the same function. We find that the tax commission's determination that this property constituted a "replacement facility" under the definition contained within the act is supported by

competent, material, and substantial evidence on the whole record. This determination, when taken into consideration with the definition of a "new facility" under the act, precludes a finding that the property constituted a "new facility." Accordingly, we conclude that the circuit court was correct in upholding the tax commission's determination.

We also believe that the circuit court was correct in its reversal of the tax commission's award of an IFEC to GM based solely on its past practices. While the controlling principle of taxation under both the federal and state constitutions is the equal treatment of similarly situated taxpayers, *Edward Rose Bldg Co v Independence Twp,* 436 Mich 620, 640; 462 NW2d 325 (1990), successful assertion of a claim that a party has been denied equal protection in the imposition of a tax requires that the party show that the taxing authority "has failed to tax similarly situated enterprises and that its failure to do so was intentional and knowing, rather than mistaken or the result of inadvertence." *MCI Telecommunications Corp v Dep't of Treasury,* 136 Mich App 28, 36-37; 355 NW2d 627 (1984).

GM has made no such showing, relying instead on the commission's prior errors in support of its assertion that it is entitled to an IFEC. However, prior mistakes must be corrected, not compounded by continued error. See *Michigan Oil Co v Natural Resources Comm,* 71 Mich App 667, 683; 249 NW2d 135 (1976), aff'd 406 Mich 1; 276 NW2d 141 (1979). Accordingly, we conclude that the tax commission erred in determining that a failure to award GM the requested IFEC would be discriminatory and that the circuit court correctly reversed the decision of the tax commission.

We would note our concern over the tax commis-

sion's longstanding position, which is apparently also shared by the Commerce Department, that IFECs may be granted for "replacement facilities" only when those facilities are located in plant rehabilitation districts, and not IDDs, given the absence of any apparent statutory authority for this position. However, we conclude that this issue has been waived by GM's acceptance of this longstanding position before the commission and GM's failure to include the issue within its statement of questions presented on appeal. Accordingly, we decline to address it. *Joyce v Vemulapalli,* 193 Mich App 225, 228; 483 NW2d 445 (1992); *Check Reporting Services, Inc v Michigan National Bank-Lansing,* 191 Mich App 614, 628; 478 NW2d 893 (1991).

Even though we have determined that the circuit court was correct in its reversal of the commission's award of the requested IFEC, we conclude that the relief ordered by the circuit court was inappropriate.

GM argues that it is entitled to a remand to the tax commission for an assessment of the property's value. In support of its argument, GM correctly notes that the tax commission has the authority to place corrected assessments on the current assessment rolls for property incorrectly reported or omitted in the current or prior two years. MCL 211.154(1); MSA 7.211(1). However, GM fails to note that the tax commission has already determined the value of the property, which it also determined constituted a "replacement facility," establishing that value at $23,791,096. Had the tax commission not erroneously determined that GM was entitled to an IFEC, tax would have been computed on that amount. GM's sole remedy to challenge this valuation was a timely appeal to the Michigan Tax

Tribunal, an option that it chose not to exercise. MCL 205.731; MSA 7.650(31). See also *Nicholson v Birmingham Bd of Review,* 191 Mich App 237, 239-240; 477 NW2d 492 (1991). The commission's determination that the property was valued at $23,791,096 was sufficient to enable the circuit court to order the payment of taxes based upon that valuation.

Accordingly, we conclude that the tax commission has assessed the property that is the subject of this appeal and that a valid tax may be imposed on that amount. However, because the circuit court is not given the power to levy or collect taxes, the remedy that it should have ordered was a remand to the commission with directions to enter the value of the "replacement facility," as determined in its decision, onto the tax rolls and for the collection of the applicable taxes and interest. We order such relief.

Given our resolution of this matter, we decline to consider whether the commission correctly determined that its grant of the requested IFEC would not impair the financial soundness of the Lake Orion Community Schools. In any event, we would note that this issue has not been preserved for appellate review because of the circuit court's failure to address it. *McKelvie v Mt Clemens,* 193 Mich App 81, 86; 483 NW2d 442 (1992).

We affirm the circuit court's decision, but modify the relief ordered, remanding this matter to the tax commission to proceed in accordance with this opinion.

GAVULIC v BOYER

Docket No. 134535. Submitted June 10, 1992, at Lansing. Decided July 7, 1992, at 9:15 A.M.

Diane Gavulic brought an action in the Oakland Circuit Court against Wayne Boyer and Boyer & Associates, alleging that she suffered financial losses because of negligent and fraudulent actions of Wayne Boyer while he was her financial advisor. A default judgment was entered against the defendants. The court, John N. O'Brien, J., denied the defendants' motions to set aside the judgment and for reconsideration or rehearing. The defendants appealed.

The Court of Appeals *held:*

1. Inasmuch as the defendants' motion for reconsideration or rehearing was filed with the trial court within the twenty-one-day appeal period after the entry of the order denying the motion to set aside the default judgment and this appeal was taken within twenty-one days after the denial of the motion for reconsideration, this appeal is an appeal as of right of the order denying the motion to set aside the default, and any issue that could have been raised in a direct appeal of that order may be raised in this appeal.

2. Because it is uncontroverted that the plaintiff did not give notice of the entry of the default, good cause sufficient to warrant the setting aside of the default has been shown. Further, because the defendants have pleaded a meritorious defense that, if proven, would defeat the plaintiff's claim, the trial court abused its discretion in refusing to set aside the default judgment.

Reversed and remanded.

1. APPEAL — TIMELY APPEALS — POSTJUDGMENT RELIEF.

An appeal of an order denying a motion for postjudgment relief is an appeal as of right of the underlying judgment if the motion was filed with the trial court within twenty-one days after

REFERENCES

Am Jur 2d, Appeal and Error § 127; Judgments §§ 770 *et seq.*

Appealability of order setting aside, or refusing to set aside, default judgment. 8 ALR3d 1272.

entry of the underlying judgment and a claim of appeal is filed within twenty-one days after entry of the order denying the motion for postjudgment relief (MCR 7.204[A][1][b]).

2. JUDGMENTS — DEFAULT JUDGMENTS — NOTICE OF DEFAULT — GOOD CAUSE.

Good cause sufficient to warrant setting aside a default or a default judgment is shown by establishing that a party seeking entry of a default failed to notify the opposing party of its entry (MCR 2.603[A][2]).

Daguanno, Nemes & Accettura (by *Robert F. Harrington*), for the plaintiff.

Eric J. McCann, P.C. (by *Eric J. McCann*), for the defendants.

Before: GRIBBS, P.J., and HOOD and C. W. SIMON, JR.,* JJ.

PER CURIAM. Defendant Wayne Boyer[1] appeals as of right from the June 21, 1990, order of the Oakland Circuit Court denying his motion to set aside a default judgment entered on November 30, 1989, in favor of the plaintiff. We reverse.

Plaintiff's complaint alleged that she had entrusted Boyer, a financial advisor doing business as Boyer & Associates, with $84,000 to invest on her behalf. The complaint further alleged that, through Boyer's negligence and fraudulent actions, plaintiff had suffered damages at least to the

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

[1] Although the action was commenced against both Wayne Boyer and Boyer & Associates, the parties have not been careful in the drafting of the various motions, orders, and briefs to make clear whether only one or both defendants were being included. We note that the default named only Wayne Boyer, while the default judgment was entered against both defendants. Further, although the claim of appeal was filed on behalf of both defendants, the defense brief on appeal was filed on behalf of Wayne Boyer only and sought relief for him alone. For ease of reference, we will speak of Wayne Boyer individually, cognizant that in many instances that reference also may include Boyer & Associates.

extent of her initial investment. Plaintiff requested judgment in an amount equal to "all damages recognized by Michigan law, well in excess of Ten Thousand ($10,000.00) Dollars," as well as her costs, interest, and attorney fees. Boyer was served with the complaint by personal service on September 14, 1989.

Shortly thereafter, Boyer's attorney contacted plaintiff's attorney to acknowledge service and to make an offer of settlement. Although the parties disagree concerning whether the offer of settlement was ever formally rejected and whether there was further contact between the attorneys, it is undisputed that Boyer took no further action to defend against plaintiff's complaint.

On November 14, 1989, a default was entered against Boyer for his failure to appear, plead, or otherwise defend. Plaintiff admits that notice of the entry of the default was not served on Boyer, nor was any service attempted. On November 30, 1989, the trial court entered a default judgment in the amount of $84,000 in favor of plaintiff and against Boyer. Pursuant to MCR 2.603(B)(4), the Oakland Circuit Court Clerk mailed notice of the entry of the default judgment to Boyer on December 7, 1989. Boyer denies ever receiving notice of the entry of the default or the default judgment.

On February 13, 1990, apparently after receipt of a subpoena directing him to appear at a creditor's examination, Boyer filed a motion seeking to set aside the default judgment. In support of his motion, Boyer argued that his attorney's calls to plaintiff's attorney constituted an appearance, entitling him to notice of plaintiff's intention to enter a default judgment at least seven days before entry of the judgment, and that plaintiff's failure to notify him of the entry of default violated the applicable court rule. Boyer asserted that these

facts constituted good cause, which, in conjunction with his affidavit of meritorious defense, required that the default judgment be set aside in accordance with MCR 2.603(D).

Plaintiff's answer denied that Boyer's attorney had ever expressed an intent to represent him. While plaintiff admitted that no notice of the entry of the default had been given and stipulated setting aside the entry of the default, she also argued that Boyer's motion failed to show either good cause or a meritorious defense sufficient to set aside the default judgment.

The trial court, after a hearing, denied Boyer's motion to set aside the default by its order of June 21, 1990. On July 12, 1990, Boyer filed a motion for rehearing, reasserting his earlier arguments. Following an adjournment because of the trial court's unavailability and a hearing held on September 12, 1990, the trial court denied Boyer's motion for reconsideration by its order entered on October 25, 1990. Boyer then filed a claim of appeal with this Court on November 1, 1990.

We first note that our consideration of the trial court's denial of Boyer's motion to set aside the default judgment is appropriate. Although plaintiff asserts that our review is limited to a review of the trial court's exercise of discretion in denying Boyer's motion for reconsideration, she does not consider MCR 7.204(A)(1)(b), which allows an appeal within twenty-one days after the entry of an order denying a motion for rehearing or reconsideration filed within the original appeal period. Because Boyer's motion for reconsideration was filed within the appeal period after the denial of the motion to set aside the default judgment and his appeal from the order denying his motion for reconsideration was timely, appellate review of the

original order denying relief from the default judgment is appropriate.[2]

We now turn to the merits of this case. Essentially, Boyer argues that plaintiff's failure to provide notice of the default renders the default invalid, that a default judgment may not be entered if based upon an invalid default, and that because of these defects and his showing of good cause and a meritorious defense, the trial court abused its discretion in denying the motion to set aside the default. We agree with Boyer's ultimate conclusion and, accordingly, reverse the decision of the trial court.

While the policy of this state generally favors the meritorious determination of issues and, therefore, encourages the setting aside of defaults, the trial court's decision regarding whether to set aside a default will not be disturbed on appeal absent an abuse of discretion. *Marposs Corp v Autocam Corp,* 183 Mich App 166, 170-171; 454 NW2d 194 (1990). Pursuant to MCR 2.603(D)(1), a "motion to set aside a default or default judgment, except when grounded on a lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed."

Good cause sufficient to warrant the setting aside of a default or default judgment includes (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements that created the default, or (3) some

[2] While we note that Boyer's motion for rehearing was not filed within the fourteen-day period mandated by MCR 2.119(F)(1), we conclude that plaintiff's failure to object to its timeliness before the trial court precludes consideration of any arguments related to that issue on appeal. Failure to raise an argument before the trial court precludes its consideration on appeal. *Bloemsma v Auto Club Ins Ass'n (After Remand),* 190 Mich App 686, 692; 476 NW2d 487 (1991).

other reason showing that manifest injustice would result if the default and the resulting default judgment were allowed to stand. *Lindsley v Burke,* 189 Mich App 700, 702; 474 NW2d 158 (1991).

The entry of a default is generally a ministerial act. *Alycekay Co v Hasko Construction Co, Inc,* 180 Mich App 502, 506; 448 NW2d 43 (1989). Nonetheless, pursuant to MCR 2.603(A)(2), the defaulted party is entitled to notice of the entry of the default after the entry. The apparent intention of this notice requirement is to enable the defaulted party to choose whether to move to set aside the default. See, e.g., *White v Sadler,* 350 Mich 511, 519; 87 NW2d 192 (1957); *Deeb v Berri,* 118 Mich App 556, 562; 325 NW2d 493 (1982). Although there are no reported cases addressing the consequences of the failure to provide notice of the entry of default, it is well settled that a failure to notify a party entitled to notice of the impending entry of a default judgment constitutes a substantial defect in the proceedings and, accordingly, good cause. *Perry v Perry,* 176 Mich App 762, 769-771; 440 NW2d 93 (1989); *Deeb, supra* at 565.

We believe that a failure to notify a party of an entry of a default, in violation of MCR 2.603(A)(2), is also sufficient to show a substantial defect in the proceedings. Without knowledge of the entry of a default, a party situated similarly to the way in which Boyer asserts he found himself in this matter may find himself engaged in an attempt to resolve a dispute while the litigation proceeds without him. Given plaintiff's admission that she failed to notify Boyer of the entry of the default, we believe that good cause warranting the setting aside of the default judgment has been shown.

Given this conclusion, we decline to address

Boyer's contentions that the actions of his attorney in this matter were sufficient to constitute an appearance or that plaintiff's complaint did not state a specific amount demanded, either of which, if shown, would entitle him to notice of the impending entry of a default judgment. MCR 2.603(B)(1)(a).

However, to be entitled to have the default judgment set aside, Boyer also was required to show, by an affidavit of fact, that there exists a meritorious defense to plaintiff's claim. Boyer, in his affidavit, admitted that he had managed several investments on plaintiff's behalf, but maintained that he had informed her of the risks associated with the investments and that he had acted prudently and in plaintiff's best interests, and denied that he had engaged in either negligent or fraudulent conduct. Finally, Boyer denied that his fault had caused plaintiff's losses.

Simply put, we believe that Boyer has set forth sufficiently a meritorious defense to plaintiff's claims. If proven at trial, the asserted defenses would preclude liability on plaintiff's claims. If Boyer informed plaintiff of the risks inherent in the investment and engaged in neither negligent nor fraudulent conduct, plaintiff is not entitled to recover even the amount of her initial investment. See, e.g., *Leib v Merrill Lynch, Pierce, Fenner & Smith, Inc,* 461 F Supp 951, 952-954 (ED Mich, 1978)(describing the duties owed by a stockbroker to an investor).

Because Boyer showed both good cause and a meritorious defense to plaintiff's claims, we conclude that the trial court abused its discretion in denying the motion to set aside the default judgment. Accordingly, we reverse and remand this matter for further proceedings.

BLACK v DEPARTMENT OF SOCIAL SERVICES

Docket No. 129827. Submitted June 9, 1992, at Lansing. Decided July 7, 1992, at 9:20 A.M.

Wendy Black petitioned the Oakland Circuit Court for review of a hearing officer's affirmance of a decision of the Department of Social Services to remove, as a sanction for noncooperation in identifying the father of her child, the portion of aid to families with dependent children received by her for her individual needs from the total amount of AFDC benefits received for herself and her child. Although a blood test had conclusively excluded the man named by the petitioner from being considered the child's father, she continued to name him as the father. The court, Jessica R. Cooper, J., affirmed, finding that the determination was proper because the petitioner had not cooperated in identifying the child's father. The petitioner appealed, alleging that the blood test cannot be considered conclusive evidence of noncooperation.

The Court of Appeals *held:*

1. The respondent has the burden of proving noncooperation. To do so, the respondent must show both that the mother failed to provide requested information and that she knew the requested information. If the mother honestly believes that the father is the man she has named, her answer is cooperative, even if another man is the father.

2. The respondent presented no evidence that the petitioner had information that she was withholding. The petitioner attested that she lacked any further information.

3. A blood test alone cannot be deemed conclusive evidence with regard to the issue of the petitioner's good faith. A mother who honestly asserts, under oath, that she has no further information regarding the child's father cannot be sanctioned for noncooperation solely on the basis of adverse blood test results.

4. There is no evidence in this case that the petitioner knew more than she was disclosing. The finding of noncooperation is not supported by the evidence.

Reversed.

Oakland Livingston Legal Aid (by *David W. Hull*), for the petitioner.

Frank J. Kelley, Attorney General, *Gay Secor Hardy,* Solicitor General, and *James P. Delaney,* Assistant Attorney General, for the respondent.

Before: GRIBBS, P.J., and HOOD and C. W. SIMON, JR.,* JJ.

PER CURIAM. This is an appeal as of right from a circuit court decision affirming respondent's refusal to lift sanctions imposed on petitioner for noncooperation in identifying the father of her child. We reverse.

Petitioner became pregnant at age seventeen. She delivered a baby girl on September 21, 1982. Both started receiving aid to families with dependent children (AFDC) benefits.

In October of 1983, at the request of respondent Department of Social Services, petitioner, her child, and the putative father submitted to a blood test to determine paternity. The test conclusively excluded the man named by petitioner from being the child's father.

After receiving the test results, petitioner continued to name the same man as the father of her child. In May of 1984, petitioner's AFDC benefits were cut to exclude benefits for her individual needs as a sanction for what respondent determined was her refusal to cooperate in identifying the father of her child. Her child's benefits were not cut.

Although she received notice of the sanction, petitioner did not challenge it until 1989, when

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

she requested a hearing.[1] According to respondent, petitioner could have the sanction lifted at any time by identifying the child's father.[2]

Inexplicably, petitioner does not contend that the test results must be erroneous and has apparently not demanded a re-test. She argues, instead, that the blood test cannot be considered conclusive evidence of noncooperation. She contends that she was a virgin before she slept with the putative father and that he was her only sexual partner around the time of the child's conception.

Review of final administrative decisions "shall include, as a minimum," whether they are "authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." Const 1963, art 6, § 28. The Administrative Procedures Act requires administrative decisions to be set aside "if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following":

> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law. [MCL 24.306(1); MSA 3.560(206)(1).]

[1] There is no timeliness problem raised. Additionally, the sanction is a continuing one.

[2] In light of our disposition of this case, we need not address petitioner's argument that the sanction is a permanent one in violation of the unpublished consent judgment of the United States District Court in *Carr v Dempsey,* File No. 80-73657 (ED Mich, January 4, 1992).

The substantial evidence test requires that a decision be supported by "evidence which a reasoning mind would accept as sufficient to support a conclusion. '[Substantial evidence] consists of more than a mere scintilla . . . but may be somewhat less than a preponderance' of the evidence." *Soto v Director, Michigan Dep't of Social Services,* 73 Mich App 263, 271; 251 NW2d 292 (1977) (quoting federal cases). "The . . . findings of the administrative tribunal will ordinarily be upheld." "[I]t is not the Court's function to resolve conflicts in the evidence or to pass on the credibility of the witnesses." *Id.* at 272. Where there is sufficient evidence, the reviewing court—including the circuit court—must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result in its place. *Murphy v Oakland Co Dep't of Health,* 95 Mich App 337, 339-340; 290 NW2d 139 (1980).

The AFDC program was established by Congress under the Social Security Act. The program is financed largely by the federal government, with state matching funds, but is administered by the state. See *King v Smith,* 392 US 309, 316; 88 S Ct 2128; 20 L Ed 2d 1118 (1968). Participating states are required to submit plans implementing the AFDC program for the approval of the Secretary of the Department of Health and Human Services. 42 USC 602(b); see also *King, supra* at 316.

The Social Security Act set out several provisions that must be included in the state AFDC plan, including that "as a condition of eligibility for aid, each applicant or recipient will be required to cooperate with the State . . . in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed." 42 USC 602 (a)(26)(B)(i); see also 45 CFR 232.12(a)(1) and (2). The plan must also "specify that cooperate includes

. . . [p]roviding information, or attesting to the lack of information, under penalty of perjury." 45 CFR 232.12(b)(3).

Respondent has implemented the federal requirements through various manuals. One of these manuals provides that cooperation includes identifying and helping to locate the absent parent and "taking any actions needed to establish paternity and obtain child support (e.g., testifying at hearings or obtaining blood tests)." See DSS, *Program Eligibility Manual,* PPB 85-12, Item 255, pp 3-4 (July 30, 1985).

Respondent has the burden of proving noncooperation. See DSS, *Administrative Hearings Handbook,* ch VII, § A. To do so, respondent must show both that the mother failed to provide requested information and also "[t]hat she knew the requested information." *Id.* "If the mother *honestly* believes that the father is the man she has named, her answer is cooperative even if another man is the father." *Id.,* § B (emphasis added).

There are no published decisions addressing what constitutes noncooperation. There are, however, at least four unpublished decisions of this Court that, although nonbinding under MCR 7.215(C), are helpful in resolving this question.

In *Karczewski v DSS,* an unpublished opinion per curiam of this Court, decided December 1, 1988 (Docket No. 99945), a finding of noncooperation was reversed where the mother swore that she could not identify the father of her child because she had had sexual relations with several men, none of whom she could name, around the time of conception. This Court found that, because there was no evidence that the mother knew the father's identity and was refusing to provide that information, the finding of noncooperation was unsupported by the record.

In *Myers v DSS,* another unpublished opinion per curiam of this Court, decided July 27, 1989 (Docket No. 108264), a finding of noncooperation was reversed where the man identified by the mother as the father of her child could not be found. Again, this Court found that there had been no evidence presented by the DSS that the mother had any information regarding the putative father that she was refusing to provide.

There are two unpublished cases involving noncooperation in light of blood tests. These two cases are in conflict.

In *Cash v DSS,* an unpublished opinion per curiam of this Court, decided August 22, 1991 (Docket No. 115662), a finding of noncooperation was reversed where the man consistently named as the father was excluded by a blood test. This Court found that the DSS had presented no evidence that the mother had information that she was withholding.

The opposite result was reached in *Hines v DSS,* unpublished opinion per curiam of this Court, decided July 13, 1987 (Docket No. 94634). A panel of this Court found that the administrative tribunal was justified in relying on the blood test results as evidence of noncooperation.

We believe that *Cash* represents the better-reasoned view. Accord *R K v Dep't of Human Services,* 215 NJ Super 342; 521 A2d 1319 (1987); *Atkinson v Ledbetter,* 183 Ga App 739; 360 SE2d 66 (1987); see also *Karczewski, supra; Myers, supra.*

In this case, petitioner has consistently named one man as the father of her baby. There was absolutely no evidence presented below that petitioner possessed information that she was refusing to disclose. She candidly admitted that she could not explain the results of the blood test. In effect,

petitioner did attest to a lack of any further information, under oath and under penalty of perjury.

The test results were admitted by the administrative tribunal with no foundational testimony regarding accuracy, chain of custody, and so forth. See *Burnside v Green,* 171 Mich App 421, 425; 431 NW2d 62 (1988). The hearing officer relied on the test results to conclude that petitioner must be lying or withholding information, and affirmed the sanction imposed by respondent. He did not evaluate petitioner's credibility on the basis of other evidence of minor inconsistencies in her story, including whether she was living with the putative father at the time of conception and how many times they had had intercourse. The possibility that the test results may have been wrong, that petitioner's memory was faulty, or that she might be suffering from delusions was not investigated or discussed.

While it is possible that, in some circumstances, a blood test may be conclusive with regard to the issue of paternity—a question that we do not decide—it cannot be deemed conclusive with regard to the issue of petitioner's good faith. Even respondent's own manuals recognize that the "honesty" of the mother's belief is crucial in finding noncooperation. See DSS, *Administrative Hearings Handbook,* ch VII, § B. Further, under the federal regulations governing the program, cooperation includes "attesting to the lack of information, under penalty of perjury." 45 CFR 232.12(b)(3). Therefore, a mother who honestly asserts, under oath, that she has no further information regarding the child's father cannot be sanctioned for noncooperation solely on the basis of adverse blood test results.

Where, as in this case, there is no evidence that

the mother knew more than she was disclosing, a finding of noncooperation based solely on blood test results is not supported by competent, material, and substantial evidence on the whole record. Petitioner cooperated with respondent within the meaning of the law. Sanctions were unwarranted.

We are not unmindful that our holding may require respondent to come up with evidence that may be peculiarly within a mother's knowledge and, therefore, very difficult to obtain or disprove. However, given that respondent need only prove its case by a preponderance of the evidence, we feel that the task is not insurmountable. Further, our holding is a narrow one, a blood test *alone* is not conclusive evidence of noncooperation.

Reversed.

HACIENDA MEXICAN RESTAURANTS OF KALAMAZOO CORPORATION v HACIENDA FRANCHISE GROUP, INC

Docket No. 137161. Submitted March 4, 1992, at Grand Rapids. Decided July 7, 1992, at 9:25 A.M.

Hacienda Mexican Restaurants of Kalamazoo Corporation and Albert Mickelson brought an action in the Kalamazoo Circuit Court against Hacienda Franchise Group, Inc., and others, alleging fraudulent inducement to enter into a franchise agreement and violations of the Franchise Investment Law, MCL 445.1501 *et seq.*; MSA 19.854(1) *et seq.* The court, William G. Schma, J., granted summary disposition for the defendants, ruling that, under the doctrine of forum non conveniens, the proper forum for the action was an Indiana court. The plaintiffs appealed.

The Court of Appeals *held:*

1. The trial court did not abuse its discretion in invoking forum non conveniens. The franchise agreement was negotiated in, executed in, and made subject to Indiana law by Indiana corporations and individuals who were residents of Indiana. Additionally, the dispute between the plaintiffs and the defendants was already in litigation in an Indiana court.

2. The trial court correctly determined that the Franchise Investment Law, which applies to all arrangements between a franchisor and a franchisee in connection with the offer or sale of a franchise in Michigan, did not apply to the franchise agreement in this case because the offer, sale, and acceptance of the agreement occurred in Indiana.

Affirmed.

CONFLICT OF LAWS — JURISDICTION — FORUM NON CONVENIENS.

A Michigan court does not abuse its discretion under the doctrine of forum non conveniens in declining jurisdiction of an action by a franchisee against a franchisor concerning a franchise in Michigan where the franchisee and the franchisor are residents of another state and the franchise agreement was negotiated

---

REFERENCES

Am Jur 2d, Courts §§ 172-178.

See the Index to Annotations under Forum Non Conveniens.

in, executed in, and made subject to the laws of that other state.

Deming, Hughey, Lewis, Allen & Chapman, P.C. (by *Ross E. Chapman* and *Richard J. Bosch*), for the plaintiffs.

Hammerschmidt, Bonewitz, Amaral & Jonas (by *Susan A. Horn* and *Joseph L. Amaral*), for the defendants.

Before: DOCTOROFF, C.J., and MICHAEL J. KELLY and R. B. BURNS,* JJ.

PER CURIAM. Plaintiffs appeal as of right the trial court's January 7, 1991, award to the defendants of summary disposition based on the doctrine of forum non conveniens. We find no error and affirm.

All individual parties to this action are Indiana residents. The corporate parties are Indiana corporations having their principal offices in Indiana and are authorized to do business in Michigan. Plaintiff Hacienda Mexican Restaurants of Kalamazoo Corporation, as franchisee, and defendant Hacienda Franchise Group, Inc., as franchisor, negotiated and entered into an agreement in Indiana, authorizing plaintiffs to operate a franchise restaurant in Portage, Michigan. When plaintiff subsequently failed to make timely royalty payments, defendant exercised its contractual right to terminate the franchise agreement, sued plaintiffs in Indiana, and on or about April 24, 1990, obtained a preliminary injunction prohibiting plaintiffs from continuing their Portage, Michigan, franchise.

Plaintiffs on June 5, 1990, commenced the pres-

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

ent action in the Kalamazoo Circuit Court, alleging in count I of their complaint that they had been fraudulently induced to enter into the franchise agreement, and claiming in count II that defendants had violated the Franchise Investment Law (FIL), MCL 445.1501 *et seq.*; MSA 19.854(1) *et seq.* Plaintiffs' first amended complaint, filed on September 26, 1990, added to the monetary damages prayed for in the original complaint a request for rescission of the franchise agreement.

On July 17, 1990, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(1), (6), and (7), claiming lack of personal jurisdiction. Their amended motion for summary disposition, filed on October 23, 1990, additionally claimed that pursuant to MCR 2.116(C)(7) the trial court should decline jurisdiction on the basis of the doctrine of forum non conveniens. After a hearing on the motion, the court ruled that it had jurisdiction, but declined to exercise it on the basis of forum non conveniens. Plaintiffs now appeal the award of summary disposition for defendants.

We need not decide whether MCR 2.116(C) is an improper vehicle for raising a claim of forum non conveniens, as plaintiffs initially maintain. Plaintiffs have failed to show any prejudice resulting from defendants' use of a motion for summary disposition to present their forum non conveniens argument to the court. Plaintiffs were afforded an adequate opportunity to be heard regarding the matter and utilized it fully. Furthermore, we note that subrule 2.116(C) has previously served the very purpose that plaintiffs now question. *Holme v Jason's Lounge,* 168 Mich App 132; 423 NW2d 585 (1988).

We find no merit to plaintiffs' contention that the trial court abused its discretion in invoking the doctrine of forum non conveniens under these

facts. In *Cray v General Motors Corp,* 389 Mich 382, 395; 207 NW2d 393 (1973), the Court stated:

> The principle of *forum non conveniens* establishes the right of a court to resist imposition upon its jurisdiction although such jurisdiction could properly be invoked. It presupposes that there are at least two possible choices of forum.

The Court in *Cray* enunciated the factors that the trial court should consider in rejecting or accepting jurisdiction:

> 1. The private interest of the litigant.
> a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;
> b. Ease of access to sources of proof;
> c. Distance from the situs of the accident or incident which gave rise to the litigation;
> d. Enforcibility [sic] of any judgment obtained;
> e. Possible harassment of either party;
> f. Other practical problems which contribute to the ease, expense and expedition of the trial;
> g. Possibility of viewing the premises.
> 2. Matters of public interest.
> a. Administrative difficulties which may arise in an area which may not be present in the area of origin;
> b. Consideration of the state law which must govern the case;
> c. People who are concerned by the proceeding.
> 3. Reasonable promptness in raising the plea of *forum non conveniens.* [*Id.* at 396.]

The trial court's decision whether to decline jurisdiction is a matter of discretion that "will not be overturned on appeal absent an abuse of discretion." *Holme v Jason's Lounge, supra* at 135.

Our review of the trial court's findings discloses

no abuse of discretion. Pursuant to *Cray* factor 1a, the court noted that although there would be some witnesses in Michigan, they were not critical to the action and all the significant witnesses were in Indiana. The court concluded that the significant documents and people were all in Indiana (factor 1b) and observed that the situs giving rise to the litigation (factor 1c) was a considerable distance from Kalamazoo. It was concerned about the enforceability of a Michigan judgment in Indiana (factor 1d) if it was incompatible with the result of the pending Indiana case in which plaintiffs had already counterclaimed for relief. The court also recognized the possibility of harassment (factor 1e) if defendants were forced to litigate in Michigan after having already done so in Indiana; noted that because of the parties' contractual choice of law provision, Indiana law would apply to a Michigan trial of plaintiffs' fraud claim (factor 2b); found that the people affected by the proceeding were in Indiana (factor 2c); and held that defendants had raised the forum non conveniens issue promptly (factor 3).

We reject plaintiffs' contention that the FIL applies to the present facts. MCL 445.1504(1); MSA 19.854(4)(1) provides in pertinent part that "[t]his act applies to all written or oral arrangements between a franchisor and franchisee in connection with the offer or sale of a franchise." MCL 445.1504(2) and (3); MSA 19.854(4)(2) and (3) define when an offer, sale, or acceptance is made in this state:

> (2) An offer or sale of a franchise is made in this state when an offer to sell is made in this state, or an offer to buy is accepted in this state, or, if the franchisee is domiciled in this state, the franchised business is or will be operated in this state.

> (3) An offer to sell is made in this state when the offer either originates from this state or is directed by the offeror to this state and received at the place to which it is directed. An offer to sell is accepted in this state when acceptance is communicated to the offeror in this state. An acceptance is communicated to the offeror in this state when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed.

In this case, both the franchisor and the franchisee are Indiana corporations with their principal places of business in Indiana. The franchise agreement was negotiated and executed in Indiana. There was therefore no offer, sale, or acceptance made "in this state," and the FIL does not apply.

We note with interest the Michigan Attorney General's belief that the FIL is inapplicable to the facts of this case. In a document entitled "Assurance of Discontinuance," summarizing the results of his investigation of defendant's activities in Michigan, the Attorney General recognized "that the MFIL does not apply to a nonresident franchisee such as the one sold to an Indiana Corporation to be operated in Kalamazoo County, Michigan."

Plaintiffs' reliance upon *In re Dynamic Enterprises, Inc,* 32 Bankr 509 (MD Tenn, 1983), is misplaced because that case is factually distinguishable. Unlike the case at bar, the defendants in *Dynamic,* including the franchisee, were Michigan residents. *Id.* at 514. Because the franchise was operated in Michigan, the Michigan residence of the franchisee would trigger application of the FIL pursuant to MCL 445.1504(2); MSA 19.854(4)(2).

The court also observed that "it is apparent that the parties intended that Michigan law be applied

in enforcing and interpreting the contract." *Dynamic, supra* at 514, n 2. By contrast, the franchise agreement in the present case contains a provision that the agreement "is to be construed according to the laws of the State of Indiana."

The trial court did not abuse its discretion in declining jurisdiction on the ground that the balancing of interests favors an Indiana forum.

Affirmed.

In re WASHBURN ESTATE

McCARTHY & ASSOCIATES, INC v WASHBURN

Docket No. 130196. Submitted June 11, 1992, at Detroit. Decided July 7, 1992, at 9:30 A.M.

McCarthy & Associates, Inc., petitioned the Wayne Probate Court to reopen the estate of Michael B. Washburn, deceased, which was closed on March 23, 1988, following unsupervised probate proceedings in which the decedent's creditors received notice by publication. McCarthy, which brought its petition in order to pursue a contractual claim against the estate, argued for the retroactive application of *Tulsa Professional Collection Services, Inc v Pope,* 485 US 478, decided April 19, 1988, in which the Court held that notice by publication to a decedent's known creditor violates the creditor's right to procedural due process under the Fourteenth Amendment. Terry Washburn, successor independent personal representative of Michael Washburn's estate, responded, arguing that *Tulsa* should have prospective application only and that the probate court was without jurisdiction to hear the petition because the claim against the estate was not filed within the time limits set by MCL 700.328; MSA 27.5328. The probate court, Thomas A. Maher, J., granted the petition. The respondent appealed by leave granted.

The Court of Appeals *held:*

1. *Tulsa* does not apply retroactively to probate proceedings rendered final before April 19, 1988. Retroactive application of the new rule of law established by *Tulsa* would not further its purposes and would generate hardship and injustice to those who relied on the former rule to define their property rights.

2. McCarthy's claim against the estate was barred by MCL 700.328; MSA 27.5328 because it was not presented within four months after the publication of notice to creditors and a petition for a tardy claim was not filed before final settlement and distribution of the assets of the estate.

Reversed.

Monaghan, LoPrete, McDonald, Sogge & Yakima (by *Ronald R. Sogge*), for the petitioner.

Goldstein, Serlin, Reizen, Rosenbaum & Baker, P.C. (by *Barry M. Rosenbaum*), for the respondent.

Before: FITZGERALD, P.J., and CAVANAGH and NEFF, JJ.

PER CURIAM. Terry Washburn, successor independent personal representative of the estate of Michael B. Washburn, deceased, appeals by leave granted the June 13, 1990, order of Wayne Probate Judge Thomas A. Maher reopening the previously closed estate so that petitioner McCarthy & Associates (hereinafter McCarthy) could pursue its contract claim against the estate. We reverse.

I

Washburn's estate was probated pursuant to the independent probate procedures, MCL 700.301 *et seq.*; MSA 27.5301 *et seq.*, which contemplate the expeditious settlement and distribution of an estate without court supervision. Terry Washburn was appointed independent personal representative on December 10, 1986. Pursuant to statutes and court rules then in effect,[1] notice to creditors was given by publication.[2] No claims were filed against the estate, and decedent's debts were paid and the assets distributed under the laws of intestacy to his widow and children. The estate was

[1] The statutes have subsequently been amended. 1988 PA 222 revised and consolidated the laws relative to the probate of decedents' estates and applies to proceedings commenced on or after January 1, 1989. MCL 700.703; MSA 27.5703 was modified to require actual notice to known creditors as required by *Tulsa Professional Collection Services, Inc v Pope*, 485 US 478; 108 S Ct 1340; 99 L Ed 2d 565 (1988).

[2] 1978 PA 642, MCL 700.328(1); MSA 27.5328(1), provided:

> An independent personal representative shall cause publication of notice with respect to presentment of claims as provided by supreme court rule.

closed on March 23, 1988, when Terry Washburn filed a verified closing statement.[3]

On March 22, 1989, McCarthy filed suit against Michael B. Washburn in the Wayne Circuit Court for breach of contract. When McCarthy was advised of Michael Washburn's death, the complaint was amended to substitute Terry Washburn, personal representative of the decedent's estate. The personal representative asked the circuit court to dismiss the amended complaint because no order reopening the estate had been entered. The circuit court apparently agreed that McCarthy had to reopen the estate in probate court.

McCarthy moved to have the estate reopened pursuant to MCL 600.848(1); MSA 27A.848(1), which provides:

> Upon petition, where justice requires, and after due notice is given to all parties in interest, the probate court may grant rehearings and modify and set aside orders, sentences, or judgments rendered in the court.

McCarthy argued that justice required reopening the estate because, less than a month after the estate was closed, the United States Supreme Court decided *Tulsa Professional Collection Services, Inc v Pope,* 485 US 478; 108 S Ct 1340; 99 L Ed 2d 565 (1988), holding that an Oklahoma statute providing for notice to a decedent's known creditors solely by publication violated the Due Process Clause of the Fourteenth Amendment. McCarthy argued that its right to due process would likewise be violated if it was forever barred from bringing its claims in this case.[4]

---

[3] MCL 700.357(3); MSA 27.5357(3) provides in part that "an independent personal representative shall close an estate by filing with the court . . . a verified closing statement."

[4] McCarthy alleged that it was an actual known creditor because

The personal representative responded by arguing that *Tulsa* should not be given retroactive effect and that, at the very least, should not be given total retroactive effect in such a manner that an estate already closed will be allowed to be reopened. The personal representative also argued that § 848(1) was not applicable because the estate proceeded through independent probate and therefore no "orders, sentences, or judgments [were] rendered in the court" within the meaning of the statute. Instead, the personal representative argued that MCL 700.593(2); MSA 27.5593(2) was applicable. That statute provides:

> Upon filing a petition after the closing of an estate, the court may cause the estate to be reopened for the purpose of administering after-discovered assets or any other assets belonging to the estate or to complete the administration of the estate in case the estate was closed without being fully administered by the fiduciary or court, or for the correction of typographical errors, omissions, or misdescription of property contained in any order or record in the estate, and for any of these purposes may appoint successor fiduciary. *The failure of a complainant to file a claim against the estate during the original administration thereof shall not be a cause for reopening the estate or for the appointment of a successor fiduciary.* [Emphasis added.]

The personal representative argued that the mandatory language contained in the last sentence required the probate court to dismiss McCarthy's petition.

In an opinion dated May 10, 1990, the probate

decedent's attorneys who assisted the personal representative in probating the estate were the same attorneys who were involved in settling the dispute involving the listing agreements before Michael Washburn's death.

court granted the petition to reopen the estate and to file a tardy claim pursuant to § 848(1) for the following reasons:

> Under the old claims statute by which this estate was administered, notice only need be given by publication. However after the United State Supreme Court ruled in *Tulsa Professional* [*Collection Services, Inc,* 485 US 478; 108 S Ct 1340; 99 L Ed 2d 565 (1988)] that such notices deprived creditors of procedural due process, the Michigan Claims Act was amended to provide that in both supervised and independent probate, known creditors must be given actual written notice.
>
> Because procedural due process is an important constitutional right, this court determines that the facts in this case create a classic situation "where justice requires" that the order closing the estate be set aside, and the case is re-opened for the purpose of permitting Petitioner to pursue its claim under its contract in Circuit Court.

II

The pivotal issue we must decide is whether the *Tulsa* decision applies retroactively to probate proceedings finalized before that decision was announced on April 19, 1988. Because our determination focuses on the application of a United States Supreme Court decision, we rely upon United States Supreme Court cases that have addressed the issue of retroactive and prospective application of judicial decisions. See *Carter v Chattanooga, Tennessee,* 850 F2d 1119 (CA 6, 1988).

In *Chevron Oil Co v Huson,* 404 US 97; 92 S Ct 349; 30 L Ed 2d 296 (1971), the Court articulated the following standards for prospective application of a decision: (1) Was a new rule of law established? (2) Will the purposes of the decision be

furthered by retroactive application? and (3) Will hardship or injustice be generated by retroactivity?

Applying these standards, we must initially determine whether *Tulsa* established a new principle of law. In *Tulsa,* the Court addressed a question of first impression. In addition, the Court acknowledged that it rejected a practice widely adopted by state legislatures and courts when it stated: "Such 'nonclaim statutes' are almost universally included in state probate codes." 485 US 479.

To satisfy the second prong of the test, we must determine if the purposes of the *Tulsa* rule would be furthered by retroactive application. The purpose of the actual notice requirement is to satisfy the due process requisite stated in *Tulsa* and established in *Mullane v Central Hanover Bank & Trust Co,* 339 US 306; 70 S Ct 652; 94 L Ed 865 (1950). While that purpose may be furthered by retroactive application of the *Tulsa* decision, we conclude that the benefit of avoiding hardships created by retroactivity is an ample basis for prospective application.

The third prong of the test is an examination of the hardship generated by retroactivity. In this case, retroactive application of the *Tulsa* decision could cause the disturbance of many property rights. Those rights were defined according to law unexpectedly declared invalid, and they have created immeasurable reliance. "The actual existence of a statute, prior to [it being declared invalid], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot Co Drainage Dist v Baxter State Bank,* 308 US 371, 374; 60 S Ct 317; 84 L Ed 329 (1940).

We hold that the *Tulsa* decision does not apply retroactively to probate proceedings rendered final

before it was decided on April 19, 1988.[5] A probate estate is closed when the independent personal representative files a verified closing statement with the court. MCL 700.357; MSA 27.5357. In this case, the closing statement was filed on March 23, 1988. Thus, petitioner's claim is barred because he failed to file it within the time limits prescribed by statute.[6]

III

Having concluded that procedural due process does not require the probate court to reopen the estate, we will briefly address respondent's argument that reopening of the estate is barred under § 593(2) of the Revised Probate Code, and that the estate cannot be reopened by utilizing § 848(1) of the Revised Judicature Act.

At the time this estate was administered, MCL 700.328; MSA 27.5328 provided:

> (2) Claims against a decedent's estate which arose before or after the death of the decedent, including claims of the state and a subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the independent personal representative, and the heirs and the devisees of the decedent, unless any of the following occurs:
>
> (a) The claim is presented within 4 months after the date of the first publication of notice to creditors if notice is given in compliance with supreme court rule or 4 months after the claim becomes due, whichever is later.

[5] Our holding is consistent with the holdings of other states that have addressed this issue. See, e.g., *Farm Credit Bank of St Louis v Brown*, 217 Ill App 3d 730; 160 Ill Dec 581; 577 NE2d 906 (1991); *In re Weidman Estate*, 476 NW2d 357 (Iowa, 1991).

[6] See part III.

(b) A petition for leave to file tardy claim is filed before final settlement and distribution of the assets of the estate if the petitioner did not have actual notice of the estate.

(c) The claim is presented within 3 years after the decedent's death, if notice to creditors has not been published.

In this case, McCarthy's claim was not presented within the specific time limits set forth in subsection a, nor was a petition to file a tardy claim filed before final settlement of the estate.[7] Petitioner's failure to file a claim within the time limit rendered the probate court without jurisdiction to hear the petition to reopen the estate under the Revised Judicature Act. See *In re Hillier Estate,* 189 Mich App 716, 721; 473 NW2d 811 (1991).

Reversed.

---

[7] MCL 700.732; MSA 27.5732 provided:

On the application of a creditor who failed to present his claim, if made within 18 months following the time originally fixed for the presentation of claims, and *before the estate is closed,* the court shall allow further time, not exceeding 1 month, for the creditor to present his claim. [Emphasis added.]

EVERETT v EVERETT

Docket No. 127293. Submitted February 5, 1992, at Lansing. Decided July 7, 1992, at 9:35 A.M.

John V. Everett was granted a divorce from Lynne S. Everett in the Washtenaw Circuit Court, Edward D. Deake, J. He appealed, alleging that the court erred with regard to the division of property.

The Court of Appeals *held:*

1. The trial court complied with the requirement of MCR 2.517(A)(1) that it find the facts specially; however, the court's view of the evidence with regard to the value of the options owned by the plaintiff to purchase shares of stock in his employer's company is not plausible. The case must be remanded for a revaluation of the plaintiff's stock options.

2. The judgment of divorce must contain an order to exercise the matured options in order to avoid an inequitable property distribution caused by fluctuating market prices.

3. The present value of the stock options is to be calculated by subtracting the cost of the option from the market price of the stock. The actual date to be used to determine the market price for valuation purposes is within the discretion of the trial court.

4. The trial court erred in valuing the stock options without taking into consideration the tax consequences when exercised.

5. The trial court erred in finding the same present value for all the plaintiff's options on 3,660 shares of stock where the options with regard to two hundred of those shares had not yet matured. The trial court must divide these options in a manner that protects the defendant's equitable share.

6. The trial court did not clearly err in valuing the home in which the plaintiff lives.

Reversed and remanded.

REFERENCES

Am Jur 2d, Divorce and Separation §§ 901, 947.

Divorce and separation: treatment of stock options for purposes of dividing marital property. 46 ALR4th 640.

Valuation of stock options for purposes of divorce court's property distribution. 46 ALR4th 689.

1. DIVORCE — PROPERTY DIVISION — STOCK OPTIONS — PRESENT VALUE.

The present value of stock options is to be calculated in divorce proceedings by subtracting the cost of the options from the market price of the stock, and consideration should be given to the tax consequences when the options are exercised; the date to be used to determine the market price is within the discretion of the trial court.

2. DIVORCE — PROPERTY DIVISION — STOCK OPTIONS — PRESENT VALUE.

Stock options that have not matured and therefore may never be exercised should not be given the same present value, for purposes of a division of marital property in a divorce action, as matured stock options, the value of which is readily ascertainable.

Judith A. Curtis, for the plaintiff.

Dykema Gossett (by *E. Edward Hood* and *Daniel R. Shemke*), for the defendant.

Before: HOLBROOK, JR., P.J., and GRIFFIN and MARILYN KELLY, JJ.

PER CURIAM. Plaintiff appeals as of right from the property division incorporated in the trial court's judgment of divorce. We reverse.

The parties were married on July 10, 1965, and have two adult children. They separated in June 1986. Plaintiff filed for divorce on March 25, 1987. Trial was held in September 1989 and January 1990.

Plaintiff claims that the trial court erred in finding that stock options plaintiff received through his employment were valued at $102,445. Plaintiff does not contest that the stock options are marital property, but maintains that the trial court failed to consider several factors affecting the valuation of the options, including tax consequences. Plaintiff also argues that the trial court

failed to make findings of fact indicating how it arrived at the value of the options. Defendant, on the other hand, argues that the evidence in the record supports the trial court's valuation of the stock options. She maintains that taxes are too speculative for the court to deduct an amount for them from the value of the options. Defendant also argues that the trial court made adequate findings of fact regarding the value of the options.

In *Thames v Thames,* 191 Mich App 299, 301-302; 477 NW2d 496 (1991), this Court stated:

> This Court is required to accept the factual findings of a trial court in a divorce case unless those findings are clearly erroneous. *Beason v Beason,* 435 Mich 791, 805; 460 NW2d 207 (1990). A finding is clearly erroneous if the reviewing court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed. *Id.* Under this standard, the reviewing court cannot reverse if the trial court's view of the evidence is plausible. *Id.* Deference is given to the special opportunity of the trial court to judge the credibility of witnesses. MCR 2.613(C).

The trial court found that plaintiff owned options to purchase 3,660 shares of stock in his employer's company. The trial court specifically determined that these options were worth $102,445, which was the amount defendant testified to and alleged in her trial brief. We conclude that the trial court complied with the requirement of MCR 2.517(A)(1) to find the facts specially. *Birkenshaw v Detroit,* 110 Mich App 500, 509; 313 NW2d 334 (1981); *Kirkendall v Heckinger,* 105 Mich App 621, 628; 307 NW2d 699 (1981).

Although the trial court complied with MCR 2.517(A)(1), we believe the trial court's view of the evidence with regard to the valuation of the op-

tions is not plausible. The trial court's $102,445 valuation figure is based upon the testimony of defendant and her trial brief that lists this amount. However, defendant failed to fully explain how this number was calculated. Meanwhile, plaintiff presented expert testimony regarding a method to calculate the value of the options that resulted in a valuation of $50,861. During the January trial proceedings, plaintiff relied on his expert's formula and testified that the options were then worth $66,000. Consequently, we remand the case to the trial court for revaluation of plaintiff's stock options in light of this opinion. See *Postema v Postema,* 189 Mich App 89, 102; 471 NW2d 912 (1991).

We next consider the method of valuation of stock options in divorce proceedings, which is an issue of first impression in this Court. Other jurisdictions have examined the issue regarding how to calculate the value of stock options, a formidable task given the numerous possible contingencies and restrictions involving stock options. In this case, problems inherent in calculating the value of the options are alleviated by the fact that plaintiff asked the trial court, when valuating the options, to assume that all the options would be exercised. The judgment of divorce must contain an order to exercise the matured options in order to avoid an inequitable property distribution caused by fluctuating market prices.

In *Burkey v Burkey (On Rehearing),* 189 Mich App 72; 471 NW2d 631 (1991), this Court calculated the present value of an employee stock ownership plan (ESOP) by determining the number of shares in the employee's account and multiplying that figure by the value of those shares. *Id.,* p 76. An ESOP is a plan whereby the employee or employer, or both, place specified amounts of money

into the plan, with a trustee crediting the contributions, and the benefit paid out upon retirement is directly related to the value of the account. *Id.*, pp 75-76.

Stock options, on the other hand, are a type of employee benefit where the employer offers to the employee the opportunity to purchase stock in the employer's company at any given time for a certain price. Options are characterized as matured on the date the options may be exercised by the employee. Upon purchase, the stock is owned by the employee and is usually tradable on the open market. The options, however, might be subject to various conditions. For example, in this case, plaintiff's options were neither transferable nor assignable. The right to exercise the options expires on certain dates. The options were contingent upon plaintiff's continued employment with his employer, and any options that are not matured at the time plaintiff ends his employment are forfeited.

Although stock options are fundamentally different from ESOP's, the value of options in this case is determinable in a similar manner. The present value of stock options is calculated by subtracting the option cost from the market price of the stock. The actual date on which to determine the market price for valuation purposes is within the discretion of the trial court. *Id.*, pp 76-77. If the market price of the stock is lower than the option cost, then the options are worthless and need not be allocated between the parties.[1] In this case, the options had different costs depending on when they were offered by plaintiff's employer.

[1] A situation might arise where the market price of the stock is lower than the option cost at the time of the divorce proceedings, and then is higher than the option cost after the divorce judgment. We need not address at this time any possible remedy in that hypothetical situation.

We agree with plaintiff that the trial court erred in valuating the options without taking into consideration the tax consequences. See *Lesko v Lesko,* 184 Mich App 395, 403; 457 NW2d 695 (1990); *Wiand v Wiand,* 178 Mich App 137, 151; 443 NW2d 464 (1989). Plaintiff's expert testified that even though the options are not subject to immediate taxation, they will be taxed when they are exercised because they are a form of employment compensation. Indeed, the record indicates that options exercised by plaintiff in 1988 were taxed. Thus, the trial court clearly erred when it valued the options without considering the tax consequences. *Thames, supra.* We direct the trial court to adjust the valuation of the options accordingly. *Lesko, supra.*

The trial court also clearly erred in finding the same present value for all plaintiff's options on 3,660 shares of stock. At the time of trial, plaintiff owned options on 3,660 shares of stock, but the options with regard to two hundred shares were not yet matured. It was inappropriate to place the same present value on the options for the two hundred shares that were not yet matured as on the options that had matured, because of the conditions applicable to the options as listed above. For example, the options on the two hundred shares could be rendered worthless by plaintiff's ending his employment, or if the market price of the stock is less than the option cost when the options mature. As a result, the trial court must divide these options in a manner that protects defendant's equitable share in them.

Finally, plaintiff contends that the trial court clearly erred in valuing the New Jersey home in which he lives. He argues that the property has negative equity because of a downturn in the real estate market.

The trial court valued the property at $40,250, which is the amount defendant claimed was the down payment on the house. Plaintiff purchased the home for $222,500 in 1988. The record indicates that plaintiff made a $22,250 down payment, and the mortgage balance at the time of trial was $199,000. The record also shows that plaintiff exercised some stock options in order to make the down payment,[2] but did not notify defendant about this expenditure of marital assets.

Despite plaintiff's argument, the trial court held that the property had some value. The trial court held that plaintiff's poor business decision to purchase the home should not result in harm to defendant. The court also stated that plaintiff's decision to not notify defendant about his exercise of stock options to pay for the home played a part in its valuation of the home. Under these circumstances, we cannot say that the trial court's valuation of the New Jersey home was clearly erroneous.

Reversed and remanded to the trial court for further proceedings consistent with this opinion.

[2] The proofs show that the $40,250 figure determined by the trial court as the down payment represents the pretax gain plaintiff received when he exercised stock options. Plaintiff then liquidated this stock and used the after-tax dollars for the down payment.

PEOPLE v TAYLOR

Docket No. 127861. Submitted March 11, 1992, at Lansing. Decided April 9, 1992, approved for publication July 10, 1992, at 9:00 A.M.

Annette Taylor was convicted by a jury in the Oakland Circuit Court, Robert C. Anderson, J., of felonious assault and possession of a firearm during the commission of a felony, after she allegedly shot her estranged husband at her home. The defendant pleaded guilty of being an habitual offender, second-offense, was sentenced accordingly, and appealed.

The Court of Appeals *held:*

1. The trial court abused its discretion with respect to voir dire in refusing to question potential jurors about their attitudes toward self-defense and the use of deadly force, thereby preventing the defendant from intelligently exercising her peremptory challenges.

2. The trial court abused its discretion in refusing to admit evidence of the victim's prior acts of violence toward the defendant. On retrial, the defendant should be allowed to offer such evidence because it is relevant to her motive and intent.

3. The trial court did not abuse its discretion in admitting the testimony of the victim's mother that the defendant had threatened to shoot the victim. On retrial, however, the trial court should reconsider the relevance of that evidence because it was offered to establish that the defendant had access to a gun, a fact that the defendant has since conceded.

4. Arguments by the prosecutor concerning statements made by the defendant before her arrest were within the bounds of permissible comment about the evidence and reasonable inferences that can be drawn from the evidence.

5. The trial court abused its discretion in refusing to instruct the jury with regard to the misdemeanor of reckless use of a firearm resulting in injury. A rational view of the evidence could have supported a verdict of guilty of the lesser included

---

REFERENCES

Am Jur 2d, Evidence §§ 280, 298; Jury § 202; Trial § 1427.

See the Index to Annotations under Escape or Flight; Instructions to Jury; Lesser Included Offenses; Voir Dire.

misdemeanor and not guilty of the original felony charge of assault with intent to commit murder.

6. The trial court improperly instructed the jury with regard to flight by refusing to tell the jury that, in addition to being evidence of consciousness of guilt, flight also could be evidence of fear.

7. The trial court erred in refusing to instruct the jury that the defendant had no duty to retreat in her home. The instruction was appropriate because the prosecutor had raised an issue concerning the reasonableness of the defendant's decision to remain at home while her husband repeatedly attacked her.

Reversed and remanded.

1. CRIMINAL LAW — JURY — VOIR DIRE.

The scope of voir dire is left to the discretion of the trial court; however, the court may not restrict voir dire in a manner that prevents the development of a factual basis for the exercise of peremptory challenges.

2. CRIMINAL LAW — EVIDENCE — PRIOR BAD ACTS OF VICTIM.

Evidence of a victim's prior bad acts of violence directed toward a defendant may be admissible where relevant to the issue of self-defense.

3. CRIMINAL LAW — JURY INSTRUCTIONS — LESSER INCLUDED MISDEMEANORS.

A trial court should instruct a jury with regard to appropriate lesser included misdemeanors if a rational view of the evidence could support a verdict of guilty of the misdemeanor and not guilty of the felony, the defendant has proper notice or has made a request, and the instruction would not result in confusion or injustice.

4. CRIMINAL LAW — EVIDENCE — FLIGHT.

A defendant's flight may result from factors other than guilt, and it is for the jury to determine what caused the defendant to flee.

Frank J. Kelley, Attorney General, *Gay Secor Hardy,* Solicitor General, *Richard Thompson,* Prosecuting Attorney, *Michael J. Modelski,* Chief, Appellate Division, and *Anica Letica,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Gail Rodwan*), for the defendant on appeal.

Before: SHEPHERD, P.J., and SAWYER and CONNOR, JJ.

PER CURIAM. Defendant pled guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082, after a jury convicted her of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to 3½ to 6 years for the assault conviction and two years for the felony-firearm conviction. Defendant appeals her convictions as of right. We reverse.

While in the midst of a divorce, defendant shot her husband in the face in February of 1988. He claimed that it was an act of revenge. She claimed that it was self-defense.

I

Defendant argues that the trial court erred in refusing to question potential jurors about their attitudes toward self-defense and the use of deadly force. We agree.

The scope of voir dire is left to the discretion of the trial court. *People v Harrell,* 398 Mich 384, 388; 247 NW2d 829 (1976). However, a trial court may not restrict voir dire in a manner that prevents the development of a factual basis for the exercise of peremptory challenges. *People v Mumford,* 183 Mich App 149, 155; 455 NW2d 51 (1990). In this case, the refusal of the trial court to ask any questions concerning the subject of self-defense and juror attitudes toward the use of deadly force unduly restricted voir dire and was an abuse of discretion.

Defendant did not exhaust her peremptory challenges. Generally, a party must do so to preserve

for appeal a question of jury selection. *People v Rose,* 268 Mich 529, 531; 256 NW 536 (1934). This is not, however, an absolute requirement. See, e.g., *People v Miller,* 411 Mich 321; 307 NW2d 335 (1981), rev'g 88 Mich App 210; 276 NW2d 558 (1979) (codefendant Ewing's conviction reversed despite failure to exhaust peremptory challenges). The purpose of appellate preservation requirements is to induce litigants to do everything they can in the trial court to prevent error, eliminate its prejudice, or at least create a record of the error and its prejudice. In contrast to *Rose, supra,* defendant refused to express satisfaction with the jury empaneled and repeatedly reminded the trial court that she felt that the voir dire prevented her from intelligently exercising her peremptory challenges. Requiring defendant to unintelligently exercise them would be pointless, because it could not have prevented the error, eliminated its prejudice, or further demonstrated the error and its prejudice.

II

Defendant contends that the trial court erred in limiting defendant's ability to testify about her husband's prior acts of violence toward her, and erred in allowing a witness to testify about a threat defendant allegedly made months before the shooting.

The decision whether to admit evidence is left to the discretion of the trial court. *People v Milton,* 186 Mich App 574, 575; 465 NW2d 371 (1990), remanded on other grounds 438 Mich 852 (1991). This Court finds an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.,* pp 575-576.

Prior acts of violence by the victim may be relevant to the issue of self-defense. *People v Rockwell,* 188 Mich App 405, 408-410; 470 NW2d 673 (1991). We find the trial court's nearly complete ban to be without justification, because it denied defendant the opportunity to present important evidence relevant to her motive and intent. MRE 404(b). On retrial, defendant should be allowed to present evidence of the victim's prior acts of violence toward her. The trial court may exercise its discretion under MRE 403 in deciding how much of this evidence to admit.

The trial court did not err in admitting the testimony of the victim's mother that, eight months before the shooting, defendant had told her that she had a gun and would shoot the victim. The threat was used to establish that defendant had access to a gun. At the time the trial court was asked to rule, it was the only evidence regarding the issue of access, and the court's decision that the probative value of the evidence outweighed its prejudicial effect was not an abuse of discretion. Because defendant subsequently presented evidence at trial establishing that the weapon had been purchased about a month before the shooting, the lower court should reconsider the relevancy and the remoteness of the evidence upon retrial. *People v DeRushia,* 109 Mich App 419, 426-428; 311 NW2d 374 (1981).

III

Defendant next contends that the prosecutor made improper arguments concerning her prearrest statements. After review of the record, we find the argument to have been permissible comment about the evidence and reasonable inferences drawn from it. *People v Gaines,* 129 Mich App 439,

445; 341 NW2d 519 (1983). Compare *People v Storch,* 176 Mich App 414, 422-423; 440 NW2d 14 (1989).

IV

Defendant argues that the trial court abused its discretion when it refused to instruct the jury with regard to two lesser included misdemeanors as she requested. We agree that the jury should have been instructed on one of the misdemeanors.

Defendant was charged with assault with intent to commit murder. MCL 750.83; MSA 28.278. The jury was also instructed on assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and felonious assault, MCL 750.82; MSA 28.277. Defendant requested, but the trial court refused to give, instructions on reckless use of a firearm with resulting injury, MCL 752.861; MSA 28.436(21), and injuring by discharge of a firearm intentionally but without malice pointed at another, MCL 750.235; MSA 28.432.

In *People v Stephens,* 416 Mich 252, 261-265; 330 NW2d 675 (1982), the Supreme Court decided that, when properly requested, a trial court should instruct a jury on appropriate lesser included misdemeanors if a rational view of the evidence could support a verdict of guilty of the misdemeanor and not guilty of the felony, the defendant has proper notice or has made the request, and the instruction would not result in confusion or injustice.

Defendant's request for both misdemeanor instructions was properly made. We find each to be appropriate because both protect the same interests protected by the felonies and the evidence used to prove the felonies generally will prove the misdemeanors as well. Neither instruction would have created undue confusion or injustice.

However, while a jury viewing the evidence rationally could have found defendant not guilty of the felonies and guilty of reckless discharge, it could not have found defendant guilty of intentionally aiming without malice. Defendant testified that she threatened her husband with the shotgun in self-defense, then intentionally fired the gun without aiming it while her eyes were closed. If the jury accepted her story, it could have found her guilty of reckless discharge, but there was no evidence to support finding that she had intentionally aimed the gun without malice.

The error in not instructing the jury on reckless discharge cannot be held harmless because the jury rejected the primary charge and found defendant guilty of the least serious charge it was instructed on. *People v Beach,* 429 Mich 450, 465-467; 418 NW2d 861 (1988).

V

Finally, defendant argues that the trial court improperly instructed the jury with regard to flight and the duty to retreat while being attacked in her own home. We agree.

The trial court instructed the jury that defendant's flight could be evidence of consciousness of guilt and refused to instruct that flight could have resulted from reasons consistent with innocence. The defendant objected to the court's instruction, claiming that the jury should have been instructed that flight can also demonstrate fear. Flight can result from factors other than guilt, and it is for the jury to determine what caused defendant to flee. *People v Stull,* 127 Mich App 14, 18; 338 NW2d 403 (1983). The trial court should have instructed the jury on how to evaluate this evidence in accordance with CJI 4:4:01, now CJI2d

4.4. Instructing about the prosecutor's, but not the defendant's, theory of the evidence was erroneous. *People v Ora Jones,* 395 Mich 379, 393; 236 NW2d 461 (1975).

The trial court also refused to instruct the jury that defendant had no duty to retreat from an assault in her own home. See CJI2d 7.17, formerly CJI 7:9:03. Considering that the prosecutor had raised the issue of the reasonableness of defendant's decision to remain in her home while her husband attacked her repeatedly, the instruction should have been given. *People v Fisher,* 166 Mich App 699, 710-711; 420 NW2d 858 (1988).

Both instructional errors did not fairly present the issues tried in this case or protect the defendant's rights. Therefore, reversal is required. *People v Harris,* 190 Mich App 652, 664; 476 NW2d 767 (1991).

Reversed and remanded. We do not retain jurisdiction.

PEOPLE v JONES

Docket No. 133064. Submitted April 20, 1992, at Grand Rapids. Decided May 13, 1992, approved for publication July 10, 1992, at 9:05 A.M.

Tywayne D. Jones was convicted by a jury in the Muskegon Circuit Court, Michael E. Kobza, J., of receiving and concealing stolen property with a value exceeding $100 and larceny with safe damage. He then pleaded guilty of being a third-felony offender, and was sentenced. He appealed, alleging that he was denied a preliminary examination, that the court erred in denying his request to waive his right to a jury trial, and that there was insufficient evidence to submit to the jury the lesser offense of receiving and concealing stolen property.

The Court of Appeals *held:*

1. The defendant waived his right to a preliminary examination under MCL 767.42(1); MSA 28.982(1). In addition, the defendant, in earlier proceedings dismissed without prejudice at the prosecutor's request, had a preliminary examination with regard to the charged offenses.

2. The trial court did not abuse its discretion in denying the defendant's request to waive his right to a trial by jury or in failing to state why the request was denied. The defendant did not sign a written request as required by MCL 763.3(1); MSA 28.856(1), and the statute does not require the court or the prosecutor to state reasons for approving or denying the request.

3. There is no basis for appellate review of the defendant's contention that there was insufficient evidence to submit to the jury the lesser offense of receiving and concealing stolen property with a value exceeding $100, because the defendant raised the issue for the first time on appeal and there is no evidence indicating that failure to review the issue would deprive the defendant of a fair trial or result in manifest injustice.

Affirmed.

REFERENCES

Am Jur 2d, Criminal Law § 677.

See the Index to Annotations under Criminal Law; Jury and Jury Trial.

TRIAL — PRETRIAL PROCEDURE — WAIVER OF RIGHT TO JURY TRIAL — STATEMENT OF REASONS.

A trial court is not required to state its reasons for approving or denying a defendant's request to waive the right to a trial by jury and to be tried before the court without a jury; the court or the prosecutor may refuse the request for any reason or for no reason at all (MCL 763.3[1]; MSA 28.856[1]).

Frank J. Kelley, Attorney General, *Gay Secor Hardy,* Solicitor General, *Tony Tague,* Prosecuting Attorney, and *Kevin A. Lynch,* Senior Assistant Prosecuting Attorney, for the people.

Balgooyen Law Offices, P.C. (by *Gerald W. Gibbs*), for the defendant on appeal.

Before: HOOD, P.J., and SHEPHERD and K. N. SANBORN,* JJ.

PER CURIAM. Defendant appeals as of right his jury conviction of receiving and concealing stolen property with a value exceeding $100, MCL 750.535; MSA 28.803, and larceny with safe damage, MCL 750.531; MSA 28.799. Defendant was sentenced, after pleading guilty as a third-felony offender, to concurrent terms of imprisonment of five to ten years and five to twenty years, respectively. We affirm.

Defendant first argues that the trial court did not have jurisdiction to try the case because he had been denied a preliminary examination. In Michigan, the right to a preliminary examination is solely a creation of the Legislature and is not a procedure that is based on the constitution. *People v Johnson,* 427 Mich 98, 103; 398 NW2d 219 (1986) (opinion of BOYLE, J.); *People v Hall,* 435 Mich 599, 603; 460 NW2d 520 (1990). The right to a prelimi-

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

nary examination derives from MCL 767.42(1); MSA 28.982(1), which states in part:

> An information shall not be filed against any person for a felony unless such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination.

In this case, after defendant was charged with breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305, and larceny with safe damage, a preliminary examination was held and defendant was bound over on those charges to circuit court for a trial set for September 12, 1989. On the day of the trial, the trial court granted the prosecution's motion for an order of nolle prosequi and dismissed the case without prejudice because a key prosecution witness could not be located. On the same day, a new complaint and warrant were issued with regard to the same charges, and shortly thereafter a second preliminary examination was scheduled. Because defendant failed to appear for the scheduled preliminary examination, it was rescheduled for March 12, 1990. On that date, defendant moved to quash the information unless the prosecution could produce new evidence showing probable cause to bind him over to circuit court. Because it was undisputed that the evidence to be offered was the same as before, the district judge decided that there was no reason to hold another preliminary examination, and defendant was once again bound over for trial on the same charges.

We find that defendant waived his statutory right to a preliminary examination. Defendant does not dispute the fact that probable cause that

he committed the crimes with which he was charged was determined at the first preliminary examination. Upon entry of the order of nolle prosequi, the prosecution obtained a new complaint and warrant and proceeded to a preliminary examination with regard to the reissued case, pursuant to MCL 767.29; MSA 28.969. *People v Ostafin,* 112 Mich App 712, 715-716; 317 NW2d 235 (1982). At the scheduled preliminary examination, defendant did not dispute the fact that the evidence presented at the first preliminary examination was sufficient to determine probable cause to bind him over. Moreover, at no time before, during, or even after trial until this appeal, did defendant object to the failure to provide a preliminary examination. See *People v Alexander,* 72 Mich App 91, 98; 249 NW2d 307 (1976). Accordingly, we find that defendant waived his right to a preliminary examination under MCL 767.42(1); MSA 28.982(1). Furthermore, the statute gives the defendant the right to a preliminary examination for the felony with which he was charged. That is precisely what defendant had.

Defendant also argues that the trial court abused its discretion in denying him a bench trial. We disagree. MCL 763.3(1); MSA 28.856(1) provides in part:

> In all criminal cases arising in the courts of this state the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury. Except in cases of minor offenses, the waiver and election by a defendant shall be in writing signed by the defendant and filed in the case and made a part of the record.

While the record reveals that defendant indicated to the trial court that he wanted to waive his right to trial by jury before the trial began, he did not

sign a written request as required under the statute. Notwithstanding, defendant claims that the trial court's failure to state any substantive grounds for the refusal to conduct a bench trial constituted an abuse of discretion. The trial court refused defendant's request on the ground that sixty-five citizens had already been called for jury service and the county had to pay for them. If the rule were that the court had to give sound reasons, then we would agree with defendant that the reason given by the trial court would have been invalid. The jurors could have been sent home and the county would not have suffered a greater financial burden than it did when the case proceeded to a full jury trial. However, we note that the plain language of the statute does not require the court to state reasons for approving or denying the request. *People v Hawkins,* 181 Mich App 393, 396; 448 NW2d 858 (1989). Thus, the trial court or the prosecutor could refuse the request for no reason at all or for any reason.

Defendant finally contends that there was insufficient evidence to submit to the jury the lesser offense of receiving and concealing stolen property valued over $100, MCL 750.535; MSA 28.803, because the testimony of the property owner did not establish the open and fair market value of the stolen items. We find there is no basis for appellate review because defendant raised the issue for the first time on appeal, and there is no evidence indicating that failure to review would deprive him of a fair trial or would result in manifest injustice. *Napier v Jacobs,* 429 Mich 222, 233, 235; 414 NW2d 862 (1987). We note that the victim testified that a videocassette recorder valued at between $110 and $150 and a coin collection worth at least $500 were taken, along with several long guns, a small safe, and a stamp collection.

Affirmed.

DAVIS v LINK, INC

Docket No. 129016. Submitted March 11, 1992, at Grand Rapids. Decided April 22, 1992; approved for publication July 10, 1992, at 9:10 A.M. Leave to appeal sought.

Lener Davis brought an action in the Berrien Circuit Court against Link, Inc., and Capitol Engineering Company, seeking damages for an injury she sustained while operating a press at Whirlpool Corporation that containened a die manufactured by Link and designed by Capitol. At the time of the injury, the press was being operated with no safety guards. The plaintiff alleged defective design and manufacture of the die. The court, Casper O. Grathwohl, J., directed a verdict in favor of the defendants. The plaintiff appealed.

The Court of Appeals *held:*

1. The trial court did not err in directing a verdict for the defendants. The plaintiff failed to present evidence of the defendants' knowledge of unsafe use of the die or evidence that unsafe use was foreseeable.

2. Because the regulations of the Occupational Safety and Health Act, MCL 408.1001 *et seq.*; MSA 17.50(1) *et seq.*, apply to employers and employees only, the defendants were not subject to the MIOSHA, and its standards were not relevant to their alleged breach of duty.

3. The trial court did not abuse its discretion in refusing to qualify the plaintiff's proffered witness as an expert or to admit that witness' testimony. Although the witness was educated as a mechanical engineer, he did not have the necessary experience and training to qualify as an expert in metal forming systems or as a tool builder.

Affirmed.

PRODUCTS LIABILITY — DIES — DESIGNERS AND MANUFACTURERS.

A designer or manufacturer of a die may not be held liable to an injured press operator for defective design or manufacture where the designer or manufacturer did not have knowledge of unsafe use or the use was not foreseeable.

REFERENCES

Am Jur 2d, Products Liability §§ 375-380.

See the Index to Annotations under Products Liability.

Gary C. Newton, for Lener Davis.

Lilly, Domeny & Byrne (by *Paul Z. Domeny* and *James R. Shinar*), for Link, Inc.

Cholette, Perkins & Buchanan (by *Kenneth L. Block*), for Capitol Engineering Company.

Before: FITZGERALD, P.J., and HOOD and CAVANAGH, JJ.

PER CURIAM. Plaintiff Lener Davis appeals as of right from the trial court's order granting defendants' motions for a directed verdict in this defective design and manufacture case. We affirm.

Plaintiff was a punch press operator at Whirlpool Corporation. On January 19, 1987, plaintiff caught her hand in the pinch point between the gib of a press frame and the ram of the press as the ram was on its up stroke and suffered serious injuries to her fingers. Plaintiff filed suit against defendant Link, Inc., the manufacturer of the die used in the press, and defendant Capitol Engineering Company, the designer of the die, alleging failure to design and manufacture sufficient guarding of pinch points.

I

Plaintiff first argues that the trial court utilized an improper standard when ruling on defendants' motions for a directed verdict. We disagree. Whirlpool contracted with defendants to design and manufacture a component part according to Whirlpool's specifications. The component part, a die, was installed by Whirlpool into a press used to manufacture lids for washing machines. There is no allegation that the die itself was defectively designed or manufactured. See *Antcliff v State*

Employees Credit Union, 95 Mich App 224, 232-233; 290 NW2d 420 (1980).

The supplier of a die set to a component manufacturer does not have a duty to place guards on the die set or warn the component manufacturer of hazards attendant in its use. *Fredericks v General Motors Corp,* 411 Mich 712, 720; 311 NW2d 725 (1981). At the time of plaintiff's injury, 1967 PA 282 required that each employer establish and maintain conditions of work that were reasonably safe and healthful for employees. *Fredericks, supra* at 720. Pursuant to MCL 408.1016; MSA 17.50(16) and MCL 408.1021; MSA 17.50(21), the Michigan Department of Labor has authority to promulgate standards of safety for the workplace. 1979 AC, R 408.12411 provides in part:

> The employer shall insure, by adequate supervision, that correct operating procedures are being followed and that all required safeguards are installed, are functional, and are being used.

In light of this statutory duty imposed on Whirlpool, the relevant inquiry is whether there was evidence presented of the manufacturer's knowledge of unsafe use or that unsafe use is foreseeable. *Shipman v Fontaine Truck Equipment Co,* 184 Mich App 706, 712-713; 459 NW2d 30 (1990). The trial court utilized such a standard in ruling on defendants' motions for a directed verdict. Plaintiff failed to present evidence of the manufacturer's knowledge of unsafe use, and no evidence was presented that unsafe use was foreseeable. To the contrary, the evidence revealed that the die had been successfully used in the press for four or five years without incident before plaintiff's injury. Donald Reitz, a Whirlpool employee whose job it was to set the die in the press, testified that there

was no obvious pinch point in the press and that he never recognized a hazard before plaintiff's injury. Viewing the evidence of foreseeability in a light most favorable to plaintiff, the evidence was insufficient to establish a prima facie case, and the motion for a directed verdict was properly granted. *Reisman v Regents of Wayne State University,* 188 Mich App 526, 538; 470 NW2d 678 (1991).

II

Next, plaintiff argues that defendants "assumed a duty" to comply with the regulations of the Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq.*; MSA 17.50(1) *et seq.,* when they considered MIOSHA regulations in designing dies. Plaintiff further argues that admission of the standards was necessary to establish defendants' breach of duty. We disagree. MIOSHA regulations are applicable to employers and employees only. *Zalut v Andersen & Associates, Inc,* 186 Mich App 229, 235; 463 NW2d 236 (1990).

III

Lastly, plaintiff argues that the trial court improperly excluded the testimony of plaintiff's expert witness, Adolf Wolf. There are three prerequisites to the admission of expert testimony: (1) the witness must be an expert, (2) there must be facts in evidence that require or are subject to examination and analysis by a competent expert, and (3) there must be knowledge in a particular area that belongs more to an expert than the common man. *King v Taylor Chrysler-Plymouth, Inc,* 184 Mich App 204, 215; 457 NW2d 42 (1990); *People v Beckley,* 161 Mich App 120, 125; 409 NW2d 759 (1987), aff'd 434 Mich 691; 456 NW2d 391 (1990). The

party that proffers the expert bears the burden of persuading the trial court that the expert has specialized knowledge that will aid the factfinder in understanding the evidence or determining a fact in issue. *People v Smith,* 425 Mich 98, 112; 387 NW2d 814 (1986). A witness may be qualified as an expert by knowledge, skill, experience, training, or education. MRE 702; *Mulholland v DEC Int'l Corp,* 432 Mich 395, 403; 443 NW2d 340 (1989).

The qualification of a witness as an expert and the admissibility of the expert's testimony are in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *Mulholland, supra* at 402.

In this case, the issue involved the design and manufacture of a die. Plaintiff's proffered expert, Adolf Wolf, is a mechanical engineer. Though Wolf did take a class in machine design during his undergraduate studies in the 1960s, he has never designed a die. Wolf has never worked for a tool and die designer, has never attended a tool and die design school, has never served as an apprentice for a tool builder or tool designer, and has never worked as a journeyman, tool builder, or tool designer. In fact, Wolf stated:

> I'm not a tool and die maker, no, sir. In fact, in this case I never even looked at the die itself because from the parts that were produced it appears there was nothing wrong with the die that was manufactured to perform the part or manufacture the part. I never even looked at that.

A review of the extensive voir dire of Wolf's qualifications reveals that the trial court did not abuse its discretion in sustaining defendants' objection to Wolf's qualifications and in excluding his

proffered expert testimony. Although Wolf was educated as a mechanical engineer, he does not have the necessary experience and training to qualify him as an expert in metal forming systems or as a tool builder.

Affirmed.

PEOPLE v LAWSON

Docket No. 131930. Submitted May 5, 1992, at Lansing. Decided July 20, 1992, at 9:00 A.M.

Leo Lawson pleaded guilty in the Recorder's Court for the City of Detroit, John P. O'Brien, J., of possession with intent to deliver less than fifty grams of cocaine. He was sentenced to four to twenty years' imprisonment, a term falling at the low end of the sentencing guidelines. He appealed, alleging that the court failed to articulate properly the reasons for imposing the sentence.

The Court of Appeals *held:*

1. A trial court's express reliance on the sentencing guidelines in imposing a sentence within the range recommended by the guidelines satisfies the articulation requirement of *People v Coles,* 417 Mich 523 (1983).

2. The rationale of *People v Triplett,* 432 Mich 568 (1989), that articulation is required so that the factors that the sentencing court utilized to impose the sentence would be known by the defendant, may be satisfied where the articulation is provided by the context of remarks, preceding the imposition of sentence. In this case, remarks by both the prosecutor and defense counsel reflect an unambiguous understanding that the guidelines would be the basis of the sentence.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — ARTICULATION OF REASONS.

A trial court's express reliance on the sentencing guidelines in imposing a sentence within the range recommended by the guidelines satisfies the requirement that the court articulate its reasons for imposing the sentence; the requirement may be satisfied where the articulation is provided by the context of remarks preceding the imposition of sentence, e.g., where remarks by both the prosecutor and defense counsel reflect an unambiguous understanding that the guidelines would be the basis of the sentence.

REFERENCES

Am Jur 2d, Criminal Law §§ 535-539.

See the Index to Annotations under Criminal Law.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, and *Timothy A. Baughman,* Chief of Research, Training and Appeals, and *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people.

Kim D. Johnson, for the defendant on appeal.

Before: TAYLOR, P.J., and MICHAEL J. KELLY and SHEPHERD, JJ.

TAYLOR, P.J. Defendant pleaded guilty of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and was sentenced to four to twenty years' imprisonment, to be served consecutively to a sentence imposed in another case. He now appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(A).

Defendant does not assert that the sentence itself constitutes an abuse of discretion, but only that the trial court gave little or no explanation for the sentence imposed, and therefore failed to satisfy the articulation requirement. In this regard, defendant contends that an expanded articulation requirement is mandated by *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). Despite defendant's argument to the contrary, a trial court's express reliance on the sentencing guidelines in imposing sentence continues to satisfy the articulation requirement of *People v Coles,* 417 Mich 523, 549; 339 NW2d 440 (1983). *People v Broden,* 428 Mich 343, 354-355; 408 NW2d 789 (1987); *In re Dana Jenkins,* 438 Mich 364, 376; 475 NW2d 279 (1991); *People v Dukes,* 189 Mich App 262, 266; 471 NW2d 651 (1991).

Defendant is correct in his assertion that the trial court did not explicitly rely on the sentencing

guidelines, or any other factors, in imposing sentence. It would appear, upon cursory review, that the lack of articulation by the court would require a remand for articulation under *People v Triplett,* 432 Mich 568, 573; 442 NW2d 622 (1989).

However, we find that remand is not required. The sentencing record reveals that the imposition of sentence was almost immediately preceded by the prosecutor's argument that defendant should be sentenced at the high end of the guidelines and defense counsel's argument that the sentence should fall either at the low end of the guidelines or below the guidelines. The trial court then said, "The sentence will be a sentence of four to twenty years," a term falling at the extreme low end of the guidelines. In the context of the preceding arguments of counsel, it is inescapably clear that the court was sentencing defendant under the guidelines even though the judge himself did not actually speak those words.

In *Triplett,* our Supreme Court said articulation is required so that the factors the sentencing court utilized to impose sentence would be known by the defendant. However, the mere expression by the court that the sentence was imposed pursuant to the guidelines suffices to satisfy that requirement. *In re Jenkins, supra; Dukes, supra.*

We hold today that the *Triplett* rationale may be satisfied where the articulation is provided by the context of the preceding remarks, e.g., where the remarks of both the prosecutor and defense counsel reflect an unambiguous understanding that the guidelines would be the basis of the sentence.

Further, this approach will maximize judicial resources. *People v Beneson,* 192 Mich App 469, 471; 481 NW2d 799 (1992).

Affirmed.

VERMILYA v DUNHAM

Docket No. 128987. Submitted March 3, 1992, at Grand Rapids. Decided July 20, 1992, at 9:05 A.M. Leave to appeal sought.

Harlan Vermilya, as conservator for his son, Matthew Vermilya, a minor, brought an action in the Bay Circuit Court against Dale Dunham, principal of Kolb Middle School, alleging that the injuries that Matthew suffered when a soccer goal was pushed over on him were a proximate result of the defendant's failure to supervise the maintenance of the goal and control the actions of students. The trial court, Eugene C. Penzien, J., granted the defendant's motion for summary disposition holding, on the pleaded facts, that no reasonable jury would find that the defendant was guilty of gross negligence within the meaning of the governmental immunity statute. The court further awarded the defendant costs and attorney fees on the basis that the plaintiff's action was frivolous. The plaintiff appealed.

The Court of Appeals *held:*

1. The court correctly held that no reasonable jury would find on the pleaded facts that the defendant's conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury would result. Because there was no question that the defendant was acting within the scope of his authority while engaged in the exercise of a governmental function, the trial court correctly granted summary disposition on the basis of statutory governmental immunity.

2. The court properly found that at the time he filed this action the plaintiff was aware that his allegations against the defendant lacked merit and that, accordingly, the action was frivolous. However, it was error to award as part of the sanctions in this action costs and attorney fees attributable to a separate action against the school.

Affirmed, but remanded for redetermination of costs.

REFERENCES

Am Jur 2d, Actions § 46; Damages § 616; Municipal, County, School, and State Tort Liability §§ 42-45.

See the Index to Annotations under Governmental Immunity or Privilege; Frivolous Action.

1. GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — GROSS NEGLIGENCE — SUMMARY DISPOSITION.

Summary disposition is properly granted to a governmental employee on the basis of statutory governmental immunity where it is uncontroverted that the employee was acting within the scope of authority while in the exercise or discharge of a governmental function and the court finds that, on the pleaded facts, reasonable minds could not conclude that the defendant's conduct had been so reckless as to demonstrate a substantial lack of concern for whether an injury would result (MCL 691.1407; MSA 3.996[107]).

2. ACTIONS — FRIVOLOUS ACTIONS — SANCTIONS.

Sanctions for the bringing of a frivolous action are warranted where the plaintiff, on the basis of a ruling in another action, has reason to believe that an action against the defendant would lack merit (MCL 600.2591; MSA 27A.2591).

Sumpter & Perry, P.C. (by *Thomas E. McDonald*), for the plaintiff.

Braun, Kendrick, Finkbeiner, Schafer & Murphy (by *Frank M. Quinn* and *J. Edmund Frost*), for the defendant.

Before: DOCTOROFF, C.J., and MICHAEL J. KELLY and R. B. BURNS,* JJ.

DOCTOROFF, C.J. Plaintiff appeals as of right the trial court's order granting summary disposition and awarding costs to defendant. Plaintiff argues that the trial court erred in ruling that defendant's conduct did not constitute gross negligence, that the award of costs was improper because the filing of the complaint was justified, and that the amount of costs awarded was excessive. We affirm the grant of summary disposition, reverse the award of costs, and remand for redetermination of costs.

On October 4, 1988, plaintiff's eleven-year-old son was injured when a steel soccer goal was

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

pushed over on top of him at school. In November 1988, plaintiff filed an action against the school.[1] In May 1989, plaintiff moved to amend the complaint to add the students who tipped the goal over and the school's principal, Dale Dunham, as defendants. The trial court allowed the students to be added as defendants, but denied the motion to add Dunham.

Plaintiff filed this action against defendant Dunham on January 26, 1990. On February 26, 1990, defendant moved under MCR 2.116(C)(7) and (10) for summary disposition based on individual governmental immunity under MCL 691.1407(2); MSA 3.996(107)(2). The trial court granted defendant's motion, ruling that no reasonable juror could conclude that defendant "was so reckless as to demonstrate a substantial lack of concern."

Plaintiff first argues that the trial court erred in ruling that defendant's conduct did not constitute gross negligence.

A motion for summary disposition may be brought under MCR 2.116(C)(7) on the ground that a claim is barred by governmental immunity. The motion may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(5); *Paterek v 6600 Limited,* 186 Mich App 445, 447; 465 NW2d 342 (1990). In deciding a motion for summary disposition under MCR 2.116(C)(7), the court reviews the plaintiff's complaint to see whether facts have been pleaded justifying a finding that recovery in a tort cause of action is not barred by governmental immunity. *Pawlak v Redox Corp,* 182 Mich App 758, 763; 453 NW2d 304 (1990).

MCL 691.1407; MSA 3.996(107) provides in relevant part:

[1] The school's motion for summary disposition was granted by the trial court. Plaintiff has appealed the trial court's ruling. That appeal is *Vermilya v Kolb Middle School,* Docket No. 134120.

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each . . . employee of a governmental agency . . . shall be immune from tort liability for injuries to persons or damages to property caused by the . . . employee . . . while in the course of employment or service . . . if all of the following are met:
>
> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

The first two elements are not at issue here. Plaintiff, relying on *Tallman v Markstrom,* 180 Mich App 141; 446 NW2d 618 (1989), argues that whether defendant's conduct amounted to gross negligence as defined by the statute is a question for the jury. In *Tallman,* this Court reversed a grant of summary disposition under MCR 2.116(C)(7) to the defendant, who taught a woodworking class during which Nicholas Tallman suffered injury while operating a table saw. The plaintiff, next friend of Nicholas, claimed the defendant was negligent in permitting Nicholas' use of a table saw unequipped with guards or safety devices. This Court held:

> We believe plaintiff's second amended complaint alleged sufficient conduct to support a claim of gross negligence in avoidance of governmental immunity. Generally, once a standard of conduct is established, the reasonableness of an actor's conduct under the standard is a question for the

> factfinder, not the court. *Forche v Gieseler,* 174 Mich App 588; 436 NW2d 437 (1989); *Clink v Steiner,* 162 Mich App 551; 413 NW2d 45 (1987). The trial court therefore erred in finding plaintiff, as a matter of law, failed to plead sufficient facts in avoidance of governmental immunity. [180 Mich App 144.]

We reject the suggestion that *Tallman* precludes a grant of summary disposition in every case in which a plaintiff alleges that negligent conduct by a defendant government employee resulted in injury. The more appropriate view is that summary disposition is precluded in cases in which reasonable jurors could honestly have reached different conclusions with regard to whether the defendant's conduct amounted to gross negligence. However, if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted. *Cf., Vsetula v Whitmyer,* 187 Mich App 675, 682; 468 NW2d 53 (1991) (where reasonable minds could not differ, the trial court may decide the issue of proximate cause as a matter of law).

After reviewing the record, we agree with the trial court that the undisputed facts in this case preclude a finding that defendant's conduct amounted to gross negligence. Defendant became aware that the goals could be tipped over approximately one to two weeks before plaintiff's son was injured. He then asked his maintenance supervisor to determine how the goals could be anchored, checked with the maintenance supervisor on his progress, made announcements in school instructing the children to stay off the goals, and disciplined students for climbing the goals. The trial court properly granted defendant's motion for summary disposition.

Next, plaintiff claims that the award of costs

was improper. Plaintiff argues that the complaint was not frivolous.

A trial court's finding with regard to whether a claim or defense was frivolous will not be disturbed on appeal unless the finding is clearly erroneous. *State Farm Fire & Casualty Co v Johnson,* 187 Mich App 264, 268; 466 NW2d 287 (1991).

In awarding costs to defendant, the trial court stated that before this action had been filed it had denied plaintiff's motion to amend the complaint in the action against Kolb Middle School to add Dunham as a defendant because such an amendment would be futile. The trial court then stated that sanctions were warranted because, despite the trial court's earlier ruling, plaintiff filed this separate action against defendant. Upon review of the record, we conclude that the trial court was correct in finding that plaintiff knew of the lack of merit in his allegations against defendant when plaintiff's motion to amend the complaint in the action against Kolb Middle School was denied. Filing another action with essentially the same allegations was therefore frivolous.

Plaintiff also argues that the amount awarded was excessive.

MCL 600.2591; MSA 27A.2591, provides in relevant part:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs

> allowed by law or by court rule, including court costs and reasonable attorney fees.

The trial court awarded defendant $4,454.68 in costs and fees. The bill of costs submitted by defendant includes approximately twenty-three hours attributed to researching and drafting the motion for summary disposition. The motion and brief consist of only ten substantive pages. Considering the issue presented and defendant's argument, and noting the similarity of the introductory paragraphs of defendant's argument in this case and in the brief in support of the motion for summary disposition in the Kolb Middle School case, the amount of time expended appears excessive. Also included in the bill of costs were charges for transcripts of depositions that were taken in the action against Kolb Middle School. Defense counsel stated that he charged fifty percent of the costs of those transcripts to this case and the other fifty percent to the Kolb Middle School case. Half of the transcripts listed in defendant's bill of costs are not cited in the brief in support of defendant's motion for summary disposition. Furthermore, the statement of facts in the brief in support of defendant's motion for summary disposition in this case and in the brief in support of defendant's motion for summary disposition in the Kolb Middle School case are substantially similar. In fact, many paragraphs are identical. Therefore, although some overlap of the charges could be expected, we conclude that the trial court erred in charging plaintiff with the costs and fees incurred by defense counsel in the Kolb Middle School case, inasmuch as those costs and fees are identified in defendant's bill of costs. Therefore, we reverse the award of costs and remand for redetermination of costs and fees in accordance with MCL 600.2591; MSA 27A.2591.

Defendant's request for actual and punitive damages pursuant to MCR 7.216(C) is denied.

Affirmed in part, reversed in part, and remanded for redetermination of costs and fees. We do not retain jurisdiction.

UNITED SERVICES AUTOMOBILE ASSOCIATION v NOTHELFER

Docket No. 132817. Submitted June 10, 1992, at Lansing. Decided July 20, 1992, at 9:10 A.M.

United Services Automobile Association, as subrogee of Robert and Harriet Komer, brought an action in the Saginaw Circuit Court against Shane Nothelfer and his parents to recover payments made to the Komers pursuant to their homeowner's insurance policy for damages caused to their insured property during an unauthorized party held by Shane while he was house-sitting for the Komers. The Komers had filed a separate suit against Shane for damages not covered by the insurance policy. That action, to which United Services was not a party, was settled and dismissed with prejudice. The court, Joseph R. McDonald, J., granted summary disposition for all the defendants. The plaintiff appealed with regard to the dismissal of the complaint against Shane.

The Court of Appeals *held:*

The trial court erred in ruling that the doctrine of res judicata barred the plaintiff from bringing an action against Shane and in dismissing the complaint against him. Shane waived the defense of res judicata when he did not object to the plaintiff's failure to join in the Komers' action against him.

Reversed and remanded.

ACTIONS — COURT RULES — SPLITTING CAUSE OF ACTION — WAIVER OF RIGHT TO RAISE ISSUE.

The common-law rule against splitting a cause of action has been replaced by the court rule regarding the necessary joinder of parties; because joinder is mandatory under the court rule and benefits the defendant, the burden of objecting to misjoinder is on the defendant; the right to claim that separate suits violate the joinder rule is waived where the defendant fails to make such a timely assertion (MCR 2.205[A]).

Denenberg, Tuffley, Bocan, Jamieson, Black,

REFERENCES

Am Jur 2d, Actions § 132.

Waiver of, by failure to promptly raise, objection to splitting cause of action. 40 ALR3d 108.

Hopkins & Ewald, P.C. (by *Jeffrey R. Learned* and *Patrick K. Thornton*), for the plaintiff.

McGraw, Borchard & Martin, P.C. (by *Patrick J. McGraw* and *Joseph S. Harrison*), for the defendant.

Before: GRIBBS, P.J., and HOOD and C. W. SIMON, JR.,* JJ.

GRIBBS, P.J. Plaintiff United Services Automobile Association appeals as of right an order dismissing on grounds of res judicata its subrogation claim in this insurance case. MCR 2.116(C)(7). We reverse and remand for further proceedings.

In December 1987, Robert and Harriet Komer planned a vacation in Colorado and hired sixteen-year-old Shane Nothelfer to watch their home while they were gone. Nothelfer had an unauthorized party at the Komers' home on December 31, 1987, during which the home was vandalized and miscellaneous personal property of the Komers' was stolen. In satisfaction of its obligation under the Komers' homeowner's insurance policy, plaintiff, United Services, paid the Komers $16,475.09 for damage caused during the party. However, the Komers claimed to have suffered additional property damage not covered by their insurance policy and filed suit against defendant Shane Nothelfer. United Services was not a party to that lawsuit. On October 9, 1989, the Komers settled with Shane Nothelfer for $1,200, and the lawsuit was dismissed with prejudice.

On October 26, 1989, plaintiff filed suit against Shane Nothelfer and his parents to recover its insurance payments to the Komers. The parents moved for summary disposition, which was

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

granted. Subsequently, defendant Shane Nothelfer moved for summary disposition, alleging that plaintiff's claim was barred by the doctrine of res judicata because of the Komers' previous lawsuit against him. On August 13, 1990, the trial court issued an order granting Shane's motion for summary disposition and dismissing plaintiff's complaint. Plaintiff does not challenge the dismissal with regard to Shane's parents. Therefore, the only defendant before this Court is Shane Nothelfer. Plaintiff now appeals.

Plaintiff contends that defendant waived the defense of res judicata when he failed to object to plaintiff's nonjoinder in the Komer's action against him, and that the trial court therefore erred in dismissing its complaint and in ruling that it was barred by the doctrine of res judicata from filing a suit against defendant. We agree.

MCR 2.205 has replaced the common-law rule against splitting a cause of action. *Martin v Johnson,* 87 Mich App 342, 346; 274 NW2d 785 (1978). MCR 2.205(A) provides the following with regard to the necessary joinder of parties:

> Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

Because joinder is mandatory under MCR 2.205(A), rather than permissive, joinder is required for the benefit of the defendant and thereby places on the defendant the burden of objecting to misjoinder. *Martin, supra* at 346. Thus, the defendant must make a timely assertion of the position that separate suits violate the rule prohibiting the

splitting of actions, modernly known as the joinder rule. *Chunko v LeMaitre,* 10 Mich App 490, 496; 159 NW2d 876 (1968). If the defendant fails to make such a timely assertion, he waives his right to make such a claim; in effect, the defendant "acquiesces in splitting causes of action by not raising timely objection." *Id.*

In this case, the record clearly indicates that defendant did not object to nonjoinder or move to have plaintiff joined in the lawsuit filed by the Komers to recover for losses not covered by the insurance policy. Therefore, plaintiff's subrogation claim against defendant was not barred by the doctrine of res judicata when the Komers settled with defendant and stipulated to dismissal of their claim with prejudice.

We reverse and remand for further proceedings.

PEOPLE v PASSENO

PEOPLE v MICHAELS

Docket No. 128293, 128639. Submitted June 9, 1992, at Lansing. Decided July 20, 1992, at 9:15 A.M.

Joseph A. Passeno pleaded guilty in the Oakland Circuit Court, Fred M. Mester, J., of two counts of armed robbery, two counts of kidnapping, ten counts of possession of a firearm during the commission of a felony, and one count of breaking and entering. Following a jury trial, he was convicted of one count of first-degree murder and two counts of felony murder for the murder of Glen Tarr and two counts of felony murder and one count of second-degree murder for the murder of Wanda Tarr. He appealed.

Bruce C. Michaels was convicted by a jury in the Oakland Circuit Court, Fred M. Mester, J., of two counts of first-degree murder, four counts of felony murder, two counts of armed robbery, and eight counts of felony-firearm with regard to the murder of Glen and Wanda Tarr. He appealed. The appeals were consolidated.

The Court of Appeals *held:*

1. Multiple convictions and sentences for counts of first-degree murder and felony murder arising from the death of a single individual violate state and federal constitutional guarantees against double jeopardy. The proper remedy is to affirm Passeno's and Michaels' convictions of first-degree murder, vacate Passeno's convictions of felony murder for the killing of Glen Tarr, vacate Michaels' convictions of felony murder, and affirm the mandatory life sentences. Multiple convictions and sentences for counts of felony murder and second-degree murder arising from the death of a single individual likewise violate state and federal guarantees against double jeopardy. The proper remedy is affirmance of one of Passeno's felony-murder convictions and vacation of his other felony-murder

REFERENCES

Am Jur 2d, Criminal Law §§ 243 *et seq.*, 378, 385-389, 552, 603, 721; Evidence §§ 539, 540.

See the Index to Annotations under Criminal Law; Double Jeopardy; Evidence; Homicide; Venue.

conviction and his second-degree murder conviction for the killing of Wanda Tarr.

2. Conviction of felony murder and an underlying felony also violates the right against double jeopardy under the Michigan Constitution. The proper remedy is vacation of the conviction and sentence for the underlying felony. One of Passeno's convictions of an underlying felony must be vacated; which one depends upon which felony-murder conviction is affirmed on remand. The mandatory life sentence for the felony-murder conviction that is affirmed also must be affirmed.

3. The defendants may be convicted of only as many counts of felony-firearm as there are underlying felony convictions. Four of Michaels' and five of Passeno's convictions of felony-firearm are affirmed. The remaining felony-firearm convictions are vacated.

4. The trial court did not abuse its discretion in denying Passeno's motions for a change of venue and a directed verdict. The jury that was impaneled was competent to hear the evidence, and Passeno failed to prove that he was entitled to a change of venue. With regard to the motion for a directed verdict, there was sufficient evidence to enable the jury to determine that the killings were accomplished with premeditation and deliberation, thus precluding the grant of a directed verdict.

5. The trial court in Passeno's trial erred in admitting without a limiting instruction evidence of Michaels' incriminating statements to another witness. The error was harmless, however, because the evidence supplied through the incriminating statements was merely cumulative and the other evidence of Passeno's guilt was overwhelming.

6. Passeno's argument regarding the sentences imposed for his convictions of armed robbery and kidnapping need not be addressed because, given the affirmance of his convictions of first-degree murder for the killing of Glen Tarr and one count of felony murder for the killing of Wanda Tarr and the life sentences imposed for those convictions, no relief would be afforded even if it were concluded that the sentences were disproportionate.

7. The trial court's findings of fact supporting its determination with regard to each of the factors to be considered in deciding whether to sentence Michaels, a juvenile, as an adult were not clearly erroneous. The court did not abuse its discretion in sentencing Michaels as an adult.

Affirmed in part, reversed in part, and remanded.

1. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — MULTIPLE CONVICTIONS AND SENTENCES FOR SINGLE KILLING.

   Multiple convictions and sentences for counts of first-degree murder and felony murder or felony murder and second-degree murder arising from the death of a single individual violate the constitutional guarantees against double jeopardy (US Const, Am V; Const 1963, art 1, § 15).

2. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — FELONY MURDER — UNDERLYING FELONIES.

   Conviction of felony murder and an underlying felony violates the state constitution's guarantee against double jeopardy (Const 1963, art 1, § 15).

3. VENUE — CRIMINAL LAW — MOTIONS AND ORDERS — PRETRIAL PUBLICITY.

   The existence of pretrial publicity, standing alone, does not necessitate a change of venue; to be entitled to a change of venue, the defendant must show either a pattern of strong antipathy in the community and publicity so extensive and inflammatory that jurors could not remain impartial when exposed to it or that the jury was actually prejudiced or that the atmosphere surrounding the trial would create a probability of prejudice.

4. CRIMINAL LAW — EVIDENCE — NONTESTIFYING CODEFENDANT'S CONFESSION — HARMLESS ERROR.

   Evidence of incriminating statements by a nontestifying codefendant that interlock with a defendant's confession is admissible only when an appropriate limiting instruction is given; failure to give the limiting instruction is harmless where the evidence supplied through the codefendant's confession is merely cumulative and the other evidence of the defendant's guilt is overwhelming.

5. CRIMINAL LAW — JUVENILES — SENTENCES.

   A bifurcated standard is applied in reviewing a trial court's decision to sentence a minor as a juvenile or an adult: first, the court's findings of fact supporting its determination regarding each of the statutory factors to be considered is reviewed for clear error; second, the ultimate decision whether to sentence the minor as a juvenile or as an adult is reviewed for an abuse of discretion (MCL 769.1[3]; MSA 28.1072[3]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Richard Thompson,* Pros-

ecuting Attorney, *Michael J. Modelski,* Chief, Appellate Division, and *Thomas S. Richards,* Assistant Prosecuting Attorney, for the people.

Michael J. McCarthy, P.C. (by *Michael J. McCarthy*), for Joseph Passeno.

Faintuck, Shwedel & Wolfram (by *William G. Wolfram*), for Bruce Michaels.

Before: GRIBBS, P.J., and HOOD and C. W. SIMON, JR.,* JJ.

HOOD, J. Defendants Joseph Passeno and Bruce Michaels appeal as of right from their convictions of multiple offenses arising from the slayings of Glen and Wanda Tarr on the evening of November 9, 1989. The appeals were consolidated by the Court of Appeals. We affirm in part, reverse in part, and remand.

Passeno was originally charged with two counts of first-degree murder, MCL 750.316; MSA 28.548, two counts of felony murder, MCL 750.316; MSA 28.548, two counts of armed robbery, MCL 750.529; MSA 28.797, two counts of kidnapping, MCL 750.349; MSA 28.581, ten counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and one count of breaking and entering, MCL 750.110; MSA 28.305. Immediately before trial, Passeno pleaded guilty with regard to each of the nonmurder offenses. Following trial, he was convicted of one count of second-degree murder and two counts of felony murder for the killing of Wanda Tarr and one count of first-degree murder and two counts of felony murder for the killing of Glen Tarr.

Michaels was originally charged with two counts

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

of first-degree murder, four counts of felony murder, two counts of armed robbery, and eight counts of felony-firearm. Following trial, Michaels was convicted of all counts, as charged.

We will first consider defendants' assertion that the constitutional prohibitions against double jeopardy have been violated by their convictions of more than one count of murder for each of the slayings. We conclude that appellate review of this issue is appropriate, despite defendants' failure to raise it before the trial court, because a significant constitutional question is presented. *People v Newcomb,* 190 Mich App 424, 431; 476 NW2d 749 (1991).

Both the federal and state constitutions prohibit placing a person in jeopardy of criminal conviction or incarceration twice for the same offense. US Const, Am V; Const 1963, art 1, § 15. Because Michigan's Double Jeopardy Clause is "substantially identical" to that found within the Fifth Amendment of the United States Constitution, *People v Bush,* 187 Mich App at 316, 322; 466 NW2d 736 (1991), we will consider whether defendants' convictions violate their provisions simultaneously.

Multiple convictions and sentences for counts of both first-degree murder and felony murder arising from the death of a single individual violate the constitutional guarantees against double jeopardy. *People v Zeitler,* 183 Mich App 68, 71; 454 NW2d 192 (1990); *People v Goree,* 132 Mich App 693, 712; 349 NW2d 220 (1984). Where a defendant is convicted of both first-degree and felony murder for the slaying of a single individual, the majority of reported cases hold that the conviction of first-degree murder must be affirmed, and the conviction of felony murder vacated. See, e.g., *People v Carl Johnson,* 99 Mich App 547, 559-560; 297

NW2d 713 (1980). We believe that this is an appropriate remedy, given that first-degree murder requires proof of an element not required for felony murder. Accordingly, we affirm Passeno's conviction of first-degree murder and vacate his convictions of felony murder for the killing of Glen Tarr and affirm Michaels' convictions of first-degree murder and vacate his convictions of felony murder. The mandatory life sentences for those affirmed convictions are affirmed.

Similarly, because felony murder requires proof of an element not required for a conviction of second-degree murder, we conclude that convictions of both felony murder and second-degree murder for the killing of the same individual should result in the affirmance of the felony-murder conviction and vacation of the second-degree murder conviction. See *People v Hall,* 83 Mich App 632, 638; 269 NW2d 476 (1978) (affirming a conviction of first-degree murder and vacating a conviction of second-degree murder arising out of the killing of the same individual). Accordingly, we affirm one of Passeno's convictions of felony murder and vacate the other conviction of felony murder and his conviction of second-degree murder for the killing of Wanda Tarr.

Our disposition of the issue regarding defendants' convictions of more than one count of murder for the killing of a single individual requires that we also consider their remaining convictions. Conviction of both felony murder and the underlying, or predicate, felony also violates a defendant's right against double jeopardy under the state constitution. *People v Wilder,* 411 Mich 328, 352; 308 NW2d 112 (1981); *Bush, supra* at 325-326; *People v Lumsden,* 168 Mich App 286, 300-301; 423 NW2d 645 (1988). See also *People v Robideau,* 419 Mich 458, 489, n 8; 355 NW2d 592 (1984). When a

defendant erroneously is convicted of both felony murder and the underlying, or predicate, felony, the remedy is a vacation of the conviction and sentence for the underlying, or predicate, felony. *Lumsden, supra* at 301. Accordingly, we conclude that one of Passeno's convictions of an underlying, or predicate, felony must be vacated. Of course, which conviction must be vacated is dependent upon which felony-murder conviction is affirmed. We remand this matter to the trial court for a determination regarding which conviction should be affirmed. The mandatory life sentence for that conviction will also be affirmed.

Finally, we consider defendants' felony-firearm convictions. Conviction of felony-firearm requires that the prosecutor prove, beyond a reasonable doubt, that the defendant possessed or carried a firearm during the commission of any felony or attempted felony. *Wayne Co Prosecutor v Recorder's Court Judge,* 406 Mich 374, 397-398; 280 NW2d 793 (1979), app dis 444 US 948 (1979). Accordingly, defendants properly can be convicted of only as many counts of felony-firearm as they have underlying felony convictions. We affirm four of Michaels' convictions of felony-firearm (two for his two first-degree murder convictions and two for his two armed robbery convictions) and five of Passeno's convictions of felony-firearm (one for his first-degree murder conviction, one for his felony-murder conviction, and three for whichever three underlying felony convictions are upheld), and vacate the remaining convictions of felony-firearm.

We now turn to the remaining issues presented by defendants on appeal.

Passeno argues that the trial court erred in denying his motion for a change of venue, given the tremendous amount of publicity that accompanied this matter. Passeno maintains that he could

not receive a fair trial in Oakland County because of the "intense" news coverage given to the murders of the victims; the negative community response to the murders, which he characterizes as an "uproar"; and the trial court's failure to allow the passage of time before the trial commenced. This Court reviews a trial court's grant or denial of a motion for change of venue to determine if there has been an abuse of discretion, *People v Harvey,* 167 Mich App 734, 741; 423 NW2d 335 (1988), using the somewhat stricter standard observed in criminal cases. *People v Charles O Williams,* 386 Mich 565, 573; 194 NW2d 337 (1972).

We begin by noting that the trial court's denial of Passeno's motion before jury selection was not only proper, but is considered to be the preferable practice. *Harvey, supra* at 741; *People v Collins,* 43 Mich App 259, 262; 204 NW2d 290 (1972).

The existence of pretrial publicity, standing alone, does not necessitate a change of venue. *People v Furman,* 158 Mich App 302, 321; 404 NW2d 246 (1987); *People v Haggart,* 142 Mich App 330, 334; 370 NW2d 345 (1985). Rather, to be entitled to a change of venue, the defendant must show that there is either a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it, *People v Wytcherly,* 172 Mich App 213, 220; 431 NW2d 463 (1988); *People v Prast (On Rehearing),* 114 Mich App 469, 477; 319 NW2d 627 (1982), or that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice. *Wytcherly, supra* at 220; *People v Bloom,* 15 Mich App 463, 468-469; 166 NW2d 691 (1969).

When a juror, although having formed an opinion from media coverage, swears that he is without

prejudice and can try the case impartially according to the evidence, and the trial court is satisfied that the juror will do so, the juror is competent to try the case. *Furman, supra* at 321.

Our review of the record in this matter leads us to conclude, for a number of reasons, that the trial court did not abuse its discretion in denying defendant Passeno's motion for a change of venue. Although defendant Passeno alleged the existence of wide pretrial publicity, he provided no summary or examples of the media reports. He also failed to show that there was a pattern of strong community feeling against him, sufficiently strong to render all potential jurors partial, or that the jury was actually prejudiced. The trial court, by its careful individual examination of each potential juror, determined what exposure to the media reports each had and questioned each regarding impartiality. Those who expressed a problem in setting aside their feelings because of the media coverage were promptly excused for cause. We also note that Passeno did not renew his motion after the jury panel had been selected.

Because we conclude that the jury that was ultimately impaneled was competent to hear the evidence, and that Passeno did not make either of the showings necessary to entitle him to a change of venue, we affirm the trial court's denial of Passeno's motion.

We also reject Passeno's assertion that the trial court erred in denying his motion for a directed verdict at the conclusion of the prosecutor's case in chief. Essentially, Passeno argues that insufficient evidence of premeditation and deliberation was presented to enable the original charges of first-degree murder and felony murder to go to the jury.

We first note that premeditation and delibera-

tion do not have to be shown to support a conviction of felony murder. The only intent required is the malicious intent required for a conviction of second-degree murder: intent to kill, intent to do great bodily harm, or intent to create a very high risk of death or great bodily harm with the knowledge that death or harm will probably result. *People v Flowers,* 191 Mich App 169, 176; 477 NW2d 473 (1991).

To prove first-degree murder, the prosecutor must establish that the defendant's intentional killing of another was deliberate and premeditated. *People v Coddington,* 188 Mich App 584, 599; 470 NW2d 478 (1991). Although the length of time needed to weigh a choice before it is made is incapable of a precise determination, there must be an interval during which a "second look" may be contemplated. *Furman, supra* at 308. A partial list of factors that may be considered by the trier of fact to determine if premeditation and deliberation are present includes: (1) the previous relationship between the victims and the defendant, (2) the defendant's actions before and after the crime, and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds inflicted. *Coddington, supra* at 600.

The evidence presented during the prosecutor's case in chief showed that the killings of both Wanda and Glenn Tarr were accomplished after they were taken from the comparative safety of their car and home, respectively, driven to an isolated park, walked down a path into the woods, and shot numerous times in the head from a distance of 1½ to 2 feet by two weapons. Taking this evidence in a light most favorable to the prosecution, as we are required to do, *People v Petrella,* 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Lino,* 190 Mich App 715, 720-721;

476 NW2d 654 (1991), we conclude that there was more than sufficient evidence to enable a rational trier of fact to conclude that the killings were done with premeditation and deliberation. Accordingly, we find that the trial court did not err in denying Passeno's motion for a directed verdict.

We also reject Passeno's assertion that the admission in his trial of evidence of Michaels' incriminating statements to another witness, absent a limiting instruction, requires reversal. Although it is true that evidence of incriminating statements of a codefendant, which interlock with the defendant's confession, is admissible only when an appropriate limiting instruction is given, *Parker v Randolph,* 442 US 62; 99 S Ct 2132; 60 L Ed 2d 713 (1979); *People v Jackson,* 158 Mich App 544, 552-553; 405 NW2d 192 (1987), failure to give such an instruction does not always require reversal. "Where the evidence supplied through the confession is merely cumulative and other evidence of defendant's guilt is overwhelming, the admission of a confession by a nontestifying codefendant is harmless beyond a reasonable doubt." *People v Hartford,* 117 Mich App 413, 420; 324 NW2d 31 (1982). The record in this matter provides overwhelming evidence of Passeno's guilt. We find that, although the trial court erred in admitting evidence of Michaels' incriminating statements to another witness without a limiting instruction, any error that occurred was harmless. Reversal is not required.

Finally, both defendants challenge the sentences imposed by the trial court.

Passeno argues that the sentences imposed for his convictions of armed robbery and kidnapping constitute an abuse of discretion that should shock the conscience of the Court. Although we note that the appropriate standard is now whether the sen-

tence imposed was proportionate to the offender and the offense committed, *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990), we decline to address the sentences imposed for these convictions. Given our affirmance of Passeno's convictions of first-degree murder for the killing of Glen Tarr and one count of felony murder for the killing of Wanda Tarr, and the mandatory terms of natural life imposed for those convictions, even if we concluded that the sentences were disproportionate, no relief would be afforded Passeno. *People v Sharp,* 192 Mich App 501, 506; 481 NW2d 773 (1992).

Michaels challenges the trial court's decision to sentence him as an adult in accordance with MCL 769.1(3); MSA 28.1072(3). Michaels argues that the opinions of the experts presented by the prosecution at his sentencing hearing were influenced impermissibly by his multiple convictions, his perceived lack of remorse for the killings, and his perjury regarding the facts of the case. Michaels characterizes the experts' recommendations as containing a "rather cynical implication" that if he had admitted guilt and showed remorse he would have been sentenced as a juvenile. Although he admits that the trial court sufficiently articulated the reasons for the sentences imposed, Michaels argues that the experts relied on improper sentencing considerations, his multiple convictions, and his lack of remorse in recommending adult placement and that the admission of their recommendations, along with the trial court's reliance upon the expert's recommendations, entitles him to a new sentencing hearing.

MCL 769.1(3); MSA 28.1072(3) requires that the court having jurisdiction over a minor offender, whether pursuant to MCL 764.1f; MSA 28.860(6) or not, conduct a hearing to determine "if the best

interests of the juvenile and the public" would be better served by placing the minor in the custody of the juvenile offender system or by sentencing the minor as an adult. MCL 769.1(3); MSA 28.1072(3) provides a list of criteria to be considered by the court in making its determination, including the juvenile's prior record, the seriousness and circumstances surrounding the offense, whether the offense is part of a pattern of similar offenses, whether the juvenile's behavior is likely to render him dangerous if released at age twenty-one, whether rehabilitation of the juvenile is more likely to occur in the juvenile or adult system, and what is in the best interests of the public peace and welfare.

MCR 6.931 is the court rule governing the hearings mandated by MCL 769.1; MSA 28.1072. Under MCR 6.931(E)(2), the prosecutor has the burden of proving, by a preponderance of the evidence, that the best interests of the juvenile and the public would be served by sentencing the juvenile as an adult. Subsection E(4) requires that the trial court make findings of fact and conclusions of law.

We believe that the appropriate standard of appellate review of the trial court's decision to sentence a minor as a juvenile or as an adult is a bifurcated one. First, the trial court's findings of fact supporting its determination regarding each of the factors enumerated in MCL 769.1(3); MSA 28.1072(3) should be reviewed under the "clearly erroneous" standard of MCR 2.613(C). The trial court's findings are clearly erroneous "if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). Second, the ultimate decision whether to sentence the minor as a juvenile or as an adult and the sentence itself

should be reviewed for an abuse of discretion, utilizing, as to the sentence, the standard identical to that used in reviewing sentencing decisions for adults. As noted above, the abuse-of-discretion standard for review of sentencing requires reversal if this Court determines that the sentence imposed upon the defendant "violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn, supra* at 636.

Simply put, Michaels' characterization of the experts' testimony is not supported by the record. Each of the experts recommended that Michaels be sentenced as an adult, noting the violent and serious nature of the crimes, that there was a substantial danger of recurring dangerous behavior, that Michaels would not be responsive to treatment, and that Michaels would be disruptive within the juvenile system.

The trial court, in a well-reasoned opinion, found that Michaels' behavior was indicative of an increased violent state and part of a repetitive pattern; that the crimes committed were premeditated and deliberated, occurring over a period of time sufficient to enable Michaels to take a second look, which he did not do; that Michaels was a leader, not a follower, and had undertook to commit crimes of a "violent and reprehensible nature"; that rehabilitation, if possible, was more likely to occur in the adult system; and that the interests of the public welfare required sentencing as an adult. Given that our review of the record in this matter does not leave us with a definite and firm conviction that a mistake has been made, we affirm the findings of the trial court.

Similarly, we affirm the trial court's decision to sentence Michaels as an adult. Given Michaels'

central role in the commission of these heinous crimes, we cannot conclude that the trial court's decision to sentence him as an adult was not proportionate to the circumstances surrounding Michaels or the offense. Accordingly, we find no abuse of discretion.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings in accordance with this opinion. We do not retain jurisdiction.

MAKOWSKI v TOWLES

Docket No. 130462. Submitted May 21, 1992, at Detroit. Decided July 20, 1992, at 9:20 A.M.

Irene Makowski brought an action in the Oakland Circuit Court against Chester E. Towles. When the plaintiff's counsel failed to appear for a pretrial conference, the court, Hilda R. Gage, J., dismissed the plaintiff's complaint. The plaintiff, rather than taking any action with regard to the dismissal, filed a second action, which also was dismissed when counsel again failed to appear for a pretrial conference. A third action was then commenced, which the court dismissed with prejudice on the defendant's motion. The court denied the plaintiff's subsequent motion to set aside the order of dismissal of the first action. The plaintiff appealed.

The Court of Appeals *held:*

The dismissal with prejudice of the third action constituted an adjudication of the merits of the claims raised in the first action. Accordingly, the final judgment in the third action, through the application of the doctrine of res judicata, precludes relitigation between these parties of those claims. The trial court correctly denied the motion to set aside the order of dismissal in the original action.

Affirmed.

Pianin, Paull, Sugar & Brandow (by *Michael Pianin* and *Sheryl R. Lederman*), for the plaintiff.

Draugelis & Ashton (by *Taras P. Jarema*), for the defendant.

Before: MICHAEL J. KELLY, P.J., and MACKENZIE and BRENNAN, JJ.

BRENNAN, J. Plaintiff appeals as of right from an August 1, 1989, order of dismissal and a June 20, 1990, order denying plaintiff's motion to set aside the order of dismissal. We affirm.

Plaintiff's suit against defendant was dismissed after her counsel failed to appear for a pretrial confer-

ence. Instead of taking any action with regard to the order of dismissal, plaintiff's counsel filed a second lawsuit. Plaintiff's counsel again failed to appear at the scheduled pretrial conference, and an order of dismissal was entered. Rather than dealing with that order of dismissal, plaintiff's counsel filed a third lawsuit, which was dismissed with prejudice by the trial court upon defendant's motion. Plaintiff's counsel then moved to have the original order of dismissal set aside. The motion was denied. It is from the order denying plaintiff's motion to set aside the order of dismissal that plaintiff appeals.

On appeal, plaintiff contends that the trial court abused its discretion in denying her motion to set aside the order of dismissal.[1] However, even if we were to find an abuse of discretion, plaintiff's claim would still be barred by res judicata by plaintiff's third complaint, which was dismissed with prejudice upon defendant's motion. The doctrine of res judicata bars relitigation of a claim where the same parties have fully litigated the claim and a final judgment has resulted. *Ward v Detroit Automobile Inter-Ins Exchange,* 115 Mich App 30, 37; 320 NW2d 280 (1982). In order for the doctrine to apply, the former action must have been decided on the merits, the same matter contested in the second action must have been decided in the first, and the actions must be between the same two parties or their privies. *Id.*

It is clear that the actions in the present case involved the same matters and the same parties. The only question is whether the actions were adjudicated on the merits. We find that plaintiff's third complaint was adjudicated on the merits. In *Carter v Southeastern Michigan Transportation Authority,* 135 Mich App 261, 264-265; 351 NW2d 920 (1984), a federal court dismissed plaintiff James Carter's case because of his failure to obey the orders of the court to

[1] In a supplemental brief plaintiff has cited an unpublished opinion of this Court released April 5, 1991. Plaintiff claims we are bound by that opinion under Administrative Order 1990-6. Plaintiff is clearly wrong. Only published opinions are contemplated.

attend the final pretrial conference[2] and for lack of progress. James Carter and his wife then brought an action based on the same matter in the circuit court against the same party. The circuit court granted accelerated judgment for the defendant, finding that the plaintiffs' claim was barred by res judicata by the federal action. This Court affirmed, stating:

> [I]n Michigan practice, an involuntary dismissal due to plaintiff's failure to comply with the court rules or any order of the court will operate as an adjudication on the merits unless the order of dismissal provides otherwise. GCR 1963, 504.2.[3] While a ministerial "no-progress" dismissal might not constitute an adjudication on the merits, a dismissal on motion of the defendant and by order of the court, after judicial consideration, would most likely be considered an adjudication on the merits. [*Id.* at 265.]

See also *Wilson v Knight-Ridder Newspapers, Inc,* 190 Mich App 277, 279; 475 NW2d 388 (1991). In the present case, the third time plaintiff's case was dismissed was upon defendant's motion and after consideration by the court. Accordingly, we find that plaintiff's case was barred by res judicata.

Affirmed.

---

[2] The plaintiff was appearing in propria persona.

[3] Now MCR 2.504(B)(3), which provides:

> Unless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits.

DEMMAN v DEMMAN

Docket No. 109852. Submitted January 7, 1992, at Detroit. Decided July 20, 1992, at 9:25 A.M. Leave to appeal sought.

Janelle T. Demman was divorced from Robert A. Demman in the Monroe Circuit Court, James J. Kelley, J., and was awarded alimony, attorney fees, and a share of the defendant's inheritance as part of the division of the marital property. The defendant appealed.

The Court of Appeals *held:*

1. The trial court did not abuse its discretion in awarding alimony. The award was just and reasonable under the circumstances of this case.

2. The trial court did not abuse its discretion in considering the defendant's inheritance to be part of the divisible marital estate. An inheritance may be treated as part of a marital estate where failure to consider such property would result in an award that is insufficient to maintain either party.

3. The trial court did not abuse its discretion in awarding attorney fees to the plaintiff.

4. The trial court's division of the marital estate was fair and equitable, being nearly equal for the parties when the inheritance is considered.

Affirmed.

MICHAEL J. KELLY, P.J., dissenting in part, stated that the trial court abused its discretion in including the defendant's inheritance as part of the marital estate and in awarding attorney fees to the plaintiff because the inclusion of the inheritance was unnecessary for the maintenance of the plaintiff's living standard and, as much as possible, parties should be responsible for their own attorney fees.

Ready, Sullivan & Ready (by *Durward L. Hutchinson*), for the plaintiff.

Stephen J. Borowski, for the defendant.

Before: MICHAEL J. KELLY, P.J., and JANSEN and T. J. LESINSKI,* JJ.

JANSEN, J. Defendant, Robert Anthony Demman, appeals as of right from the June 3, 1988, judgment of divorce entered by the Monroe Circuit Court. After review of the record, we affirm.

Defendant contends that the award of alimony to plaintiff was improper because she makes more money than him, has more seniority on the job, has a house payment roughly one-half the size of his rent payment, and because plaintiff is likely cured of cancer, thereby obviating the necessity of awarding alimony to cover future medical expenses or loss of income due to the illness. Defendant contends that the award of alimony was punitive. We disagree with defendant.

An award of alimony is within the trial court's discretion. *Pelton v Pelton,* 167 Mich App 22, 27; 421 NW2d 560 (1988); *Ackerman v Ackerman,* 163 Mich App 796, 803; 414 NW2d 919 (1987). This Court reviews an alimony order de novo, but will not modify an award unless convinced that, had it been in the position of the trial court, it would have reached a different result. *Pelton,* p 27; *Ackerman,* p 804; *Burkey v Burkey (On Rehearing),* 189 Mich App 72, 79; 471 NW2d 631 (1991).

A court may award alimony in a divorce action "as it considers just and reasonable," after considering the ability of either party to pay, the character and situation of the parties, and all other circumstances in the case. *Ackerman,* p 803. Several relevant factors should be considered by the court, including, but not limited to, the past relations and conduct of the parties, the length of the marriage, the ability of the parties to work, the

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

ages of the parties, the needs of the parties, the health of the parties, and general principles of equity. *Id.* In addition, a party's fault in causing the divorce is a valid consideration in awarding alimony. *Kurz v Kurz,* 178 Mich App 284, 295; 443 NW2d 782 (1989).

As the trial court noted, at the time it entered the judgment of divorce, plaintiff was forty-seven years old and defendant was forty-six years old. The marriage had lasted twenty-three years, during which time plaintiff mothered two children to adulthood. Defendant described plaintiff as a good wife and mother. Defendant was in apparent good health, while plaintiff undisputably was in poor health. Plaintiff's "health and future are precarious." Plaintiff had a "nightmarish" bout with cancer and it is certain that she will have to undergo further reconstructive procedures in the future. The marital relationship, combined with plaintiff's poor health, has taken an emotional toll on her as well.

Plaintiff worked six days a week while defendant went to college during the early years of their marriage. Plaintiff's earnings contributed substantially to defendant's obtaining a professional degree. Plaintiff returned to work three weeks after the birth of their first child, six weeks after the birth of their second child, and she continued to work throughout the marriage.

The trial court found that defendant's "actions and uncaring attitude caused the marital breakup." It is clear that defendant had at least one extramarital affair, and possibly a second. The record indicates that defendant had decided to go his own way after the children were raised. The trial court determined that an award of alimony was required to ensure the maintenance of plaintiff's prior standard of living. As the court noted:

"It is essential to plaintiff's well-being that the causes of acute anxiety in her remaining years be reduced."

Had we sat in the place of the trial court, we would not have reached a different conclusion regarding the award of alimony to plaintiff. The record supports the trial court's award of alimony to plaintiff, and its findings in this regard were not clearly erroneous. *Beason v Beason,* 435 Mich 791; 460 NW2d 207 (1990). Additionally, and contrary to defendant's assertion, the record is devoid of any evidence that the trial court awarded alimony to plaintiff as a punitive measure. There was no abuse of discretion in this regard. *Pelton, supra.*

Defendant next contends that consideration by the trial court of defendant's inheritance as a joint marital asset was inappropriate. Defendant argues that plaintiff did nothing to procure or preserve the inheritance, and the first distribution of assets comprising the inheritance came after plaintiff filed for divorce. We are of the opinion that, under the given facts of this case, it was within the trial court's discretion to include in its calculation of marital assets the disbursement of inheritance made to defendant in 1986.

In support of defendant's argument, he relies upon *Grotelueschen v Grotelueschen,* 113 Mich App 395; 318 NW2d 227 (1982). A reading of *Grotelueschen* indicates that the decision to include inheritance in the valuation of marital assets is discretionary and is dependent upon the particular circumstances of a given case. This Court, quoting from *Charlton v Charlton,* 397 Mich 84, 94; 243 NW2d 261 (1976), stated that an inheritance may be treated as part of the marital estate "if an award otherwise was insufficient to maintain either party." *Grotelueschen,* p 400.

In the present case, the trial court concluded

that plaintiff would be unable to maintain her standard of living without alimony, even under a property division that took into account approximately one-half of defendant's entire inheritance. Therefore, the trial court decided to include in the calculation of the marital estate only $150,000 of defendant's inheritance, which represents the value of disbursements made to defendant in 1986. Under the circumstances of this case, the inclusion of the $150,000 inheritance was necessary for the maintenance of plaintiff. We believe this to be a valid exercise of the court's discretion.

Defendant also claims that plaintiff was not entitled to an award of attorney fees. It has long been the general rule that a trial court possesses broad discretion relative to the grant of attorney fees in a divorce case. *Vollmer v Vollmer,* 187 Mich App 688, 690; 468 NW2d 236 (1991).

The trial court did not specifically state its reasons for believing that plaintiff should be awarded attorney fees in order to prosecute the litigation. However, the trial court did note that, in light of the property division that was made, it would not be fair to award to plaintiff the entire amount of attorney fees sought. The trial court then awarded plaintiff an amount that "would be fair."

It is our opinion that, on the basis of the evidence of plaintiff's monthly expenses and her need for alimony, the trial court properly exercised its discretion in this matter. *Vollmer, supra.* We find no error in the award of attorney fees to plaintiff.

Lastly, defendant contends that the trial court abused its discretion in awarding plaintiff seventy-four percent of the marital estate, while at the same time only awarding defendant twenty-six percent. We cannot agree with defendant. The division of marital assets in a divorce proceeding is

left to the sound discretion of the trial court. *Nielsen v Nielsen,* 179 Mich App 698, 699; 446 NW2d 356 (1989). Appellate review is de novo, and this Court will not substitute its judgment for that of the trial court unless it is convinced that it would have reached a different result. *Burkey,* p 78.

Our review of the record indicates that the division of the marital estate is nearly equal on each side. Although removal of defendant's inheritance from consideration would skew the percentages in the fashion suggested by defendant, resort to such calculations by defendant is unavailing because we have determined that the inclusion of his inheritance in the property calculation was a valid exercise of the trial court's discretion.

The objective of a property settlement is to reach a fair and equitable division in light of all the circumstances. *Ackerman,* p 807; *Pelton,* p 26. No mathematical formula governs the division, and the division need not be equal, but only equitable. *Ackerman,* p 807; *Pelton,* p 26.

In the present case, we are of the opinion that the division of the marital estate was fair and equitable, given the circumstances of this case. We find no abuse of discretion.

Affirmed.

T. J. LESINSKI, J., concurred.

MICHAEL J. KELLY, P.J. *(concurring in part and dissenting in part).* I respectfully dissent.

I believe that the trial court abused its discretion in including defendant's inheritance from his father's estate as part of the marital estate and in awarding attorney fees to plaintiff. I would, however, agree with the majority and affirm the distribution of the marital assets, not including the

inheritance, and the award of alimony based on the trial court's finding of fault.

The parties had agreed to separate before plaintiff's diagnosis of cancer. In fact, this marriage appears to have been star-crossed from the beginning. In 1984 or early 1985, the parties agreed that they would stay together until their daughter was married and their son graduated from college. Defendant moved out of the marital home in October 1985. The divorce complaint was filed in February 1986. The marital estate was computed at $168,500 and plaintiff was awarded three-fourths of that estate. Plaintiff's complaint for divorce preceded the death of defendant's father, and preceded by a year any distribution from the estate to the defendant. There simply can be no argument that the wife contributed to the inheritance or relied on it. If the gender of the parties were reversed and the trial court invaded the wife's inheritance, oh how the rafters would ring. If the rule in *Charlton v Charlton,* 397 Mich 84, 94; 243 NW2d 261 (1976), and *Grotelueschen v Grotelueschen,* 113 Mich App 395; 318 NW2d 227 (1982), is gender neutral, then the defendant's inheritance was his sole and separate property.

In *Lee v Lee,* 191 Mich App 73, 78-79; 477 NW2d 429 (1991), our most recent word on the subject, we held that "[p]laintiff's inheritance was her separate property and should have been distributed as part of the marital estate only if the remaining property was insufficient for the suitable support and maintenance of defendant, MCL 552.33; MSA 25.103, or if defendant had contributed to its acquisition, improvement, or accumulation." In this case, the court was concerned about the wife's standard of living and therefore awarded alimony. There was no need to invade defendant's inheritance to maintain plaintiff's

standard of living, and I believe it was an error of law to invade the inheritance to increase the plaintiff's standard of living.

The trial court also erred in awarding attorney fees. This is not the first time a majority of a panel of this Court has diluted or disregarded the hitherto long-established rule regarding attorney fees. I quote from my own dissent in *Wilcher v Wilcher,* unpublished opinion per curiam of the Court of Appeals, decided August 27, 1991 (Docket No. 123315):

> Attorney fees are not awarded as a matter of right but only when necessary to allow a party to carry on or defend an action. *Vaclav v Vaclav,* 96 Mich App 584, 593; 293 NW2d 613 (1980); *Zechlin v Zechlin* [sic, *Zecchin v Zecchin*], 149 Mich App 723; 386 NW2d 652 (1986). The trial judge in this case did not make a finding as to the necessity of an award of attorney fees. Clearly on this record she could not. The majority notes that defendant's monthly take home pay is considerably less than plaintiff's and then concludes, ipso facto, that that necessitates an attorney fee award. I think that is plain wrong. It was clearly erroneous for the trial judge to base her determination of defendant's ability to carry on or defend the action on a comparison of defendant's income to plaintiff's. It is defendant's financial status alone which must be examined to determine her ability to pay. See, e.g., *Tomblinson v Tomblinson,* 183 Mich App 589, 593; 455 NW2d 346 (1990). Plaintiff's financial position is of absolutely no consequence to such a determination. Besides the alimony, half the house, and considerable assets, only one of which establishes her ability to pay—a fidelity Michigan tax-free account in the amount of $75,191 defendant was employed as a legal secretary grossing $27,000 yearly in salary. Defendant made no showing that these assets were inadequate to allow her to carry on or defend the action.

The reasons for awarding attorney fees in this case are no better than the reasons described above. Reliance on the elastic language in *Vollmer v Vollmer,* 187 Mich App 688; 468 NW2d 236 (1991), and *Curylo v Curylo,* 104 Mich App 340; 304 NW2d 575 (1981), gives unmerited support to what I consider to be a discredited line of authority. A trial judge should not have unlimited discretion relative to the award of attorney fees in a divorce case. Divorce litigation is expensive for both parties. To the extent possible, each party should be responsible for its own attorney fees absent an inability to carry on or defend the action. To hold otherwise is to encourage excesses.

I would reverse the trial court's award of attorney fees and its inclusion of defendant's inheritance from his father's estate.

PEOPLE v CHAMBERS

Docket No. 130410. Submitted December 10, 1991, at Detroit. Decided July 20, 1992, at 9:30 A.M.

Allan Chambers, Gary Chambers, and William K. Honeycutt were charged in the Detroit Recorder's Court with several counts of breaking and entering an unoccupied building with intent to commit larceny. The court, Dalton A. Roberson, J., dismissed the charges, ruling that the defendants' arrests were illegal because they were preceded by an unreasonable investigatory stop. The arrests were made after the police were alerted to suspicious activity by three white males at a golf course at 3:00 A.M. At the course, an officer found equipment and footprints in the snow leading to an apartment complex, and radioed other officers to watch for three white males suspected of larceny headed toward the apartment complex. Another officer observed and detained the defendants as they were leaving the apartment complex in an automobile. The first officer arrived at the apartment complex, observed the defendants' footwear, went back to the golf course to reexamine the footprints, and concluded that the defendants' shoes matched the footprints. Twenty minutes elapsed between the initial stop of the defendants and their arrests. The prosecution appealed.

The Court of Appeals *held:*

1. An investigatory stop must be founded on a particularized suspicion, based on an objective observation of the totality of circumstances, that the person stopped has been, is, or is about to be involved in criminal wrongdoing. Under the circumstances of this case, the police officer who stopped the defendants did so with reasonable suspicion that they had been engaged in criminal wrongdoing.

2. In determining whether a detention is too long in duration to be justified as an investigatory stop, the critical inquiry is whether the police diligently were pursuing a means of investigation that likely would confirm or dispel their suspicions quickly, during which it was necessary to detain those stopped. In this case, the defendants' prearrest detentions were reasonable and provided no grounds either for suppression of the evidence or dismissal of the charges.

Reversed and remanded.

SULLIVAN, J., dissenting, stated that, under the circumstances of this case, the police officer who stopped the defendants did not have a reasonable, articulable suspicion that the defendants had committed a crime.

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 *Janice M. Joyce Bartee,* Assistant Prosecuting Attorney, for the people.

Stempien & Stempien, P.C. (by *Scott D. Kappler*), for Allan Chambers on appeal.

Jerome Harris, for Gary Chambers on appeal.

James A. Waske, for William K. Honeycutt on appeal.

Before: MICHAEL J. KELLY, P.J., and SULLIVAN and CONNOR, JJ.

CONNOR, J. Defendants were charged with several counts of breaking and entering an unoccupied building with intent to commit larceny, MCL 750.110; MSA 28.305. The trial court granted defendants' motion to dismiss based on their claim of an illegal arrest. The people appeal as of right. We reverse.

At about 3:00 A.M. on March 5, 1990, Canton Township Police Officer Jerry Hardesty was called to investigate a "suspicious situation." He talked to a tow-truck driver who had seen three white men moving something on a golf course near a highway he was traveling. When the driver confronted them, the men had threatened to "cap" him, and then had run away. Hardesty confirmed that a pile of "equipment" had been left behind,

and saw three sets of footprints in the five inches of freshly fallen snow.

The footprints led in the direction of an apartment complex. Hardesty radioed for other officers to be on the lookout for three white males suspected of larcenous activity headed in the direction of the apartment complex. Officer Daniel Antieau heard the radio message. He saw three white men, the defendants, leaving the apartment complex in an automobile. The car was the only one on the road, and there were no other tire tracks in the snow.

Officer Antieau stopped the car and began to question the driver. A couple of minutes later, Officer Hardesty arrived and saw that two of the men were wearing work boots and the third was wearing tennis shoes. He went back to the abandoned equipment and followed the tracks in the snow. He saw that the tracks were consistent with the shoes of the men Antieau had stopped. The tracks led to a storage locker facility that had obviously been broken into. In one of the storage rooms, Hardesty found the print of a tennis shoe on the top of a table. Officer Hardesty radioed Officer Antieau, who placed all three men under arrest. In all, defendants were detained for about twenty minutes before they were formally arrested.

The prosecution contends on appeal that the twenty-minute detention did not transform the "investigative stop" into an illegal arrest, and that therefore the trial court erred in dismissing this case. We agree.

We first note that suppression of evidence, not dismissal of the charge, is the proper remedy for an illegal search or seizure. *People v Dalton,* 155 Mich App 591, 597; 400 NW2d 689 (1986). However, without the evidence obtained as a result of

the twenty-minute detention, there would be nothing to tie defendants to the crimes with which they were charged, making dismissal inevitable.

A trial court's decision to suppress evidence will not be disturbed unless the ruling was clearly erroneous. *People v Martinez,* 187 Mich App 160, 171; 466 NW2d 380 (1991), lv den 439 Mich 929 (1992), remanded on other grounds on reconsideration 439 Mich 979 (1992). A decision is clearly erroneous if, although there is evidence to support it, the Court is left with a definite and firm conviction that a mistake has been made. *Id.* Although we find no clear error in the trial court's factual findings in this instance, we reverse because we are left with the definite and firm conviction that the trial court erred in suppressing the evidence.

Whenever a police officer stops someone and restrains that person's freedom to leave, the officer has "seized" the person under the Fourth Amendment. *Terry v Ohio,* 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968). However, the constitution does not forbid all seizures, only unreasonable ones. *Id.* at 9. A brief stop of a suspicious individual, in order to maintain the status quo momentarily while more information is obtained, may be reasonable. *Adams v Williams,* 407 US 143, 146; 92 S Ct 1921; 32 L Ed 2d 612 (1972). And, "If the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry and Adams.*" *Michigan v Summers,* 452 US 692, 701, n 12; 101 S Ct 2587; 69 L Ed 2d 340 (1981).

In determining whether an "investigatory stop" is reasonable, the court must examine both the character of the official intrusion and its justification. *Id.* at 701. Such an "investigatory stop" must

be founded on a particularized suspicion, based on an objective observation of the totality of the circumstances, that the person stopped has been, is, or is about to be involved in criminal wrongdoing. *People v Shabaz,* 424 Mich 42, 59; 378 NW2d 451 (1985). See also *People v Armendarez,* 188 Mich App 61, 66-68; 468 NW2d 893 (1991).

While arguing in support of the trial court's dismissal, defendants question whether Officer Antieau had a particularized suspicion sufficient to justify stopping the car. We agree with the trial court's implicit finding that he did.

A police officer's reasonable suspicion may be based on information obtained from another. *Adams, supra* at 147. See also *People v Estabrooks,* 175 Mich App 532, 536-537; 438 NW2d 327 (1989). It was reasonable for Officer Antieau to suspect that these were the three men about whom Officer Hardesty had radioed. They were the only people seen at the apartment complex. They were three white men in a group. They were leaving the area to which the three "suspects" had fled. And the lone tracks in the snow clearly reflected that their car was the only one to have left the apartment complex in some time.

Moreover, it was reasonable for Officer Hardesty, and therefore Officer Antieau, to suspect the men had been involved in criminal activity. They had been seen moving equipment on a golf course at three in the morning during a heavy snowfall. When discovered, they threatened violence, then abandoned the equipment and fled.

Defendants' conduct raises a reasonable inference that the equipment had been obtained illegally. This behavior was far more indicative of criminal activity than merely running,[1] sitting in a

[1] *People v Bryant,* 135 Mich App 206; 353 NW2d 480 (1984); *People v Dixon,* 85 Mich App 271; 271 NW2d 196 (1978).

parked car,[2] driving away from a business after hours,[3] carrying a brown paper bag,[4] or being black and driving a car slowly in a predominantly white neighborhood.[5] Hardesty had a particularized suspicion of criminal activity, which he voiced when he radioed that he thought the equipment had been stolen. Compare with *Shabaz, supra* at 63-64.

The possibility that the occupants of the car were engaged in criminal conduct was strong enough that, upon an objective appraisal of the situation, we would be critical of the officer had he failed to stop the car and conduct a brief investigation to determine if, in fact, an offense had occurred in the area. We find Officer Antieau's suspicion that the three had been involved in criminal activity to be reasonable. Thus, the investigatory stop was justified.

The trial court decided that although the stop may have been justified, holding the men for twenty minutes was not. We disagree. A twenty-minute detention does not transform an investigatory stop into an arrest as a matter of law. Compare *United States v Sharpe,* 470 US 675, 686; 105 S Ct 1568; 84 L Ed 2d 605 (1985), with *United States v Place,* 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983). The question that must be asked in assessing whether a detention is too long in duration to be justified as an investigatory stop is whether the police were diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain those stopped. *Sharpe, supra.*

The police did not have to engage in a "fishing

[2] *People v Freeman,* 413 Mich 492; 320 NW2d 878 (1982).

[3] *People v Bloyd,* 416 Mich 538; 331 NW2d 447 (1982).

[4] *People v Shabaz,* 424 Mich 42; 378 NW2d 451 (1985).

[5] *People v Burrell,* 417 Mich 439; 339 NW2d 403 (1983).

expedition" to determine whether the equipment had been stolen. Compare with *People v Bloyd,* 416 Mich 538; 331 NW2d 447 (1982). The newly fallen snow made it possible for them to confirm or dispel their suspicions in a matter of minutes by following the footprints to find out where the equipment had come from. The police diligently pursued this avenue of investigation until they, in fact, confirmed their suspicions.

Moreover, it was necessary to detain defendants while following the tracks in the snow. Although the three men's identities could have been determined very quickly, the circumstances indicated that they had been "caught in the act." This being the case, they were likely to have in their possession evidence of the crime, which would be lost absent detention.

Under the circumstances, the twenty-minute detention was reasonable. Therefore, the detention was not grounds for suppression of the evidence, and dismissal was not mandated.

Reversed and remanded. We do not retain jurisdiction.

MICHAEL J. KELLY, P.J., concurred.

SULLIVAN, J. *(dissenting).* I dissent.

Defendants were charged with breaking and entering an unoccupied building with intent to commit larceny, MCL 750.110; MSA 28.305. The circuit court granted defendants' motion to dismiss on the ground that the prearrest investigative detention was unreasonably long. I would affirm.

The trial court found that the length of detention in this case, twenty minutes, while police investigated to determine if a crime had been committed, was "unusual" and dismissed the charges. We review the court's findings for clear error. *People v Bryant,* 135 Mich App 206, 210;

353 NW2d 480 (1984). Under the circumstances, the trial court's finding was not clearly erroneous.

The trial court focused on the length of the detention. The prosecution argues that it was reasonably necessary to pursue an investigation, relying on *United States v Sharpe,* 470 US 675; 105 S Ct 1568; 84 L Ed 2d 605 (1985). I would not address the length of detention, because the initial stop was not justified. The officer who stopped defendants' car had no reasonable, articulable suspicion that defendants had committed a crime. *People v Armendarez,* 188 Mich App 61, 66-67; 468 NW2d 893 (1991). He stopped their car solely on the basis of a radio report that three men, possibly white, had fled on foot from the area of a possible larceny. A different officer received information from a citizen-informant and tracked the car from the area where the men were last seen. That officer, however, was not the one who stopped the car, and the officer who did stop the car had none of the information that the other officer had obtained. The officer who stopped the car neither observed the defendants acting suspiciously nor trailed their car from the scene of the first observed suspicious activity. Compare *People v Estabrooks,* 175 Mich App 532, 538; 438 NW2d 327 (1989). The connection here between the stop and the later-discovered crime is too attenuated to pass constitutional muster.

I also disagree with the prosecution's contention that the court should not have dismissed the charges because the only possible remedy was suppression of evidence. I note first that the prosecution failed to raise this objection in the trial court. Even if it is not waived, and even if the appropriate order would have been to suppress evidence, this case would have been dismissed. The

only evidence linking these defendants to the crime flowed from the illegal stop.

I would affirm.

BOTSFORD GENERAL HOSPITAL v CITIZENS INSURANCE COMPANY

Docket No. 121337. Submitted January 8, 1992, at Detroit. Decided July 20, 1992, at 9:35 A.M. Leave to appeal denied, 441 Mich —.

Botsford General Hospital and Christopher Noel brought an action in the Oakland Circuit Court against the Citizens Insurance Company, seeking no-fault personal protection benefits for medical expenses, wage loss, and replacement services arising out of injuries suffered by Noel in an automobile accident. The court, Fred M. Mester, J., entered judgment incorporating a jury award of damages for the plaintiff, finding that the untitled, unregistered, and uninsured automobile that Noel was driving at the time of the accident was owned by his wife and that, accordingly, the defendant, pursuant to its assignment by the assigned claims facility, was obligated to pay personal protection benefits. The defendant appealed.

The Court of Appeals *held:*

1. Because there was a disputed question of fact concerning whether Noel was an owner of the automobile he was driving at the time of the accident, the trial court properly submitted the question of the ownership to the jury. The failure to strictly comply with the statutory provisions relating to the transfer of an automobile title did not preclude the jury from considering the question whether Noel was an owner of the vehicle or deciding that he was not an owner.

2. Reversal is required because of the admission into evidence, over the defendant's objection on hearsay grounds, of the handwritten sales receipt of the former owner of the vehicle that indicated that the vehicle was being sold to Noel's wife. Under the circumstances, there was insufficient indicia of reliability in the nature of the document to warrant its admission into evidence under the rule excepting from the hearsay rule

---

REFERENCES

Am Jur 2d, Automobile Insurance §§ 340 *et seq.*; Evidence §§ 497, 498, 834; Limitation of Actions § 265; Physicians, Surgeons, and Other Healers §§ 378 *et seq.*; Subrogation §§ 11 *et seq.*, 129.

See the Index to Annotations under Automobile Insurance; Documentary Evidence; Limitation of Actions; Subrogation.

documents purporting to establish or affect an interest in property.

3. Bostford Hospital was entitled to bring a subrogation claim for that portion of its charges that had not been paid by Medicaid. The fact that, in the absence of insurance benefits, the hospital would have had to accept the Medicaid payments as payment in full did not preclude the hospital from seeking from the defendant the difference between its reasonable charges for the medical services it provided and the amount paid by Medicaid. Neither does the fact that the state has a statutory right of subrogation against the defendant for the amount of the Medicaid payments preclude the hospital from proceeding with its claim for the charges not paid by Medicaid.

4. Because the hospital's claim arose by subrogation from Noel's claim and Noel commenced his action within the statutory one-year limitation period after the accident, the hospital could intervene and commence its action more than one year after the accident.

5. There was sufficient evidence to support the jury's award of damages for replacement services.

6. Because the defendant did not pursue zealously during discovery the production of plaintiff Noel's tax documents, neither the court's allowing the jury to consider the question of wage loss without the production of those records nor the court's refusal to instruct the jury concerning the failure to produce those records requires reversal.

Reversed and remanded.

MICHAEL J. KELLY, P.J., dissenting, stated that the admission of the sales receipt into evidence was not critical to the plaintiff's proofs, that the error in its admission was harmless, and that, accordingly, the verdict and judgment should be affirmed.

1. AUTOMOBILES — TITLES — VEHICLE CODE — JURY QUESTIONS.

Failure to comply strictly with the statutory provisions relating to the transfer of the title of an automobile does not preclude submission of the question of its ownership to the jury (MCL 257.233; MSA 9.1933).

2. EVIDENCE — HEARSAY — RULES OF EVIDENCE — DOCUMENTS.

Documents relating to personalty, including contracts and bills of sale, are included within the rule of evidence that excepts from the hearsay rule statements contained in a document purporting to establish or affect an interest in property where: the circumstances in which the instrument was made and the financial interests at stake promote reliability, the statement at issue is germane to purposes of the document, and subsequent

dealings with the property have not been inconsistent with the tenor of the document (MRE 803[15]).

3. INSURANCE — NO-FAULT — PERSONAL PROTECTION BENEFITS — HEALTH CARE PROVIDERS — MEDICAID.

A health care provider that has received Medicaid payments for medical services provided to a patient who suffered injuries in an automobile accident may seek from the patient's no-fault insurer reimbursement of any reasonable charges for services that Medicaid did not pay, even though in the absence of insurance benefits the provider would have had to accept the Medicaid payment as payment in full; the statutory right of subrogation of the state extends only to the amount of the Medicaid payments and does not automatically foreclose other claims (MCL 400.106[1][b][ii]; MSA 16.490[16][1][b][ii]).

4. INSURANCE — NO-FAULT — HEALTH CARE PROVIDERS — LIMITATION OF ACTIONS — SUBROGATION.

A health care provider need not bring its action against a no-fault insurer for medical services provided to an insured injured in an automobile accident within the statutory one-year limitation period where the health provider's claim is one that arises by subrogation from the patient's claim and the patient commenced an action for medical expenses within the one-year limitation period (MCL 500.3145; MSA 24.13145).

Zweig & Lane, P.C. (by *Carol L. Fossee*), for Botsford General Hospital.

John R. Hocking, III, for Christopher Noel.

Anselmi & Mierzejewski (by *Joseph S. Mierzejewski*), for the defendant.

Before: MICHAEL J. KELLY, P.J., and JANSEN and T. J. LESINSKI,* JJ.

T. J. LESINSKI, J. Defendant, Citizens Insurance Company, appeals as of right a September 18, 1989, judgment of the Oakland Circuit Court involving no-fault personal protection insurance (PIP)

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

benefits. Following an August 1989 jury trial, plaintiffs, Christopher Noel and Botsford General Hospital, were awarded damages in the amount of $83,211.80, payable by Citizens. Citizens claims as error several rulings by the court.

On November 9, 1985, Christopher Noel was involved in an automobile accident while driving a 1977 Mercury Monarch. That vehicle was uninsured, as were the two other vehicles in the Noel household. The license plate on the Monarch was registered to another automobile owned by Mary Noel, plaintiff's wife. As a result of injuries sustained in the accident, plaintiff was taken to Botsford General Hospital, where he subsequently underwent six surgical procedures.

Because Christopher Noel (hereafter plaintiff) had no source of PIP coverage for the claimed losses, he filed an application with the Michigan Department of State assigned claims facility, pursuant to MCL 500.3171 *et seq.*; MSA 24.13171 *et seq.* On the face of the application, in the space marked "owner of vehicle involved," the application states "just purchase (sic) by Chris Noel."

Under Michigan law, the owner of an uninsured motor vehicle involved in an accident is ineligible for no-fault benefits, including benefits through the assigned claims plan. See MCL 500.3113(b); MSA 24.13113(b) and MCL 500.3173; MSA 24.13173. During the investigation conducted by Dena Hendon of the assigned claims facility, Mary Noel advised Hendon that the vehicle had been purchased by plaintiff shortly before the accident. Dena Hendon denied the claim, after making a determination that plaintiff owned the vehicle and, therefore, was ineligible for benefits.

On May 9, 1986, plaintiff submitted a second application for benefits to the assigned claims facility. In the space designated "owner of vehicle

involved," this application states "Mary Noel." Upon receipt of this second application, Hendon assigned plaintiff's claim to Citizens for further investigation regarding ownership.

Meanwhile, Botsford General Hospital submitted its billings for treatment of plaintiff to the Michigan Department of State for payment. The Department of Social Services paid the hospital a statutory percentage of the $43,992.92 amount submitted. The DSS also began its own investigation into the ownership of the vehicle and applicable insurance coverage for the loss.

After corresponding with Dennis Howder on the subject of the sale and ownership of the Monarch, the DSS in October 1986 concluded that plaintiff was the owner of the vehicle and sought no further reimbursement from Citizens for the bills it had paid on plaintiff's behalf.

Plaintiff filed suit against Citizens on October 6, 1986. Botsford General Hospital subsequently moved to intervene for the purpose of recovering its claimed medical expense losses. Intervention was granted on November 15, 1988. The matter proceeded to trial. The jury returned a verdict in favor of plaintiffs in the amount of $83,211.80, including hospital expenses, wage loss, replacement service costs, and interest. Citizens appeals the jury verdict. We reverse.

I

The first issue is whether the trial court properly left to the jury the question regarding who owned the 1977 Mercury Monarch.

Under Michigan law, a person is not entitled to be paid PIP benefits if that person was the owner of a motor vehicle involved in an accident and that vehicle was required to be, but was not, insured

under Michigan's no-fault act. MCL 500.3113; MSA 24.13113 and MCL 500.3173; MSA 24.13173. The Vehicle Code, MCL 257.37(b); MSA 9.1837(b), defines "owner" as "a person who holds the legal title of a vehicle." This provision has been incorporated into the Michigan no-fault act. *Albanys v Mid-Century Ins Co,* 91 Mich App 41, 45-46; 282 NW2d 11 (1979).

At trial, evidence indicated that not long before the accident the Monarch had been purchased from Dennis Howder. Plaintiff gave $300 cash to Howder and took possession of the car. Although Howder signed the certificate of title, neither he nor Noel filled in the line designated for the new owner. At the time of sale, a license plate registered to Mary Noel was placed on the car.

Over a hearsay objection by Citizens, the trial court admitted an October 15, 1985, handwritten receipt that stated that the $300 paid for the Monarch was "received from Mary Noel." Evidence was also admitted that at the time of the accident no application for a new title had been filed with the Secretary of State. Thus, title was still under the name of Dennis Howder.

Plaintiff claimed that although he actually conducted the purchase transaction with Howder, the purchase money was his wife's and he was merely taking delivery of the car as her agent. Mary Noel testified that she had retained actual possession of the title since the purchase and that the car carried her license plates. Additional evidence of ownership included statements made on plaintiff's multiple applications for insurance benefits.

Section 233 of the Vehicle Code, MCL 257.233; MSA 9.1933, which concerns transfers of title, provides:

> (4) The owner shall indorse on the back of the

certificate of title an assignment of the title with warranty of title in the form printed on the certificate . . . and deliver or cause the certificate to be mailed or delivered to the purchaser or transferee at the time of the delivery to the purchaser or transferee of the vehicle. . . .

(5) Upon the delivery of a motor vehicle and the transfer, sale, or assignment of the title or interest in a motor vehicle by a person, including a dealer, the effective date of the transfer of title or interest in the vehicle shall be the date of execution of either the application for title or the certificate of title.

According to Citizens, the parties' failure to comply strictly with the provisions of § 233 precluded the lower court from permitting the question of ownership to reach the jury. Rather, Citizens argues that the undisputed fact that plaintiff actually handed the money to the seller, took possession of the vehicle, and received delivery of the certificate of title conclusively established him as the owner under § 233.

Legal title and ownership of a vehicle are not coextensive terms under the Vehicle Code; more than one person may be liable as "owner," even if no one possesses all the normal incidents of ownership. *Messer v Averill,* 28 Mich App 62, 65, n 2; 183 NW2d 802 (1970). The question of ownership is one of fact that is to be decided by the factfinder. *Albanys v Mid-Century Ins Co,* 407 Mich 925 (1979), rev'g 91 Mich App 41; 282 NW2d 11 (1979); *John v John,* 47 Mich App 413; 209 NW2d 536 (1973).

Citizens accepts that "ownership" is a question of fact relative to plaintiff, but argues that the same is not true relative to Mary Noel. We disagree. The proper focus of inquiry is whether plaintiff was an "owner" of the vehicle, not

whether Howder had effectively transferred its title. Plaintiff would be entitled to PIP benefits under the assigned claims plan, MCL 500.3171 *et seq.*; MSA 24.13171 *et seq.*, regardless of whether Howder or Mary Noel owned the vehicle, so long as plaintiff himself was not an owner.

We conclude that the lower court did not err in permitting the question of Mary Noel's ownership to be decided by the jury rather than granting Citizens' motion for a directed verdict. Viewing the evidence in the light most favorable to plaintiff, we find that there was a question of fact concerning ownership. See *Stoken v J E T Electronics & Technology, Inc,* 174 Mich App 457, 463; 436 NW2d 389 (1988).

II

Citizens next argues that it was error for the trial court to admit the handwritten sales receipt into evidence under the exception to the hearsay rule that allows documents affecting an interest in property to be entered into evidence.

MRE 803(15) excepts from the hearsay rule the following:

> A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

Only one Michigan case discusses MRE 803(15), and that case applied the exception to facts contained in a will. See *People v Burton,* 177 Mich App 358; 441 NW2d 87 (1989). Moreover, there is a dearth of federal case law regarding the issue and

none that this Court could find concerning documents dealing with personalty rather than real property. On the other hand, 4 Weinstein, Evidence, § 803(15)[01], p 307, indicates that documents concerning personalty, including contracts or bills of sale, are included in the exception as long as other requirements are met:

> The rule rests both on necessity—for litigation may arise so many years after a conveyance that declarants and witnesses to the transaction may be unavailable—and on a number of indicia of trustworthiness: (1) the circumstances in which dispositive instruments are made and the financial interests at stake promote reliability; (2) the fact that the recital is in writing eliminates the danger of inaccuracy of transmission; (3) since the statement must be germane to the purpose of the document, a protest would be expected about an untrue fact intrinsic to the transaction; and (4) the exception does not apply if dealings with the property have been inconsistent with the tenor of the document.

The second element is met here because the receipt is in writing, which eliminates any danger regarding the accuracy of transmission. The third element is met because the document is germane to the purpose of its execution, i.e., to establish the sale of the 1977 Monarch to Mary Noel. And we find that the fourth element is met because the fact that plaintiff was driving the Monarch at the time of the accident is not necessarily inconsistent with an intent to sell the Monarch to Mary Noel. The remaining question is whether the first element was met. We find that it was not.

For the receipt to qualify for admission under the hearsay exception, the first element requires that it must be made under circumstances that promote reliability. *Id.* The basis for the rule

excluding hearsay evidence is that such evidence is not subject to the tests that can ordinarily be applied to ascertain the truth of an assertion, whether written or oral. See 29 Am Jur 2d, Evidence, § 493, pp 551-552. When hearsay evidence is used, its declarant is not before the factfinder, and the factfinder cannot cross-examine the declarant or evaluate his demeanor. *Id.* at 552. Nevertheless, admission of the evidence may be permitted under an exception to the hearsay rule where the inherent indicia of reliability in such documents weigh in favor of admission, even though the declarant is not before the factfinder. See generally Wigmore, Evidence (Chadbourn rev), § 1420-1423, pp 251-255; see also *Solomon v Shuell,* 435 Mich 104, 119-120; 457 NW2d 669 (1990).

MRE 803(15) is identical to FRE 803(15). The Advisory Committee's Note to FRE 803(15) highlights the element requiring that the document be made under circumstances that promote reliability:

> Exception (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one.

We believe that the handwritten sales receipt at issue here was not made under circumstances that promote its reliability. The federal committee note refers to a type of document that would be filed with a governmental agency, namely, a deed for real property. Although statements contained in documents intended for filing may meet the standard of reliability, we believe that handwritten documents that would be neither filed nor signed by anyone not a party to the transaction do not satisfy the reliability element. A certificate of title, on the other hand, would meet the reliability standard where filed with the appropriate agency. In light of what little authority exists regarding this issue, we conclude that the handwritten receipt does not qualify for admission under MRE 803(15). The admission of the receipt was therefore an abuse of discretion requiring reversal. See *Kochoian v Allstate Ins Co,* 168 Mich App 1, 12; 423 NW2d 913 (1988).

III

Next, Citizens argues that the health care providers, including Botsford General Hospital, were statutorily bound to accept the amounts received as payment in full for their services, regardless of any additional costs incurred while treating plaintiff.[1] The essence of Citizens' argument is that acceptance of Medicaid payments for injuries suffered in accidents involving automobiles discharges an assigned claims servicing insurer from liability to the claimant or the providers of medical services for charges exceeding the statutory amount paid by Medicaid.

[1] An employee of Botsford General Hospital in patient accounting testified that of the approximately $40,000 in bills submitted to Medicaid for plaintiff's expenses, Medicaid had paid a percentage, or approximately $10,000.

Medicaid assistance is made available under the Social Welfare Act to the "medically indigent." See MCL 400.105(1); MSA 16.490(15)(1). A "medically indigent" individual is defined by statute as one whose

> need for the type of medical assistance available under this act for which application has been made has been professionally established and payment for it is not available through the legal obligation of a contractor, public or private, to pay or provide for the care without regard to the income or resources of the patient. [MCL 400.106(1)(b)(ii); MSA 16.490(16) (1)(b)(ii).]

MCL 500.3172(1); MSA 24.13172(1) provides that a person is entitled to PIP benefits under the assigned claims plan where the injury arises "out of the ownership, operation, maintenance, or use of a motor vehicle . . . if no personal protection insurance is applicable to the injury . . . ." Assuming that Noel was not an owner of the vehicle involved in the accident, he qualifies for assigned claims PIP benefits. Where a person qualifies for PIP benefits under the assigned claims plan, he does not satisfy the definition of "medically indigent" found in MCL 400.106(1)(b)(ii); MSA 16.490(16)(1)(b)(ii) for the reason that he is thereby entitled to medical assistance "available through a legal obligation of a contractor, public or private. . . ." *Johnson v Michigan Mutual Ins Co,* 180 Mich App 314, 320-321; 446 NW2d 899 (1989); see also *Workman v DAIIE,* 404 Mich 477, 501-502; 274 NW2d 373 (1979). Whether Noel was an "owner" of the vehicle, which would disqualify him from receiving no-fault PIP benefits, is another question to be decided upon remand.[2]

[2] Citizens points out that the DSS is "subrogated to any right of

IV

Citizens also claims that because the DSS was statutorily subrogated to the rights of the claimant and the services providers to pursue Citizens, both plaintiff and Botsford General Hospital lack standing to bring this claim. However, as plaintiff Botsford points out, the right of subrogation of the DSS is intended to ensure that it does not bear primary responsibility for payment of benefits. The Social Welfare Act does not create in the state an exclusive right of subrogation and, in fact, establishes the right of the injured person to seek payment for reasonable medical costs. MCL 400.106(1)(b)(ii); MSA 16.490(16)(1)(b)(ii) states:

> An action taken by the state or the state department [Department of Social Services] in connection with the right of recovery afforded by this section shall not operate to deny the injured, diseased, or disabled person any part of the recovery beyond the costs expended on the person's behalf by the state department.

Although the DSS had a right of subrogation, it did not have a right of subrogation of plaintiff's entire claim. Thus, the decision of the DSS not to pursue its claims against Citizens did not automatically foreclose claims by plaintiff and Botsford General Hospital seeking recovery from Citizens.

V

Citizens argues that Botsford General Hospital was barred from intervening in this case because

recovery which a patient may have for the cost of hospitalization" for sums that it pays as Medicaid benefits. See MCL 400.106(1)(b)(ii); MSA 16.490(16)(1)(b)(ii). Thus, the DSS is entitled to collect its expenditures, approximately $10,000, from defendant Citizens if it is determined that Citizens is liable to Noel for PIP benefits pursuant to the assigned claims plan, MCL 500.3171 *et seq.*; MSA 24.13171 *et seq.*

Botsford's claim was submitted more than two years after the period of limitation applicable to plaintiff's claim had expired.

MCL 500.3145; MSA 24.13145 provides:

> An action for a recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of the injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. . . . The notice of the injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

Plaintiff's original complaint against Citizens, filed on October 6, 1986, claimed reimbursement for "all reasonable charges, unlimited amount for medical and/or rehabilitative expenses and hospital charges." Botsford's cross-complaint, filed on November 15, 1988, states:

> 5. The reasonable charges for medical treatment rendered to Plaintiff at Botsford General Hospital totalled $43,922.92.
>
> * * *
>
> 7. Botsford General Hospital is subrogated to the rights of Plaintiff Christopher Noel with respect to insurance for medical treatment at Botsford General Hospital from Defendant Citizens Insurance Company of America.

The purpose of the one-year limitation is to

protect against stale claims and protracted litigation. *Pendergast v American Fidelity Fire Ins Co,* 118 Mich App 838, 841-842; 325 NW2d 602 (1982). The notice to the insurer anticipated by the statute was provided in the first complaint, which was filed within the one-year limitation period. Botsford's claims did not change or enlarge the claims already in existence. Accordingly, we conclude that the trial court did not err in granting Botsford's motion to intervene, nor was it error to deny Citizens' motion for a directed verdict with respect to the issue of the statute of limitations.

VI

Citizens contends that the jury award of $3,600 for replacement services was improper because plaintiff did not prove he actually incurred any expenses for such services. The following testimony was given by Mary Noel regarding the changes in their household after the accident:

> *Q.* All right. You were saying your living room is what?
>
> *A.* Becomes a make-shift hospital room, so to speak. We had the IV's, and we had medication, and things to clean his wound and dress it.
>
> *Q.* How long did that go on?
>
> *A.* That went on for a long, long, time. At least a year, if not more.
>
> * * *
>
> *Q.* After the accident, was there anything that you had to do around the house that Mr. Noel normally did around the house?
>
> *A.* Well, yeah, I did everything. I became a mom and a dad. As far as mowing the grass, taking out the trash, shoveling of the sidewalks, you know, being more attentive to the kids . . .
>
> It was everything I had to do, run to the store,

> which normally he would be the one to run out and get milk, do little things like that.

Personal protection insurance benefits recoverable under Michigan's no-fault act included, at all pertinent times,

> expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent. [MCL 500.3107(b); MSA 24.13107(b), see now MCL 500.3107(c); MSA 24.13107(c).]

In addition, case law also permits the recipient of no-fault PIP benefits to recover for replacement services provided by family members. See *Van Marter v American Fidelity Fire Ins Co,* 114 Mich App 171; 318 NW2d 679 (1982); *Visconti v DAIIE,* 90 Mich App 477; 282 NW2d 360 (1979); see also *Kushay v Sexton Dairy Co,* 394 Mich 69; 228 NW2d 205 (1975).

Arguably, the record in this case could have been developed to reflect in more detail the services provided by Mary Noel to plaintiff. However, the evidence that plaintiff spent nearly a year in a makeshift hospital bed in the Noels' living room could support a finding that Mary Noel's services exceeded those expected of a spouse under normal circumstances.

When reviewing the sufficiency of the evidence in a civil action, this Court must view the evidence in the light most favorable to the plaintiff, and give the plaintiff the benefit of every reasonable inference that can be drawn from the evidence. If, after reviewing the evidence, reasonable people

could differ, the question is properly left to the trier of fact. *Boggerty v Wilson,* 160 Mich App 514, 522; 408 NW2d 809 (1987). Accordingly, the questions concerning whether plaintiff was entitled to collect the value of replacement services, and the determination of that value, were properly left to the jury. The trial court, viewing the evidence in the light most favorable to plaintiff, did not err in denying Citizens' motion for a directed verdict with respect to the issue of replacement services.

VII

Citizens argues that the trial court erred in giving the following jury instruction:

> In Michigan, two or more writings to a transaction, if they clearly relate to the same transaction, are to be construed together. Therefore, if you find that the receipt from [the seller] and the title to the car sold, were given at the same time by [the seller], you should read them or construe them together.

In its place, Citizens offered an instruction to the effect that ownership of the vehicle under these facts is established by referring to the legal title of the vehicle, MCL 257.37(b); MSA 9.1837(b), and that the transfer-of-title statute, MCL 257.233; MSA 9.1933, mandates that plaintiff, as recipient of the title, keys, and the vehicle at the time of purchase, became the owner.

As discussed earlier, the transfer-of-title statute does not mandate that plaintiff be considered the "owner" of the vehicle. Rather, ownership was a question of fact to be resolved by the jury. However, the objectionable jury instruction does make reference to the handwritten receipt that was improperly admitted into evidence under a hear-

say exception. For this reason, we conclude that the instruction was erroneous. Whether this error requires reversal need not be addressed because the case is to be reversed and remanded for error in the admission of the handwritten sales receipt.

VIII

Citizens contends that it was error for the trial court to permit the issue of wage loss to go to the jury without production of plaintiff's income tax returns or business records. Citizens requests reversal and remand with instructions to grant Citizens' motion for a directed verdict or, alternatively, to include a standard jury instruction concerning the failure to produce evidence if plaintiff refuses to produce these records on remand. See SJI2d 6.01(a).

Plaintiff was awarded $7,845.50 for wage loss. He had been working before the accident as an independent contractor for Thermo Window Corporation. Citizens had served plaintiff with a motion to produce income tax returns for the purpose of determining wage loss. When the documents were not produced, Citizens did not move for an order to compel production. During cross-examination, defense counsel asked plaintiff about his failure to authorize release of the tax records. Pursuant to objection, the trial court ascertained that no such order to compel had been filed and precluded Citizens from probing into the issue in this manner at trial.

SJI2d 6.01(a) permits the jury to infer that evidence that was under a party's control and for which the party gave no reasonable excuse for nonproduction would have been adverse to that party. *Zmija v Baron,* 119 Mich App 524, 540; 326 NW2d 908 (1982), rev'd on other grounds 422 Mich

900 (1985). It is undisputed that the issue of wage loss was material. Citizens, however, admitted at trial that no motion to compel the production of the tax records had been made.

The trial court's refusal to give Citizens' instruction, in light of the fact that Citizens did not zealously pursue the production of the tax documents during discovery, is not so inconsistent with substantial justice as to require reversal. See *Moghis v Citizens Ins Co of America,* 187 Mich App 245, 251; 466 NW2d 290 (1990). Other evidence from which wage loss could have been determined was presented to the jury, even though some of it was contradictory. At trial, plaintiff testified that his wage loss was $710 a week. His first application for benefits claimed $1,000 a week and his second application claimed $1,200 a week. Plaintiff's 1099 form from Thermo Window was also introduced into evidence.

IX

Finally, Citizens argues that it was error for the plaintiff's taxed bill of costs, including mediation sanctions sought pursuant to MCR 2.403(O), to be entered by the court clerk without a hearing. We believe that this issue should be decided on remand after the matter of liability has been conclusively established.

Reversed and remanded for a new trial.

JANSEN, J., concurred.

MICHAEL J. KELLY, P.J., *(dissenting).* I respectfully dissent. I believe that the error of admitting exhibit 1, the receipt signed by the vehicle seller, Dennis Howder, was harmless and does not require reversal.

The plaintiff's burden was not to establish who was the owner of the vehicle, but only that he was not. I believe plaintiff adequately established the circumstances of the transaction and that the receipt was not critical. The jury could have believed that Christopher Noel was his wife's agent in picking up the car, that the car was purchased to replace Mrs. Noel's disabled vehicle, that she supplied the money to buy it, and that the license plate from her old car was put onto the new one. This evidence did not depend on the receipt made out to Mary Noel, which was erroneously admitted. Furthermore, there was evidence concerning a contact with Dennis Howder by the Department of Social Services regarding the subject of the transaction, but no party offered any testimony of Dennis Howder. If consideration of the certificate of title alone is controlling, then under MCL 257.233; MSA 9.1933, Dennis Howder was the owner of record and title never legally passed to either of the Noels. Compare *Michigan Mutual Ins Co v Reddig*, 129 Mich App 631; 341 NW2d 847 (1983). Finally, representatives of defendant insurance company were in contact with Dennis Howder and yet failed to produce him in support of any claim it made to the effect that plaintiff Christopher Noel was the owner of the vehicle. I conclude either that Howder's testimony would have been adverse to Citizens or that the failure to introduce his testimony or his deposition should be taken as an indication that his testimony would have been favorable to Christopher Noel.

I would affirm.

PEOPLE v SMITH

Docket No. 130483. Submitted March 3, 1992, at Lansing. Decided July 20, 1992, at 9:40 A.M.

Michael J. Smith pleaded guilty in the Ingham Circuit Court, James R. Giddings, J., to a reduced charge of unarmed robbery and was sentenced to one year in jail and five years' probation. He subsequently violated conditions of probation by, among other things, failing to abide by the terms of an electronic tether program. He was sentenced to five to fifteen years' imprisonment, despite a minimum term of zero to thirty-six months recommended in the sentencing information report. He appealed.

The Court of Appeals *held:*

1. The sentencing guidelines, although strictly not applicable to a probation violation, are invaluable in determining a proportionate sentence for such a violation and should be used as a starting point in determining the continuum within which the sentence should fall. A trial court remains free to consider the defendant's actions and the seriousness and severity of the facts and circumstances surrounding the probation violation in ariving at the proper sentence. The sentence imposed in this case does not violate the principle of proportionality.

2. The defendant properly did not receive credit toward the sentence for time spent in the electronic tether program. Participation in that program was not equivalent to confinement in jail.

Affirmed.

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

State Appellate Defender (by *Sheila N. Robertson*), for the defendant on appeal.

Before: MARILYN KELLY, P.J., and MCDONALD and G. S. ALLEN,* JJ.

G. S. ALLEN, J. Pursuant to a plea bargain, defendant pleaded guilty to a reduced charge of unarmed robbery, MCL 750.530; MSA 28.798. On December 14, 1988, he was sentenced to one year in the Ingham County Jail and placed on five years' probation. The terms of probation included a requirement that he continue drug rehabilitation services and attend school or obtain training for employment. Defendant was released from jail on June 8, 1989, and within two months committed five violations of probation, including failure to obtain vocational training or employment and testing positive for drug use.

On September 6, 1989, defendant pleaded guilty of probation violation and was sentenced to six to fifteen years' imprisonment. However, sentence was delayed to allow defendant to attend a boot camp program of the Department of Corrections. Defendant successfully completed the boot camp program, and at a delayed sentence hearing on January 10, 1990, the prison sentence was vacated and defendant was continued on probation. However, defendant was placed in an electronic tether program.

Shortly thereafter, defendant violated probation by refusing to answer his telephone as required by the electronic tether agreement and by leaving his home on February 21, 1990. When the police tried to pick up defendant on a warrant issued by the court, defendant's brother and sister interfered with the police, and defendant fled. He remained at large until some two months later, when he was arrested on April 17, 1990. Upon arrest, defendant

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

fought with the police. On May 16, 1990, the court sentenced defendant to six to fifteen years in prison in accordance with the sentence imposed on September 6, 1989. After hearing defendant speak following the imposition of sentence, the court amended its sentence to five to fifteen years, though stating that defendant deserved a six- to fifteen- year sentence.

At sentencing, the trial court was provided with a sentencing information report (SIR), which suggested a minimum sentence range of zero to thirty-six months. The statutory maximum penalty for the underlying offense of which defendant pleaded guilty (unarmed robbery) is fifteen years.

The first issue raised on appeal is whether the sentencing guidelines should apply to defendant's sentence for probation violation. Relying heavily on the recent case of *People v Peters,* 191 Mich App 159; 477 NW2d 479 (1991), defendant argues that, although sentencing guidelines were not intended to apply to probation violations, they still are an "invaluable tool" to be used as a "barometer" of the principle of portionality established in *People v Milbourn,* 435 Mich 630, 635-636; 461 NW2d 1 (1990). (BRICKLEY, J.)

This Court has consistently held that the sentencing guidelines do not apply to probation violations, *People v Young,* 181 Mich App 728, 731; 450 NW2d 43 (1989); *People v Reeves,* 143 Mich App 105, 107; 371 NW2d 488 (1985), and that sentences for probation violation should comply with the principle of proportionality announced in *Milbourn. People v Leske,* 187 Mich App 153, 158; 466 NW2d 361 (1991). Most recently, in *People v Peters, supra,* a panel of this Court, after first stating that the sentencing guidelines are not applicable to violations of probation, went on to note that

they may be utilized as "a starting point" in determining a sentence. *Id.,* 167.

However, *Milbourn* holds that the second edition of the guidelines is the best "barometer" for use in measuring the proportionality of a given sentence. *Id.,* 656. Under existing precedent, factoring in the sentencing guidelines when sentencing for a probation violation is a difficult proposition, requiring a second analysis of the guidelines initially prepared for defendant's underlying offense. *Peters,* 167. Under these circumstances, the guidelines should be utilized only as a starting point in determining the continuum within which the sentence should fall. The trial court is at liberty to consider defendant's actions and the seriousness and severity of the facts and circumstances surrounding the probation violation in arriving at the proper sentence. The reasons for the sentence imposed should be articulated on the record. *Id.*

Given the circumstances of the underlying offense, the reduced charge of unarmed robbery, the repeated instances of probation violation, and defendant's vita, we conclude that the sentence does not violate the principle of proportionality. We come to this conclusion regardless of whether the sentencing guidelines are utilized as a "barometer" or as a "starting point" from which to determine the proportionality of the sentence. Contrary to the defense claim, defendant had more than a peripheral role in the armed robbery. In pleading guilty, he said that he participated in the robbery as an intimidator and received a gold neck chain for his efforts. At the time he was originally sentenced in this case, defendant was already serving a jail sentence for a plea-based conviction of receiving and concealing stolen goods with a value in excess of $100, reduced from an original charge of breaking and entering an occupied build-

ing. Defendant's juvenile record includes a misdemeanor larceny, two breaking and enterings, carrying a concealed weapon, confinement at the Boy's Training School, and a lack of response to programs available in the juvenile system. Given these circumstances, as well as the fact that when twice given a "break" by the sentencing court defendant repeatedly broke the terms of his probation and electronic tether program, we find that the sentence imposed does not violate the principle of proportionality.

The second issue raised on appeal is whether defendant is entitled to receive credit against his sentence for the time he spent in the electronic tether program. This issue is one of first impression in Michigan. The recently developed electronic tether system is used throughout the United States as an alternative to prison. See Note, *Home incarceration under electronic monitoring: A statutory review,* 7 NYL Sch J Human Rights 285 (1990). As authority for the claim that credit should be granted, defendant cites *People v Granquist,* 183 Mich 343; 454 NW2d 207 (1990), for the proposition that confinement in one's home under a tether program is the equivalent of confinement in prison. Defendant further argues that "since the tether program is equivalent to actual incarceration, the double jeopardy clause requires that he be granted additional credit against his sentence."[1] We disagree on both grounds.

Defendant reads *Granquist* too broadly. After first holding that escape from one's own apartment is an escape from prison under the liberal descrip-

[1] Defendant does not ask for credit pursuant to the sentence credit statute, MCL 769.11b; MSA 28.1083(2), but rather on double jeopardy grounds. See *People v Sturdivant,* 412 Mich 92, 96; 312 NW2d 622 (1981). Indeed, defendant is clearly not entitled to credit under the statute. *People v Whiteside,* 437 Mich 188, 196-197; 468 NW2d 504 (1991).

tion of "prison" contained in the prison escape statute, MCL 750.193(2); MSA 28.390(2), the *Granquist* Court then stated that "tether" is not a prison:

> We agree with defendant's argument that the electronic tether was not a "prison"; but the tether was not intended to form the bounds of defendant's physical confinement. *The electronic tether is nothing more than a surveillance device which permits corrections officers to monitor a defendant's presence in his approved residence during curfew hours.* [*Id.*, 346-347. Emphasis added.]

Under no circumstances can we reasonably conclude that confinement in one's home or apartment is the equivalent of confinement "in jail." This is so even where, as here, the conditions of home confinement require the person confined to go directly to work, to return home immediately from work, and to be at home at all times unless approval is given by a probation officer. Home detention does not include the highly structured setting of a prison or jail. One cannot remain on the phone for extended periods, invite friends for extended visits, order a pizza, watch television during periods of one's own choosing, or have free access to the refrigerator in jail.

For the foregoing reasons, defendant's conviction and sentence are affirmed.

PRECISION PIPE & SUPPLY, INC v MERAM CONSTRUCTION, INC

Docket No. 129294. Submitted May 21, 1992, at Detroit. Decided July 20, 1992, at 9:45 A.M.

Precision Pipe & Supply, Inc., brought an action in the Macomb Circuit Court against subcontractor Meram Construction, Inc., general contractor Midwest Development Company, Inc., and others, seeking payment for materials furnished for a construction project. Meram cross-claimed against Midwest. L.P.O.M. Group, the project owner, which had created an escrow fund covering the disputed amount and had taken an assignment of Midwest's claims and defenses against Meram, moved to intervene, alleging that its interests were not sufficiently represented by the existing parties. The court, George R. Deneweth, J., denied the motion. L.P.O.M. appealed.

The Court of Appeals *held:*

The trial court abused its discretion in denying the motion to intervene. L.P.O.M. filed a timely application and showed that representation of its interests by the existing parties was inadequate. Also, a disposition of the action, as a practical matter, may impair or impede the ability of L.P.O.M. to protect its interest.

Reversed.

PARTIES — INTERVENTION OF RIGHT.

A party may intervene as a matter of right where it makes a timely application and shows that representation of its interests by the existing parties is inadequate and the trial court determines that a disposition of the action, as a practical matter, may impair or impede the party's ability to protect its interests (MCR 2.209[A][3]).

Abbott, Nicholson, Quilter, Esshaki & Youngblood, P.C. (by *Timothy J. Kramer*), for Precision Pipe & Supply, Inc.

REFERENCES

Am Jur 2d, Parties §§ 133-141.

See the Index to Annotations under Intervention.

Lawrence D. Heitsch, for Meram Construction, Inc., and Sam Meram.

Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, P.C. (by *Stephen Scapelliti*), for American Title Insurance Company.

Steven B. Haffner, for L.P.O.M. Group.

Before: MICHAEL J. KELLY, P.J., and MACKENZIE and BRENNAN, JJ.

BRENNAN, J. L.P.O.M. Group appeals as of right from a May 2, 1990, order denying its motion to intervene. We reverse.

In 1987, L.P.O.M. hired Midwest Development Company, Inc., as general contractor to construct two quick oil change facilities. Midwest hired Meram Construction, Inc., as a subcontractor to work on the project. Precision Pipe & Supply, Inc., supplied materials to Meram for this project. L.P.O.M. refused to pay Meram's outstanding invoice of approximately $23,000, claiming that it incurred an additional expense of approximately $27,000 to correct Meram's defective work. In order to obtain a waiver of lien, which was required to close on the sale of the two projects, L.P.O.M. entered into an "escrow and hold harmless agreement" with Midwest and American Title Insurance Company. Pursuant to the agreement, L.P.O.M. established an escrow fund for $23,247 to satisfy any judgment Meram might obtain against Midwest arising from labor and materials provided by Meram for the two projects. The escrow agreement required that Midwest assign to L.P.O.M. all defenses and claims it had against Meram in connection with the two projects.

On July 7, 1989, Precision filed the underlying action against Meram for payment for the materi-

als it supplied. Meram then cross-claimed against Midwest for payment for materials and services provided on several projects, including the two projects of L.P.O.M. Midwest answered Meram's cross-claim, but asserted no defenses. Meram and Midwest then entered into a partial consent judgment in favor of Meram against Midwest. Meanwhile, Precision obtained a judgment against Meram and obtained an order directing American Title to pay Precision out of the escrow fund. On January 9, 1990, L.P.O.M. first learned that Meram had filed a claim against Midwest. American Title stopped payment on the check to Precision for $24,485.57 because L.P.O.M. had threatened to sue. On January 22, 1990, L.P.O.M. moved to intervene both as a cross-defendant and a garnishee defendant. The court denied the motion, finding that intervention would delay and complicate the proceedings, which had continued for nearly a year with considerable expense to the parties. Further, the court reasoned that L.P.O.M. created the escrow agreement upon which Precision, Meram, Midwest, and American Title had relied in this litigation so that L.P.O.M. was estopped to deny, by intervening in this action, the availability of the escrow funds to satisfy a judgment of Meram against Midwest.

On appeal, L.P.O.M. argues that the court abused its discretion and deprived L.P.O.M. of its right to due process of law by denying its motion to intervene. L.P.O.M. moved for intervention pursuant to MCR 2.209(A)(3), which provides:

> (A) Intervention of Right. On timely application a person has a right to intervene in an action:
>
> * * *
>
> (3) when the applicant claims an interest relating to the property or transaction which is the

> subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The decision whether to grant a motion to intervene is within the court's discretion. *Sumpter v Kosinski,* 165 Mich App 784, 802; 419 NW2d 463 (1988). However, the rule should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented. *Id.*

In the present case, L.P.O.M.'s application for intervention was timely where it filed a motion to intervene thirteen days after learning of the action. The record reveals that L.P.O.M.'s interests were not adequately protected. Midwest, which had assigned its claims and defenses against Meram to L.P.O.M., failed to notify L.P.O.M. of Meram's cross-claim against Midwest and raised no affirmative defenses in its answer to Meram. Furthermore, Midwest entered into a partial consent judgment with Meram to the detriment of L.P.O.M.'s interest in the escrowed funds. American Title did not inform L.P.O.M. of the existence of Meram's cross-claim against Midwest or the existence of garnishment proceedings until January 9, 1990. Finally, it appears that L.P.O.M.'s ability to protect the escrowed funds and the claims and defenses against Meram that Midwest assigned to L.P.O.M. will be impaired where L.P.O.M. seeks to upset the amount of the consent judgment, not merely redistribute or reapportion the amount. Compare *Oliver v Dep't of State Police,* 160 Mich App 107, 116; 408 NW2d 436 (1987). It is only through the pending action that L.P.O.M. can assert its defenses against Meram. If L.P.O.M. not allowed to intervene, it will be barred forever from litigat-

ing its claims against Meram and protecting its escrow fund.

With regard to the trial court's finding that intervention by L.P.O.M. would delay and complicate the proceedings, we agree that intervention may not be proper where it will have the effect of delaying the action or producing a multifariousness of parties and causes of action. *Ferndale School Dist v Royal Oak Twp School Dist No 8,* 293 Mich 1; 291 NW 199 (1940). However, we believe that intervention might never be granted if this were strictly construed. Moreover, we note that L.P.O.M.'s intervention should not overcomplicate the proceedings. More importantly, we note that any delay in the case is not the fault of L.P.O.M., but rather Midwest for failing to notify L.P.O.M. of the proceedings. L.P.O.M. responded immediately after being notified of the action and should not suffer as a result of Midwest's inaction. With respect to the trial court's finding of estoppel, we note that L.P.O.M. is not denying the existence of the escrow agreement. Instead, L.P.O.M. is merely attempting to assert claims and defenses against Meram that Midwest assigned to L.P.O.M. in the escrow agreement. Accordingly, we find that the trial court abused its discretion in denying L.P.O.M.'s motion to intervene. As a result of our disposition of this issue, it is unnecessary to address L.P.O.M.'s remaining arguments.

Reversed.

NUGENT v BAUERMEISTER

Docket No. 127010. Submitted December 11, 1991, at Lansing. Decided July 20, 1992, at 9:50 A.M. Leave to appeal sought.

Richard G. Nugent, as conservator of the estate of Matthew A. Nugent, a minor, brought an action in the Genesee Circuit Court against Chris L. Bauermeister and others, seeking damages for emotional distress suffered by the minor in witnessing the death of a friend struck by a pickup truck operated by Bauermeister. The court, Judith A. Fullerton, J., granted summary disposition for the defendants, ruling that the plaintiff had failed to state a claim on which relief could be granted. The plaintiff appealed.

The Court of Appeals *held:*

A plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person only if the plaintiff is an immediate member of the victim's family. It is not reasonably foreseeable that a bystander other than a close relative would suffer emotional distress as a result of witnessing a third person's injury. Permitting recovery by unrelated bystanders would expose defendants to limitless liability, out of proportion to their negligence.

Affirmed.

TORTS — EMOTIONAL DISTRESS — BYSTANDERS.

Recovery for emotional distress caused by observing the negligently inflicted injury of a third person may be had only if the plaintiff is an immediate member of the victim's family.

Beltz & Associates (by *C. Robert Beltz* and *Paul Jones*), for Frederick Bosco.

Law Offices of Natinsky & Jaffa (by *Leonard*

REFERENCES

Am Jur 2d, Fright, Shock, and mental Disturbance §§ 1-3, 16, 23, 24.

Relationship between victim and plaintiff-witness as affecting right to recover damages in negligence for shock or mental anguish at witnessing victim's injury or death. 94 ALR3d 486.

Natinsky), for Chris L. Bauermeister and Kenneth L. Cook.

Before: WEAVER, P.J., and MACKENZIE and FITZGERALD, JJ.

MACKENZIE, J. Plaintiff Richard G. Nugent, as conservator of the estate of his minor son, Matthew, appeals as of right from an order granting summary disposition in favor of defendants Chris L. Bauermeister and Kenneth L. Cook. We affirm.

The facts of the case are undisputed. Matthew (hereafter plaintiff) and his close friend, Eric John Bosco, were riding their bicycles on the shoulder of M-25 in Bay County when defendant Bauermeister lost control of the pickup truck he was driving. The mirror of the truck grazed but did not hurt plaintiff's elbow. Plaintiff then watched as the truck struck and fatally injured Eric.

Plaintiff's complaint alleged that witnessing the death of his friend, due to defendant Bauermeister's negligent operation of a motor vehicle, caused plaintiff to suffer severe emotional distress. The trial court agreed with defendants that the complaint failed to state a claim and accordingly granted summary disposition under MCR 2.116(C)(8). The sole issue on appeal is whether a person who witnesses the death of a friend has a viable cause of action for emotional and psychological injury. We hold that he does not.

It is undisputed that, in Michigan, a plaintiff may in certain instances recover for mental distress when a third person is injured or exposed to injury by a negligent tortfeasor and the plaintiff is present. The class of persons entitled to such bystander recovery is extremely limited, however. In *Gustafson v Faris,* 67 Mich App 363; 241 NW2d 208 (1976), this Court, quoting from Prosser, Torts

(4th ed), § 54, pp 334-335, adopted the following restrictions for bystander recovery for emotional distress:

> [I]t is . . . obvious that if recovery is to be permitted, there must be some limitation. *It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident,* and every distant relative of the person injured, *as well as his friends.* And obviously the danger of fictitious claims, and the necessity of some guarantee of genuineness, are even greater here than before. It is no doubt such considerations that have made the law extremely cautious.
>
> . . . It is clear that the injury threatened or inflicted upon the third person must be a serious one, of a nature to cause severe mental disturbance to the plaintiff, and that the shock must result in actual physical harm. *The action might, at least initially, well be confined to members of the immediate family of the one endangered, or perhaps to husband, wife, parent, or child,* to the exclusion of mere bystanders, and remote relatives. As an additional safeguard, it might be required that the plaintiff be present at the time of the accident or peril, or at least that the shock be fairly contemporaneous with it, rather than follow when the plaintiff is informed of the whole matter at a later date. [67 Mich App 368-369. Emphasis added.]

These limitations have consistently been applied by this Court since *Gustafson* was decided. See *Miller v Cook,* 87 Mich App 6; 273 NW2d 567 (1978); *Williams v Citizens Mutual Ins Co of America,* 94 Mich App 762; 290 NW2d 76 (1980); *Pate v Children's Hosp of Michigan,* 158 Mich App 120; 404 NW2d 632 (1986); *Wargelin v Sisters of Mercy*

Health Corp, 149 Mich App 75; 385 NW2d 732 (1986); *Henley v Dep't of State Hwys & Transportation,* 128 Mich App 214; 340 NW2d 72 (1983); *Detroit Automobile Inter-Ins Exchange v McMillan (On Remand),* 159 Mich App 48; 406 NW2d 232 (1987).

We decline to deviate from *Gustafson* by expanding the class of persons entitled to bystander recovery from immediate family members to close friends of the injured third party. Our research has found two cases in which the bystander plaintiffs sought to recover for emotional distress after witnessing the death of a person who was "like a brother or sister" to them, the claim pleaded in this case. *Kately v Wilkinson,* 148 Cal App 3d 576; 195 Cal Rptr 902 (1984); *Trapp v Schuyler Construction,* 149 Cal App 3d 1140; 197 Cal Rptr 411 (1983). In both cases, recovery was denied. In a somewhat analogous line of cases, bystander recovery has also been denied where the plaintiff claiming emotional distress cohabited with, but was not married to, the injured third party. See *Elden v Sheldon,* 46 Cal 3d 267; 250 Cal Rptr 254; 758 P2d 582 (1988); *Drew v Drake,* 110 Cal App 3d 555; 168 Cal Rptr 65 (1980); *Ferretti v Weber,* 513 So 2d 1333 (Fla App, 1987). But see *Ledger v Tippitt,* 164 Cal App 3d 625; 210 Cal Rptr 814 (1985).

Two rationales are generally advanced for the decision to deny bystander recovery to a plaintiff who is not an immediate family member. The first rationale involves the problem of reasonable foreseeability. Under this analysis, courts have held that it is not reasonably foreseeable that a bystander other than a close relative would suffer emotional distress as a result of witnessing a third party's injury. *Trapp, supra; Drew, supra.* The second rationale involves the need to circumscribe liability, and is typically articulated as a concern

that permitting recovery by bystanders other than close relatives would expose defendants to limitless liability, out of proportion to the degree of the their negligence. See *Thing v La Chusa,* 48 Cal 3d 644; 257 Cal Rptr 865; 771 P2d 814 (1989). In this regard, at least one court has held that the class of persons who may properly seek bystander recovery for emotional distress should be limited to those individuals who are permitted to bring an action under the state's wrongful death statute. *Gates v Richardson,* 719 P2d 193 (Wyo, 1986).

Both rationales are sound and are consistent with the concerns articulated by Prosser, as adopted by this Court in *Gustafson, supra,* and its progeny. Accordingly, we hold that a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person only if the plaintiff is an immediate member of the victim's family.

Plaintiff also suggests that he should be allowed to recover for the injuries he suffered as a direct victim of defendant Bauermeister's negligence, i.e., being grazed by the pickup truck and fearing for his personal safety. A fair reading of the complaint discloses that such a claim was not pleaded, however. The trial court did not err in granting summary disposition pursuant to MCR 2.116(C)(8) for plaintiff's failure to state a claim upon which relief could be granted.

Affirmed.

NIGGELING v DEPARTMENT OF TRANSPORTATION

Docket No. 133808. Submitted February 5, 1992, at Grand Rapids. Decided July 20, 1992, at 9:55 A.M.

Janet Niggeling, as conservator for Jon W. Hill, brought an action in the Court of Claims against the Department of Transportation, seeking damages resulting from an automobile accident. The court, John D. Payant, J., entered judgment for the plaintiff following a bench trial. The judgment included awards of prejudgment and postjudgment interest of twelve percent, compounded annually. The defendant paid the judgment principal and subsequently paid postjudgment interest while it appealed the award of prejudgment interest. The Court of Appeals affirmed the award of prejudgment interest, determining it to be authorized by MCL 600.6455; MSA 27A.6455. 183 Mich App 770 (1990). The defendant tendered an amount it computed to be the balance of its obligation to the plaintiff. The plaintiff claimed additional interest was due, and the trial court ordered the defendant to pay the additional interest as computed by the plaintiff. The defendant appealed.

The Court of Appeals *held:*

1. MCL 600.6455; MSA 27A.6455 provides in part that where a bona fide, reasonable, written offer of settlement in a civil action in tort is not made by the party against whom the judgment is subsequently rendered, or is made but not filed with the court, the court must order that interest of twelve percent, compounded annually, be paid from the date of the filing of the complaint to the date of the satisfaction of the judgment.

2. The rule in Michigan for the computation of interest in cases of partial payment applies the payment in discharge of accrued interest and the surplus, if any, in discharge of the principal. Compound interest may lead to interest on interest, in that accrued interest is added at the end of the compounding period to the principal and subsequent interest is assessed on the total of unpaid principal and unpaid accrued interest. The plaintiff correctly applied the principles governing partial payment and compound interest in computing the balance of the defendant's obligation.

Affirmed.

Blanton & Bowman, P.C. (by *Michael Bowman*), and *Petrucelli & Petrucelli, P.C.* (by *Vincent R. Petrucelli*), for the plaintiff.

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

Before: MACKENZIE, P.J., and WEAVER and R. B. BURNS,* JJ.

MACKENZIE, P.J. Plaintiff's ward was injured in a 1985 automobile accident. On June 27, 1986, plaintiff filed suit in the Court of Claims against defendant. Following a bench trial, a judgment in plaintiff's favor was entered in the amount of $887,154, plus postjudgment interest. The court subsequently entered an order assessing prejudgment interest from the date of the filing of the complaint. Defendant appealed the assessment of prejudgment interest. This Court affirmed. *Niggeling v Dep't of Transportation,* 183 Mich App 770; 455 NW2d 415 (1990).

Defendant paid plaintiff the judgment amount of $887,154, on November 19, 1988. On November 23, 1988, defendant paid plaintiff $32,666.71 in postjudgment interest, representing twelve percent simple interest on the judgment amount from the date of entry through the date of payment of the principal amount. On July 18, 1990, after this Court affirmed the award of prejudgment interest, defendant paid plaintiff $234,472.79. Plaintiff claimed additional interest of $63,087.22, plus $20.74 per day, and filed a motion to compel payment of interest. The trial court agreed and

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

entered an order assessing interest based on the following computations submitted by plaintiff:

> 1) 6/27/86 to 6/27/87: Principal ($887,154.00) and interest at 12% ($106,458.48) equals $993,612.48.
>
> 2) 6/27/87 to 6/27/88: Principal ($993,612.48) and interest at 12% ($119,233.49) equals $1,112,845.90.
>
> 3) 6/27/88 to 11/19/88: Principal ($1,112,845.90) and interest for 145 days at 12% ($53,050.73) equals $1,165,896.60. Subtract payment on 11/19/88 of $887,154.00 to equal outstanding amount of $278,742.60. ($887,154.00 paid on 11/19/88).
>
> 4) 11/19/88 to 11/23/88: Principal ($278,742.60) and interest for 4 days at 12% ($366.56) equals $279,109.16. Subtract payment of post-judgment interest of $32,666.71 to equal outstanding amount of $246,442.45. ($32,666.71 paid on 11/23/88).
>
> 5) 11/23/88 to 6/27/89: Principal ($246,442.45) and interest for 216 days at 12% ($17,500.32) equals $263,943.23.
>
> 6) 6/27/89 to 6/27/90: Principal ($263,943.23) and interest at 12% ($31,673.18) equals $295,616.41.
>
> 7) 6/27/90 to 7/18/90: Interest accumulated at a daily rate of $97.18.
>
> 8) 6/27/90 to 7/18/90: Principal ($295,616.41) and interest for 20 days at 12% ($1,943.60) equals $297,560.01. Subtract payment of $234,472.79 to equal outstanding amount of $63,087.22.
>
> 9) 7/18/90 to present: Interest accumulates at a daily rate of $20.74 until payment in full.

Defendant now appeals as of right. We affirm.

In *Niggeling, supra,* this Court held that prejudgment interest should be awarded under MCL 600.6455(5); MSA 27A.6455(5), which provides:

> Except as otherwise provided in subsection (3), if a bona fide, reasonable written offer of settlement

> in a civil action based on tort is not made by the party against whom the judgment is subsequently rendered, or is made and that offer is not filed with the court, the court shall order that interest be calculated from the date of filing the complaint to the date of satisfaction of the judgment.

There is no dispute concerning the rate of interest, twelve percent per annum, or that it is to be compounded annually. See MCL 600.6455(1); MSA 27A.6455(1); *Niggeling, supra.* The calculations adopted by the trial court assume that, because of compounding, a balance was due after the two payments made by defendant in November 1988, and that the balance continued to accrue interest at the statutory rate of twelve percent compounded annually. Defendant claims that this method of calculation was improper. We disagree.

Compound interest means interest on interest, in that accrued interest is added periodically to the principal, and interest is computed upon the new principal thus formed. *Ruloff v Hazen,* 124 Mich 570, 572-573; 83 NW 370 (1900); 45 Am Jur 2d, Interest & Usury, § 76, p 69. The difference between simple and compound interest is that simple interest does not merge with the principal and thus does not become part of the base on which future interest is calculated. *Gage v Ford Motor Co,* 423 Mich 250, 259; 377 NW2d 709 (1985); *Stewart v Isbell,* 155 Mich App 65, 79; 399 NW2d 440 (1986).

Partial payment stops the accrual of interest only with respect to the portion paid, not to the entire amount determined to be due. *Cates v Moyses,* 57 Mich App 405, 412; 226 NW2d 106 (1975), modified on other grounds 394 Mich 762 (1975). Tender of only that portion for which a party believes itself to be liable does not toll the

accrual of interest on the entire liability later determined to be due. *Id.*

Michigan follows the Massachusetts or United States rule in computing interest: a partial payment is applied first to interest then due; if the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of the principal remaining due. *Wallace v Glaser,* 82 Mich 190, 191; 46 NW 227 (1890); *Krisfalusi v Krisfalusi,* 178 Mich App 458, 463; 444 NW2d 196 (1989), rev'd on other grounds 434 Mich 916 (1990).

Applying these principles to this case, we conclude that the Court of Claims properly adopted plaintiff's computation of interest. Plaintiff's calculation adds the interest to the judgment amount annually on June 27, 1987, and June 27, 1988. It continues to add simple interest at a per diem rate until the date of defendant's first partial payment, November 19, 1988, and deducts that payment from the total then due. The calculation continues in this fashion, adding interest to the principal annually, and setting off the remaining payment.

Defendant characterizes the payment made on November 19, 1988, as payment of the principal. The amount paid corresponds to the amount of the damage award; by the time that payment was made, however, the "principal" included the interest added annually. Further, by the time that payment was made, simple interest had accumulated from June 27, 1988, to November 19, 1988, the date of the payment. Simple interest does not become part of the judgment. *Gage, supra,* p 259; *Schwartz v Piper Aircraft Corp,* 90 Mich App 324, 327; 282 NW2d 306 (1979). Compound interest, however, merges with the principal; there is no distinction between the original principal and added interest.

Defendant argues that it is unfair for plaintiff to have had use of the funds, and for her to collect interest on the funds from defendant as well. Plaintiff has not computed interest on the portion of the judgment paid by defendant. The calculations adopted by the lower court credit the payments made by defendant and continue to calculate interest on the remaining balance. There is no accrual of interest on funds previously paid.

Defendant cites authority suggesting that it could have stopped the interest from accumulating further by depositing the disputed sum with the clerk of the court. MCR 2.620(2). *Coughlin v Dean,* 174 Mich App 346, 354; 435 NW2d 792 (1989). Defendant chose not to do that. Instead, it tendered payment only of the undisputed sums. Those payments stopped the accrual of interest only with respect to the amount paid, not with respect to the entire amount later found to be due. *Cates, supra.*

Finally, we reject defendant's suggestion that no interest accrues between anniversary dates. Defendant's expert assumed accrual of interest at the annual rate of twelve percent simple interest, figured on a per diem basis, at several points in defendant's proposed calculations. Moreover, the statute requires that interest under subsection 5 "be calculated from the date of filing the complaint to the date of satisfaction of the judgment." MCL 600.6455(5); MSA 27A.6455(5). This suggests that interest accrues to the satisfaction date, not to the last previous anniversary of the filing of the complaint.

It appears that defendant's entire argument hinges on the mistaken assumption that only the amount of damages awarded by the court constituted the judgment principal. The Legislature specified compound interest; that interest became

an integral part of the principal upon being added at annual intervals. Defendant's payments constituted partial payment, applied first to accrued interest and then to reduction of principal. Having chosen not to deposit the disputed sum with the clerk of the court, defendant remains liable for the interest that has accrued since its last payment.

Affirmed.

PEOPLE v PUROLL

Docket No. 133335. Submitted March 3, 1992, at Grand Rapids. Decided July 20, 1992, at 10:00 A.M.

Walter L. Puroll was convicted by a jury in the Antrim Circuit Court, Charles M. Forester, J., of second-degree criminal sexual conduct. The defendant appealed, claiming error in the admission of testimony concerning a subsequent alleged act of sexual conduct between him and the victim, members of the same household, and in the court's failure to give a limiting instruction with respect to that testimony.

The Court of Appeals *held:*

Evidence of subsequent similar sexual assaults by a defendant against a victim is admissible where the defendant and the victim are members of the same household. The question whether a limiting instruction should have been given was not preserved for appellate review.

Affirmed.

MICHAEL J. KELLY, J., dissenting, stated that the subsequent act alleged by the victim does not qualify as a second uncharged act of sexual abuse and that, accordingly, the repeated references to it by the prosecution was error requiring reversal.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Charles H. Koop,* Prosecuting Attorney, and *J. Ronald Kaplansky,* Assistant Attorney General, for the people.

Gregory G. Justis, for the defendant.

Before: DOCTOROFF, C.J., and MICHAEL J. KELLY and R. B. BURNS,* JJ.

R. B. BURNS, J. Following a jury trial, defendant was convicted of second-degree criminal sexual

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

conduct involving a member of his household. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). On September 10, 1990, defendant was sentenced to 2½ to 15 years' imprisonment and now appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting the victim's testimony regarding a subsequent sexual act between defendant and the victim. We disagree. *People v DerMartzex,* 390 Mich 410; 213 NW2d 97 (1973); *People v Dreyer,* 177 Mich App 735; 442 NW2d 764 (1989). Further, MRE 404(b) specifically provides for the admission of evidence of other crimes, wrongs, or acts that occurred after the conduct at issue in the case. Contrast, however, FRE 404, which does not contain language specifically allowing for the admission of evidence of subsequent acts.

Defendant next argues that the trial court erred in failing to give the jury a limiting instruction regarding the evidence of the subsequent sexual act between defendant and the victim. However, defendant failed to request such a limiting instruction and failed to object to the jury instructions as given. Therefore, this issue is not preserved for appellate review. *People v Livery Clark,* 172 Mich App 407, 417; 432 NW2d 726 (1988).

Affirmed.

DOCTOROFF, C.J., concurred.

MICHAEL J. KELLY, J. *(dissenting).* I respectfully dissent.

I question the validity of the rule enunciated in *People v Dreyer,* 177 Mich App 735, 738; 442 NW2d 764 (1989), lv den 434 Mich 865 (1990),[1]

[1] The *Dreyer* Court refers to the *Jenness-DerMartzex* exception to the general evidentiary rule that evidence of other crimes is barred because it is more prejudicial than probative and convicts an accused

permitting a complainant's testimony regarding subsequent acts of sexual abuse where, as in this case, the acts do not qualify as similar, signature acts, on the theory that such acts "are part of the pattern of abuse." However, this is not the case to take on the validity of that rule.[2]

In this case, the subsequent act could hardly qualify as a second uncharged act of sexual abuse. This second incident occurred in a hallway and involved no sexual touching, unless we are to infer that an adult who clutches a child's arms from behind and makes posterior-anterior contact with the child is guilty of wrongful, sexually abusive, touching.

During his closing argument, the prosecuting

because he is a bad man. The foundation goes back to the "unnatural and improbable acts" explication of Mr. Justice Christiancy in *People v Jenness,* 5 Mich 305, 323-324 (1858), which is not, I submit, a proper foundation for turning the prior bad-acts rule of evidence on its head in sex crimes. We are never told why the prosecutor who has evidence of other crimes, prior or subsequent, does not charge them. There is uncertainty concerning whether prior bad acts are crimes in some cases. The "sexual intimacy" judicially noticed by Justice LEVIN in *People v DerMartzex,* 390 Mich 410, 414-415; 213 NW2d 97 (1973), probably contributed to the confusion. Justice LEVIN said:

> "Limiting [the victim's] testimony to the specific act charged and not allowing her to mention acts leading up to the assault would seriously undermine her credibility in the eyes of the jury. Common experience indicates that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy."

Certainly the "antecedent sexual acts" permitted in *DerMartzex* provide no foundation at all for the subsequent crimes permitted in *Dreyer.* I believe it is unfortunate that the Supreme Court denied leave in *Dreyer,* because I believe it was wrongly decided. What jury could resist convicting *Dreyer* of rape for the two subsequent uncharged motel incidents.

[2] Implications of due process occur regularly in these cases under the aegis of evidence "more probative than prejudicial." At the very least, subsequent crimes should be charged and appropriately litigated. Subsequent bad acts that do not warrant criminal charges should be excluded, at least until a meaningful reexamination of the parameters of the rule is undertaken by the Supreme Court, which has the resources to do so.

attorney repeatedly called the jury's attention to this second uncharged incident, each time describing the incident as a "sexual act."

I think the admission of the evidence of the second incident and the emphasis on its characterization as sexual abuse was error, and I cannot find it harmless.

I would reverse.

BLASE v APPICELLI

Docket No. 120284. Submitted February 11, 1992, at Detroit. Decided July 20, 1992, at 10:05 A.M. Leave to appeal sought.

John Blase brought an action in the Wayne Circuit Court against John M. Appicelli, alleging false arrest, malicious prosecution, and assault and battery. The defendant, a police officer, had arrested the plaintiff for disorderly conduct. The plaintiff had tendered a plea of guilty of disorderly conduct in the 36th District Court, which the court, Leon Jenkins, J., took under advisement. The court subsequently dismissed the charge. The circuit court, Claudia House Morcom, J., granted summary disposition for the defendant and dismissed the complaint, ruling that there were no genuine issues of material fact and that the defendant was entitled to judgment as a matter of law. The plaintiff appealed.

The Court of Appeals *held:*

1. The circuit court erred in summarily dismissing the claims of false arrest and malicious prosecution on the ground that the plaintiff's guilty plea provided conclusive proof of probable cause for his arrest and prosecution. Although, a conviction, unless procured by fraud or unfair means, is conclusive evidence of probable cause, there was no conviction in this instance because the guilty plea tendered by the plaintiff never was accepted. Also, the plaintiff's plea may have been procured through unfair means because the district judge initiated and participated in the discussions that led to the agreement to plead guilty.

2. An action for malicious prosecution is not barred by the settlement or compromise of a prosecution where the settlement or compromise was brought about by duress or coercion.

3. The circuit court did not err in summarily dismissing the claim of assault and battery. The plaintiff failed to respond to

---

REFERENCES

Am Jur 2d, False Imprisonment §§ 96-100, 120, 128; Malicious Prosecution § 71.

See the Index to Annotations under False Imprisonment and Arrest; Malicious Prosecution.

the defendant's contention that he had used only force that was necessary to effectuate the arrest.

Affirmed in part, reversed in part, and remanded.

1. TORTS — FALSE ARREST — MALICIOUS PROSECUTION — PROBABLE CAUSE — GUILTY PLEAS.

A plea of guilty of a criminal offense that is taken under advisement and ultimately not accepted by a court, leading to dismissal of the charge, does not constitute conclusive evidence of probable cause for the arrest and the prosecution and is not grounds for dismissal of an action for false arrest or malicious prosecution.

2. TORTS — MALICIOUS PROSECUTION — SETTLEMENT OR COMPROMISE OF CHARGE.

An action for malicious prosecution is not barred by the settlement or compromise of a prosecution where the settlement or compromise was brought about by duress or coercion.

Goodman, Eden, Millender & Bedrosian (by *William H. Goodman*), for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Stewart H. Freeman* and *Ronald W. Emery,* Assistant Attorneys General, for the defendant.

Before: DOCTOROFF, C.J., and MICHAEL J. KELLY and BRENNAN, JJ.

DOCTOROFF, C.J. Plaintiff appeals as of right a circuit court order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). Plaintiff contends that the trial court erred in dismissing his claims of false arrest, malicious prosecution, and assault and battery. We affirm in part and reverse in part.

This case arises from an incident that occurred on May 29, 1985, at Tiger Stadium. Plaintiff and his wife attended a baseball game with two friends, Bill Mitchell and Bill McGraw. Two men who sat directly behind the Blases were loud,

boisterous, and obnoxious. The men allegedly threw small bits of paper that landed on Rosemary Blase's sweater and one of the men then removed the paper in an offensive manner.

Plaintiff sought the assistance of an usher. Defendant, who sat next to the two men, told the usher that nothing was going on and the usher left. The two men left sometime before the end of the game.

At the end of the game, Mitchell asked defendant what he thought of the two men. Defendant indicated that he did not think the men had been obnoxious and that he thought Rosemary Blase had been obnoxious and provoked the men. When Rosemary Blase took issue with defendant's opinion, plaintiff stepped between them. According to defendant, plaintiff stepped on his foot and pushed him into a seat. Plaintiff denies doing this and claims that defendant turned him around, placed him in a chokehold, and announced that he was a police officer. Defendant received assistance from stadium security and plaintiff was taken to the stadium's police holding room. Plaintiff was charged with disorderly conduct, a misdemeanor.

Plaintiff subsequently appeared before 36th District Court Judge Leon Jenkins. Plaintiff initially pleaded not guilty and requested a jury trial. Judge Jenkins called the prosecutor and defense counsel into his chambers. Judge Jenkins stated his belief that the prosecutor would win, suggested that the parties enter into a plea bargain, and set forth the terms of the plea bargain. Judge Jenkins informed defense counsel that if her client demanded a jury trial and was found guilty, he would receive the maximum jail sentence.

After discussing the plea bargain with defense counsel, plaintiff pleaded guilty of disorderly conduct. Judge Jenkins took the plea under advise-

ment, ruling that, if plaintiff avoided any felony or misdemeanor convictions for six months, the case would be automatically dismissed. The charges against plaintiff were ultimately dismissed.

Thereafter, plaintiff filed this action against defendant, alleging false arrest, malicious prosecution, assault and battery, and violation of his constitutional rights under 42 USC 1983. The § 1983 claim was later voluntarily dismissed. The trial court granted defendant's motion for summary disposition of all three claims and dismissed plaintiff's complaint.

A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The party opposing the motion must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Ewers v Stroh Brewery Co,* 178 Mich App 371, 374; 443 NW2d 504 (1989), MCR 2.116(G)(4). The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *McCluskey v Womack,* 188 Mich App 465, 469; 470 NW2d 443 (1991). Giving the benefit of reasonable doubt to the opponent, the court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Amorello v Monsanto Corp,* 186 Mich App 324, 330; 463 NW2d 487 (1990).

To prevail on a claim of false arrest, the plaintiff must show that the arrest was not legal, i.e., that it was made without probable cause. *Tope v Howe,* 179 Mich App 91, 105; 445 NW2d 452 (1989). One element that the plaintiff must prove to succeed

on an action for malicious prosecution is the absence of probable cause for the proceedings. *Young v Barker,* 158 Mich App 709, 721; 405 NW2d 395 (1987).

In granting the motion for summary disposition, the trial court accepted defendant's position that plaintiff's claims of false arrest and malicious prosecution were invalid as a matter of law because plaintiff's guilty plea was conclusive proof of probable cause.

It is well established that a conviction, unless procured by fraud or unfair means, is conclusive evidence of probable cause. *Moore v Michigan Nat'l Bank,* 368 Mich 71, 73; 117 NW2d 105 (1962); *Piechowiak v Bissell,* 305 Mich 486, 497; 9 NW2d 685 (1943), quoting 1 Cooley on Torts (4th ed), p 397, § 118. The general rule applies to a conviction that results from a guilty plea. *Killian v Fuller,* 162 Mich App 210, 215; 412 NW2d 698 (1987).

The significant fact about this case is that the proceedings in the 36th District Court did not result in a conviction. The transcript of the guilty plea proceedings clearly indicates that Judge Jenkins did not accept plaintiff's guilty plea.[1] A guilty plea that is taken under advisement and never accepted does not result in a conviction. Therefore, the trial court erred in granting summary disposition of plaintiff's claims of false arrest and malicious prosecution on the basis that his guilty plea was conclusive proof of probable cause.

In addition, if the testimony of plaintiff's defense

[1] We note that the record of the proceedings in the 36th District Court contains the following rubber-stamped entry: "Defendant withdraws former plea of not guilty and enters plea of guilty. Plea accepted." However, immediately below that is another rubber-stamped entry: "Taken under advisement for 6 months to 2/17/86 if no further contact with law enforcement, case to be dismissed." Given the trial court's clear statements on the record at the guilty plea proceeding, we reject any assertion that the first rubber-stamped entry establishes that plaintiff's plea was accepted.

counsel is believed, plaintiff's guilty plea was procured by unfair means. A guilty plea that is procured by unfair means is not conclusive evidence of probable cause. *Moore, supra; Piechowiak, supra.* In *People v Killebrew,* 416 Mich 189; 330 NW2d 834 (1982), the Supreme Court held that a trial judge should not initiate or participate in discussions aimed at reaching a plea agreement and may not engage in negotiation of the bargain itself. The voluntariness of a criminal defendant's guilty plea is questionable where a trial court exerts or even seems to exert the authority of its position to induce the defendant to plead guilty. *Id.,* p 202. In this case, Judge Jenkins not only initiated the discussion but also set forth the terms of the plea bargain. In rejecting plaintiff's claim that his guilty plea was coerced, the trial court made determinations regarding the credibility of plaintiff and plaintiff's defense counsel. The trial court may not weigh credibility when deciding a motion for summary disposition. *Arbelius v Poletti,* 188 Mich App 14, 19; 469 NW2d 436 (1991). The trial court therefore erred in rejecting plaintiff's claim that his guilty plea was coerced.

We decline to address plaintiff's argument that the arrest was unlawful because he did not exhibit disorderly conduct. Plaintiff did not raise this issue in the trial court, and therefore it cannot be reviewed. *Jones v Continental Casualty Co,* 186 Mich App 656, 659; 465 NW2d 45 (1991).

Plaintiff also argues that dismissal of his claims of malicious prosecution was improper because there is a question of fact concerning whether the criminal proceedings terminated in his favor. In ruling on the motion for summary disposition, the trial court did not address defendant's alternative argument that summary disposition of the claim of malicious prosecution was appropriate because the

criminal proceeding did not terminate in plaintiff's favor. Defendant argued that the proceedings did not terminate in plaintiff's favor because the case was dismissed pursuant to an agreement of compromise with the plaintiff. Plaintiff argued that, because his guilty plea was coerced, the rule that an action for malicious prosecution is barred where the criminal proceedings were terminated by a compromise that is not indicative of the plaintiff's innocence did not apply.

Although no published opinion in Michigan has addressed this issue, other jurisdictions have held that a settlement or compromise brought about by duress or coercion will not bar an action for malicious prosecution. *White v Int'l Text-Book Co,* 156 Iowa 210; 136 NW 121 (1912); *Schwartz v Schwartz,* 206 Wis 420; 240 NW 177 (1932); *Robertson v Bell,* 57 Wash 2d 505; 358 P2d 149 (1961); *Gowin v Heider,* 237 Or 266; 386 P2d 1 (1963). We agree with the view adopted in these cases and hold that, if the trier of fact determines that plaintiff's guilty plea was coerced, defendant may not rely on the rule that an action for malicious prosecution is barred where the prior proceeding was terminated by compromise or settlement.

Finally, plaintiff argues that the trial court erred in dismissing his claim of assault and battery. In moving for summary disposition, defendant contended that the arrest was lawful. In his supplemental brief in support of the motion for summary disposition, defendant asserted that the assault and battery claim should be dismissed because he used only that force necessary to effect the arrest. Plaintiff did not offer any response to defendant's argument in his brief in response or at oral argument. Therefore, summary disposition of plaintiff's assault and battery claim was appropriate.

The summary disposition of plaintiff's claims of false arrest and malicious prosecution is reversed. The summary disposition of plaintiff's claim of assault and battery is affirmed.

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

PEOPLE v REYNOLDS

Docket No. 134478. Submitted June 3, 1992, at Grand Rapids. Decided July 20, 1992, at 10:10 A.M.

Michael W. Reynolds was convicted in the Kalamazoo Circuit Court, Philip D. Schafer, J., of violating probation imposed for convictions of breaking and entering an occupied dwelling with intent to commit a felony and of being an habitual offender, second offense. The court revoked probation and imposed a prison sentence of 5 to 22½ years for the underlying convictions. The defendant appealed.

The Court of Appeals *held:*

1. The trial court correctly denied sentence credit for time spent in a tether program. The defendant was not entitled to credit pursuant to MCL 769.11b; MSA 28.1083(2) because placement in the program was not attributable to a denial of bond or an inability to furnish bond. The Double Jeopardy Clauses of the federal and state constitutions, US Const, Am V; Const 1963, art 1, § 15, which mandate credit for confinements amounting to time spent in jail, do not require a grant of credit to the defendant because participation in a tether program is not tantamount to confinement in jail.

2. Contrary to the defendant's claim, the record contained sufficient evidence from which a rational trier of fact could have concluded that the preponderance of the evidence indicated that the defendant had violated his probation.

3. The sentence imposed was proportionate to the circumstances surrounding the offense and the offender. The sentence exceeded the recommendations of the sentencing guidelines, but the guidelines do not apply to habitual offenders or probation violators.

Affirmed.

SENTENCES — PROBATION VIOLATIONS — CREDITS — PARTICIPATION IN TETHER PROGRAMS.

Time spent in a tether program by a defendant on probation who

---

REFERENCES

Am Jur 2d, Criminal Law § 525; Habitual Criminals and Subsequent Offenders §§ 1-5, 30.

See the Index to Annotations under Criminal Law; Habitual Criminals and Subsequent Offenders; Sentence and Punishment.

is subsequently found guilty of probation violation does not, upon revocation of probation, entitle the defendant, under the sentence credit statute or the Double Jeopardy Clauses of the federal and state constitutions, to credit toward a prison sentence imposed for the underlying conviction (MCL 769.11b; MSA 28.1083[2]; US Const, Am V; Const 1963, art 1, § 15).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, and *David W. DeBack,* Assistant Prosecuting Attorney, for the people.

James K. Jesse, for the defendant on appeal.

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

BRENNAN, J. Following a hearing, defendant was convicted of probation violation for testing positive for THC, a chemical found in marijuana, and for driving while his license was suspended. Defendant's probation was revoked and he was sentenced to 5 to 22½ years in prison for his underlying convictions of breaking and entering an occupied dwelling with intent to commit a felony, MCL 750.110; MSA 28.305, and of being a second-felony offender, MCL 769.10; MSA 28.1082. He appeals as of right, and we affirm.

Defendant first argues that the court improperly denied him credit for time he spent in a tether program. Because defendant's participation in the tether program was not due to his being denied or unable to furnish bond for the offense of which he was convicted, he is not entitled to sentence credit under the sentence credit statute, MCL 769.11b; MSA 28.1083(2). *People v Wagner,* 193 Mich App 679; 485 NW2d 133 (1992); *People v Whiteside,* 437 Mich 188, 196; 468 NW2d 504 (1991). Moreover, we note that the Double Jeopardy Clauses of the federal and state constitutions, US Const, Am V;

Const 1963, art 1, § 15, do not mandate an award of sentence credit for the time defendant spent in the tether program. "Sentence credit under the double jeopardy clauses is only required for confinements amounting to time spent 'in jail' as that term is commonly used and understood." *Wagner, supra,* p 682, citing *Whiteside, supra,* p 202. The tether program is a restriction, not a confinement, and is not "jail" as that term is commonly used and understood.

Defendant next argues that there was insufficient evidence to establish a probation violation. The record reveals that defendant admitted driving during the time his license was suspended. Moreover, defendant tested positive for THC, even allowing for a margin of error. A prosecution witness testified that the test result was accurate. There was no evidence indicating otherwise. Viewing this evidence in a light most favorable to the prosecution, we find that a rational trier of fact would conclude that the preponderance of the evidence indicated that defendant violated his probation. *People v Ison,* 132 Mich App 61, 66; 346 NW2d 894 (1984).

Finally, defendant contends that his sentence was disproportionate. The sentencing guidelines do not apply to habitual offenders or to defendants convicted of probation violation. *People v Randolph Warner,* 190 Mich App 26, 29; 475 NW2d 397 (1991); *People v Hoffer,* 193 Mich App 624; 484 NW2d 781 (1992). However, we note that the guidelines recommended zero to eighteen months of imprisonment and defendant was sentenced to a prison term of 5 to 22½ years. The trial court tried putting defendant into substance abuse programs, confining him to short jail periods totaling nine months, and finally tried to put him in the

tether program. Despite the trial court's efforts, defendant came before the court three times, incurring five probation violations. Accordingly, we find that the sentence is proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

NATIONAL INDEMNITY COMPANY v BUDGET RENT A CAR SYSTEMS, INC

Docket No. 128552. Submitted March 10, 1992, at Detroit. Decided July 21, 1992, at 9:00 A.M.

National Indemnity Company, the excess automobile liability insurer of Priscilla Dunlap, brought an action in the Oakland Circuit Court against Budget Rent A Car Systems, Inc., and Transamerica Insurance Company, seeking reimbursement of monies it paid toward the settlement of a personal injury action by a person injured by Dunlap while she was driving an automobile rented from Budget. In addition to excess bodily injury liability coverage by National and primary bodily injury liability coverage by her personal automobile insurer, Dunlap had residual bodily injury liability coverage from Budget. Budget was self-insured for owner liability and had excess liability coverage by Transamerica. The National policy and the Transamerica policy contained "other insurance" clauses in which each insurer stated that its coverage was excess to any other collectible insurance. Toward the settlement, National, Budget, and Dunlap's automobile insurer, contributed their respective policy limits and Transamerica paid the balance. The court, John N. O'Brien, J., granted summary disposition for National. Budget and Transamerica appealed.

The Court of Appeals *held:*

The trial court erred in granting summary disposition for National. The proper treatment of a conflict between "other insurance" clauses of two applicable insurance policies, either of which would cover a specific loss if the other policy did not exist, is to declare the clauses mutually repugnant and to prorate each insurer's liability on the basis of its share of the combined policy limits. The case must be remanded for a pro-rata allocation of the excess insurers' liabilities.

Reversed and remanded.

Franklin, Bigler, Berry & Johnston, P.C. (by *Steven C. Berry*), for the plaintiff.

Brochert & Ward (by *Michael J. Brochert* and *David S. Anderson*), for the defendants.

Before: MACKENZIE, P.J., and WAHLS and BRENNAN, JJ.

PER CURIAM. This case presents questions of the priority of coverage by several no-fault automobile insurance policies, a number of which contain so-called "other insurance" clauses. In August 1986, Priscilla Dunlap, a resident of California, rented an automobile from defendant Budget Rent A Car Systems, Inc. Dunlap was involved in an accident with another motorist, who later brought an action against Dunlap and Budget. The claim was settled for $400,000.

Dunlap was personally insured by Fidelity and Casualty Company of New York under her own automobile liability policy, which provided primary liability coverage in an amount of $15,000. Dunlap also had excess automobile liability coverage in an amount of $85,000 under a policy issued by plaintiff National Indemnity Company. The lease agreement between Dunlap and Budget provided Dunlap with $20,000 in residual bodily injury liability coverage pursuant to MCL 257.520(b)(2); MSA 9.2220(b)(2). Budget was self-insured for this amount, as well as an additional $230,000 for its liability as the owner of the vehicle. Budget also possessed excess liability coverage for amounts over $250,000 through a policy issued by defendant Transamerica Insurance Company with a coverage limit of $1,500,000. Dunlap was also included as an insured under this policy.

The $400,000 settlement was paid by the insurers as follows: (1) Fidelity paid its policy limit of $15,000 on behalf of Dunlap and is not a party to the present action; (2) National paid its policy limit of $85,000 for excess liability coverage on behalf of Dunlap, but reserved its right to contest the amount; (3) Budget paid $20,000, the coverage

limit provided Dunlap by the rental agreement, and $230,000, the amount for which it was self-insured for owners liability; and (4) Transamerica paid $50,000, the balance of the settlement, pursuant to its excess liability policy with Budget and Dunlap.

National thereafter brought this claim against Budget and Transamerica for reimbursement of the $85,000 it had paid toward the settlement. National argued that its coverage was excess to that provided by both Budget and Transamerica and, because those two insurers' policy limits were adequate to satisfy the judgment, National was without liability. National's policy incorporated the terms of the Fidelity policy, which included the following provision:

> [A]ny insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

The Transamerica policy, in turn, contains a provision that states its insurance is excess to any other collectible insurance.

National moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court granted National's motion, apparently pursuant to subsection 10, but provided no explanation of why it believed Budget's and Transamerica's coverage to be primary. Budget and Transamerica now appeal.

The primary issue in this case is whether a court, when confronted with two insurance policies that are claimed to be excess to any other insurance, should look to the intent of the parties as they are reflected in the policies to determine which policy is primarily liable or instead prorate

liability according to the policies' limits. These alternative approaches to determining liability were discussed by our Supreme Court in *Federal Kemper Ins Co, Inc v Health Ins Administration, Inc,* 424 Mich 537, 542-543; 383 NW2d 590 (1986):

> Disputes may arise, as in the instant case, when two or more insurance policies covering the same risk contain [provisions intended to limit liability where other insurance is available]. . . . Two trends have evolved. The majority rule attempts to reconcile the competing provisions by discerning the parties' intent through an analysis of the clauses. . . . Critics of this approach argue that it is circular and that the decision as to which clause is primary depends on which policy is read first. Thus some courts deem the provisions "mutually repugnant" and reject both clauses. . . . Courts adopting this minority view . . . hold that liability must be prorated.

This Court has taken the minority approach on at least two occasions. In *Farm Bureau Mutual Ins Co v Horace Mann Ins Co,* 131 Mich App 98; 345 NW2d 655 (1983), this Court held that liability should be prorated where two competing policies, one containing an escape clause and the other a pro-rata clause, would each have provided coverage had the other policy not existed. In *Mary Free Bed Hosp & Rehabilitation Center v Ins Co of North America,* 131 Mich App 105; 345 NW2d 658 (1983), the same panel that decided *Farm Bureau* declared two conflicting excess insurance clauses mutually repugnant, disregarded them, and directed that liability be prorated on remand. More recently, the minority approach was mentioned favorably by a panel of this Court in *Admiral Ins Co v Columbia Casualty Ins Co,* 194 Mich App 300, 316; 486 NW2d 351 (1992), but the panel found the

rule inapplicable because the two policies at issue did not conflict.[1]

We agree with the minority approach and the rationale for its use expressed in *Farm Bureau, supra.* We also reject National's argument that this case does not present a situation that is ripe for the application of the minority approach because two different named insureds are involved. As National notes elsewhere in its appellate brief, Dunlap is also a named insured under the Transamerica policy. We are unable, however, to determine the correct proration of liability. Although the parties calculate their liability under the minority approach in their appellate briefs, they do not discuss the basis for their assignments of primary coverage, which must first be addressed before excess liability may be prorated.[2] The record provided to this Court does not contain adequate detail of the accident that gave rise to this action to enable us to calculate the amount of primary coverage. We therefore remand this case to the trial court, where the parties' excess insurance liability may be determined consistent with the minority approach we have adopted.

Budget and Transamerica also argue that National is required to pay the full limit of its policy because Dunlap, National's insured, agreed to indemnify Budget for all liability in excess of the $20,000 of coverage provided by the rental agreement. This argument is not properly before us. Although defendants raised this argument in their

[1] Because the panel in *Admiral Ins Co* did not have to apply the minority approach to decide the case, it might be argued that the panel's favorable discussion of the minority approach was dicta and not binding on this panel pursuant to Administrative Order No. 1990-6. Nonetheless, we agree that the minority approach should be used.

[2] Budget's and Transamerica's calculations treat Budget's $230,000 of self-insured owner's liability coverage as primary coverage and actually produce a result that is more favorable to National than the result calculated by National.

own motion for summary disposition, the argument was never decided by the trial court. *Sallee v Auto Club Ins Ass'n,* 190 Mich App 305, 308; 475 NW2d 828 (1991). Moreover, defendants did not plead this argument either as an affirmative defense or as a counterclaim. MCR 2.111(F)(3)(c). Finally, Dunlap, the alleged indemnitor, has not been joined as a party.

National claims on appeal that it is entitled to full recovery of the amount it paid toward the settlement because its coverage is excess to that provided by Fidelity, while Fidelity is not liable at all, despite its payment of its policy limit toward the settlement. According to National, the Fidelity policy's nonowned vehicle exclusion excludes coverage in this case. This issue is without merit. National conceded below that the nonowned vehicle exclusion was inapplicable in this case because the exclusion pertained to uninsured motorist coverage, not liability coverage. After examining the Fidelity policy, we see no reason to disagree with National's initial judgment, and National has presented no new arguments on appeal regarding the exclusion.

Reversed and remanded. We do not retain jurisdiction.

DOWNRIVER PLAZA GROUP v CITY OF SOUTHGATE

Docket No. 129708. Submitted March 3, 1992, at Detroit. Decided July 21, 1992, at 9:05 A.M. Leave to appeal sought.

Downriver Plaza Group and Lewis George, as personal representative of the estate of Nicholas George, deceased, brought a class action in the Wayne Circuit Court against the City of Southgate on behalf of themselves and persons residing in the city who were billed and paid user charges for the Southgate-Wyandotte Drainage District as part of their 1988 and 1989 city tax bills. The court, Marianne O. Battani, J., entered a judgment of no cause of action, finding that the defendant was authorized to impose the user fee and had rectified defects in earlier efforts to assess a user charge by adopting on January 3, 1990, a resolution properly implementing the charges. The court specifically found that the resolution had retroactive effect from December 1, 1987. The plaintiffs appealed.

The Court of Appeals *held:*

1. The court erred in finding that the January 3, 1990, resolution retroactively permitted assessment of user charges for the years 1988 and 1989. The resolution must be given prospective effect only. The right to due process prohibits a municipal corporation from imposing a liability for the payment of charges for a past act if an enforceable obligation was not in place when the act occurred. In this case, the trial court declared that resolutions adopted on April 17, 1975, and April 27, 1988, regarding the drainage district user charges were unenforceable because they failed to set forth a rate for imposing a service charge as required by the city charter. It would be a violation of the plaintiffs' rights of due process to allow the city to keep the money gained through violation of the city charter. The plaintiffs are entitled to refunds of the monies paid.

2. The trial court did not determine whether a resolution adopted on August 30, 1989, validly established a user charge.

REFERENCES

Am Jur 2d, Constitutional Law §§ 667-681.

See the Index to Annotations under Due Process; Retrospective Operation and Laws; Taxes.

The case must be remanded to determine whether the August 30, 1989, resolution validly implemented a user charge. If the resolution created an enforceable obligation, the plaintiffs may be assessed user charges beginning on that date.

Reversed and remanded.

1. CONSTITUTIONAL LAW — DUE PROCESS — RETROACTIVE LEGISLATION — VESTED RIGHTS.

Considerations of due process limit the reach of retroactive legislation that otherwise would impair vested rights.

2. CONSTITUTIONAL LAW — DUE PROCESS — MUNICIPAL CORPORATIONS — PAYMENT FOR PAST ACTS.

Due process requires that liability to a municipal corporation for payment of charges for performance of an act may not be imposed for a past act where an enforceable obligation was not in place when the act occurred and the reason underlying the immunity from liability compels the continuance of the immunity.

Fried & Levitt, P.C. (by *David M. Fried* and *Dennis Watson*), for the plaintiffs.

Law Offices of John F. Gilhool, P.C. (by *John F. Gilhool*), for the defendant.

Before: NEFF, P.J., and GRIBBS and MURPHY, JJ.

PER CURIAM. Following a two-day bench trial, on May 21, 1990, the Wayne Circuit Court granted a judgment of no cause of action against plaintiffs, Downriver Plaza Group, a Michigan copartnership, and Lewis George, personal representative of the estate of Nicholas George, deceased, in favor of defendant City of Southgate. Plaintiffs now appeal as of right from the judgment of the trial court. We reverse and remand.

I

Plaintiffs filed this class action on behalf of themselves and those individuals who reside in

defendant city and were billed on their 1988 and 1989 city tax bills for user charges for the Southgate-Wyandotte Drainage District (SWDD). Plaintiffs alleged that the user charges for operation and maintenance were invalid and sought recovery of any monies paid for the user charges on their 1988 and 1989 city tax bills. The SWDD services the City of Wyandotte and sixty percent of the population of defendant.

In 1975, defendant, through Wayne County, received a federal grant in the amount of $40,793,250 for the construction of pollution control devices within the SWDD. On April 17, 1975, the Southgate City Council adopted Resolution No. 551-75, in which it agreed "to 'implement a system of User Charges' " to assure that all users would pay a proportionate share of the operating and maintenance costs of the system.

From 1980 through 1987, operation and maintenance fees were assessed against defendant but were paid by the Wayne County Drainage Board out of excess construction funds. Because the excess construction funds had been depleted, on or about March 17, 1988, the county drainage board sent defendant notice of the user charges for which it was responsible.

On April 13, 1988, the Southgate City Council conducted a public hearing regarding the establishment of user charges for the SWDD. On April 27, 1988, Resolution No. 94-88 was adopted at a public hearing. Under that resolution, defendant resolved to apportion the costs of operating, maintaining, and replacing facilities of the SWDD as proposed by the county drainage board and set forth the geographic area responsible for the operation and maintenance costs.

Pursuant to Resolution No. 94-88, defendant

included the operation and maintenance costs for the drainage district on the tax bills for the summer and winter of 1988 and on the summer 1989 tax bill.

By resolution adopted at a public hearing on January 3, 1990, the Southgate City Council resolved, among other things, that the individual user formula presented on April 13, 1988, would be readopted and that any objections to the user-charge formula should be filed within twenty-eight days of the annual adoption of the user charge. Under that resolution, defendant also resolved to affirm or reaffirm the costs of operating and maintaining the SWDD for fiscal years December 1, 1987, through November 30, 1991, and to assess annual costs in compliance with the user-charge formula.

The trial court limited the discussion in its opinion to two issues. First, it found that defendant had the authority to impose a user fee for the operation and maintenance of the SWDD. Second, it concluded that defendant had rectified the defects in its original efforts to assess a user charge, and, in adopting the resolution dated January 3, 1990, defendant had properly implemented the user charges. Specifically, the trial court found that the January 3, 1990, resolution had retroactive effect from December 1, 1987, and, accordingly, entered a judgment of no cause of action in favor of defendant and against plaintiffs.

Plaintiffs now appeal as of right from the trial court's judgment.

II

Plaintiffs first argue that the trial court erroneously found that the January 3, 1990, resolution retroactively created user charges for the years 1988 and 1989. Plaintiffs claim that giving that

resolution retroactive effect was in violation of their rights of due process. We agree.

In *Metro Homes, Inc v City of Warren,* 19 Mich App 664; 173 NW2d 230 (1969), the facts indicated that on January 13, 1959, the Warren City Council adopted a resolution that attempted to impose "sewer tap charges" on structures built after the date of the resolution; however, the council exempted existing structures from the charges. In *Beauty Built Construction Corp v City of Warren,* 375 Mich 229; 134 NW2d 214 (1965), our Supreme Court had decided with regard to the same resolution that, by exempting the previously built structures from the charge, the city denied those who built after the date of the resolution equal protection of the law. In an attempt to cure the invalid resolution, on April 20, 1965, the Warren City Council had enacted an ordinance that retroactively extended the fee requirement to all structures. Nevertheless, this Court held that the 1965 ordinance could not be given retroactive effect. *Metro Homes, supra* at 667. In refusing to give the newer legislation retroactive effect, this Court stated that considerations of due process limit the reach of retroactive legislation that would otherwise impair vested rights. *Id.* at 670. Further, the right to due process prohibits a municipal corporation from imposing a liability for payment of charges for a past act if an enforceable obligation was not in place when the act occurred. *Id.* at 671. However, this rule is limited to cases where the reason underlying the immunity from liability compels the continuance of the immunity. *Id.* at 671-672.

In this case, the trial court's opinion in response to the parties' cross motions for summary disposition declared that Resolutions Nos. 94-88 and 551-75 were unenforceable because they failed to set

forth a rate for imposing a service charge as required by the city charter. Plaintiffs' immunity from liability for the user charges was not a mere technicality. We believe that it would be a violation of plaintiffs' rights of due process to allow the municipality to keep the money gained through violation of the city charter. Moreover, property owners cannot be expected to anticipate the amount of taxes to be assessed at some future date merely because they were put on notice several years previously that a special charge would be assessed.

We hold that the January 3, 1990, resolution should be given prospective effect only. In light of the possibility that some of the property has changed hands, plaintiffs are entitled to a refund of whatever monies were paid in violation of their rights of due process. Our holding reaffirms the principles set out in *Metro Homes.*

III

Plaintiffs next argue that Resolution No. 206-89, adopted August 30, 1989, did not validly establish user charges for operation and maintenance costs.

The trial court determined that the January 3, 1990, resolution established a rate for implementing user charges and that the assessments had retrospective effect from December 1, 1987. It made no finding regarding whether the August 30, 1989, resolution validly established a user charge. If the August 30, 1989, resolution creates an enforceable obligation, plaintiffs could be assessed user charges beginning on that date. We remand to the trial court for a finding with regard to whether the August 30, 1989, resolution validly implemented a user charge.

IV

We reverse the trial court's judgment and remand to the trial court for a determination with regard to the prospective validity of the August 30, 1989, resolution establishing user charges. We direct the city to refund the monies collected in violation of plaintiffs' rights of due process. We do not retain jurisdiction.

McNEIL v QUINES

Docket No. 131273. Submitted May 5, 1992, at Lansing. Decided July 21, 1992, at 9:10 A.M.

Betty T. McNeil, as personal representative of the estate of Robert A. McNeil, who died on June 20, 1981, brought a malpractice action in the Tuscola Circuit Court on March 14, 1990, against Fay Quines, M.D., who last treated the decedent on the date of his death. The plaintiff, whose appointment as personal representative became effective on June 15, 1983, had brought a negligence action in the Saginaw Circuit Court on June 17, 1983, against two hospitals that had treated the decedent. The plaintiff moved to add Quines as a defendant in that action on May 21, 1985, and the motion was granted on May 28, 1985. The Saginaw Circuit Court granted summary disposition for the defendants on March 1, 1990, determining that it lacked jurisdiction. The Tuscola Circuit Court, Patrick R. Joslyn, J., granted summary disposition for Quines, ruling that the action was barred by the applicable statutes of limitation. The plaintiff appealed.

The Court of Appeals *held:*

Medical malpractice actions generally are subject to a two-year period of limitation. MCL 600.5805(4); MSA 27A.5805(4), MCL 600.5838; MSA 27A.5838. However, where a person dies before the expiration of the period, MCL 600.5852; MSA 27A.5852 extends it for two years after letters testamentary or letters of administration are granted to the executor or administrator of the person's estate. In this case, the period was extended to June 15, 1985, and was tolled on May 21, 1985, when the plaintiff added Quines as a defendant in the action in the Saginaw Circuit Court. The period of limitation recommenced on March 1, 1990, when the Saginaw Circuit Court dismissed the action, and had not expired when the plaintiff brought her action in the Tuscola Circuit Court.

Reversed.

Diane M. Freilich and *Charles J. Porter,* for the plaintiff.

Smith & Brooker, P.C. (by *James W. Tarter*), for the defendant.

Before: WAHLS, P.J., and MARILYN KELLY and REILLY, JJ.

PER CURIAM. In this medical malpractice action, plaintiff, the personal representative of the estate of Robert McNeil, deceased, appeals as of right from an order of the Tuscola Circuit Court that granted summary disposition to defendant pursuant to MCR 2.116(C)(7). The trial court held that plaintiff's claim was barred by the statute of limitations. We reverse.

This case has been before this Court previously. See *McNeil v Caro Community Hosp,* 167 Mich App 492; 423 NW2d 241 (1988), which sets forth some of the facts of the case. In the prior appeal on leave granted, this Court held that the Saginaw Circuit Court, where plaintiff first brought her claim, had abused its discretion when it set aside a May 10, 1984, order that had dismissed the case with prejudice. The order that set aside the dismissal was entered on March 5, 1985, and the instant defendant was added as a party on May 28, 1985. Later, the two defendant hospitals' motions for summary disposition in the prior action were denied by the Saginaw Circuit Court, and this Court granted leave to appeal. The instant defendant was not a party to that appeal. After this Court reversed the order that set aside the dismissal and our Supreme Court denied plaintiff leave to appeal, 434 Mich 852 (1990), defendant moved for and was granted summary disposition in the Saginaw Circuit Court. Plaintiff then filed an action in the Tuscola Circuit Court against defendant. We will address additional facts that relate to the statute of limitations issue in our discussion in issue III, *infra.*

I

Plaintiff first claims that the Saginaw Circuit Court erred in granting defendant's motion for summary disposition. This issue is not properly before us. The instant appeal arises from the Tuscola Circuit Court's grant of summary disposition, not that of the Saginaw Circuit Court. Plaintiff did not appeal the Saginaw Circuit Court order. Even if the issue were properly before us, we have not been provided with the record pertaining to the Saginaw Circuit Court proceeding. We will not review this argument. MCR 7.204(A)(1); MCR 7.210.

II

Plaintiff next argues that the Saginaw Circuit Court's grant of summary disposition to defendant was not an adjudication on the merits. We agree. This is a threshold argument to the statute of limitations question that we will consider next. According to the Saginaw Circuit Court order,[1] "the Court did not base its decision on the merits of the case, but on the basis of the appellate decisions denying re-instatement [sic] of the original cause of action, thereby suggesting that this Court did not have jurisdiction to allow an amendment to the complaint to add Defendant FAY QUINES, M.D."[2] The trial court did not review the merits of plaintiff's case, but rather dismissed the case because it believed that it lacked jurisdiction. This was not an adjudication on the merits. *Laude v Cossins,* 334 Mich 622, 625-626; 55 NW2d 123 (1952).

[1] A copy of the order was found in the Tuscola Circuit Court record.

[2] We express no opinion with regard to the trial court's reasoning. See issue I, *supra.*

III

Plaintiff claims that the Tuscola Circuit Court erred in granting defendant summary disposition on the ground that the statutory period of limitation had allegedly run. The transcript of the hearing on defendant's motion does not clearly indicate the trial court's reasons for its decision.[3]

Plaintiff's claim against defendant accrued on June 20, 1981, the last day of treatment and the day plaintiff's decedent died. However, a personal representative of the decedent's estate was not appointed until June 15, 1983. The two-year statutory period of limitation applicable to medical malpractice actions, MCL 600.5805(4); MSA 27A.5805(4), MCL 600.5838; MSA 27A.5838, would have expired five days later, on June 20, 1983. MCL 600.5852; MSA 27A.5852, however, extended the limitation period:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, *an action which survives by law may be commenced by* or against *the executor* or administrator of the deceased person or the claim may be proved as a debt against the estate of the deceased person, as the case may be, *at any time within 2 years after letters testamentary or letters of administration are granted, although the period of limitations has run,* subject to the limitations provided in section 20 of chapter 8 of Act No.

[3] We are somewhat troubled by one of the trial judge's statements:

> If I should rule in favor of the plaintiff in this matter, that means I go through a medical malpractice lawsuit, and six years from now find out that the defendant was right, that's basically what's going on here.

When ruling on the legal issue of the statute of limitations, the trial court should not have considered the factual validity of plaintiff's claim or the convenience that a grant of summary disposition to defendant would afford the trial court.

> 288 of the Public Acts of 1939, being section 708.20 of the Compiled Laws of 1948. *But no executor or administrator shall bring an action under this provision unless he commences it within 3 years after the period of limitations has run.* [Emphasis added.]

Thus, on the facts of this case, the period of limitation was extended until June 15, 1985.[4] On May 21, 1985, plaintiff moved to add defendant as a party. On May 28, 1985, the Saginaw Circuit Court entered an order that allowed plaintiff to amend her complaint and name defendant as a party. Because plaintiff proceeded to secure the order that allowed the amendment within a reasonable time, the period of limitation was tolled from the date plaintiff moved to add defendant, May 21, 1985. *Hall* v *Fortino,* 158 Mich App 663; 405 NW2d 106 (1986). After defendant was joined as a party and the court acquired jurisdiction over defendant, the limitation period remained tolled. MCL 600.5856; MSA 27A.5856. During the Saginaw Circuit Court proceedings, then, twenty-five days remained on the limitation period, i.e., May 21, 1985, to June 15, 1985.

After this Court reversed the Saginaw Circuit Court order that allowed plaintiff to set aside the dismissal, defendant moved for summary disposition. The motion was granted, and an amended order was entered on March 1, 1990, on which date the period of limitation began to run again. Plaintiff filed her Tuscola Circuit Court action against defendant on March 14, 1990, within the twenty-five days that remained in the limitation

[4] We understand the three-year period referred to in MCL 600.5852; MSA 27A.5852 to be a limitation of the two-year extension allowed by the statute in cases where an executor or administrator is not appointed until more than three years after a statutory period of limitation has run. This case does not present that situation.

period after the Saginaw Circuit Court action was dismissed. With regard to the new action and the statute of limitations, the period of limitation was tolled during the time the Saginaw Circuit Court action was pending between plaintiff and defendant (and, earlier, during the period after the personal representative was appointed) because the Saginaw Circuit Court action was not adjudicated on the merits. *Roberts v City of Troy,* 170 Mich App 567, 581; 429 NW2d 206 (1988). See also issue II, *supra.* The Tuscola Circuit Court action therefore was not barred by the statute of limitations.

We reject defendant's argument that the period of limitation expired on June 15, 1985. Defendant claims that, because this Court reversed the March 5, 1985, order that set aside the dismissal, everything that occurred thereafter was "nullified," including the addition of defendant as a party. Defendant provides no relevant authority for this proposition, and this Court will not search for authority to sustain or reject a party's position. *Consumers Power Co v Public Service Comm,* 181 Mich App 261, 268; 448 NW2d 806 (1989). We note that, even though the order was later reversed, the Saginaw Circuit Court had acquired jurisdiction over defendant and that, after this Court reversed the order, defendant remained a party to the action and brought a motion for summary disposition, which was granted.

We conclude that the Tuscola Circuit Court erred in granting summary disposition to defendant pursuant to MCR 2.116(C)(7).

Reversed.

PEOPLE v DEMERS

Docket No. 119977. Submitted April 9, 1992, at Lansing. Decided July 21, 1992, at 9:15 A.M. Leave to appeal sought.

Robert E. Demers was convicted by a jury in the Bay Circuit Court of absconding while free on bail pending disposition of charges of criminal sexual conduct. The court, Eugene C. Penzien, J., sentenced the defendant to thirty-two to forty-eight months' imprisonment. The defendant appealed, claiming that the court erred in precluding him from presenting, as a defense, evidence of his motive for absconding. The defendant sought to introduce that evidence in an effort to invoke the jury's mercy and power to disregard the court's instructions and return a verdict less than warranted by other evidence. The defendant also claimed that he should have been sentenced by one judge only on the charge of absconding and the charges of criminal sexual conduct, arguing that his absconding was improperly considered at the two sentencing proceedings.

The Court of Appeals *held:*

1. The trial court correctly refused to allow the defendant to present a defense based on jury "nullification." Jury nullification is not recognized by the Legislature as a defense to absconding, and the purpose of the statute proscribing absconding would be subverted were such a defense to be recognized.

2. Because the defendant did not appeal his sentences for the convictions of criminal sexual conduct, they cannot be reviewed. The defendant's sentence for absconding, however, was within the sentencing guidelines and therefore was presumptively neither excessively severe nor unfairly disparate. The defendant offered nothing to rebut those presumptions.

Affirmed.

BAIL — ABSCONDING — DEFENSES — JURY.

A defendant charged with absconding while on bail may not present evidence of the motive for absconding as part of the

---

REFERENCES

Am Jur 2d, Criminal Law § 183; Bail and Recognizance § 61.

See the Index to Annotations under Defenses; Escape or Flight; Intent or Motive; Justification or Excuse.

defense where the purpose of introducing that evidence would be to invoke the jury's mercy and its power to return a verdict less than warranted by other evidence (MCL 750.119a; MSA 28.396[1]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Martha G. Mettee,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Rolf E. Berg*), for the defendant on appeal.

Before: REILLY, P.J., and HOLBROOK, JR., and MARILYN KELLY, JJ.

PER CURIAM. Defendant appeals as of right his conviction by a jury of absconding while on bond, MCL 750.199a; MSA 28.396(1), and his prison sentence of thirty-two to forty-eight months, arguing that the trial court erred in not allowing him to present his defense aimed at jury "nullification," and that he should be resentenced by a single judge in both this matter and for the underlying offenses. We affirm.

As his first issue, the defendant claims that the trial court erred in precluding him from presenting to the jury his motive for absconding: he believed that he needed to be represented by the attorney he had hired to be trial counsel, rather than the attorney who was only to do pretrial investigation and make pretrial appearances. According to the defendant, this res gestae evidence was relevant because it would prompt the jury to exercise its power of nullification. Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence. *People v St Cyr,* 129 Mich App 471, 473-474; 341 NW2d 533 (1983).

Although the jury has the power to disregard the trial court's instructions, it does not have the right to do so. *Id.,* p 474. We need not address the issue whether juries should be told of the power of nullification. Rather, we must decide whether a defendant is entitled to present a defense that does nothing more than present facts that are aimed solely at prompting jury nullification. This is an issue of first impression in Michigan.

A trial court may exclude from the jury testimony concerning a defense that has not been recognized by the Legislature as a defense to the charged crime. In *People v Hocquard,* 64 Mich App 331; 236 NW2d 72 (1975), this Court affirmed the trial court's decision to exclude the defendant's testimony concerning the defenses of duress and necessity, holding that the defense of necessity is a very limited defense to prison escape and that the defendant failed to establish its elements. Likewise, in *People v Peach,* 174 Mich App 419, 428-429; 437 NW2d 9 (1989), this Court held that the trial court properly refused the defendant's request to present evidence of her intent to make restitution as a defense to a charge of false pretenses over one hundred dollars. In *People v Rau,* 174 Mich App 339; 436 NW2d 409 (1989), this Court held that the trial court did not abuse its discretion by precluding the defendant from presenting evidence regarding the defense of duress where the defendant was charged with possession of a dangerous weapon by an inmate, determining that while the defense of duress could be raised against a charge of prison escape, duress could not be allowed as a defense to possession of a dangerous weapon by an inmate because there is no threat to individuals' safety by an escape and the Legislature has not extended the defense to the charged crime. *Id.,* p 342. Duress was not allowed

as a defense in *Rau* also as a matter of public policy to protect the safety of prison personnel and other inmates. *Id.*

Similarly, we cannot endorse jury nullification as a defense to absconding while on bail. The Legislature enacted this statute to ensure that criminal defendants do not impede the judicial process by failing to be present at court proceedings. *People v Perryman,* 432 Mich 235, 241; 439 NW2d 243 (1989), citing *People v Litteral,* 75 Mich App 38, 43; 254 NW2d 643 (1977). The purpose of this statute would be nullified if an absconding defendant were allowed to present a defense of jury nullification, because defendants could decide to flee from trial and then seek mercy from a jury. Moreover, such a defense is inconsistent with the absconding statute because the statute does not require the specific intent to abscond. *People v Rorke,* 80 Mich App 476, 478; 264 NW2d 30 (1978); *Litteral,* p 44, n 2. In the absence of the Legislature's recognition of jury nullification as a defense to the instant offense, we decline to find error in a trial court's decision to preclude a defendant from presenting evidence of this defense.

Defendant next argues that he is entitled to resentencing before a single judge for his absconding conviction and the underlying charges of criminal sexual conduct because each sentencing judge considered his absconding. See *People v Bryars,* 168 Mich App 523, 526-528; 425 NW2d 125 (1988). Unlike *Bryars,* the defendant in this case has not consolidated his separate appeals for his criminal sexual conduct convictions and his absconding conviction. The only record before us is the one concerning the defendant's absconding conviction. We cannot grant the requested relief when the defendant failed to present this Court with the record of the criminal sexual conduct proceedings. *People v*

Calloway, 169 Mich App 810, 817; 427 NW2d 194 (1988), vacated on other grounds, 432 Mich 904 (1989). We may consider the defendant's sentence for absconding. However, the defendant's argument that he was prejudiced when the sentencing judge considered the effect his absconding had on the criminal sexual conduct victims does not overcome the presumption that his sentence, because it was within the guidelines range, was neither excessively severe nor unfairly disparate. *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990); *People v Broden,* 428 Mich 343, 354; 408 NW2d 789 (1987); *People v Dukes,* 189 Mich App 262, 266; 471 NW2d 651 (1991).

Affirmed.

RICHMOND TOWNSHIP v ERBES

Docket Nos. 131179, 131564. Submitted January 15, 1992, at Grand Rapids. Decided August 3, 1992, at 9:00 A.M. Leave to appeal sought.

Richmond Township brought an action in the Osceola Circuit Court against Garth, Rita, and Oneida Erbes, seeking to enjoin them from manufacturing or assembling pallets on their farm on the basis that such activity constituted a business use contrary to the township's zoning ordinance. The defendants contended that the zoning ordinance is invalid because it was improperly enacted and that, even if the ordinance is valid, the Right to Farm Act, MCL 286.471 *et seq.*; MSA 12.122(1) *et seq.*, permits their pallet-making operation. The court, George Van Kula, J., entered a judgment and order permanently enjoining the defendants from manufacturing or assembling pallets made from trees other than those grown on their land. The court found that the defendants were estopped on the basis of public policy from challenging any procedural irregularities in the enactment of the ordinance because the challenge, brought thirteen years after the ordinance was enacted, was untimely and that the Right to Farm Act did not protect the pallet-making operation. The court also ordered the defendants' attorneys, Herrinton, Herrinton & Tacoma, P.C., and James C. Herrinton and Lois H. Herrinton, to pay sanctions of $750 pursuant to MCR 2.114 for filing a motion for an improper purpose. The defendants appealed from the order enjoining their pallet-making operation (Docket No. 131564). The Herrintons appealed from the part of the order that required them to pay sanctions (Docket No. 131179). The appeals were consolidated.

The Court of Appeals *held:*

1. The trial court properly held that the defendants were estopped on the basis of public policy from challenging any procedural irregularities in the enactment of the zoning ordi-

REFERENCES

Am Jur 2d, Motions, Rules, and Orders § 5; Zoning and Planning §§ 340-342.

See the Index to Annotations under Motions; Zoning.

nance. Regardless of whether the township was required to comply strictly with the procedural requirements of the Township Rural Zoning Act, MCL 125.271 *et seq.*; MSA 5.2963(1) *et seq.*, in enacting the ordinance, its alleged failure to do so does not require invalidation of the ordinance because the defendants' challenge was untimely.

2. The defendants' counsel on appeal and their former trial counsel acted deceptively in attempting to circumvent the page limitation applicable to appellate briefs in raising an issue concerning the alleged deprivation of the defendants' right to due process. Remand is required in Docket No. 131564 to allow the trial court to determine the amount of actual damages to which the township is entitled for responding to the defendants' due process issue.

3. The trial court did not clearly err in determining that the pallets defendants construct do not fall within the definition of "farm products" contained in the Right to Farm Act and that the act does not protect their pallet-construction operation.

4. MCR 2.114 applies to pleadings, and, according to MCR 2.110(A), a motion is not a pleading. Therefore, the rule cannot be used to impose sanctions upon a person who signs a motion that is submitted for an improper purpose. The part of the order imposing sanctions against the Herrintons for filing a motion for an improper purpose must be vacated.

Affirmed in part, vacated in part, and remanded.

1. ZONING — ESTOPPEL — MUNICIPAL CORPORATIONS — ORDINANCES — PROCEDURAL IRREGULARITIES IN ENACTMENT.

A party may be estopped on the basis of public policy from challenging procedural irregularities in the enactment of a township zoning ordinance where, during a lengthy time following enactment, township officials and residents acted in accordance with the ordinance and no challenges were made with regard to the validity of its enactment.

2. WORDS AND PHRASES — RIGHT TO FARM ACT — "FARM PRODUCTS".

Wood pallets that are assembled on farm property from wood that has not been grown on the property are not "farm products" as defined in the Right to Farm Act (MCL 286.472; MSA 12.122[2]).

3. PLEADING — MOTIONS AND ORDERS — SANCTIONS.

The court rule that provides for the imposition of sanctions if a pleading is signed in violation of the rule applies to pleadings only; because a motion is not a pleading, the rule cannot be used to impose sanctions upon a person who signs a motion

that is submitted for an improper purpose (MCR 2.110[A], 2.114).

Bauckham, Sparks, Rolfe & Thomsen, P.C. (by *John H. Bauckham, John K. Lohrstorfer,* and *Eileen W. Wicklund*), for the plaintiff.

Marco S. Menezes, for Garth, Rita, and Oneida Erbes.

Herrinton, Herrinton & Tacoma, P.C. (by *Lois H. Herrinton*), for Herrinton, Herrinton & Tacoma, P.C., and James C. Herrinton and Lois H. Herrinton.

Before: BRENNAN, P.J., and HOLBROOK, JR., and MCDONALD, JJ.

HOLBROOK, JR., J. In these cases consolidated on appeal, defendants, Garth Erbes, Rita L. Erbes, and Oneida Erbes, appeal as of right an Osceola Circuit Court judgment and order enjoining them from manufacturing or assembling pallets on their farm as a business use contrary to the plaintiff's zoning ordinance. Appellants Herrinton, Herrinton & Tacoma, P.C., James C. Herrinton, and Lois H. Herrinton (the Herrintons) also appeal as of right from the part of the same judgment that ordered sanctions against them in the amount of $750. The Herrintons were the Erbes' attorneys for the circuit court action and were ordered to pay sanctions by the circuit court for filing a motion to dismiss and a supporting brief for an improper purpose. We affirm the circuit court judgment, but vacate that part of the judgment ordering sanctions against the Herrintons.

Oneida Erbes owns approximately forty acres of farmland in Richmond Township. Garth and Rita Erbes, Oneida's son and daughter-in-law, live with

Oneida and maintain the property. Defendants continue a small traditional farming operation on the property.

In 1978, the Richmond Township Board adopted a resolution for zoning the township. The hearing was held on August 14, 1978. The parties dispute whether the hearing was held by the township board or by the newly established zoning board. Minutes of the meeting were taken by the township clerk, but apparently no minutes of the meeting were taken by a member of the township's zoning board. Attendance vouchers indicate that several members of the zoning board were present. The former township clerk testified at trial that neither the proposed ordinance nor a zoning map were available at the hearing.

On December 4, 1978, the Richmond Township Board adopted the proposed zoning ordinance. The version of the ordinance adopted by the board classified defendants' property as residential.

On January 18, 1983, plaintiff adopted a "compilation" of its ordinances, incorporating much of the 1978 zoning ordinance, along with amended and additional sections. The amended zoning ordinance, now included in the 1983 compilation, was entitled Ordinance No. 9.

In 1985, Garth and Rita Erbes began to make wood pallets from wood grown on the wood lot on the farm. A pallet is a wooden platform made of slats cut from low-grade lumber and nailed or stapled together. As production increased, the operation developed into an informal cooperative utilizing wood cut from neighboring farms and sawed at local mills or on portable farm sawmills. Local farmers then used the materials to make pallets, with some of the construction taking place at defendants' farm. Defendants distributed materials and collected pallets because many of the

participants in the pallet operation were Amish and did not have motor vehicles or telephones.

On July 1, 1987, Garth Erbes contacted Richard Kirch, the Richmond Township zoning administrator, and inquired regarding whether defendants could construct a pole barn on the property for the purposes of storage, horse stalls, and pallet assembly. Kirch told him that the uses were permitted because the property was zoned agricultural. The parties dispute whether Kirch later told defendants that the zoning did not permit use of the building for pallet assembly. Defendants applied for and received a building permit for the pole barn.

Defendants then constructed the pole barn at an approximate cost of $10,000. The county building inspector inspected the barn and issued the compliance permit on August 6, 1987. Defendants commenced pallet assembly in the barn. On October 1, 1987, Garth Erbes contacted Kirch concerning proposed additions to the barn. Kirch informed him that pallet assembly activities on defendants' property were in violation of the township zoning ordinance. Garth Erbes then applied for a zoning permit and a building permit to make the additions to the barn. The permit applications were denied.

On December 4, 1987, Kirch issued defendants a notice of zoning violation, stating that defendants were violating Ordinance No. 9 by conducting an industrial operation in a nonindustrial-use zone. Kirch issued a similar notice on January 14, 1988, and a third notice on March 7, 1988. The third notice charged defendants with violating §§ 20.804 to 20.806 of the zoning ordinance. Defendants claim that these sections are not included in the 1983 compilation of the ordinance, and are instead

found in the 1978 zoning ordinance, which the township contends was incorporated into the 1983 version.

Plaintiff then brought criminal charges against defendants in district court alleging violation of Ordinance No. 9. Those charges were dismissed without prejudice. Plaintiff also instituted a civil action in circuit court, seeking injunctive relief for the zoning violation. Defendants counterclaimed, contending that the township's zoning ordinance was invalid because it was improperly enacted. Defendants further contended that even if the zoning ordinance were valid, the Right to Farm Act, MCL 286.471 *et seq.*; MSA 12.122(1) *et seq.*, permitted defendants to carry on their pallet operation.

Following an eight-day bench trial held between June 20, 1989, and January 12, 1990, the trial court issued its opinion on April 11, 1990. Relevant to the issues on appeal, the trial court found that the August 14, 1978, hearing was a joint hearing by the township board and the zoning board. The court found that the text of the ordinance and a zoning map were available at the hearing and that the zoning board did not make substantive changes to the ordinance after it was adopted by the township board on December 4, 1978. The trial court then held that plaintiff was not obligated to strictly comply with the procedural requirements of the Township Rural Zoning Act, MCL 125.271 *et seq.*; MSA 5.2963(1) *et seq.*, and that defendants were estopped on the basis of public policy from challenging any procedural irregularities in the enactment of the ordinance. The trial court rejected defendants' argument that the Right to Farm Act protected their pallet operation. The court concluded that defendants were precluded by the ordinance from conducting the

pallet operation, which constituted an unlawful extension of a nonconforming use.

During the proceedings before the circuit court, the Herrintons filed a motion to dismiss on behalf of defendants. The motion sought dismissal pursuant to MCR 2.116(C)(8) and (9), and was filed with documentary evidence appended. Plaintiff responded to the motion on November 2, 1989. The Herrintons also filed a brief supporting the motion, but did not file the brief until November 1, 1989, and it was not received by plaintiff's counsel until November 3, the Friday before a scheduled Monday hearing. Plaintiff moved for an award of attorney fees, contending that both the motion and the brief were untimely.

On July 5, 1990, the circuit court issued an opinion and order granting plaintiff's request for sanctions. The circuit court found that defendants' motion to dismiss was untimely, that the documentary evidence was improperly appended to the motion, and that the brief supporting the motion was filed untimely and improperly.

On July 18, 1990, the circuit court issued its judgment and order permanently enjoining defendants from conducting their pallet operation on their property, except for pallets constructed from wood grown on their property.

DOCKET NO. 131564

In this case, defendants appeal the circuit court's order permanently enjoining them from conducting their pallet operation, raising several issues. We find their third issue dispositive of most of their remaining issues, and address this issue first.

Defendants contend that the trial court erred in holding that they were estopped on the basis of

public policy from challenging any procedural irregularities in the enactment of the ordinance. Defendants maintain that they should not be barred where plaintiff has failed to show that it would be prejudiced by such a challenge. We disagree.

When a zoning ordinance has been the subject of public acquiescence and reliance for a lengthy time, the reasonableness of a belated challenge is questionable. *Edel v Filer Twp,* 49 Mich App 210, 214; 211 NW2d 547 (1973); *Northville Area Non-Profit Housing Corp v Walled Lake,* 43 Mich App 424, 434-435; 204 NW2d 274 (1972). In *Edel,* a challenge to a zoning ordinance eighteen years after its enactment based on a claim that the township failed to strictly comply with the notice requirements of the enabling legislation was held to be precluded by estoppel and by overriding policy considerations. The Court in *Northville* concluded that a challenge to a zoning ordinance four years after its enactment on the ground that the ordinance was improperly enacted was precluded on public policy grounds. In this case, defendants challenged the zoning ordinance thirteen years after its enactment. During that time, township officials and residents acted in accordance with the ordinance, and no challenges were made with regard to the validity of its enactment. Consequently, we affirm the trial court's decision that defendants are estopped from challenging the ordinance as having been improperly enacted.

Defendants argue that the trial court erred in holding that plaintiff was not obligated to strictly comply with the procedural requirements of the Township Rural Zoning Act. We recognize that townships lack authority to zone except as specifically granted in the enabling legislation, and that the mandatory provisions of such enabling legisla-

tion require compliance. See *Fox & Associates, Inc v Hayes Twp,* 162 Mich App 647, 650; 413 NW2d 465 (1987); *Krajenke Buick Sales v Hamtramck City Engineer,* 322 Mich 250, 255; 33 NW2d 781 (1948); *Davis v Imlay Twp Bd,* 7 Mich App 231, 236; 151 NW2d 370 (1967). However, failure to strictly comply with the mandatory procedures of the act does not necessarily invalidate an ordinance. See *Brae Burn, Inc v Bloomfield Hills,* 350 Mich 425, 429; 86 NW2d 166 (1957); *Brown v Shelby Twp,* 360 Mich 299, 307; 103 NW2d 612 (1960). Regardless of whether plaintiff was required to strictly comply with the act's procedures, its failure to do so does not require invalidation of the ordinance, because the defendants' challenge was untimely.

Defendants further argue that the trial court made findings against the great weight of the evidence when it found that the August 14, 1978, hearing was a joint hearing by the township board and the zoning board, the text of the ordinance and the zoning map were available at the hearing, and the zoning board did not make substantive changes to the ordinance after it was adopted by the township board on December 4, 1978.

Defendants did not move timely for a new trial and therefore failed to preserve this issue for review. *Jenkins v Raleigh Trucking Services, Inc,* 187 Mich App 424, 429; 468 NW2d 64 (1991). Nevertheless, this Court could review the issue if failure to consider it would result in a miscarriage of justice. *Petrus v Dickinson Co Bd of Comm'rs,* 184 Mich App 282, 288; 457 NW2d 359 (1990). No miscarriage of justice will result from our failure to review the issue because defendants are estopped from challenging the ordinance as having been improperly enacted.

Next, defendants contend that plaintiff failed to

comply with the notice requirements of the Township Rural Zoning Act, MCL 125.279; MSA 5.2963(9), when it adopted the 1983 compilation of ordinances, which contains Ordinance No. 9. Notwithstanding defendants' failure to cite authority for their position that the entire compilation is invalid because certain sections were amended without adherence to the proper procedure, defendants are again estopped from challenging the ordinance on public policy grounds. *Edel, supra; Northville, supra.* Moreover, the trial court correctly found that the changes in the text of the 1978 ordinance as compiled in the 1983 ordinance were not relevant to defendants' property.

The next issue raised by defendants is whether the adoption and enforcement of Ordinance No. 9 deprives defendants of due process of law. However, the trial court did not address this issue, and our review is limited to issues actually decided by the trial court. *Lowman v Karp,* 190 Mich App 448, 454; 476 NW2d 428 (1991).

We find that defense counsel improperly presented this issue on appeal. First, defendants' trial counsel, the Herrintons, attempted to raise and argue this issue on behalf of defendants in the Herrintons' brief on appeal. Because the Herrintons no longer represent defendants in this matter, the Herrintons are without standing to raise the issue. *Ford Motor Co v Jackson (On Rehearing),* 399 Mich 213, 226; 249 NW2d 29 (1976); *Grace Petroleum Corp v Public Service Comm,* 178 Mich App 309, 312-313; 443 NW2d 790 (1989). Second, the Herrintons note in their brief on appeal that they separated their appeal from that of defendants, their former clients, because they wanted to dedicate their brief to raising their appeal of the sanction. The Herrintons thought that raising their issue and defendants' issues in one brief

would be unfair to defendants, who required the full fifty pages allowed by MCR 7.212(B) for their brief. The Herrintons proceeded in their brief on appeal, however, to use approximately twenty-five pages discussing issues on behalf of defendants, which the Herrintons lack standing to raise. Third, defendants' appellate counsel filed a fifty-page brief on behalf of defendants. With regard to the issue of due process, defendants' appellate counsel simply referenced the Herrintons' brief without presenting any argument other than a list of citations.

An appellant must properly argue issues identified in the statement of the questions in order to properly present an appeal. *Midland v Helger Construction Co, Inc,* 157 Mich App 736, 745; 403 NW2d 218 (1987). We believe defendants' appellate counsel and former trial counsel acted deceptively to circumvent the page limitations of MCR 7.212(B). Accordingly, plaintiff is entitled to appellate costs because the appellate briefs of defendants' appellate counsel and former trial counsel are grossly lacking in the requirements of propriety and grossly disregarded the requirements of a fair presentation of the issues to the court. MCR 7.216(C)(1)(b).

Defendants' final argument is that the trial court clearly erred when it determined that the Right to Farm Act does not protect their pallet-making operation. They claim that the trial court clearly erred in finding that defendants' property is not a "farm," that defendants are not conducting "farm operations," and that pallets are not "farm products" as defined in the act. Defendants maintain that the trial court erred in failing to apply the interim guidelines regarding farm processing of fiber products.

The Right to Farm Act was enacted by our

Legislature in 1981 to protect farms from being declared a nuisance. *Northville Twp v Coyne,* 170 Mich App 446, 448-449; 429 NW2d 185 (1988). The act prohibits a farm or farm operation from being declared a public or private nuisance where the farm or farm operation conforms to "generally accepted agricultural and management practices." MCL 286.473(1); MSA 12.122(3)(1). Whether the farm or farm operation conforms to such practices is determined according to policies articulated by the state agricultural commission. *Id.*

Section 2 of the Right to Farm Act provides in pertinent part:

> (c) "Farm product" means those plants and animals useful to human beings and includes, but is not limited to, forages and sod crops, grains and feed crops, dairy and dairy products, poultry and poultry products, livestock, including breeding and grazing, fruits, vegetables, flowers, seeds, grasses, trees, fish, apiaries, equine and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur.
>
> (d) "Generally accepted agricultural and management practices" means those practices as defined by the commission of agriculture. The commission shall give due consideration to available Michigan department of agriculture information and written recommendations from the Michigan state university college of agriculture and natural resources cooperative extension service and the agricultural experiment station in cooperation with the United States department of agriculture soil and conservation service and the agricultural stabilization and conservation service, the department of natural resources and other professional and industry organizations. [MCL 286.472; MSA 12.122(2).]

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the

Legislature. *Lorencz v Ford Motor Co,* 187 Mich App 63, 68-69; 466 NW2d 346 (1991), lv gtd 437 Mich 1036 (1991). The legislative intent can be ascertained by examining the language of the act, the subject matter under consideration, the scope and purpose of the act, and preceding statutes. *Girard v Wagenmaker,* 437 Mich 231, 238-239; 470 NW2d 372 (1991). In enacting the Right to Farm Act, the Legislature was concerned with the regulation of land use imposed upon farms by local government as well as private sources, and the impact of such regulation upon farming operations. *Northville Twp, supra,* p 448.

In this case, we need not determine whether defendants' property is a "farm" or whether defendants are conducting "farm operations" because the dispositive issue is whether the pallets produced by defendants are "farm products" under the act. The pallets are constructed of wood and nails or staples. The vast majority of the wood used for the pallets originates from outside defendants' property, while a very small portion of the wood is taken from defendants' property. The products, therefore, are not grown on the property, but are only assembled there from purchased material. The pallets do not match any of the definitions of farm products set forth in the act, and are not specifically mentioned in the Department of Agriculture's guidelines.

Defendants argue, however, that the pallets fit within the more general phrase included at the end of the statutory definition of farm products that includes "any other product which incorporates the use of food, feed, fiber, or fur."

Statutes are to be construed to avoid absurd or unreasonable results. *Lepp v Cheboygan Area Schools,* 190 Mich App 726, 732; 476 NW2d 506 (1991). Under the rule of ejusdem generis, where a

statute contains general words that follow a designation of particular subjects, the meaning of the general words will be presumed to be restricted by the particular designation as including things of a similar kind, class, character, or nature as those specifically enumerated. *Attorney General v Blue Cross & Blue Shield of Michigan,* 168 Mich App 372, 380-381; 424 NW2d 54 (1988).

Applying this rule of statutory construction, the trial court in this case found that the general words "any other product which incorporates the use of food, feed, fiber, or fur" must be read to mean other products of the same nature as those enumerated in that section. The trial court correctly noted that to give the words the broad meaning argued by defendants would be to allow practically anyone to claim protection under the act when constructing, for example, flooring or furniture, which are arguably products incorporating fiber. The trial court determined that farm products as defined by the act did not incorporate pallets that were only assembled on the property without any of the product having been grown on the property. It was not improper for the trial court to look to the definitions of farm products used by other jurisdictions, considering the lack of guidance provided by the act and the guidelines. We find that the trial court did not clearly err in determining that defendants' pallets do not fall within the statutory definition of farm products.

DOCKET NO. 131179

In this case, the Herrintons appeal the trial court's order imposing sanctions against them for filing an improper motion. The Herrintons also raise substantive issues on behalf of defendants, but as we have already ruled, the Herrintons lack

standing to raise these issues. *Ford Motor Co v Jackson (On Rehearing), supra; Grace Petroleum Corp, supra.*

The Herrintons argue that the trial court was not justified in ordering sanctions under MCR 2.114. In *Contel Systems Corp v Gores,* 183 Mich App 706, 710-711; 455 NW2d 398 (1990), this Court stated:

> Since the imposition of a sanction under MCR 2.114 is mandatory upon the finding that a pleading was signed in violation of the court rule, or a frivolous action or defense had been pled, there is no discretion for the trial court to exercise in determining if a sanction should be awarded. Rather, the relevant inquiry is whether the trial court erred in finding that the court rule had been violated and, therefore, that the imposition of a sanction was required. Since this involves a finding of fact by the trial court, that finding must be reviewed to determine if it is clearly erroneous. MCR 2.613(C). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Tuttle v Dep't of State Hwys,* 397 Mich 44; 243 NW2d 244 (1976).

MCR 2.114(D)(3) provides:

> Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (3) the pleading is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Court rules are subject to the same rules of statutory construction as are statutes. *Collier v*

Westland Arena, Inc, 183 Mich App 251, 255; 454 NW2d 138 (1990). Applying the rules of statutory construction, we find that where a court rule provides its own glossary, the terms must be applied as expressly defined. See *Harder v Harder,* 176 Mich App 589, 591; 440 NW2d 53 (1989).

MCR 2.114(D)(3) plainly states that the rule applies to "pleadings." A motion is not a pleading pursuant to MCR 2.110(A). This Court's opinions affirming the imposition of sanctions under MCR 2.114 have involved cases where the propriety of pleadings, and not motions, was disputed. See, e.g., *In re Goehring,* 184 Mich App 360, 366-368; 457 NW2d 375 (1990); *Contel Systems Corp, supra.* Although plaintiff relies on *Ramsey v Pontiac,* 164 Mich App 527, 538; 417 NW2d 489 (1987), that case refers to the imposition of costs for a frivolous motion, as opposed to sanctions for an improper motion. Thus, MCR 2.114 cannot be used to impose sanctions upon a person who signs a motion that is submitted for an improper purpose.

Because the trial court clearly erred in imposing sanctions against the Herrintons pursuant to MCR 2.114 for filing a motion for an improper purpose, we find it unnecessary to discuss whether the motion was improper, whether the Herrintons were denied due process, or the reasonableness of the sanction. Regarding the Herrintons' issue that the court is required to sanction plaintiff's counsel for filing the allegedly frivolous motion for sanctions, this issue was not raised in the trial court and we consider it unpreserved for our review. *Lowman, supra.*

In Docket No. 131179, we vacate that part of the trial court's order of judgment imposing sanctions against the Herrintons for filing a motion for an improper purpose.

In Docket No. 131564, we affirm the trial court's

decision that defendants are estopped on the basis of public policy from challenging plaintiff's zoning ordinance. Moreover, we find that the trial court did not err in determining that the Right to Farm Act does not protect defendants' pallet-construction operation. However, we remand this case to the trial court for it to determine the amount of actual damages to which plaintiff is entitled for responding to defendants' due process issue. We do not retain jurisdiction.

CITY OF DETROIT v KALLOW CORPORATION

Docket No. 125345. Submitted December 12, 1991, at Detroit. Decided August 3, 1992, at 9:05 A.M.

The City of Detroit brought a condemnation action in the Wayne Circuit Court against Kallow Corporation and George Willi after each refused an offer of $361,950 for its property and the city deposited those amounts with the city treasurer. The case was submitted for mediation of the sole issue of just compensation. The property owners accepted, and the city rejected, an evaluation of $480,000 for each of the parcels. A jury subsequently returned a verdict of $450,000 for each of the property owners. The court, Marvin R. Stempien, J., awarded actual costs, including reasonable attorney fees, to the property owners as a sanction for the city's rejection of the mediation evaluation. The city appealed the imposition of mediation sanctions.

The Court of Appeals *held:*

Where a condemnor pays or deposits an amount it estimates to be just compensation and rejects a subsequent mediation evaluation for a higher figure, the condemnor is liable to the condemnee for mediation sanctions under MCR 2.403(D) if the verdict provides for compensation beyond the payment or deposit in an amount equal to ninety percent or more of the difference between the mediation evaluation and the payment or deposit. Because the verdict in this case was more favorable to the city than was the mediation evaluation and resulted in a savings of more than ten percent of the difference between the mediation evaluation and the payment or deposit, the city was not liable for mediation sanctions.

Reversed.

Cooper, Fink & Zausmer, P.C. (by *Mark J. Zausmer* and *Avery K. Williams*), for the plaintiff.

Ackerman & Ackerman, P.C. (by *Alan T. Ackerman*), for the defendants.

Before: MICHAEL J. KELLY, P.J., and SULLIVAN and CONNOR, JJ.

SULLIVAN, J. Plaintiff appeals as of right from a circuit court award of mediation sanctions under MCR 2.403(O) in this condemnation action. We reverse.

Defendants each owned one of the fourteen parcels of property condemned by the City of Detroit for the expansion of Cobo Hall in late 1985. The parties agree that these adjoining lots were nearly identical in all pertinent characteristics. Plaintiff's appraisers established fair compensation for each of the lots at $361,950, and plaintiff offered that sum to each of the owners. Defendants' appraisers valued the lots at $540,000 each, and defendants refused plaintiff's offers. Plaintiff deposited $361,950 for each parcel with the city treasurer and filed a complaint under § 5 of the Uniform Condemnation Procedures Act, MCL 213.55; MSA 8.265(5).[1]

Defendants did not dispute the necessity of the taking; the sole issue was just compensation for the property. The case was submitted to mediation under MCR 2.403, and the mediation panel evaluated the parcels at $480,000 each. Defendants accepted the mediation evaluation; plaintiff rejected it. Following trial in the Wayne Circuit Court, the jury awarded defendants $450,000 for each parcel.

Defendants asked the court to award actual costs, including a reasonable attorney fee, as mediation sanctions under MCR 2.403(O). They contended that plaintiff was liable for sanctions because it did not improve its position by at least ten percent and that, in order to meet that threshold, the award would have to be less than $432,000,

[1] Plaintiff has represented that the deposited funds were paid to the owners before mediation. There is no evidence of that payment in the abbreviated record submitted on appeal. In any event, our decision is not affected by whether the funds were deposited in an account as required by the statute or in fact were paid to the owners.

i.e., ten percent less than the mediation evaluation of $480,000.

Plaintiff responded that it did improve its position by more than ten percent, comparing only the amounts actually in dispute, that is, the additional compensation over the compensation paid before filing the complaint. Applying plaintiff's reasoning, the jury's total verdict had to be $468,195 or less for plaintiff to improve its position by at least ten percent: the true mediation award was $118,050 per parcel ($480,000 minus $361,950) and the verdict represents a true award of $88,050 ($450,000 minus $361,950), which is more than ten percent below the mediation evaluation.

The trial court agreed with defendants, ruling that the express terms of MCR 2.403(O) require comparison of the mediation evaluation with the jury's verdict, without allowing for setoffs.

We hold that, in a condemnation action where the condemning authority has paid or deposited the estimated just compensation, mediation sanctions must be based on the amount actually in dispute. Where the condemning authority has rejected a mediation evaluation, it will be liable to the owner for sanctions under MCR 2.403(O) if the award of additional compensation is ninety percent or more of the mediation panel's evaluation of additional compensation. Additional compensation means the amount in excess of the estimated just compensation paid or deposited.

The relevant parts of MCR 2.403(O) are as follows:

> (1) If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing

party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.

(2) For the purpose of this rule "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion filed after mediation.

(3) 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.

Principles of statutory construction apply to determine the Supreme Court's intent in promulgating rules of practice and procedure. *Issa v Garlinghouse,* 133 Mich App 579, 581; 349 NW2d 527 (1984). The mediation sanction rule is not to be interpreted with wooden literalness if such construction is inconsistent with its purpose. *Commercial Union Ins Co v Liberty Mutual Ins Co,* 137 Mich App 381, 394; 357 NW2d 861 (1984), aff'd 426 Mich 127; 393 NW2d 161 (1986); *Issa,* p 582. The overall purpose of the mediation rule is to encourage settlement and deter protracted litigation. Accordingly, the mediation sanction rule places the burden of litigation costs upon the party that requires a trial by rejecting a proposed mediation award. *Warren v Pickering,* 192 Mich App 153; 480 NW2d 306 (1991); *Bien v Venticinque,* 151 Mich App 229, 232; 390 NW2d 702 (1986).

Not all rejections of mediation evaluations are penalized by the rule. *Issa,* p 582. A party is not to be penalized for rejection of a mediation award

when the rejection was reasonable, as evidenced by a jury verdict more than ten percent more favorable to the party. *Bien,* p 233.

Defendants contend, and the trial court ruled, that the clear language of the rule confines the comparison to the verdict, without regard to the reduction for the earlier payment.[2] We disagree. This Court, in construing the language of the mediation rule, so as to achieve its intended purpose, and its predecessor, GCR 1963, 316.7, has not limited itself to a literal application of the rule's terms.

In *Commercial Union Ins Co,* decided under the former rule, this Court held that sanctions were appropriate, even though a literal application of the rule would have denied relief. The rule at the time did not provide for an evaluation of no cause of action. The Court acknowledged that the ten percent improvement rule could not mathematically apply to such an award; it held, nonetheless, that a plaintiff must win "at least something" in order to avoid costs in the face of a no cause of action evaluation. *Id.,* p 394.

More closely analogous to the case before us, in *Wayne-Oakland Bank v Brown Valley Farms, Inc,* 170 Mich App 16, 20; 428 NW2d 13 (1988), the claim against one defendant was dismissed during trial. At the time, the mediation rule did not include dispositive motions in its definition of "verdict" as subrule O(2) now does. This Court held that, despite the language requiring comparison of the mediation evaluation with a "verdict," the rule should not be read strictly to require a verdict in order to impose sanctions. *Id.,* p 20. The Court relied on the committee comment to MCR 2.403,

[2] The parties have based their arguments on the verdict amount of $450,000, without regard to the adjustments for interest and costs allowed under MCR 2.403(O)(3).

which states: "The rejecting party is liable for costs unless that party improves its position by at least 10 percent." *Id.*

Literal application of the rule in the case before us would not serve the purpose of the mediation rule. We first note that literal application is not logically possible in a condemnation case. Under MCR 2.403(O)(3), a verdict "is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation." Literal application of this standard in a condemnation case produces an absurd result. The plaintiff is the payor; if the verdict is higher than the evaluation, the plaintiff obviously has not improved its position. In such a case, as in *Commercial Union Ins Co and Wayne-Oakland Bank,* we must look to the purpose of the rule and consider the standard of reasonableness in determining what constitutes a ten percent improvement in a party's position.

Plaintiff's rejection of the mediation evaluation in this case was reasonable. Plaintiff improved its position by more than ten percent, comparing the additional compensation it would have paid under the mediation evaluation and the additional compensation it must pay under the verdict.

It is clear from plaintiff's mediation summary that this case was submitted to the mediation panel as a dispute over the additional compensation. Plaintiff stated the contested issue in the opening paragraph as follows: "The ultimate question before this panel is the fair market value of the Subject Properties. Is the City's determination of just compensation fair and accurate, or is the property owner entitled to additional estimated just compensation?" The damages were stated in terms of the additional compensation sought by defendants. The conclusion requested a mediation

award of $361,950 for each parcel, "including estimated just compensation already paid."

Unlike cases involving setoffs of settlements or judgments paid by other tortfeasors, see *Hall v Citizens Ins Co,* 141 Mich App 676, 689; 368 NW2d 250 (1985), in a condemnation case, the estimated compensation is a part of the total fair compensation, paid by the same party, without questions of contribution, fault, or identity of injury inherent in such cases. The amount is never in dispute during the litigation because it must be paid to or for the benefit of the owner before the complaint is filed. It raises the base line of the dispute from zero to the sum deposited or paid. It is not, in that sense, a setoff.

Defendants argue that basing liability for mediation sanctions on additional compensation rather than on gross verdicts should be limited, if allowed at all, to cases in which the condemning authority asked the mediation panel to render its evaluation on that basis. The parties agree that this has been the practice in some cases. We see, however, no substantive difference between an evaluation that expressly excludes the estimated compensation and one in which that exclusion is necessarily implied.

There was no dispute or confusion in this case over what the panel's evaluation meant; it does not require speculation to determine if the panel meant the award to include the estimated compensation already paid. Compare *Maple Hill Apartment Co v Stine,* 131 Mich App 371, 379-380; 346 NW2d 555 (1984), vacated and remanded 422 Mich 863 (1985). It would be arbitrary and unreasonable to base the award or denial of mediation sanctions on the fortuity of the particular way a panel makes the award, or on the way the condemning authority makes its request.

Plaintiff's rejection of the mediation evaluation was reasonable within the meaning of MCR 2.403(O), and defendants were not entitled to sanctions.

Reversed.

PEOPLE v VETTESE

Docket No. 123271. Submitted July 7, 1992, at Detroit. Decided August 3, 1992, at 9:10 A.M. Leave to appeal sought.

Kenneth R. Vettese was convicted by a jury in the Macomb Circuit Court, John B. Bruff, J., of three counts of first-degree criminal sexual conduct, one count of breaking and entering, and one count of unarmed robbery and was sentenced to prison terms of thirty to sixty years for each of the CSC convictions and terms of ten to fifteen years for each of the other convictions. The defendant appealed, claiming that he was entitled to a new trial because of the admission of expert evidence concerning hair found at the scene of the crime, the court's refusal to grant a mistrial during voir dire, and an instruction by the trial court that had the effect of coercing a verdict. The defendant also claimed that the sentences imposed with respect to the CSC convictions violate the principle of proportionality.

The Court of Appeals *held:*

1. The testimony given by the State Police laboratory scientist to the effect that hairs found at the scene of the crime were similar in all respects to hair samples taken from the defendant and could have been the defendant's, even though the witness could not say with certainty that the hairs were the defendant's or what percentage of the population might be the source of that type of hair, was relevant because it placed the defendant within the group of suspects that could have committed the crimes. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Other evidence establishing the defendant as the perpetrator was substantial; thus, there is little reason to suppose that the jury accorded undue weight to the hair-matching evidence, particularly in view of the fact that the prosecutor did not place undue stress on the value of this evidence.

2. The claim that the verdict was coerced by the court's

REFERENCES

Am Jur 2d, Expert and Opinion Evidence §§ 278, 301.

Admissibility and weight, in criminal case, of of expert or scientific evidence respecting characteristics and identification of human hair. 23 ALR4th 1199.

instruction to the jury that it would continue deliberations the following day if it had not reached a verdict by 5:00 P.M. is without merit. The instruction was not coercive and was for the purpose of advising the jury regarding what would happen if it had not reached a verdict by that time. The affidavit of a juror, upon which the defendant relies, does not provide a basis for finding coercion, because it is general in nature and does not specifically allege that any of the jurors was coerced into agreeing to the verdict.

3. The defendant was not prejudiced by the questions the prosecutor asked the prospective jurors during voir dire. Accordingly, the court did not abuse its discretion in denying the defendant's motion for a mistrial.

4. Because the sentences are within the sentencing guideline range, they are presumptively proportionate. Although at the upper limit of the range, the sentences are proportionate to the seriousness of the circumstances surrounding the offense and the offender and do not constitute an abuse of discretion.

Affirmed.

EVIDENCE — HAIR-MATCHING EVIDENCE — RELEVANCY.

Evidence that a defendant's hair is similar to hair found at the scene of a crime is relevant even if there is no evidence concerning the proportion of the population having that type of hair (MRE 401).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Carl J. Marlinga,* Prosecuting Attorney, *Robert J. Berlin,* Chief Appellate Lawyer, and *Richard J. Goodman,* Assistant Prosecuting Attorney, for the people.

John D. Lazar, for the defendant.

Before: MURPHY, P.J., and SHEPHERD and T. S. EVELAND,* JJ.

SHEPHERD, J. Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520(b); MSA 28.788(2), one count of breaking and entering,

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

MCL 750.110; MSA 28.305, and one count of unarmed robbery, MCL 750.530; MSA 28.798. Defendant was sentenced to concurrent prison terms of thirty to sixty years for each of the CSC I convictions and ten to fifteen years each for the breaking and entering and unarmed robbery convictions. Defendant appeals as of right, and we affirm.

Defendant's convictions arose out of events that occurred in the early morning hours of May 10, 1988, in the victim's house in Warren. The victim testified that she was awakened at approximately 3:00 A.M. by a man standing next to her bed. The man knocked off her glasses, put his hand over her eyes, and turned off the light. The victim testified that just before he knocked off her glasses, she recognized her assailant as her former baby-sitter's boyfriend. The victim testified that she felt something sharp in her side and that defendant put a pillow over her face and forced her to put her hands to her sides. After completing the sexual assault, the assailant left the bedroom and ran out the front door of the house, taking the victim's purse that was on the dining room table.

Defendant first argues that the trial court committed error requiring reversal by permitting Glen Moore, a crime laboratory scientist with the Michigan State Police, to testify as an expert in the field of hair analysis regarding a comparison of hair samples. At trial, Moore testified, over a defense objection, that he analyzed several hairs taken from the victim's bedsheets and that one of the hairs was similar in all respects to a pubic hair taken from defendant and could have come from defendant. The expert testified that both sets of pubic hair came from a Caucasian with a Mediterranean background. However, the expert was unable to say with certainty that defendant was the

source of the hair or what percentage of the subgroup population might be the source.

Defendant urges us to consider Judge PETERSON's forceful dissent in *People v Kosters,* 175 Mich App 748, 757-776; 438 NW2d 651 (1989), lv gtd 434 Mich 900 (1990), vacated and lv den 437 Mich 937 (1991). In *Kosters,* the defendant was convicted of sexually molesting his young son and daughter. There, a majority of this Court held that evidence comparing a sample of the defendant's pubic hair with pubic hairs that were found on the daughter's diaper immediately after the defendant's admitted visitation with her was admissible under MRE 401 because it tended to connect the defendant with the crime.

In his dissent, Judge PETERSON argued that the pubic-hair evidence should have been excluded under MRE 702, MRE 401, and MRE 403. First, he argued that even if the hair comparison evidence satisfies the test adopted from *People v Davis,* 343 Mich 348; 72 NW2d 269 (1955), and *Frye v United States,* 54 US App DC 46; 293 F 1013 (1923), relative to allowing an expert to testify concerning his findings or opinion, the expert was limited to describing the hairs as being Caucasian pubic hairs and could not testify concerning whether the hairs could or might be from the defendant, because such testimony was not necessary to help a jury understand the evidence under MRE 702. Under the *Davis-Frye* rule, novel scientific evidence must be shown to have gained the general acceptance of the particular field in which it belongs to be admissible at trial. *People v Young,* 418 Mich 1, 17-18; 340 NW2d 805 (1983), after remand 425 Mich 470; 391 NW2d 270 (1986).

Judge PETERSON also argued in opposition to various panels of this Court that had admitted hair-matching evidence under MRE 401. See *Peo-*

ple v Horton, 99 Mich App 40; 297 NW2d 857 (1980); *People v Goree,* 132 Mich App 693; 349 NW2d 220 (1984); *People v Furman,* 158 Mich App 302; 404 NW2d 246 (1987). In *Kosters,* Judge PETERSON argued that the evidence in question suggests neither a greater nor a lesser probability that the hairs were from the defendant, because no evidence of probability was shown. Moreover, even if the expert testimony had any relevance, Judge PETERSON contended that it should be excluded under MRE 403, because its probative value was substantially outweighed by the prejudicial effect of superficial scientific testimony.

In their respective dissents to the Supreme Court's order vacating its previous order granting leave to appeal, Chief Justice CAVANAGH and Justice LEVIN agreed with Judge PETERSON that it was error to admit the hair-matching evidence. *Kosters, supra,* 437 Mich 937-952. Chief Justice CAVANAGH argued that the hair-matching evidence was inadmissible because the expert testimony was irrelevant and improper and because the prosecutor's distortion and misrepresentation of the nature of the evidence during closing argument may have prejudiced the defendant and influenced the verdict. Chief Justice CAVANAGH stated:

> The expert's testimony thus lacked any significant probative value for purposes of identifying the defendant as the source of the disputed hairs. See MRE 401. Because, on the basis of the expert's testimony, it is conceivable that thousands of individuals in the local area might have produced the hairs, this evidence established only an infinitesimally small possibility that the defendant and the abuser were one and the same individual. Any minuscule probative value such evidence might have would clearly be outweighed by the unfair prejudicial effect. See MRE 403. [*Id.,* pp 939-940].

In arguing that the evidence lacked any significant probative value, Chief Justice CAVANAGH noted that the expert witness could not provide "*any* meaningful statistical grouping for the jury" and could only arrive at "the meaningless conclusion that the disputed hairs *might* have come from defendant, just as they *might* have come from any other Caucasian." Emphasis in original; *id.,* p 942.

More importantly, however, Chief Justice CAVANAGH found that the "jury may have vested this evidence with undue weight," owing to the prosecutor's misleading and distorted presentation of the hair-analysis evidence. During closing argument, the prosecutor argued:

> [C]ould it be that somebody else has pubic hair with a similar characteristic to that? Yes, it's possible, but it's not likely. Not likely, not likely, not likely, not likely, not likely, not likely. Seven times.
>
> Add it all up. Is it possible that this could be somebody else's pubic hair other than Elroy Kosters? It's possible. How likely? We don't know. There are no numbers for that sort of thing. [*Id.*]

In his dissent, Justice LEVIN agreed with Chief Justice CAVANAGH that the hair-sample evidence was "pseudoscientific evidence that might very well have misled the jury." *Id.,* p 952.

In the instant case, we must conclude, as have previous panels of this Court that have addressed the question of the admissibility of hair-matching evidence offered by an expert, that the trial court's admission of this type of evidence did not constitute error requiring reversal. See *People v Hayden,* 125 Mich App 650, 658-659; 337 NW2d 258 (1983). First, microscopic hair analysis satisfies the *Davis-Frye* test for admissibility of scientific opin-

ion testimony. *People v Watkins,* 78 Mich App 89, 95-96; 259 NW2d 381 (1977).

Second, the hair-matching evidence constitutes relevant evidence under MRE 401. In this case, the testimony that the pubic hair found in the victim's bed was similar in all relevant respects to the defendant's pubic hair has probative value, because it places defendant within the group of suspects that could have committed the crimes and thereby makes it more probable than not that defendant was the perpetrator. In finding that this evidence satisfies MRE 401, we note that it is not necessary to provide evidence of degrees of probability, as Judge PETERSON contended. The fact that defendant was not excluded from the class of possible suspects suffices to show that the evidence is relevant and is entitled to some weight by the jury, even though the expert did not positively identify defendant as the source of the pubic hair found in the victim's bedsheets. Equally, we note that this type of evidence could also be relevant to exclude a person as a possible suspect in a case. See, e.g., *State v Acklin,* 317 NC 677; 346 SE2d 481 (1986), where the Supreme Court of North Carolina found prejudicial error requiring a new trial in a rape and kidnapping prosecution where the trial court refused to admit laboratory reports showing that pubic hair and semen found on a victim were not attributable to the defendant.

Further, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. In this case, there was substantial, if not overwhelming, evidence of defendant's guilt. The victim identified defendant as the perpetrator. Although the victim saw her assailant for just one second, she immediately recognized him as her baby-sitter's former boyfriend, who lived down the street from her.

Further, defendant owned a blue jean jacket and black leather gloves similar to what the victim's assailant was wearing. The evidence also indicated that defendant apparently entered the home through the kitchen window. Afterwards, a large knife with a black handle was discovered in the kitchen sink, and a smaller knife with a pearl handle and a serrated blade was found in the victim's bed. Neither knife belonged to the victim. However, both knives matched other knives that were found several days later in defendant's house when the police searched his house pursuant to a search warrant. The police found five knives in a kitchen drawer identical to the knife found in the victim's bed. The police also found a butcher-block knife holder on his kitchen counter that was missing one knife similar to the large black-handled knife found in the kitchen sink.

Moreover, there is little reason to suppose that the jury in this case accorded undue weight to this evidence. During closing argument, the prosecutor fairly summed up the expert's testimony:

> You recall that he told you that, in all respects, the hair that was found in the bed is similar to the known pubic hairs of Kenneth Vettese. That fact, in of itself [sic], does not, I submit, conclusively prove that Kenneth Vettese is the guy. But the mere fact that the hairs in the bed and the hairs plucked from Kenneth Vettese are similar in every respect and at least puts him in the group of people to be considered by you.

We do not believe that the prosecutor's characterization of the testimony prejudiced defendant or improperly influenced the verdict. Unlike his counterpart in *Kosters* who apparently sought to exploit the jury's potential misapprehension of this

evidence, the prosecutor in this case presented the evidence as being no more valuable than it actually was, made the jury aware of the limitations of this evidence, and asked the jury to consider it for whatever benefit it may provide.

If the prosecutor had offered only the hair-matching evidence in support of the identification of the defendant, we would have been constrained to conclude that its prejudicial effect substantially outweighed its probative value. By the same token, if the prosecutor had presented the hair-matching evidence in an otherwise weak case in which the other evidence was not sufficient to establish the defendant's guilt, we similarly would be constrained to conclude that the evidence was more prejudicial than probative. See *State v Stallings,* 77 NC App 189; 334 SE2d 485 (1985), where the court concluded that evidence of microscopic hair analysis was insufficient to take a case to the jury absent some other substantial evidence of guilt. Where, as here, the prosecutor has substantial, if not overwhelming, evidence of a defendant's guilt and presents the hair-matching evidence with circumspection, then we do not see how its probative value could be substantially outweighed by any unfair prejudice.

We further note that reversal in this case would be warranted only if the Michigan Supreme Court adopted a rule excluding all hair-analysis testimony offered by an expert because the prejudicial effect substantially outweighs its probative value in all circumstances. Under such a rule, the introduction of hair-matching evidence could never constitute harmless error. As yet, our Supreme Court has not decided this precise question. Further, even Chief Justice CAVANAGH in his dissent in *Kosters* does not clearly embrace a rule excluding this type of evidence in all circumstances. We

note that no other jurisdiction that has considered this question has adopted such a rule.

Defendant next argues that he was denied his right to a fair trial because the trial court gave a coercive instruction to the jury and because the atmosphere surrounding the jury's deliberations was coercive. In support of this claim, defendant presents the affidavit of juror Kyla Miller, who contacted defendant and his counsel more than a year after the verdict. In her affidavit, juror Miller states that the members of the jury were coerced and pressured by the trial court's instruction to reach a verdict by 5:00 P.M. or return the next day and that certain members of the jury coerced three or four jurors into reaching a guilty verdict so that the jurors would not have to return the next day. The affiant also states that the holdout jurors were coerced by this deadline because the jury was over term and that one juror was excused when she lost her job because of her jury service.

Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered. *People v Malone,* 180 Mich App 347, 352; 447 NW2d 157 (1989). As a general rule, jurors may not impeach their verdicts by affidavits. *People v Pizzino,* 313 Mich 97; 20 NW2d 824 (1945); *Hoffman v Monroe Public Schools,* 96 Mich App 256; 292 NW2d 542 (1980). However, affidavits or testimony impeaching the verdict are properly received where they concern overt acts, accessible to the knowledge of all the jurors, that do not involve matters inhering in the verdict. *People v Graham,* 84 Mich App 663; 270 NW2d 673 (1978). Mistakes or misconduct inherent in the verdict may not be challenged. *Id.* Moreover, a reviewing court should not rely upon an affidavit that is generalized, ambiguous, or vague. *Id.; Peo-*

ple v Van Camp, 356 Mich 593; 97 NW2d 726 (1959).

In the instant case, the trial court instructed the jury as follows:

> And if you have not arrived at a verdict by 5:00 [P.M.], you will be excused and asked to report back here tomorrow morning at 8:30 and commence your deliberations in the morning.

It is clear that the trial court's instruction was not coercive and merely indicated that the jurors would have to return the next day if they did not reach a verdict by 5:00 P.M. There is nothing in the trial court's instruction to suggest that the jurors had to reach a verdict by that time.

Further, we find no basis upon which to consider juror Miller's affidavit. The affidavit contains only vague allegations dealing with matters inherent in the verdict that may not be challenged. *People v Graham, supra.* While the affiant alleges that the jurors were influenced by the fact that one juror had lost her job because of jury service, there is no suggestion that the remaining jurors were confronting a similar situation or were influenced by the excused juror's situation. Thus, we conclude that defendant was not denied a fair trial because of the trial court's instruction or a coercive atmosphere during the jury's deliberations.

Defendant also contends that the trial court erred in denying his motion for a mistrial, in which the defendant argued that the prosecutor improperly shifted the burden of proof to defendant during voir dire by asking prospective members of the jury whether they would have a problem in determining intent by defendant's words and actions.

Denial of a motion for a mistrial rests within

the sound discretion of the trial court and will not be disturbed unless such denial constituted an abuse of discretion. *People v Von Everett,* 156 Mich App 615, 621-622; 402 NW2d 773 (1986). To find error requiring reversal, a trial court's denial of a mistrial must have been so gross as to have deprived the defendant of a fair trial and to have resulted in a miscarriage of justice. Reversal is not warranted unless the defendant makes an affirmative showing of prejudice resulting from the abuse of discretion. *Id.*

After a review of the record, we find nothing to indicate actual prejudice to defendant or that he was denied a fair trial. Thus, the trial court did not err in refusing to grant defendant's motion for a mistrial.

Defendant next claims that he was denied a fair trial owing to the cumulative effect of the errors. We find this claim to be without merit.

Defendant finally claims that his sentence of thirty to sixty years in prison for each of the three convictions of first-degree criminal sexual conduct violates the principle of proportionality enunciated in *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). We disagree.

In *Milbourn,* pp 635-636, 654, the Supreme Court held that a sentencing court abuses its discretion when it violates the principle of proportionality, which requires a sentence to be proportionate to the seriousness of the crime and the defendant's prior record. The second edition of the sentencing guidelines is the best "barometer" of proportionality. *Id.,* p 656. A sentence within the guidelines is presumptively proportionate. *People v Broden,* 428 Mich 343, 354; 408 NW2d 789 (1987).

In the instant case, the sentencing guideline

range for each CSC I conviction was 180 months to 360 months. Defendant's thirty-year minimum sentence for each CSC I conviction was at the maximum of the sentencing guidelines minimum range of thirty years, and thus presumptively proportionate. Defendant has not presented mitigating factors relating to his criminal history or the circumstances of these offenses sufficient to overcome this presumption of proportionality. *People v Dukes,* 189 Mich App 262, 266; 471 NW2d 651 (1991). Although defendant asserts that this case and the offender are far from being the "worst," we note that defendant broke into the victim's home, raped her repeatedly while armed with a knife, and threatened to kill her and her two children, ages ten and twelve at the time, who were awakened by their mother's screams but were too frightened to leave their adjoining bedrooms to come to her aid. Having reviewed the record, we conclude that defendant's sentences are proportionate to the seriousness of the circumstances surrounding the offenses and the offender and do not constitute an abuse of discretion.

Affirmed.

PEOPLE v LYONS

Docket No. 135768. Submitted January 8, 1992, at Detroit. Decided August 3, 1992, at 9:15 A.M. Leave to appeal sought.

Dashawn E. Lyons, age sixteen, pleaded guilty in the Detroit Recorder's Court, Dalton A. Roberson, J., of first-degree murder and possession of a firearm during the commission of a felony. After a hearing, the court decided to sentence the defendant as a juvenile offender by placing him on probation and committing him to the care of the Department of Social Services for rehabilitation. The prosecution appealed, claiming that the defendant should have been sentenced as an adult offender.

The Court of Appeals *held:*

The prosecution proved by a preponderance of the evidence at the hearing that the defendant should be sentenced as an adult. The trial court clearly erred in finding otherwise and abused its discretion in sentencing the defendant as a juvenile.

The decision whether to sentence a minor as a juvenile or as an adult rests within the discretion of the trial court, after making findings of fact and conclusions of law in support of either choice. Under MCL 769.1(3); MSA 28.1072(3); MCR 6.931(E)(3), the court must consider:

—the juvenile's prior record, character, physical and mental maturity, and pattern of living;

—the seriousness and circumstances of the offense;

—whether the offense is part of a pattern of offenses leading to a determination that the juvenile is not amenable to treatment or, if amenable, that the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of others in the treatment program;

—whether, despite the potential for treatment, the nature of the delinquent behavior is likely to render the juvenile dangerous to the public if released at the age of twenty-one;

—whether the juvenile is more likely to be rehabilitated by services and facilities available in adult programs;

—the best interests of the public welfare and the protection of the public security.

Order of probation vacated and case remanded for sentencing as an adult.

MICHAEL J. KELLY, J., dissenting, stated that the trial court

did not clearly err with respect to its findings of fact at the hearing and did not abuse its discretion in deciding to sentence the defendant as a juvenile.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Thomas M. Chambers,* Assistant Prosecuting Attorney, for the people.

Gerald T. Celeskey, for the defendant on appeal.

Before: MICHAEL J. KELLY, P.J., and JANSEN and T. J. LESINSKI,* JJ.

JANSEN, J. Defendant, a sixteen-year-old male, pleaded guilty before Detroit Recorder's Court Judge Dalton A. Roberson of first-degree murder, MCL 750.316; MSA 28.548, and of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Thereafter, a juvenile sentencing hearing was conducted and the trial court concluded, in accordance with MCL 769.1(3); MSA 28.1072(3), that defendant should be sentenced as a juvenile instead of as an adult. Defendant was then committed to the care of the Michigan Department of Social Services in accordance with the Youth Rehabilitation Services Act, MCL 803.301 *et seq.*; MSA 25.399(51) *et seq.* The prosecution now appeals as of right, and we reverse.

We first address what we feel to be an inappropriate procedure utilized in the taking of defendant's plea by the trial court. It appears, on the basis of our review of the record, that an obvious use of forum shopping was employed by defendant

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

and sanctioned by the trial court. Defense counsel stated that offering a plea of guilty to the charge of first-degree murder was "an unusual situation," and that defense counsel hoped to convince the trial court at sentencing to place defendant in the juvenile system, as opposed to the adult system. The case, originally assigned to Judge James E. Roberts by blind draw, was inexplicably transferred to Judge Roberson. We view this as forum shopping in order to obtain the leniency of a juvenile sentence from Judge Roberson. We cannot condone such a course of action, and we caution the trial court to refrain from approving the use of such forum shopping in the future.

The incidents leading to defendant's conviction occured on November 27, 1989, at the home of the victim, Douglas Thomas, which is located in the City of Detroit. Defendant was selling crack cocaine out of Thomas' house. On the night in question, defendant and Thomas were together at the house. At some point in the evening, defendant allegedly attempted to rob Thomas of his wallet. A struggle ensued, and defendant shot Thomas five times in the face. Thomas subsequently died. At the time of the shooting, defendant was sixteen years old.

The sole issue raised by the prosecution on appeal is whether the trial court erred in sentencing defendant as a juvenile offender instead of as an adult offender. Initially, we note that there have been no reported decisions discussing the appropriate standard of review of a trial court's determination whether to sentence a minor as a juvenile or as an adult. It is our opinion that such a decision should be reviewed for an abuse of discretion under the customary sentence review standard. The judicial discretion involved in such a decision is so inextricable from the quantum

sentence as to compel the same standard of review.

The sentencing of a criminal defendant rests exclusively within the province of the sentencing court, which sees and hears the defendant and is uniquely positioned to evaluate the defendant's credibility, character, and potential for rehabilitation. *People v Coles,* 417 Mich 523, 536-538; 339 NW2d 440 (1983). Because a subjective evaluation of those traits is usually necessary, appellate courts generally agree that punishment is to be left to the trial court's discretion. *People v Howell,* 168 Mich App 227, 232; 423 NW2d 629 (1988). Appellate review of sentencing is limited to determining whether an abuse of discretion has occurred. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Poppa,* 193 Mich App 184; 483 NW2d 667 (1992). In this case, the prosecution contends that it proved, by a preponderance of the evidence, that defendant should be sentenced as an adult, and that the trial court abused its discretion in sentencing defendant as a juvenile. We agree with the prosecution, and hold that the trial court abused its discretion in sentencing defendant as a juvenile.

Pursuant to MCL 769.1(3); MSA 28.1072(3), the trial court must conduct a juvenile sentencing hearing to determine if the best interests of the juvenile and the public would be better served by placing the minor in the custody of the juvenile offender system or by sentencing the minor as an adult. See also MCR 6.931(A). The trial court is required to consider the following factors in making its determination, giving weight to each as appropriate under the circumstances:

> (a) The prior record and character of the juvenile, his or her physical and mental maturity, and his or her pattern of living.

(b) The seriousness and the circumstances of the offense.

(c) Whether the offense is part of a repetitive pattern of offenses which would lead to one of the following determinations:

(i) The juvenile is not amenable to treatment.

(ii) That despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of other juveniles in the treatment program.

(d) Whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public if released at the age of 21.

(e) Whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.

(f) What is in the best interests of the public welfare and the protection of the public security. [MCL 769.1(3); MSA 28.1072(3); see also MCR 6.931(E)(3).]

The prosecutor has the burden of proving, by a preponderance of the evidence, that the best interests of the juvenile and the public would be served by sentencing the juvenile as an adult offender. MCR 6.931(E)(2). The trial court must make findings of fact and conclusions of law in support of a decision for juvenile probation and commitment or for sentencing as an adult offender. MCL 769.1(5); MSA 28.1072(5); MCR 6.931(E)(4). The trial court's findings of fact are reviewed under the clearly erroneous standard of review. MCR 2.613(C). Findings of fact are clearly erroneous if, after review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Gistover,* 189 Mich App 44, 46; 472 NW2d 27 (1991).

In this case, the trial court made the following

pertinent findings of fact: (1) defendant was physically and mentally mature; (2) the offense committed by defendant was of a serious nature; (3) defendant's behavior was not likely to disrupt the rehabilitation of other juveniles in the treatment program; (4) defendant's behavior was not likely to render him more dangerous to the public at age twenty-one; (5) defendant was more likely to be rehabilitated by the services and facilities available in a maximum security juvenile program than by the services available in an adult program; (6) the best interests of defendant and the public would be served by placing defendant on probation and committing him to a juvenile facility; and (7) the prosecution had failed to prove, by a preponderance of the evidence, that the best interests of the juvenile and the public would be served by sentencing defendant as an adult.

After reviewing the testimony presented at the juvenile sentencing hearing, we are of the opinion that the trial court's findings of fact were clearly erroneous and we are left with a definite and firm conviction that a mistake has been made by the trial court. The trial court abused its discretion in placing defendant in the juvenile offender system rather than in the adult offender system.

The evidence elicited at the juvenile sentencing hearing indicates that defendant has a record of being troublesome. In June 1988, defendant was arrested and found guilty of possession of cocaine. He was placed in temporary custody of the juvenile court, and was placed on intensive probation. In November 1988, defendant violated the terms of his probation by being truant from the family home. During this time, defendant was living in various crack houses. Defendant was placed in the Flint Detention Center, a maximum security facility, where his adjustment was described as poor.

Defendant was disruptive and given to attempts to impress and tease other detainees.

Subsequently, defendant was transferred to Boysville of Michigan, where his adjustment was described as fair. Defendant admitted drug use and he participated in group therapy. However, defendant escaped following an outing to a Detroit Tigers game. He was thereafter arrested for carrying a concealed weapon and for possessing cocaine, and was again placed in the Flint Detention Center. Defendant again escaped by jumping out of the dining room window with another juvenile.

Defendant was on escape status at the time he committed the present offense. Defendant was placed in the Wayne County Youth Home following his apprehension for the present offense, and he again escaped from the home in the company of two other youths.

Regarding defendant's physical and mental maturity, defendant was characterized as being competent and aware of his surroundings. Defendant is intelligent, mature, and capable of performing adequately in an academic setting. However, defendant has been suspended from school six times for fighting, and has, by his own admission, engaged in drug dealing for some time. Defendant rented a car, at the age of fourteen or fifteen, to make drug deliveries, and he would flaunt his money and beeper in front of schoolmates. At the time of Thomas' death, defendant was selling crack cocaine out of Thomas' house.

Several of the witnesses indicated that, upon interviewing defendant, they found that he expressed no remorse for killing Thomas. One witness found defendant to be a "cold person," while another stated that defendant "appeared that he was almost like proud of the fact that this happened," and that defendant was "excited in talking

about it." Further testimony indicated that defendant had a need to exert power over others and had no regard for authority.

The seriousness of the offense, the shooting of Thomas five times in the face from close range, does not require extensive elaboration. The trial court noted that this was a serious offense, and we could not agree more.

Concerning whether defendant is amenable to treatment, we find, on the basis of our review of the record, that he is not. Emphasis was placed on the fact that defendant adjusted well to the treatment he received at Boysville. However, of more importance is the conduct of defendant after his stay at Boysville. Defendant escaped from Boysville, and was subsequently apprehended and charged with carrying a concealed weapon and with possessing cocaine. Defendant was returned to the Flint Detention Center, from which he escaped after a two-week stay. Defendant then shot Thomas while on escape status. Following his detention for the killing of Thomas, defendant escaped from the youth home.

These facts are consistent with the opinion of Firoza Van Horn, an employee of the Detroit Recorder's Court Clinic and a holder of a master's degree in social work and psychology, who testified that defendant "was not interested in any kind of program that would help him change." It was Van Horn's opinion that defendant would not be amenable to treatment and that he was resistant to therapy.

We also believe, contrary to the trial court's finding, that defendant would disrupt the rehabilitation of other juveniles in the treatment program. During school, defendant would flaunt his money and beeper. Defendant, during a stay at the youth home, was overheard saying that when he got out

of the home he was "going to be the big dope man. I'm going to have all you base heads working for me." Defendant was also overheard saying how possessing a gun in the dope trade was a necessity.

Defendant's behavior was described as disruptive, and he was given to attempts to impress and tease other juvenile detainees. Defendant preyed on those who were not knowledgeable about illicit drugs, and he projected blame for his actions onto others. Defendant has been suspended from school on six occasions for fighting, he has no regard for authority, and he provokes other juveniles into negative behavior. Defendant was characterized as being "very manipulative, impulsive," and as being a leader, which would enable him to create disruption if placed within the juvenile system. Defendant has a low frustration level and, if subjected to too much stress, would rebel, attack, or fight.

In addition, we believe that defendant would be dangerous to the public if released at the age of twenty-one. Such a conclusion is supported by the testimony of various witnesses who indicated that defendant would pose a threat to the community upon his release at that age because of his lack of remorse over the killing of Thomas, his prior involvement in drug trafficking, his belief that a gun is necessary in the drug trade, his prior hostile and aggressive behavior, and his disinterest in attempting any type of personal change. This conclusion is further supported by the fact that after defendant showed modest improvement following his stay at Boysville, he again reverted to delinquent behavior. In fact, Van Horn testified that defendant would conform his behavior to the rules, but then would revert to his prior deviant behavior.

It is also unlikely that defendant could be reha-

bilitated by the services provided in the juvenile system as opposed to those of the adult system. Testimony indicated that defendant was not interested in receiving treatment or in being in any program that would help him change his behavior. Defendant is manipulative and impulsive, and has problems with authority figures and with following rules. Defendant has had several chances at reformation within the juvenile system, and on each occasion has escaped from the facility at which he was housed. This includes an escape from the Flint Detention Center, a maximum security facility. We simply cannot conclude, as did the trial court, that defendant is more likely to be rehabilitated within the juvenile system as opposed to the adult system.

It is our opinion, after reviewing the record, that the best interests of the public welfare and the protection of the public security would best be served by sentencing defendant within the adult system. We conclude that the trial court's decision to place defendant in the custody of the juvenile offender system instead of sentencing him as an adult constituted an abuse of discretion.

Therefore, we vacate the trial court's order of probation and commitment, and we remand the case to the trial court for sentencing as an adult. We do not retain jurisdiction.

T. J. LESINSKI, J., concurred.

MICHAEL J. KELLY, P.J. *(dissenting).* I respectfully dissent. I would affirm. I agree that the standard of review is for an abuse of discretion. For me, it is a Hobson's choice, one that is too close to call, and I therefore cannot find an abuse of discretion.

The juvenile sentencing alternative of incarcera-

tion until the age of twenty-one is not a sufficient societal response to the viciousness of the crimes committed, and yet the adult alternative of mandatory life imprisonment without the possibility of parole for a sixteen-year-old is so enormously retributive as to strain any sentencing judge's Solomonic powers of disposition. Unfortunately there is no potential third alternative, such as that recently fashioned by the Supreme Court in *People v Bullock,* 440 Mich 15; 485 NW2d 866 (1992).

In this case, the trial court found that: (1) defendant was physically and mentally mature; (2) the offense was of a serious nature; (3) defendant's behavior was not likely to disrupt the rehabilitation of other juveniles in the treatment program; (4) defendant's behavior was not likely to render him dangerous to the public at age twenty-one; (5) defendant was more likely to be rehabilitated through the services and facilities available in a maximum security juvenile program rather than through the services available in an adult program; (6) the best interests of defendant and the public would be served by placing him on probation and committing him to a juvenile facility; and (7) the prosecution had failed to prove, by a preponderance of the evidence, that the best interests of defendant and the public would be served by sentencing him as an adult.

After reviewing the testimony presented at the juvenile sentencing hearing, I do not believe that the trial court's findings of fact were clearly erroneous, and therefore I can find no abuse of discretion. Although there was conflicting testimony concerning a number of the factors, there is support in the record for each finding made by the trial court. Obviously, the decision is a close one,

but the trial court's benefit of seeing and hearing the defendant and the witnesses on both sides of the issues is persuasive.

I would affirm.

JEFFREY v CLINTON TOWNSHIP

Docket No. 134170. Submitted July 8, 1992, at Detroit. Decided August 3, 1992, at 9:20 A.M.

John and Roseanne Jeffrey, owners of a cougar, brought an action in the Macomb Circuit Court against Clinton Township, seeking an injunction against enforcement of the township's ordinance prohibiting the possession of certain exotic or wild animals. At the time, a criminal action for violation of the ordinance was pending against them in the 41B District Court. The circuit court, Frederick D. Balkwill, J., permanently enjoined the township from enforcing the ordinance with respect to the cougar. The township appealed.

The Court of Appeals *held:*

1. The circuit court abused its discretion in awarding the plaintiffs permanent injunctive relief. Injunctive relief is an extraordinary remedy that should obtain only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. The plaintiffs did not allege that they lack an adequate remedy at law and did not make a showing that they will be irreparably harmed by the continued pendency of the criminal proceeding in the district court.

2. The issue whether the ordinance is constitutional should be addressed in the first instance by the district court in the criminal case.

Reversed.

INJUNCTIONS — CRIMINAL LAW — EQUITY — INVALID LAWS — IRREPARABLE INJURY.

Criminal prosecutions generally cannot be restrained by injunction; however, equity jurisdiction may be invoked for the purpose of obtaining injunctive relief and a determination regarding the constitutionality of an alleged invalid law where the

REFERENCES

Am Jur 2d, Injunctions §§ 238-240.

Comment Note.—Preconviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory. 4 ALR3d 404.

complainant would suffer irreparable injury from the acts of the public officials in its enforcement.

York, Dolan & Ciaramitaro, P.C. (by *John A. Dolan*), for Clinton Township.

Before: MURPHY, P.J., and SHEPHERD and T. S. EVELAND,* JJ.

SHEPHERD, J. Plaintiffs brought this action seeking an injunction against enforcement of defendant township's ordinance prohibiting the possession of certain enumerated exotic or wild animals. Plaintiffs own a cougar, which is prohibited by the ordinance. The trial court permanently enjoined the township from enforcing the ordinance against plaintiffs with respect to the cougar they presently own. We reverse.

According to plaintiffs' complaint, they acquired a South American cougar kitten in November 1987. At that time, the pertinent township ordinance required that such animals be kept in a "suitable cage or land formation sufficient to prohibit direct or indirect contact with the public." The ordinance also required the owner of a wild animal to give notice to the township of the kind of animal involved, the propensities of the animal, and other relevant data. The township was empowered to inspect the cage or land formation, to notify appropriate state agencies of inadequacies, and to issue orders reasonably necessary to insure the health, safety, and welfare of the inhabitants of the township. To comply with this ordinance, plaintiffs put bars on the doors and windows of their house. There is no claim that plaintiffs violated the ordinance in effect at the time they acquired the cougar.

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

In June 1989, the ordinance was superseded by the one at issue herein, Clinton Township Ordinance No. 280, which provides in pertinent part:

> Section 2. *Definitions*
> As used in this ordinance:
>
> * * *
>
> (b) "Exotic or Wild Animal" means a wild animal not occurring naturally, either presently or historically in this state.
>
> * * *
>
> Section 3. *Animals Excluded*
> (1) Except as otherwise provided in this Section, it is unlawful in this township for a person to possess, breed, exchange, buy, sell, or attempt or offer to buy or sell, the following exotic or wild animals:
>
> * * *
>
> (e) Cats (wild family including but not limited to bobcat, cheetah, cougar, jaguar, leopard, lion, lynx, mountain lion, panther, puma, tiger) . . . .
>
> * * *
>
> (2) A person who owns an exotic or wild animal listed in subsection (1) on the effective date of this ordinance shall within thirty (30) days of the effective date of this ordinance remove the animal from the township.
>
> * * *
>
> Section 5. *Penalties*
> A person who violates this ordinance is guilty of a misdemeanor, punishable by imprisonment in the county jail for a term not to exceed 90 days or a fine not to exceed $500.00 or both, in the discretion of the court.
> Section 6. *Nuisance Per Se*
> Any continuing violation or a repeated violation of this ordinance shall constitute a nuisance per se and may be abated by an action in circuit court separately or in addition to criminal proceedings.

At an April 19, 1990, hearing, defendant's counsel indicated that plaintiffs were given a notice to remove their animal from the township on August 19, 1989. Plaintiffs did not comply and, again according to defendant's attorney, a warrant was requested in November 1989. Plaintiffs were cited for violating the ordinance, and, according to plaintiffs' trial brief, trial on that charge was set for April 19, 1990, in the district court. The complaint in this case was filed on April 18, 1990, and a temporary restraining order was issued that day restraining defendant from enforcing the ordinance against plaintiffs. At a show cause hearing on April 19, 1990, the trial court in this case entered a preliminary injunction. On August 23, 1990, the trial court entered its opinion and order permanently enjoining defendant from enforcing the ordinance against plaintiffs. A subsequent order clarifies that the injunction applies only to plaintiffs herein and with respect to the cougar they purchased in November 1987. The injunction was based on estoppel, the court's finding that the ordinance was an ex post facto law, and the court's finding that the ordinance conflicted with pending state legislation.

On appeal, defendant argues that "criminal prosecutions are precluded from being enjoined." This is an overstatement. Nonetheless, we agree that injunctive relief was improper in this case.

Granting injunctive relief is within the sound discretion of the trial court. *Holland v Miller,* 325 Mich 604, 611; 39 NW2d 87 (1949); *Holly Twp v Dep't of Natural Resources (On Rehearing),* 194 Mich App 213, 216; 486 NW2d 307 (1992). The exercise of this discretion may not be arbitrary, but rather must be in accordance with the fixed principles of equity jurisprudence and the evidence in the case. *Holland, supra,* p 612. Injunctive relief

is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. *Holly Twp, supra.*

Defendant cites the following cases for the proposition that it is the general rule that criminal prosecutions cannot be restrained by injunction: *Kleinke v Oates,* 187 Mich 548; 153 NW 675 (1915); *Osborn v Charlevoix Circuit Judge,* 114 Mich 655; 72 NW 982 (1897); *Society of Good Neighbors v Groat,* 77 F Supp 695 (ED Mich, 1948). Defendant fails, however, to discuss cases applying an exception to this general rule. See, e.g., *Ritchie v Hamtramck,* 340 Mich 284; 65 NW2d 732 (1954).

In *Ritchie,* our Supreme Court recognized the general rule stated in *Osborn,* but noted that an exception to this general rule was made in *Michigan Salt Works v Baird,* 173 Mich 655; 139 NW 1030 (1913):

> Equity has jurisdiction to interfere, by injunction, in a case where public officials are proceeding illegally and improperly under a claim of right, where it is alleged, as in the instant case, that the complainant thereby suffers irreparable injury. [*Ritchie, supra,* p 288, citing *Baird, supra,* p 662.]

The irreparable injury referred to must result from the acts of the public officials in enforcing the allegedly invalid law. *Diggs v State Bd of Embalmers & Funeral Directors,* 321 Mich 508, 514; 32 NW2d 728 (1948). In *Diggs,* our Supreme Court commented:

> This Court has repeatedly held that in cases where an irreparable injury will result from the acts of public officials in attempting to proceed under an invalid law, the jurisdiction of equity may be invoked for the purpose of obtaining in-

junctive relief and a determination as to the constitutionality of the statute that is involved. [*Id.*]

In this case, plaintiffs' alleged irreparable injury consists only of the feared loss of the cougar if the ordinance is enforced. Plaintiffs do not allege that they lack an adequate remedy at law. To understand the requirements of an irreparable injury and no adequate remedy at law, we may look to *Baird, supra.* In that case, the plaintiff, Michigan Salt Works, apparently had not violated the statute at issue. The plaintiff argued that injunctive relief was proper, and the Supreme Court agreed:

> Referring to the contention of defendants that complainant has a full, adequate, and complete remedy at law, it is true that it has a legal remedy. It may refuse to comply with the provisions of the act in question, and so expose itself and its responsible officers to prosecution under the act. Upon such prosecution, it may set up, in its defense, the alleged unconstitutionality of the law; and, if upheld in its contention, it will escape punishment either by way of fines or imprisonment. But suppose complainant should be illy advised, and upon final adjudication it is determined that the law is valid, it then becomes liable to all the penalties provided by the statute.
>
> If a year should be consumed in reaching a legal determination of the question, this complainant, according to the averments in the bill, would (in the event of an adverse decision) be liable to fines aggregating more than $200,000, besides a possible term of imprisonment for some one or more of its responsible officers. [*Baird, supra,* pp 660-661.]

In this case, plaintiffs had already violated the statute and criminal proceedings had been commenced before they brought this action. Plaintiffs have made no showing that they will be irreparably harmed by the continued pendency of the

criminal proceeding in district court, other than that they would be subject to the penalties for violating the ordinance. If the circuit court had upheld the ordinance or refused to enjoin its enforcement, plaintiffs would still be subject to the same penalties because the acts giving rise to the violation have already been completed. Under these circumstances, plaintiffs are not entitled to a determination in a forum other than the district court. The circuit court abused its discretion in awarding plaintiffs permanent injunctive relief. *Holly Twp, supra.*

We do not address the merits of the constitutionality of the ordinance. To do so would violate our holding that this issue should have been addressed in the first instance by the district court in the criminal case.

Reversed.

PEOPLE v ADAMS

Docket No. 125921. Submitted February 5, 1992, at Lansing. Decided August 3, 1992, at 9:25 A.M. Leave to appeal sought.

George Adams was convicted by a jury in the Oakland Circuit Court, Fred M. Mester, J., of one count of kidnapping, two counts of first-degree criminal sexual conduct, and one count of armed robbery. He was sentenced to life imprisonment for the kidnapping conviction and to 70 to 150 years' imprisonment for each of the other convictions. He appealed, alleging errors in the admission into evidence of the results of deoxyribonucleic acid (DNA) identification testing of a sample of dried semen taken from the victim's clothing and in the trial court's failure to articulate sufficient reasons for imposing sentences that departed from the sentencing guidelines range.

The Court of Appeals *held:*

1. The trial court did not err in allowing the test results in evidence. The prosecution established that DNA identification testing is generally accepted as reliable in the scientific community. Trial courts may take judicial notice of such reliability and may admit test results into evidence where the prosecution establishes that generally accepted laboratory procedures were followed. The company that did the testing in this case followed such procedures.

2. The trial court did not abuse its discretion in admitting into evidence the statistical analysis of the DNA identification testing. The record contains an adequate foundation and proof of independence of the analysis, and the evidence was relevant.

3. The trial court failed to articulate, either on the record or on the sentencing information report, sufficient reasons for departing from the sentencing guidelines range. The proper

REFERENCES

Am Jur 2d, Criminal Law §§ 537, 538; Expert and Opinion Evidence §§ 278, 296; Rape § 61.

Admissibility of DNA identification evidence. 84 ALR4th 313.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids. 75 ALR4th 897.

Comment Note.—Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment. 33 ALR3d 335.

remedy where the court fails to articulate its reasons for departing from the guidelines and sentences the defendant to a sentence more than three times the minimum sentence recommended by the guidelines is to vacate the defendant's sentences and to remand the case to the trial court for resentencing. The defendant need not be resentenced by a different judge.

Convictions affirmed, sentences vacated, and case remanded for resentencing.

GRIFFIN, J., dissenting in part, stated the trial court adequately articulated its reasons for departing from the sentencing guidelines, and that the sentences are valid and proportionate to the seriousness of the circumstances surrounding the offenses and the offender. A remand for completion of the sentencing information report guideline departure form is all that is necessary.

1. CRIMINAL LAW — EVIDENCE — DNA IDENTIFICATION TESTING — STATISTICAL ANALYSIS.

Deoxyribonucleic acid (DNA) identification testing is generally accepted in the scientific community as reliable; trial courts may take judicial notice of such reliability and may admit test results into evidence where the prosecution establishes that generally accepted laboratory procedures have been followed; statistical analysis of the DNA identification testing may be admitted where an adequate foundation and proof of its independence is shown.

2. CRIMINAL LAW — SENTENCES — SENTENCING GUIDELINES — DEPARTURE — ARTICULATION OF REASONS.

A court that imposes a sentence that exceeds the sentencing guidelines' recommended minimum range must articulate, both on the record at sentencing and on the sentencing information report, its reasons for departure from the sentencing guidelines range; the proper remedy for failure to articulate where the sentence imposed exceeds by three times the minimum sentence recommended by the guidelines is to vacate the sentence and to remand for resentencing.

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

Faintuck, Shwedel & Wolfram (by *William G. Wolfram*), for the defendant on appeal.

Before: HOLBROOK, JR., P.J., and GRIFFIN and MARILYN KELLY, JJ.

HOLBROOK, JR., P.J. Defendant appeals as of right his jury conviction of one count of kidnapping, MCL 750.349; MSA 28.581, two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of armed robbery, MCL 750.529; MSA 28.797. He claims that the trial court erred in admitting into evidence the results of deoxyribonucleic acid (DNA) identification testing completed on a sample of dried semen taken from the victim's blue jeans. After carefully reviewing the evidence, we find that the trial court did not err in allowing the results in evidence. Defendant also claims that the trial court erred in failing to articulate sufficient reasons for imposing disproportionate sentences that departed from the sentencing guidelines range. We agree, and thus remand to the trial court for resentencing.

The *Davis-Frye* rule, adopted from *People v Davis,* 343 Mich 348; 72 NW2d 269 (1955), and *Frye v United States,* 54 App DC 46, 47; 293 F 1013 (1923), allows the admission of expert testimony regarding novel scientific evidence only if that evidence has gained general acceptance among scientific experts in the field. The party offering the evidence carries the burden of demonstrating its acceptance in the scientific community. *People v Young,* 418 Mich 1, 21, n 7; 340 NW2d 805 (1983); *People v Gistover,* 189 Mich App 44, 46; 472 NW2d 27 (1991). The trial court's findings of fact regarding this issue will not be disturbed on appeal unless they are clearly erroneous. MCR 2.613(C); *Gistover,* p 46. A finding will be determined to be clearly erroneous if, after a review of the entire record, the appellate court is left with a

definite and firm conviction that a mistake has been made. *Id.*

Before reviewing the laboratory procedures, an understanding of the structure of the DNA molecule is necessary. The molecule is a double helix, shaped like a twisted ladder. Phosphate and deoxyribose sugar form the rails of the ladder. Four chemical bases—Adenine (A), Cytosine (C), Guanine (G), and Thymine (T)—lie next to each other on the sugar links along the sides of the ladder. Each A always bonds with a T on the other side of the ladder, and each C always bonds with a G on the other side of the ladder, so that the possible base pairs on the ladder are A-T, T-A, C-G, and G-C. The base pairs are connected by a hydrogen bond, such that the bonds form the rungs of the ladder. There are approximately three billion base pairs in one DNA molecule. Although no two human beings have the same sequence of base pairs (except for identical twins), we share many sequences that create common characteristics such as arms, legs, fingers, and toes. The sequences of variation from person to person are known as polymorphisms. They contain different alleles, which are alternate forms of a gene capable of occupying a single location on a chromosome. Polymorphisms are the key to DNA identification because they create the individual characteristics of everyone and are detectable in laboratory testing.

As described in the lower court proceedings, testing for DNA identification involves several procedures. Cellmark Diagnostics is the company that did the laboratory testing in this case. The preliminary procedure is extracting a DNA molecule from a cell. This can be accomplished by a protein enzyme, proteinase, and a soap breaking the cell membrane. Organic solvents are used to separate the DNA from protein, carbohydrates, and lipids.

DNA identification begins when the DNA is cut into pieces creating restriction fragment length polymorphisms (RFLP). In this phase, restriction enzymes from bacteria digest the DNA into fragments that the enzymes recognize. The goal of the forensic application of DNA identification is to isolate the few sequences of base pairs that are not identical in all humans.

The next step in the process is electrophoresis, which separates the different sizes of DNA.[1] The DNA is placed in a gel called agarose. The gel contains lanes. A DNA sample from the victim, the suspect, and from the crime scene evidence is loaded into separate lanes. Because DNA has a negative electrical charge, a positive current is run through the gel. The smaller, lighter fragments migrate toward the positive electrode faster than the bigger, heavier fragments. The DNA is then filtered to another medium where the fragments can be better seen. The DNA is stained with ethidium bromide so that it can be illuminated by ultraviolet light.

After separating the DNA by size, the two strands of the double-helix DNA are denatured. A solution of alkali separates the DNA, like opening a zipper or splitting the rungs of the ladder. The single strands of DNA are then transferred onto a nylon membrane. The process of transferring the DNA from the gel to the nylon membrane is known as "Southern blotting," named for the person who originated the technique, E.M. Southern. In fact, the first six steps in the process, from the cutting of the DNA by the enzyme to the making of the autoradiogram (discussed below), are sometimes referred to as Southern blotting.

[1] Electrophoretic typing of dried bloodstains has gained general scientific acceptance for reliability and is admissible in criminal trials where adequate safeguards have been implemented. *Gistover*, pp 53-54.

The next step is hybridization. Radioactively labeled DNA probes mark the RFLP for identification. The probes seek and attach, or hybridize, to the DNA on the nylon membrane. The residual probes that do not find complimentary DNA are then washed off the nylon filter. The filter is then placed underneath an x-ray film and developed into an autoradiogram. Dark bands appear on the autoradiogram where the probes hybridized to DNA. A single probe produces two bands on the autoradiogram. Cellmark uses four single locus probes at the same time, thus producing eight bands. Single locus means the probe attaches to DNA from one pair of chromosomes.

The results of the autoradiogram are then interpreted by examining the bands to determine if they match. This process, as well as the statistical analysis, was explained in *People v Axell,* 235 Cal App 3d 836, 847; 1 Cal Rptr 2d 411 (1991):

> Essentially the bands on the autorad from the victim's, suspect's, and crime scene evidence samples are "eyeballed" to see if they match within a certain measurement. If a match is declared, the likelihood that a match is unique must be determined. A match is said to occur if the sizes and number of the detected DNA fragments in various lanes are indistinguishable within a permissible degree of error. To calculate the permissible degree of error, Cellmark uses "resolution limits" as a unit of measurement to ascertain the "bin" or frequency at which an allele occurs in the population data base.
>
> * * *
>
> To make a statistical evaluation of the data obtained from a DNA typing, it is necessary to know how frequently in the population a band of a certain size will be found, a question answered according to the principles of population genetics. Each probe recognizes a pair of bands—one from

each parent. The probability of the combination of two particular bands recognized by one of the probes is calculated by multiplying the product of the frequencies of the two bands by two. The probability of the band patterns from all four loci is determined by multiplying the products from all four loci. This is known as the "product" or multiplication rule.

The validity of this procedure presupposes that each fact observed, and entering into the calculation, is random and independent of the others, or adjustments are made for deviations from conditions known as "Hardy-Weinberg equilibrium" and "linkage equilibrium." The Hardy-Weinberg principle is an algebraic equation that describes the genetic equilibrium within a population, assuming random mating. A homozygote is an individual who has inherited the same allele (or same length allele) from both parents. If the incidence of homozygosity far exceeds the expected frequency of that condition, then the data base population is not in Hardy-Weinberg equilibrium. [Citations omitted.]

For a further, more detailed explanation of the DNA identification process and statistical analysis, see *People v Castro,* 144 Misc 2d 956, 964-970; 545 NYS2d 985 (1989).

At the pretrial hearing in this case, the preliminary examination testimony of Doctor David Houseman was incorporated into the record. Dr. Houseman is a professor of molecular biology at the Massachusetts Institute of Technology. He reviewed Cellmark's procedures at their laboratory. He testified that Southern blotting was applied worldwide in the diagnosis of genetic conditions such as cystic fibrosis, muscular dystrophy, and Huntington's disease. He stated that the test was generally accepted in the scientific community as reliable.

The prosecution first presented at the hearing

Doctor Bonnie Blomberg, an associate professor of molecular biology and immunology at the University of Miami School of Medicine. For the past ten years she has utilized the Southern blotting technique in researching ailments such as Graves' disease. She visited Cellmark's laboratory and is familiar with their procedures. The only difference between her research and Cellmark's testing was the use of different probes. She testified that Cellmark's technique was generally accepted in the scientific community as reliable.

The prosecution next called Doctor Michael Imperiale as an expert witness. Dr. Imperiale is an assistant professor of microbiology and immunology at the University of Michigan. He uses the Southern blotting technique in studying cancer-causing viruses. After reviewing Cellmark's protocols and visiting their laboratory, Dr. Imperiale stated that Cellmark's procedures conformed to his laboratory's standards regarding Southern blotting.

The next expert presented by the prosecution was Doctor George Herrin, Jr. His entire hearing testimony is not included in the lower court record provided to this Court. Nevertheless, Dr. Herrin, the DNA unit supervisor at the Georgia Forensic Laboratory and former staff scientist at Cellmark, testified at trial that the RFLP test was generally accepted in the scientific community.

The final expert called by the prosecution to testify at the hearing was Doctor David Ginsburg, who is employed at the University of Michigan medical school as a molecular biologist focusing on the genetics of bleeding disorders. He routinely uses the Southern blotting technique in the laboratory. Dr. Ginsburg also observed Cellmark's method of operations and reviewed their protocols. He concluded that the Southern blotting technique

performed by Cellmark was generally accepted within the scientific community as accurate and reliable.

Defense counsel then called an expert witness, Doctor Robert Bever. Dr. Bever is an associate director at Genetic Design, Incorporated, a paternity testing laboratory. He is familiar with and has performed the Southern blotting technique. He also stated that the DNA identification as performed by Cellmark is generally accepted within the scientific community as reliable.

All the expert witnesses testified that DNA identification is generally accepted in the scientific community. These witnesses were unquestionably disinterested and impartial experts in this particular field. *People v Young (After Remand),* 425 Mich 470, 479-480; 391 NW2d 270 (1986). Further, the Congressional Office of Technology Assessment has found that DNA identification testing is valid and reliable in forensics when properly performed and analyzed by skilled personnel. *Axell,* pp 858-859. Indeed, all other jurisdictions that have addressed the admissibility of the results of DNA identification testing, under either a *Davis-Frye* standard or a reliability test under rules of evidence, have concluded that DNA identification testing is reliable. *Axell,* p 856; *Castro,* p 973 (although the procedure is reliable, the evidence was inadmissible because the testing laboratory failed to use generally accepted scientific techniques); *United States v Jakobetz,* 955 F2d 786 (CA 2, 1992); *Prater v State,* 307 Ark 180; 820 SW2d 429, 436 (1991); *Commonwealth v Curnin,* 409 Mass 218; 565 NE2d 440 (1991); *People v Lipscomb,* 215 Ill App 3d 413; 574 NE2d 1345, 1357 (1991); *Hopkins v State,* 579 NE2d 1297, 1302 (Ind, 1991); *State v Brown,* 470 NW2d 30, 32-33 (Iowa, 1991); *Smith v Deppish,* 248 Kan 217, 238; 807 P2d 144

(1991); *State v Davis,* 814 SW2d 593 (Mo, 1991); *State v Wimberly,* 467 NW2d 499, 505-506 (SD, 1991); *Caldwell v State,* 260 Ga 278, 285-287; 393 SE2d 436 (1990); *State v Pennington,* 327 NC 89, 101; 393 SE2d 847 (1990); *Kelly v State,* 792 SW2d 579, 585 (Tex App, 1990); *Glover v State,* 787 SW2d 544, 548 (Tex App, 1990); *State v Ford,* 301 SC 485, 490; 392 SE2d 781 (1990); *State v Schwartz,* 447 NW2d 422 (Minn, 1989) (DNA test results are admissible if performed with appropriate laboratory standards, but the results were found inadmissible there because the laboratory did not comport with quality guidelines); *State v Woodall,* 182 W Va 15; 385 SE2d 253 (1989) (testing procedures are reliable, but the results were inadmissible because they were inconclusive); *Andrews v State,* 533 So 2d 841 (Fla App, 1988); *Cobey v State,* 80 Md App 31; 559 A2d 391 (1989).

Defendant in this case acknowledges that gel electrophoresis is a generally accepted scientific method, but protests that the forensic application of the method is invalid. He raises the problem of crime-scene contamination. He also mentions the scarcity of DNA samples from the crime scene that limits the availability of repeated testing.

We do not require scientific tests to be infallible, but only that reasonable certainty follow from them. *People v Barbara,* 400 Mich 352, 365; 255 NW2d 171 (1977). Dr. Imperiale testified that if contamination were to occur, the testing would yield no result because of the total degradation of the DNA molecule. Alternatively, contamination would result in extra bands appearing on the autoradiogram. Compare *Young (After Remand),* p 500 (the effects of contamination on electrophoresis was not clear.) Unlike *Castro,* there was no indication of extra bands in this case. Dr. Blom-

berg stated that Cellmark's probes do not bind to either viral or bacterial DNA. Moreover, the DNA identification testing cannot result in a "false positive," i.e., a false match of the suspect's DNA and the sample from the crime scene. If the laboratory fails to take the proper steps in the procedure, no readable result is visible on the autoradiogram.

We conclude that the trial court did not clearly err in finding that the prosecution established that DNA identification testing is generally accepted in the scientific community as reliable. Given the overall acceptance of the technique in other jurisdictions, we hold that trial courts may take judicial notice of the reliability of DNA identification testing. *Woodall; Jakobetz.* Nevertheless, before a trial court admits the test results into evidence, the prosecutor must establish in each particular case that the generally accepted laboratory procedures were followed. See *Barbara,* p 415; *People v Lucas,* 188 Mich App 554, 580; 470 NW2d 460 (1991); Cf. *Jakobetz.* We are satisfied that Cellmark followed the generally accepted procedures in this case.[2]

Defendant argues that the statistical analysis of the DNA identification testing is inadmissible at trial. He questions the notion of the Hardy-Weinberg equilibrium, contending that populations fail to randomly mate because identifiable subpopulations tend to mate within their own ethnic community because of economic forces and lack of

[2] In *Schwartz,* pp 426-428, the Minnesota Supreme Court held that the DNA identification test results were inadmissible because the laboratory, Cellmark, did not comply with the quality control standards published by the FBI's Technical Working Group on DNA Analysis Methods and the California Association of Crime Laboratory Directors. In this case, however, Dr. Herrin testified that while these guidelines provided good suggestions, they do not have any relevance to the reliability of the testing.

social mobility.[3] Defendant claims that the danger with DNA identification evidence is that "trial by mathematics" will evolve. At trial, Dr. Herrin testified that the statistical possibility of matching the seven bands on the crime scene autoradiogram was one in four hundred million.

Defendant's contentions are inconsistent with the testimony presented in the lower court. Dr. Ginsburg testified that he was familiar with the gene and allele frequency computations of Cellmark and thought they were valid. He stated that their calculations tended to be conservative. The markers Cellmark uses are highly polymorphic, meaning that the results of the testing include numerous possibilities of alleles. Consequently, the possibility of an independent match of bands can be calculated to a high degree of probability. Defendant's expert witness, Dr. Bever, did not question the validity of Cellmark's computations, but only stated that he would be more confident of the results if Cellmark used a larger database. Notwithstanding this concern, one expert testified that a statistical analysis can be recomputed using the latest available database without repeating the Southern blotting procedures.

The defendant fails to persuade us that the admission of DNA identification evidence will lead to an improper trial by mathematics. In *People v Collins,* 68 Cal 2d 319; 438 P2d 33 (1968), the Supreme Court of California held that the trial court erred in admitting without an adequate evidentiary foundation and proof of statistical independence evidence regarding the mathematical probability of persons with the defendant's characteristics having committed the robbery. Unlike

[3] See Hoeffel, *The dark side of DNA profiling: Unreliable scientific evidence meets the criminal defendant,* 42 Stan L R 465, 490 (January, 1990).

Collins, the lower court record in this case contains an adequate foundation and proof of independence of the statistical analysis. The results of DNA identification testing would be a matter of speculation without the statistical analysis, and it does not remove the issue of identity from the jury, which is free to disregard or discredit the evidence. *Brown,* p 33. Like the statistical evidence concerning serological testing, the statistical evidence is relevant in this case, and any question concerning the size of the database or the Hardy-Weinberg equilibrium goes to the weight of the evidence and is properly left to the jury. *People v Proveaux,* 157 Mich App 357, 365-366; 403 NW2d 135 (1987).

Some courts of other jurisdictions have ruled that DNA identification evidence is admissible at trial, but have then refused to allow into evidence the statistical analysis of the testing because the databases were shown to have not been in Hardy-Weinberg equilibrium. *Curnin,* pp 225-227; *Caldwell,* pp 289-290; *State v Pennell,* 584 A2d 513, 517-520 (Del Super, 1989). However, other courts have recognized that conservative or reduced calculations such as those used by Cellmark may correct any Hardy-Weinberg deviation problems. *Axell,* p 868; *Caldwell,* p 289; *Castro,* p 969. The statistical analysis of DNA testing is inadmissible in some jurisdictions because of its prejudicial effect. *Schwartz,* pp 428-429; *Pennell,* pp 519-520. On the other hand, some courts have held that such evidence is a matter of weight for the jury. *Axell,* p 868; *Hopkins,* p 1303; *United States v Yee,* 134 FRD 161 (ND Ohio, 1991). In this case, Dr. Blomberg stated at the pretrial hearing that Cellmark properly calculated the allele frequency. She testified that the standard deviation from repeatedly running the sample molecules through one gel was so small that it was inconsequential. More-

over, Dr. Ginsburg further stated that statistical analysis, based on a database of between 125 and 250 subjects, was valid. Thus, we find that the trial court did not abuse its discretion by admitting the statistical analysis into evidence. *Jakobetz; Axell.*

Turning to the issue concerning the defendant's sentences, we agree with the defendant that the trial court failed to articulate sufficient reasons for departing from the sentencing guidelines range. Under the principle of proportionality, we review the defendant's sentences to determine whether they are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Witcher,* 192 Mich App 307, 308; 480 NW2d 636 (1991). The sentencing court is required to state on the record the criteria considered and the facts supporting the sentence imposed in order to aid the appellate review of sentences imposed. *People v Fleming,* 428 Mich 408, 428; 410 NW2d 266 (1987); *People v Poppa,* 193 Mich App 184, 189-190; 483 NW2d 667 (1992). Where the sentence imposed is within the recommended guidelines range, reference to the guidelines alone constitutes sufficient explanation. *People v Broden,* 428 Mich 343, 354; 408 NW2d 789 (1987); *People v Dukes,* 189 Mich App 262, 266; 471 NW2d 651 (1991). However, where the sentence imposed exceeds the recommended minimum range, the trial court must articulate both on the record at sentencing and on the sentencing information report its reasons for departing from the guidelines. *Fleming; People v Johnson,* 187 Mich App 621, 630; 468 NW2d 307 (1991).

In this case, the sentencing guidelines recommended a minimum range of six to fifteen years for the kidnapping conviction, and the trial court sentenced the defendant to life imprisonment for

that conviction. The minimum range for the first-degree criminal sexual conduct convictions was eight to twenty years, and the minimum range for the armed robbery conviction was five to fifteen years. The court sentenced the defendant for each of these remaining three counts to 70 to 150 years' imprisonment. The trial court stated at sentencing that the defendant repudiated all moral authority, was a danger to the community, and that he denied a civilized society to the victim and her family. The court failed to state on the sentencing information report its reasons for departing from the guidelines. Because the defendant's sentences were more than three times as long as the recommended minimum term of years and because the court failed to state specifically its reasons for departing from the guidelines, we vacate the defendant's sentences and remand for resentencing. Applying the factors listed by this Court in *People v Fisher (After Second Remand),* 190 Mich App 598, 608; 476 NW2d 762 (1991), lv gtd 439 Mich 995 (1992), we deny the defendant's request that he should be resentenced before a different judge.

Convictions affirmed, sentences vacated, and case remanded for resentencing in accordance with the principle of proportionality.

MARILYN KELLY, J., concurred.

GRIFFIN, J. *(concurring in part and dissenting in part).* I concur in that portion of the majority's opinion recognizing the scientific acceptability of DNA identification testing. Further, I join my colleagues in affirming the admissibility of the DNA identification testing in this case and in affirming defendant's convictions. I dissent, however, with regard to the remand for resentencing.

The majority has acted beyond its authority in

vacating defendant's sentences and remanding the case for resentencing. No court has the authority to vacate a valid sentence. A remand for resentencing may be ordered only with regard to those sentences that are invalid. *In re Dana Jenkins,* 438 Mich 364, 369, n 3; 475 NW2d 279 (1991), *People v Whalen,* 412 Mich 166, 169-170; 312 NW2d 638 (1981), and *People v James Williams,* 437 Mich 1045; 471 NW2d 561 (1991) (BOYLE, J., dissenting).

The majority opinion contains no finding that the sentences at issue are invalid. Rather, the majority vacates the sentences and orders resentencing "[b]ecause the defendant's sentences were more than three times as long as the recommended minimum term of years and because the court failed to state specifically its reasons for departing from the guidelines." *Ante,* p 281.

First, I respectfully disagree with the majority's conclusion that the sentencing judge did not adequately articulate his reasons for departing from the sentencing guidelines. In sentencing defendant, the Honorable Fred M. Mester acknowledged that the sentences imposed exceeded the guidelines. However, Judge Mester stated that he was departing from the guidelines because of defendant's extremely violent propensities, the serious danger defendant posed to the community, the heinous nature of the multiple crimes committed, and the extreme suffering inflicted upon the victim. Such reasons are sufficient to justify a departure from the guidelines and for the imposition of the maximum penalty allowed by law. See *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990), and *People v Redman,* 188 Mich App 516; 470 NW2d 676 (1991). I find the articulation more than adequate.

I further note that the relief ordered by my

colleagues is inappropriate. The appropriate remedy for failure to articulate is not a full resentencing. A remand solely for articulation of reasons is all that is required. See *People v Triplett,* 432 Mich 568; 442 NW2d 622 (1989).

The second reason my colleagues give for vacating the sentences is that the sentencing guidelines have been exceeded. However, departure from the guidelines is not itself a reason to vacate a valid sentence. Recently, in *People v Redman, supra,* we affirmed sixty- to ninety-year sentences, sentences out of the guidelines range, for first-degree criminal sexual conduct and kidnapping convictions, holding that the sentences recommended by the guidelines were disproportionate to the heinous nature of the offense. Similarly, I find the sentences recommended by the guidelines in the present case disproportionate to both the seriousness of the offense and the background of the offender.

As noted by the sentencing judge, defendant is an exceptionally dangerous individual who has no respect for authority and no sense of morality. At sentencing, defendant remained defiant and unrepentant, turning his back to the judge while his sentences were pronounced. At the conclusion of the hearing, defendant made the following rebellious vow:

> *The defendant:* I'll be back.

Approximately a month before the present criminal episode, defendant committed substantially similar acts of first-degree criminal sexual conduct, kidnapping, and armed robbery in Macomb County. According to the presentence report, these prior offenses "involve[d] several identical elements to our instant case." Specifically, defendant, while armed with a knife, abducted a woman,

forced her to perform sexual acts, and then robbed her.

The facts in the present case are equally as horrendous and have been aptly described by the prosecutor as follows:

> This case presented a situation embodying a woman's worst fear: abduction and brutal rape by an armed stranger—the fear of violent death and the violation of one's most intimate and private being. A knife was held to the victim's throat. She was forced to endure the pain and humiliation of forced sexual penetration—both oral and vaginal. The horror she was forced to endure will last as long as she lives.

Additionally, I note that the abduction occurred in a K mart parking lot shortly before the victim was to pick up her husband at the airport. During the kidnapping, defendant used his knife to cut the victim's face and both of her hands. Defendant repeatedly held the knife at the victim's throat and before the rape threatened to slash her between the legs. The victim was thoroughly terrorized and convinced that she was going to die.

Defendant was convicted of three high-severity felonies: first-degree criminal sexual conduct, armed robbery, and kidnapping. Each offense is separately punishable by a sentence of up to life in prison. After thoroughly reviewing the record, I find defendant's sentence of life imprisonment for his kidnapping conviction and sentences of 70 to 150 years for his convictions of first-degree criminal sexual conduct and armed robbery proportionate to the seriousness of the circumstances surrounding the offenses and the offender. Accordingly, I would affirm.[1]

[1] Defendant's brief contains a reference to an alleged violation of

Finally, I acknowledge that the sentence information report does not contain the attachment (SIR 88-2) on which the sentencing judge is directed to state the reasons for departing from the guidelines. However, this is a ministerial task for which a full resentencing is not required. See, generally, *Triplett, supra,* and *People v Bunn,* 166 Mich App 584; 421 NW2d 247 (1988). In this case, the record made at sentencing is more than sufficient to permit appellate review. I would therefore affirm defendant's convictions and sentences but remand for the completion of the SIR guideline departure form.

---

the doctrine of *People v Moore,* 432 Mich 311; 439 NW2d 684 (1989). However, because this issue is not identified in defendant's statement of issues, it is unpreserved. *People v Yarbrough,* 183 Mich App 163, 165; 454 NW2d 419 (1990); also see *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959). If the Supreme Court chooses to consider the issue, I urge the Court to revisit *People v Moore* and overrule it on the ground that it was wrongly decided.

MARQUIS v HARTFORD ACCIDENT & INDEMNITY (ON REMAND)

Docket No. 133472. Submitted February 2, 1992, at Lansing. Decided August 3, 1992, at 9:30 A.M. Leave to appeal sought.

Marie Marquis brought an action in the 72nd District Court against Hartford Accident & Indemnity, seeking work-loss benefits under a policy of no-fault automobile insurance. The defendant had paid benefits for the period that the plaintiff was unable to return to work after an accident. After her employer permanently replaced her, the plaintiff secured other employment at a lower rate of compensation and remained at that job until she quit two months later. The plaintiff sought work-loss benefits for the period of postaccident employment in an amount representing eighty-five percent of the difference in the compensation levels of her jobs and for the following period of unemployment. The court, Richard A. Cooley, Jr., J., granted summary disposition for the defendant. The St. Clair Circuit Court, Ernest F. Oppliger, J., affirmed the denial of work-loss benefits for the period after the plaintiff quit employment, but reversed the denial of differential benefits for the period when she was employed after the accident. The Court of Appeals denied the plaintiff leave to appeal. The Supreme Court, in lieu of granting leave, remanded for consideration as on leave granted. 436 Mich 866 (1990). The defendant cross appealed.

On remand, the Court of Appeals *held:*

The circuit court correctly held the defendant responsible for eighty-five percent of the wage differential after the plaintiff returned to work, but it erred in denying benefits for the period after the plaintiff quit employment.

Work-loss benefits under the no-fault act are payable only for loss of actual income caused by injury in an automobile accident. In this case, the plaintiff's injury in an automobile accident led to a reduction in income when she was forced to take a lower-paying job. A continuation of work-loss benefits based

REFERENCES

Am Jur 2d, Automobile Insurance § 361.

See the Index to Annotations under Automobile Insurance; No-Fault Insurance.

on the pay differential will not reward the plaintiff for quitting employment. These benefits are for wage loss suffered as a result of her injury in the automobile accident, and they continue regardless of whether she kept the new job.

Affirmed in part and reversed in part.

GRIFFIN, J., dissenting, stated that work-loss benefits are payable for loss of actual income only and that the lower courts correctly ruled that, by removing herself from the work force, the plaintiff suffered a loss of earning capacity, which is not compensable under the no-fault act.

INSURANCE — NO-FAULT — WORK LOSS.

Work-loss benefits under no-fault automobile insurance are payable for loss of actual income caused by injury in an automobile accident; a person who, because of injury in an automobile accident, loses a job held before the accident, acquires a new job at a lower rate of compensation, and subsequently voluntarily quits the new job suffers a loss of income in the amount of the difference in compensation levels of the two jobs and is entitled to work-loss benefits based on that difference both during employment at the new job and after becoming voluntarily unemployed (MCL 500.3107[b]; MSA 24.13107[b]).

McNamee, Rowling, Streeter & Partipilo, P.C. (by *Nancy Bates Rickel*), for the plaintiff.

Cummings, McClorey, Davis & Acho, P.C. (by *Marcia L. Howe* and *Anne M. McLaughlin*), for the defendant.

ON REMAND

Before: HOLBROOK, JR., P.J., and GRIFFIN and MARILYN KELLY, JJ.

MARILYN KELLY, J. This matter is before us on remand from the Supreme Court for consideration as on leave granted. 436 Mich 866 (1990). Plaintiff appeals and defendant cross appeals from an order of the St. Clair Circuit Court which affirmed in part and reversed in part the judgment of the district court.

Plaintiff argues that the circuit court erred by denying no-fault automobile insurance work-loss benefits to her after she voluntarily quit her job. In its cross appeal, defendant argues that the court erred in allowing plaintiff work-loss benefits after she resumed employment. We reverse that portion of the circuit court order denying plaintiff all work-loss benefits after she became voluntarily unemployed and affirm the remainder of the order.

On November 16, 1985, plaintiff was injured in an automobile accident which disabled her from her employment. When she was medically released to return to work on March 6, 1986, a permanent replacement had filled her position with her original employer. Plaintiff received no-fault work-loss benefits until she began work for a new employer on September 1, 1986. Her wages in the new position were, on average, $233.60 lower per week than those paid by her former employer. Within two months, plaintiff became dissatisfied with her new job and voluntarily resigned.

Plaintiff argued below that defendant, the no-fault insurance carrier, was liable for eighty-five percent of her wage differential. The differential is the spread between her earnings at her former employment and those at her new employment the two months she worked there and while she was voluntarily unemployed. See MCL 500.3107(b); MSA 24.13107(b). The district court ruled that defendant was responsible for no work-loss benefits after plaintiff commenced her second job. The circuit court reversed and held defendant responsible for eighty-five percent of the wage differential after plaintiff returned to work. We affirm that ruling. However, the circuit court went on to refuse to make defendant responsible for any work-loss benefits after plaintiff became voluntarily unemployed. With that holding, we disagree.

The question here is not whether plaintiff should have the same work-loss benefits after she voluntarily quit her new job as she received before she began it. She should not. At issue is whether plaintiff should have the same benefits after she quit as she was entitled to while working the second job. Those benefits are based solely on the difference between what plaintiff was paid before the accident and what she was paid in her new job.

The no-fault insurance act defines "work loss" personal protection insurance as:

> Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he had not been injured . . . . [MCL 500.3107(b); MSA 24.13107(b).]

"Work loss" includes actual loss of income. It does not include loss of earning capacity. *Ouellette v Kenealy,* 424 Mich 83; 378 NW2d 470 (1985). Here, the circuit court ruled that after plaintiff chose to become voluntarily unemployed, her "work-loss" claim was for loss of earning capacity rather than for loss of actual earnings. We disagree. *Quellette* quite clearly distinguishes the earning capacity loss involved there with a wage loss, which is what plaintiff suffered in the case before us.

Work-loss benefits are payable only for loss of actual income caused by automobile accident injuries. We recognize that subsequent events which are independent and intervening may break the necessary chain of causation. See *Smith v League General Ins Co,* 143 Mich App 112; 371 NW2d 491 (1985), rev'd 424 Mich 893 (1986); *MacDonald v State Farm Mutual Ins Co,* 419 Mich 146; 350

NW2d 233 (1984); *Luberda v Farm Bureau General Ins Co,* 163 Mich App 457; 415 NW2d 245 (1987); *Coates v Michigan Mutual Ins Co,* 105 Mich App 290; 306 NW2d 484 (1981).

In this case, unlike *MacDonald, Smith* and *Luberda,* no independent and intervening event broke the chain of causation. By contrast, in *MacDonald,* the plaintiff had a heart attack which was unrelated to the accident-related injuries. In *Smith* and *Luberda,* it was the plaintiffs' subsequent incarcerations that prevented them from working. In each of these cases, the plaintiffs would have earned no wages after the intervening events, even had the automobile accidents and resultant injuries never occurred. See *Ouellette, supra.*

Although *Coates* involved a claim for work-loss benefits, it too is distinguishable from this case. *Coates,* 297-298. *Coates* held that work-loss benefits are for loss of income an injured person would have received but for the "injury" and not, as the plaintiff argued, but for the "accident." *Id.,* 298. The plaintiff in *Coates* suffered loss of income because of damage to his truck caused by the accident, not because of injuries sustained.

Our decision in this case, to continue benefits based on the pay differential, does not reward plaintiff for quitting; it also does not reward defendant for the happenstance that plaintiff's new job did not work out. Furthermore, it implicitly recognizes that plaintiff was forced to take the new job because of accident-related injuries. The benefits which plaintiff is eligible for are those which resulted from wage loss due to her injuries and which continued regardless of whether she kept the new job.

We find no basis to deny plaintiff no-fault work-loss benefits for pay loss suffered because of her accident-related injuries, reduced by the wages she

would have earned. Moreover, based on our analysis of this claim, we find no merit to defendant's cross appeal.

Affirmed in part, reversed in part.

HOLBROOK, JR., P.J., concurred.

GRIFFIN, J. *(dissenting).* I respectfully dissent. It is well settled that "work loss" as provided by the no-fault act refers to loss of actual income and not to loss of earning capacity. *Ouellette v Kenealy,* 424 Mich 83; 378 NW2d 470 (1985). The no-fault act defines work-loss personal protection insurance as follows:

> Work loss consisting of *loss of income* from work an injured person *would have* performed during the first 3 years after the date of the accident if he had not been injured . . . . [MCL 500.3107(b); MSA 24.13107(b). Emphasis added.]

In the present case, the majority has confused loss of earning capacity and loss of actual earnings. In *Nawrocki v Hawkeye Security Ins Co,* 83 Mich App 135, 141-142; 268 NW2d 317 (1978), Judge (now Chief Justice) MICHAEL F. CAVANAGH noted that the distinction between the loss of earning capacity and the loss of actual income is the difference between what a claimant "could have" earned and "would have" earned. Further, the no-fault act provides recovery for only the latter:

> First, we note that the cases which discuss earning capacity damages stress repeatedly that plaintiff's right is to recover not what he would have earned but what he could have earned. *Prince v Lott, supra,* 369 Mich at 610; 120 NW2d at 782, *Lorenz v Sowle, supra,* 360 Mich at 555; 104 NW2d

> at 349-350, *Coger v Mackinaw Products Co,* 48 Mich App 113, 125; 210 NW2d 124, 130 (1973). This contrasts sharply with the language of the statute before us: "benefits are payable for . . . loss of income from work an injured person *would* have performed . . . ." Giving this language the plain meaning which we must, it seems evident to us that the statute is not an enactment of the common-law rule. [Emphasis in original. 83 Mich App 141-142.]

The circuit court ruled below that after plaintiff chose to become voluntarily unemployed,[1] her work-loss claim was for loss of earning capacity rather than for loss of actual earnings. I agree and would hold that once plaintiff removed herself from the work force, the only damages she suffered were for loss of earning capacity. Consequently, because the no-fault act does not allow recovery of such damages, I would hold that a claimant is not entitled to no-fault work-loss benefits during time periods that the claimant voluntarily chooses not to work.

Our decisions have repeatedly held that work-loss benefits are payable only for loss of actual income caused by an automobile accident injury. Subsequent events that are independent and intervening may break the necessary chain of causation. In *MacDonald v State Farm Mutual Ins Co,* 419 Mich 146; 350 NW2d 233 (1984), our Supreme Court held that a claimant's unrelated heart attack was a subsequent and intervening event that terminated the no-fault carrier's liability for work-loss benefits. The Supreme Court has summarized its holding in *MacDonald* as follows:

---

[1] Plaintiff's brief contains the following admission:

> Plaintiff-appellant's subsequent employment was for a period of approximately six weeks, when she voluntarily quit. Plaintiff-appellant admits that since she voluntarily quit her employment, she has failed to mitigate her damages.

> In *MacDonald v State Farm Mutual Ins Co,* 419 Mich 146; 350 NW2d 233 (1984), this Court held that where a person suffers an unrelated injury, a heart attack, after an automobile accident and is rendered unable to work, eligibility for work-loss benefits ceases *because no income would have been earned even if the accident had not occurred.* [*Ouellette, supra* at 86. Emphasis added.]

Further, the incarceration of a claimant following a criminal conviction is also an independent and intervening event that breaks the causal connection necessary for the payment of no-fault work-loss benefits. *Smith v League General Ins Co,* 143 Mich App 112; 371 NW2d 491 (1985), rev'd 424 Mich 893 (1986); *Luberda v Farm Bureau General Ins Co,* 163 Mich App 457; 154 NW2d 245 (1987). Under such circumstances, the no-fault carrier is not responsible for work-loss benefits during the period of incarceration because an event unrelated to the automobile accident removed the claimant from the work force.

In this case, like in *Coates v Michigan Mutual Ins Co,* 105 Mich App 290; 306 NW2d 484 (1981), a decision by the plaintiff, not the automobile accident, controls plaintiff's income level. Plaintiff's decision not to work is a cause independent and intervening from the accident. Under such circumstances, "[plaintiff's] eligibility for work-loss benefits ceases because no income would have been earned even if the accident had not occurred." *Ouellette, supra* at 86.

Finally, I note that such a construction of the no-fault statute is consistent with the judicially created favored-work doctrine that we have repeatedly applied in the context of the Workers' Disability Compensation Act. In a factually similar case, *Coon v Rycenga Homes,* 146 Mich App 262; 379 NW2d 480 (1985), we held that a workers' compen-

sation carrier is not liable for a wage differential during the time that a partially disabled employee unreasonably refuses favored work. In *Coon,* we rejected the petitioner's argument that a carrier is responsible for the differential between the wage of his former employment and that of his favored work. Rather, we held that when favored work is unreasonably refused, "plaintiff has forfeited his entitlement to *all* workers' compensation benefits." *Id.* at 267. (Emphasis added.)

For these reasons, I respectfully dissent and would affirm.

CONSUMERS POWER COMPANY v CITY OF FLINT

Docket No. 132239. Submitted July 14, 1992, at Lansing. Decided August 3, 1992, at 9:35 A.M.

Consumers Power Company, licensed under the Mechanical Contractors Act, MCL 338.971 *et seq.*; MSA 18.86(1) *et seq.*, to perform inspection, maintenance, and repair of gas furnaces and appliances, brought an action in the Genesee Circuit Court against the City of Flint, seeking declaratory and injunctive relief against the enforcement of a Flint ordinance that Consumers claimed required licensure by the city of journeymen and apprentices employed by Consumers to provide such services. The court, Philip C. Elliott, J., granted the relief sought by Consumers with respect to the portion of the ordinance the court deemed to be a local licensing requirement prohibited by the Mechanical Contractors Act. The city appealed.

The Court of Appeals *held:*

1. MCL 338.979; MSA 18.86(9) provides that a governmental subdivision may not establish or maintain local licensing requirements for work classifications set forth in MCL 338.976(3); MSA 18.86(6)(3). The work performed by Consumers' journeymen and apprentices falls within the classifications of § 6(3).

2. The Flint ordinance requires in part that apprentices register with the city's building and safety inspection division to facilitate their qualification for licensure as journeymen under the ordinance. Although ostensibly requiring registration only, the ordinance is part of a local licensing scheme that is prohibited by the Mechanical Contractors Act. The trial court did not err in ruling that this portion of the ordinance was invalid.

3. In the absence of a cross appeal by Consumers, the Court of Appeals cannot address Consumers' claims that the trial court erred in failing to invalidate the other challenged portions of the ordinance.

Affirmed.

REFERENCES

Am Jur 2d, Licenses and Permits § 37.

See the Index to Annotations under Licenses and Permits.

LICENSES — MECHANICAL CONTRACTORS — JOURNEYMEN AND APPRENTICES.

The Mechanical Contractors Act prohibits local governments from establishing or maintaining local licensing requirements for contractors, journeymen, or apprentices in the mechanical trades who perform work described in the work classifications enumerated in the act (MCL 338.976[3], 338.979; MSA 18.86[6][3], 18.86[9]).

George F. Hill and *Michael G. Wilson,* for the plaintiff.

Timothy G. Bograkos, City Attorney, and *Kathleen M. Abbott,* Assistant City Attorney, for the defendant.

Before: SAWYER, P.J., and CONNOR and A. G. BEST, II,* JJ.

SAWYER, P.J. Defendant appeals from a circuit court judgment that declares certain portions of a Flint city ordinance to be violative of state law and permanently enjoins defendant from enforcing those sections of its ordinance. We affirm.

The matter was submitted to the trial court on stipulated facts. Plaintiff, a public utility, is licensed by the state under the Mechanical Contractors Act, MCL 338.971 *et seq.*; MSA 18.86(1) *et seq.*, as a contractor to provide gas furnace and appliance inspection, maintenance, and repair services.[1] The city enacted an ordinance that required the licensing or registration[2] of journeymen and apprentices. Plaintiff's journeyman and appren-

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

[1] Actually, the license is held by a Consumers' employee, David F. Larsen. Under the act, a corporation does not hold a license itself. Rather, it must have a designated contractor of record in its employ.

[2] Part of the dispute involves the question whether the ordinance establishes a licensing requirement or merely a registration requirement.

tices were not licensed or registered under the ordinance, and defendant issued an appearance ticket charging plaintiff with a violation of the ordinance. That ticket was dismissed, apparently because of technical defects in the ticket itself, but defendant represented that it still intended to enforce its ordinance and would reissue a ticket against plaintiff if it did not comply with the ordinance. Plaintiff then brought this action to enjoin enforcement of the ordinance.

The trial court granted plaintiff relief with respect to certain portions of the ordinance, concluding that those sections constituted a licensing requirement and that § 9 of the Mechanical Contractors Act precludes municipalities from enacting local licensing ordinances in this area.

We turn first to the issue whether § 9 of the Mechanical Contractors Act, MCL 338.979; MSA 18.86(9), precludes a municipality from licensing journeymen and apprentices working in the mechanical trades. Defendant argues that the act does not prevent local licensing of journeymen and apprentices; rather, it only precludes local licensing of contractors. MCL 338.979; MSA 18.86(9) provides as follows:

> After the effective date of this act, *a governmental subdivision shall not establish or maintain local licensing requirements for the work classifications set forth in section 6(3).* A governmental subdivision shall not prohibit a contractor licensed under this act from engaging in the work classification or classifications for which the contractor has a license, unless the contractor is in violation of the mechanical code. [Emphasis added.]

Section 6(3), MCL 338.976(3); MSA 18.86(6)(3), provides as follows:

> A contractor's license obtained by licensure or examination shall be classified and limited as 1 or more of the following:
>
> (a) Hydronic heating and cooling and process piping.
>
> (b) HVAC equipment.
>
> (c) Ductwork.
>
> (d) Refrigeration.
>
> (e) Limited service, heating or refrigeration.
>
> (f) Unlimited service, heating or refrigeration.
>
> (g) Fire suppression.
>
> (h) Specialty.

The trial court opined as follows:

> The Court agrees with plaintiff that Section 9 prohibits local licensing of mechanical journeys and apprentices for the work classifications in Section 6(3). The first sentence of Section 9 could not be much more clear. The second sentence does not qualify the first sentence or limit the prohibition to local licensing of contractors. Rather, the second sentence simply prevents a City from prohibiting a licensed contractor from engaging in those lines of work unless he or she is in violation of the State mechanical code. It is not up to a Court to say whether the flat-out prohibition of local licensing is wise or not.

We agree with the trial court that the first sentence of § 9 clearly precludes local licensing in this area and that that prohibition is not limited to contractors. While the act as a whole does deal with the state licensing of contractors, the first sentence of § 9 speaks in very broad terms. It states that a local governmental unit "shall not" establish "licensing requirements for the work classifications" in § 6(3). It does not limit its terms to "local *contractor* licensing," nor does it contain an exclusionary clause that allows local licensing

of journeymen and apprentices. Rather, it broadly precludes local licensing requirements for the work classifications contained in § 6(3), the so-called mechanical trades.

Further, there is no indication from the language in § 9 that the reference to § 6(3) intended that § 9 be limited to contractors. Rather, the explicit language of § 9 merely refers to the "work classifications" set forth in § 6(3). It would only appear that the Legislature did not wish to repeat the list of eight work classifications and, therefore, incorporated the list in § 6(3) by reference, without any indication that the reference to the work-classification list was intended to otherwise limit the provisions of § 9.

State preemption of a particular area exists, inter alia, "where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive," and in such cases "there is no doubt that municipal regulation is pre-empted." *People v Llewellyn,* 401 Mich 314, 323; 257 NW2d 902 (1977). The language of § 9 is clear that there are to be no local licensing ordinances and that the field is expressly preempted by state law. Accordingly, the trial court correctly concluded that, to the extent that the Flint ordinance establishes a licensing requirement, it violates the provisions of § 9 and is unenforceable.

Defendant also argues that the trial court erred in determining that § M-123.6 of the ordinance is a licensing requirement. The trial court concluded that §§ M-123.2, M-123.3, and M-123.4 are local licensing requirements and are barred by the statute. Defendant appears to concede that those sections constitute a licensing requirement, but, of course, argues that they are permitted.

The trial court concluded that § M-123.6 may be a licensing requirement:

> M-123.6 is so badly worded it is difficult to understand. If legal permission to work as an apprentice, with proper supervision, will be withheld because of a failure to do more than give pertinent information, then M-123.6 also appears to be prohibited.

M-123.6 provides as follows:

> Registration of Apprentices: Apprentices shall be registered with the Division of Building and Safety Inspection to facilitate qualification of the experience required for Journey application of examination.

The trial court is correct that if § M-123.6 is a licensing requirement, it is prohibited. More to the point, however, it appears to be a section that no longer serves a useful purpose in light of the striking down of the preceding sections concerning the licensing of journeymen. The stated purpose of M-123.6 is to "facilitate qualification of the experience required for Journey application of examination." That is, it is designed to assist in the licensing of journeymen by documenting experience as an apprentice to establish qualification for licensing under the local ordinance. Although M-123.6 may only require registration, it operates as part of the prohibited licensing scheme and, therefore, would also be violative of the state statute. Accordingly, the trial court did not err in failing to rule that M-123.6 was permissible.

Finally, we note that in its prayer for relief in its brief on appeal, Consumers Power requests that this Court, in addition to affirming the trial court's rulings with respect to the issues raised by defendant, also reverse the trial court's ruling that §§ M-123.5 and M-123.7 are not licensing requirements prohibited under the statute and reverse

the trial court's decision to the extent that it ruled that § M-123.6 is not a licensing requirement. However, Consumers Power has not filed a cross appeal. Accordingly, its claims of error are not properly before this Court.

Affirmed. Plaintiff may tax costs.

WOLVERINE MUTUAL INSURANCE COMPANY v ROSPATCH CORPORATION EMPLOYEE BENEFIT PLAN

Docket No. 137975. Submitted June 9, 1992, at Grand Rapids. Decided August 3, 1992, at 9:40 A.M.

Wolverine Mutual Insurance Company, the no-fault insurer of Sandra Moon under a policy that provided for coordination of benefits, brought an action in the Kent Circuit Court against the Rospatch Corporation Employee Benefit Plan, which covered Moon, seeking reimbursement for monies paid for the medical care of Moon following her injury in an automobile accident. The Rospatch plan was administered pursuant to the Employee Retirement Income Security Act, 29 USC 1001 *et seq.*, and was self-funded, but carried stop-loss insurance coverage for benefits exceeding $50,000. The plan also provided that its benefits are not payable for injuries received in a motor vehicle accident in Michigan. The court, H. David Soet, J., granted summary disposition for Rospatch. Wolverine appealed.

The Court of Appeals *held:*

1. The trial court correctly ruled that the Rospatch plan did not contain a provision for the coordination of benefits that conflicted with a similar provision in the Wolverine policy and that the Rospatch plan contained a valid exclusion of benefits for the injuries sustained by Moon.

2. The trial court erred in ruling that the defendant was not a self-insured plan within the meaning of the ERISA because of the excess insurance coverage and that federal law therefore did not preempt the coordination of benefits in this case. On the basis of that erroneous conclusion, the court held that if the exclusion were a conflicting coordination of benefits provision, a finding of primary liability by Rospatch pursuant to *Federal Kemper Ins Co, Inc v Health Ins Administration, Inc,* 424 Mich 537 (1986), would not have been preempted by the

REFERENCES

Am Jur 2d, Automobile Insurance § 368; Pensions and Retirement Funds §§ 64, 115.

See the Index to Annotations under Automobile Insurance; Employee Retirement Income Security Act; No-Fault Insurance; Pension and Retirement.

ERISA. A self-funded employee benefit plan administered pursuant to the ERISA is not transformed into an insurance plan subject to state regulation merely because it carries stop-loss insurance coverage.

Affirmed in part and reversed in part.

1. INSURANCE — NO-FAULT — COORDINATION OF BENEFITS — EMPLOYEE BENEFIT PLANS — EMPLOYEE RETIREMENT INCOME SECURITY ACT.

An employee benefit plan administered pursuant to the Employee Retirement Income Security Act is not made liable, by operation of a provision for the coordination of benefits under a no-fault automobile insurance policy, for benefits for injuries sustained in a motor vehicle accident where the plan provides a clear and unambiguous exclusion of benefits for such injuries (29 USC 1001 *et seq.*, MCL 500.3109a; MSA 24.13109[1]).

2. INSURANCE — NO-FAULT — SELF-INSURED EMPLOYEE PLANS — STOP-LOSS COVERAGE — EMPLOYEE RETIREMENT INCOME SECURITY ACT.

The Employee Retirement Income Security Act preempts claims against uninsured self-funded employee benefit plans brought under the coordination of benefits provision of the Michigan no-fault act; the fact that a self-funded employee benefit plan has stop-loss insurance coverage does not transform it into an insured plan for purposes of the ERISA (29 USC 1144[a]; MCL 500.3109a; MSA 24.13109[1]).

Dilley, Dewey & Damon, P.C. (by *Jennie Boldish Bryan*), for the plaintiff.

Mika, Meyers, Beckett & Jones (by *Jeffrey A. DeVree* and *Elizabeth K. Bransdorfer*), for the defendant.

Before: SHEPHERD, P.J., and CONNOR and M. F. SAPALA,* JJ.

CONNOR, J. Plaintiff instituted this action to seek reimbursement from defendant for medical expenses paid on behalf of Sandra Moon and incurred as a result of a motor vehicle accident.

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

Plaintiff asserted that defendant's employee benefit plan included medical benefits subject to coordination under the no-fault act, MCL 500.3109a; MSA 24.13109(1). The trial court held that coordination by plaintiff under the no-fault act was not available[1] because defendant's plan excluded any benefits for motor vehicle accidents in this case. We affirm.

The parties stipulated the facts in the trial court. Sandra Moon was injured in an automobile accident on November 19, 1988. Her no-fault automobile insurance policy, issued to her father, Harold Moon, contained a valid coordination of benefits provision pursuant to MCL 500.3109a; MSA 24.13109(1). The automobile accident occurred in Michigan while Sandra Moon was a resident of Michigan.

At the time of her accident, Sandra Moon and Harold Moon were both covered under the Rospatch Corporation Employee Benefit Plan, which was administered pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq.* The Rospatch Corporation Employee Benefit Plan (defendant) contained two separate provisions purporting to exclude the payment of expenses incurred as a result of automobile accidents:

> MICHIGAN NO-FAULT EXCLUSION
>
> Benefits are not payable under this Plan for injuries received in an accident involving a car or other motor vehicle.

[1] The trial court granted summary disposition in this case under MCR 2.116(C)(10), ruling that there were no genuine issues of material fact and defendant was entitled to judgment as a matter of law. Under this rule, summary disposition is appropriate only when there is no factual support for a claim. See *SSC Associates Limited Partnership v General Retirement System of the City of Detroit,* 192 Mich App 360, 363-365; 480 NW2d 275 (1991).

OUT OF MICHIGAN NO-FAULT EXCLUSION

Benefits will not be paid under this plan for injuries received in an accident involving a car or other motor vehicle which is owned or leased by a covered person or any member of his immediate family or involving any car or other motor vehicle for which there is in effect, or is required to be in effect, any policy of No-Fault insurance. This exclusion is not applicable to expenses not paid by any policy of No-Fault insurance as a result of state required policy deductibles or maximums.

Plaintiff paid the medical expenses incurred by Sandra Moon under its no-fault policy. Defendant reviewed those expenses and determined that if it were required to pay expenses for the injuries, it would pay $13,546.85. The only issue the parties could not resolve was whether defendant had to pay any expenses associated with Sandra Moon's automobile accident.

On appeal, plaintiff challenges the trial court's ruling that defendant's plan provided for the exclusion of benefits for injuries incurred in this case. Plaintiff claims defendant's plan provided for a coordination of medical benefits, and therefore plaintiff was entitled to seek reimbursement under MCL 500.3109a; MSA 24.13109(1).

The trial court held that, despite the ambiguity in the two different clauses, defendant's plan excluded benefits in this case and did not provide for coordination with other insurance benefits. The trial court held that defendant's plan was unambiguous because the Michigan exclusion for no-fault benefits was the only provision that applied.

The seminal case in Michigan regarding coordination of benefits is *Federal Kemper Ins Co, Inc v Health Ins Administration, Inc,* 424 Mich 537, 551-552; 383 NW2d 590 (1986). The Supreme Court held that the defendant health insurer, under a group plan, was primarily liable for medical cover-

age as a result of a motor vehicle accident where the defendant's coordinated benefits clause conflicted with the plaintiff's no-fault policies. The Court reasoned that because the Legislature required insurers to offer coordinated coverage with other health insurance under no-fault policies in order to reduce premiums, the no-fault insurer must be secondarily liable in order to effectuate the Legislature's intent. *Id.*, pp 546, 551-552.

The application of *Federal Kemper* to this case depends on whether defendant's plan can be construed as including a provision for the coordination of benefits or for the exclusion of coverage. If defendant's plan included a "pure" exclusion, then it could not be required to coordinate its benefits with those paid in accordance with the no-fault act.

In *Auto-Owners Ins Co v Autodie Corp Employee Benefit Plan,* 185 Mich App 472, 474; 463 NW2d 149 (1990), an almost identical clause was interpreted as an exclusion rather than a coordination provision. The panel relied on *Transamerica Ins Co of North America v Peerless Industries,* 698 F Supp 1350, 1355-1356 (WD Mich, 1988), which held that because the exclusion in the defendant's plan for automobile accidents under Michigan's no-fault act was clear and unambiguous, no other health or accident insurance existed for purposes of MCL 500.3109a; MSA 24.13109(1). *Peerless, supra,* pp 1353, 1355. This type of an exclusion is considered a "pure" exclusion, because it clearly is not dependent upon the existence of any other insurance. *Transamerica Ins Co of America v IBA Health & Life Assurance Co,* 190 Mich App 190, 194-195; 475 NW2d 431 (1991).

Plaintiff contends this case should be distinguished from *Autodie* because defendant's plan appears to coordinate benefits with no-fault insur-

ance benefits for motor vehicle accidents that occur outside the State of Michigan. This arguably is an "escape" exclusion that does not avoid coordination under MCL 500.3109a; MSA 24.13109(1). See *Peerless, supra,* pp 1351, 1354; *Auto-Owners Ins Co v Lacks Industries,* 156 Mich App 837, 838-839; 402 NW2d 102 (1986).

We believe that this "escape" provision is inapplicable and irrelevant in this case because the parties agree that Sandra Moon's accident occurred in Michigan while she was a resident of Michigan. Generally, exclusions in insurance contracts are to be read independently of one another. *Hawkeye-Security Ins Co v Vector Construction Co,* 185 Mich App 369, 384; 460 NW2d 329 (1990). Under the facts of this case, the only applicable provision clearly excludes coverage, and another inapplicable exclusion cannot be relied upon to make the entire plan ambiguous. *Id.,* pp 384-385. See also *Fresard v Michigan Millers Mutual Ins Co,* 414 Mich 686, 697-698; 327 NW2d 286 (1982) (FITZGERALD, C.J.).

Defendant also argued below, as an alternative theory, that because it was self-insured, 29 USC 1144(a) preempted the coordination of benefits under the state no-fault insurance act. Defendant conceded through the testimony of its administrator that its plan includes stop-loss insurance coverage, or excess insurance coverage for claims in excess of $50,000. Defendant pays all benefits due claimants under the plan, but defendant can seek reimbursement for those claims that exceed $50,000 as a means of protecting the plan. The trial court held that defendant was not a self-insured plan within the meaning of the ERISA because of the excess insurance coverage, and consequently federal law did not preempt the coordination of benefits in this case.

We believe the trial court erred in this portion of its ruling. The panel in *Auto Club Ins Ass'n v Frederick & Herrud, Inc (On Remand),* 191 Mich App 471, 475; 479 NW2d 18 (1991), recently held that stop-loss coverage does not transform an employee benefit plan into an insured plan for purposes of the ERISA, citing *FMC Corp v Holliday,* 498 US —; 111 S Ct 403; 112 L Ed 2d 356, 366 (1990).[2] We are satisfied that *Auto Club, supra,* was correctly decided and, under Administrative Order No. 1990-6, 436 Mich lxxxiv, and Administrative Order No. 1991-11, 439 Mich xlv, both this Court and the trial court are bound by that decision.[3]

Affirmed in part and reversed in part.

---

[2] In *FMC Corp, supra,* 112 L Ed 2d 362, Justice O'Connor wrote in the Court's opinion that the plan in that case was self-funded because it did not purchase an insurance policy from any insurance company in order to satisfy the obligations to its participants. Consequently, an insurance policy that merely protects the plan from disastrous consequences, but does not directly insure the obligations owed to the plan members, does not affect the plan's status as self-insured, according to the panel in *Auto Club, supra.*

[3] But see *Frankenmuth Mutual Ins Co v Meijer, Inc,* 176 Mich App 675, 677-679; 440 NW2d 7 (1989), wherein another panel of this Court held that stop-loss coverage does not render an ERISA plan uninsured. The panel in that case placed its reliance on *Northern Group Services, Inc v Auto Owners Ins Co,* 833 F2d 85 (CA 6, 1987), opinion clarifying first decision 898 F2d 1125 (CA 6, 1990), which the panel in *Auto Club, supra,* p 474, believed was effectively overruled by the decision in *FMC Corp, supra.* The federal courts have also held that *FMC Corp, supra,* overruled *Northern Group, supra. Auto Club Ins Ass'n v Health & Welfare Plans, Inc,* 961 F2d 588, 592-593 (CA 6, 1992), and cases cited therein. But see *Michigan United Food & Commercial Workers Unions v Baerwaldt,* 767 F2d 308, 312-313 (CA 6, 1985); *Auto Club Ins Ass'n v Mutual Savings & Loan Ass'n,* 672 F Supp 997, 1000 (ED Mich, 1987); *State Farm Mutual Automobile Ins Co v American Community Mutual Ins Co,* 659 F Supp 635, 637-639 (ED Mich, 1987), aff'd 863 F2d 49 (1988) (stop-loss insurance only did not affect the status of an employee benefit plan as insured for purposes of the savings clause pursuant to the ERISA). See also *Udell v Georgie Boy Mfg, Inc,* 174 Mich App 171, 179; 435 NW2d 413 (1988), vacated and remanded for reconsideration 432 Mich 889 (1989).

TILLEY v TILLEY

Docket No. 132215. Submitted July 7, 1992, at Detroit. Decided August 3, 1992, at 9:45 A.M.

Sharon A. Tilley brought an action in the Monroe Circuit Court seeking a divorce from David M. Tilley. The court, Michael W. LaBeau, J., found that the parties had acted in loco parentis with regard to the two minor children of the plaintiff's brother who had been living with them and ordered the defendant to pay child support for the children. The parties had not adopted the children, the parental rights of the childrens' natural parents had not been terminated, and there had been no court proceeding regarding legal guardianship of the children. The defendant appealed from the support order by leave granted.

The Court of Appeals *held:*

The circuit court was not authorized by statute to enter the order regarding the care, custody, and support of children who were not the children of the parties. The defendant did not contract with the plaintiff or any other person to care for the children indefinitely, and the plaintiff did not rely upon a promise of the defendant to her detriment. As a matter of public policy, the defendant should not be held to be legally obligated to support the children simply because he voluntarily did so for several years.

Order vacated.

1. DIVORCE — CHILD SUPPORT — MINOR CHILDREN OF PARTIES — IN LOCO PARENTIS.

Upon annulling a marriage or entering a judgment of divorce, a circuit court may enter orders that it considers just and proper regarding the care, custody, and support of the minor children of the parties; the court also may enter an order requiring a nonbiological parent to support a minor child of the marital household where the parent knowingly stands in loco parentis to the child (MCL 552.16; MSA 25.96).

REFERENCES

Am Jur 2d, Divorce and Separation §§ 1018-1021.

See the Index to Annotations under Custody and Support of Children.

2. PARENT AND CHILD — CHILD SUPPORT.

Absent adoption, the obligation to support a child remains with the biological parents (MCL 722.3; MSA 25.244[3]).

Judith A. Curtis, for the defendant.

Before: MURPHY, P.J., and SHEPHERD and T. S. EVELAND,* JJ.

MURPHY, P.J. Defendant appeals by leave granted from an order of the circuit court requiring him to pay child support for plaintiff's brother's children who resided with plaintiff and defendant before the parties' divorce proceedings. We vacate the order of the circuit court.

Defendant and plaintiff were married on July 20, 1973. The parties have one child, whose support is not at issue in this appeal.

In early 1983, plaintiff and her family determined that the two minor children of plaintiff's brother, Mitchell Sproessig, and his wife, Michelle Sproessig, who were living in Texas, were being neglected. Plaintiff and defendant agreed to care for the two Sproessig children with the understanding that plaintiff and defendant would keep the children until the Sproessigs were willing and able to care for them. Plaintiff and defendant did not adopt the Sproessig children, although defendant offered to do so. The Sproessigs' parental rights were not terminated, and there was no court proceeding regarding the legal guardianship of the children.

The Sproessigs, however, signed a document entitled "Guardian Designation" that provided, in pertinent part:

Mitchell Dean Sproessig and Michelle D. Sproes-

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

> sig, each individually and together, herby designate Sharon Ann Tilley and David Miles Tilley as the guardians of the above-referenced children. The purpose of the guardianship designation is so that the children can live with Sharon and David Tilley at their residence in Michigan and so that the Tilleys can properly care for and provide for the children. It is the belief of Mitchell Sproessig and Michelle Sproessig that this affidavit is executed in the best interests of the children.

The Sproessigs also signed a "Medical and Dental Consent and Authorization" document, which authorized plaintiff and defendant to consent to medical treatment for the children. An attorney for the plaintiff and defendant drafted the documents, which were then executed by the Sproessigs in Texas. The documents were essentially affidavits and were not authorized by any court. Plaintiff and defendant did not sign the documents.

Defendant provided the total financial support for the family, while plaintiff quit her job to care for the parties' child as well as the two Sproessig children. Mitchell Sproessig maintained contact with his children, although Michelle Sproessig did not.

The children continued to live with plaintiff and defendant until 1987, when plaintiff and defendant separated. The children remained with plaintiff, while defendant continued to support the family. On April 14, 1989, plaintiff filed for divorce, requesting, in part, that defendant be ordered to pay child support for the Sproessig children.

At the conclusion of an evidentiary hearing, the circuit court found that plaintiff and defendant had acted "in loco parentis" and, as a result, defendant was obligated to provide financial support for the Sproessig children. The circuit court

entered an order requiring defendant to pay child support for the Sproessig children until they were eighteen years old. This Court granted defendant's application for leave to appeal from the support order.

Defendant first contends that he is not obligated to provide support for the Sproessig children because the circuit court did not have jurisdiction to enter the order. The circuit court's jurisdiction in a divorce action is strictly statutory. *Stamadianos v Stamadianos,* 425 Mich 1, 5; 385 NW2d 604 (1986); *Fowler v Fowler,* 191 Mich App 318, 319; 477 NW2d 112 (1991). MCL 552.16; MSA 25.96 provides that upon annulling a marriage or entering a judgment of divorce, the circuit court may enter orders that it considers just and proper regarding the care, custody, and support of the minor children of the parties. Because the Sproessig children were not children of the parties, the circuit court was not statutorily authorized to enter an order regarding the care, custody, and support of the Sproessig children.

In *Nygard v Nygard,* 156 Mich App 94, 100, n 3; 401 NW2d 323 (1986), however, this Court concluded that MCL 552.16; MSA 25.96 does not preclude a circuit court from entering an order requiring a nonbiological "parent" to support a minor child where the parent knowingly stands in loco parentis to a child of the marital household. In *Nygard,* the plaintiff mother discovered that she was pregnant and planned to give the child up for adoption. The defendant, who was not the father of the child, persuaded the plaintiff to keep the child by offering to marry the plaintiff and support the child. The parties married before the child was born, and the defendant placed his name on the birth certificate.

The plaintiff later filed for divorce, and the circuit court ordered the defendant to pay child support. This Court affirmed the support order, holding that, under certain circumstances, a person other than a biological parent may be obligated to provide child support. *Nygard, supra,* 99. This Court further held that in that case the defendant had essentially contracted to support the child and was equitably or promissorily estopped from raising the statute of frauds as a defense to such a contract. *Id.* See also *Johnson v Johnson,* 93 Mich App 415; 286 NW2d 886 (1979).

This case is distinct from *Nygard.* In this case, the Sproessig children are not the biological children of either plaintiff or defendant, nor has defendant purported to be the biological father of the Sproessig children. Rather, the Sproessig children are the children of Mitchell and Michelle Sproessig, who have not had their parental rights terminated, and who are not parties to this divorce action. Under these circumstances, the circuit court had no jurisdiction to resolve the issue of the support of the Sproessig children in this action, because such a determination would necessarily involve the rights and duties of Mitchell and Michelle Sproessig.

We also hold that defendant is not obligated to support the children. The biological parents of a child are obligated to support and maintain that child. MCL 722.3; MSA 25.244(3); *Nygard, supra,* 97. Absent adoption, the obligation to support a child remains with the natural parents. *Wilson v General Motors Corp,* 102 Mich App 476, 480; 301 NW2d 901 (1980). Generally, where there is no biological relationship between the child and the adult, the adult has no legal obligation to support

the child.[1] *Nygard, supra,* 97. A legally appointed guardian is not obligated to support a child that is the guardian's ward. MCL 700.431; MSA 27.5431.

Unlike *Nygard,* there is no indication that defendant in this case contracted with plaintiff or any other person to care for the Sproessig children indefinitely, nor has plaintiff relied upon a promise of defendant to her detriment. While defendant may have encouraged plaintiff to quit her job, there is no indication that defendant thereby induced plaintiff to take custody of the Sproessig children. Rather, plaintiff was at least equally willing to take the children into the parties' family and agreed to quit her job to care for the children. Because the equitable considerations present in *Nygard* are not present in this case, defendant has no duty to support the Sproessig children.[2]

Moreover, as a matter of public policy, defendant should not be held to be legally obligated to support the Sproessig children simply because he voluntarily did so for several years. Many people who voluntarily provide the children of family and friends with financial support may be discouraged

---

[1] This Court has held that in certain circumstances a person who is not the biological father of a child is obligated to support the child. These cases have generally been in the context of a support dispute after the entry of a judgment of divorce. The grounds for these determinations have been res judicata, as well as the public policy concern that parents should not be able to challenge paternity after a judgment of divorce as a means to resolve a custody or support dispute. *Hackley v Hackley,* 426 Mich 582, 584-585; 395 NW2d 906 (1986); *Rucinski v Rucinski,* 172 Mich App 20, 22-23; 431 NW2d 241 (1988); *Johns v Johns,* 178 Mich App 101, 106-107; 443 NW2d 446 (1989). This case does not involve these issues, nor does it involve the exceptional situation found in *Nygard* or *Johnson, supra,* where the husband married the mother before the birth of the child and thereafter held himself out as the father of the child.

[2] We also note that defendant represents on appeal that the Monroe Circuit Court, in a separate proceeding, has ordered Mitchell Sproessig to pay child support to plaintiff for the support of the Sproessig children.

from doing so if they risk becoming legally obligated to support those children until they reach majority.

The order of the circuit court is vacated.

CHERRY v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 135963. Submitted July 15, 1992, at Lansing. Decided August 3, 1992, at 9:50 A.M.

Terry Cherry brought an action in the 55th District Court against State Farm Mutual Automobile Insurance Company, her no-fault insurer, seeking personal protection insurance benefits for acupuncture treatments received from a licensed registered nurse. The court, Pamela J. McCabe, J., granted summary disposition for the defendant, and the Ingham Circuit Court, Michael G. Harrison, J., affirmed on appeal. The plaintiff appealed by leave granted.

The Court of Appeals *held:*

Pursuant to MCL 500.3107; MSA 24.13107 and MCL 500.3157; MSA 24.13157, personal protection insurance benefits are payable for the reasonable cost of treatment of accidental bodily injury where such treatment is lawfully rendered. Acupuncture is the practice of medicine or osteopathy and can be performed lawfully only by a licensed physician, MCL 333.16294; MSA 14.15(16294), or a person under the supervision of a licensed physician, MCL 333.16109(2); MSA 14.15(16109)(2).

In this case, the acupuncturist was not a licensed physician and did not perform the acupuncture under the supervision of a licensed physician. Therefore, the treatment received by the plaintiff was not lawfully rendered and may not be paid as a no-fault benefit.

Affirmed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — ACUPUNCTURE TREATMENTS.

Acupuncture treatments may be paid as personal protection insurance benefits under a policy of no-fault automobile insurance only where rendered by a licensed physician or a person under the supervision of a licensed physician (MCL

REFERENCES

Am Jur 2d, Automobile Insurance §§ 359, 360.

Provision of accident or health insurance policy that insured shall be under care of physician or surgeon. 84 ALR2d 375.

333.16109[2], 333.16294, 500.3107, 500.3157; MSA 14.15[16109][2], 14.15[16294], 24.13107, 24.13157).

Timothy A. O'Rourke, for the plaintiff.

Fraser Trebilcock Davis & Foster, P.C. (by *Mark A. Bush*), for the defendant.

Before: SAWYER, P.J., and CONNOR and A. G. BEST, II,* JJ.

CONNOR, J. Plaintiff appeals by leave granted from a circuit court affirmance of a district court grant of summary disposition for defendant of plaintiff's complaint for first-party no-fault insurance benefits, MCR 2.116(C)(10). We affirm.

In granting leave, we ordered the parties to address the following issue:

> Under § 3107 of the Insurance Code [MCL 500.3107; MSA 24.13107], is an insured's right to personal protection insurance benefits for otherwise reasonably necessary products, services, and accommodations for the injured person's care, recovery or rehabilitation, based on otherwise reasonable charges, contingent on those products, services or accommodations being furnished by licensed health care providers?

The facts in this case are generally not in controversy. Plaintiff suffered injuries in an automobile accident and was referred by her treating physicians to Deborah Lincoln, a licensed registered nurse who practices acupuncture. The acupuncture has been beneficial to plaintiff in the treatment of her injuries, but defendant refused to pay for the services rendered by Lincoln for the reason that Lincoln is not licensed to practice

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

acupuncture in Michigan. Defendant has otherwise paid for plaintiff's medical expenses and indicated that it would pay for acupuncture treatments as recommended by plaintiff's physicians, but that it would only pay for treatments from licensed acupuncturists, or a person acting under the supervision of a medical doctor, as defined by MCL 333.16109(2); MSA 14.15(16109)(2).

Lincoln practices on her own and is self-employed, but shares office space with two physicians, neither of whom are trained to perform acupuncture. One of the physicians referred plaintiff to Lincoln. Plaintiff's other physicians, who were involved in the referral, also are not trained in acupuncture.

Lincoln takes only patients who are referred by physicians and uses the doctors' diagnoses in determining how to treat patients. However, Lincoln independently decides where to place needles, how many treatments are required initially, and determines protocol. The referring physicians stay in contact with Lincoln by telephone or correspondence regarding the progress of treatment, but are not physically present during the procedures.

Defendant moved for summary disposition on the ground that it did not have to pay benefits for Lincoln's services because she was neither a physician nor rendered the services while acting under the supervision of a physician and therefore she was operating as an unlicensed medical care provider. The trial court agreed with defendant and granted summary disposition. The circuit court affirmed.

A no-fault insurer is liable only to pay no-fault medical benefits for medical treatment that meets the requirements of the no-fault act, MCL 500.3105; MSA 24.13105. A claimant who seeks to hold an insurer liable for no-fault medical benefits

under MCL 500.3107(a); MSA 24.13107(a) has the burden of proving that the expense was reasonably necessary, the charge was reasonable, and the expense was incurred. *Nasser v Auto Club Ins Ass'n,* 435 Mich 33, 49-50; 457 NW2d 637 (1990).

MCL 500.3107; MSA 24.13107 grants personal protection insurance benefits for medical expenses as follows:[1]

> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation. . . .

At issue is whether this section should be read to require that the medical expenses incurred be provided by a lawfully licensed practitioner, even if the service is provided at a treating physician's recommendation. Our decision depends upon the Legislature's intent. *Kirksey v Manitoba Public Ins Corp,* 191 Mich App 12, 16; 477 NW2d 442 (1991).

Defendant argues that § 3107(a) must be read in conjunction with MCL 500.3157; MSA 24.13157. We agree. In order to give effect to the entire enactment, under the rules of statutory construction, we must read § 3107(a) in conjunction with MCL 500.3157; MSA 24.13157. *Guitar v Bieniek,* 402 Mich 152, 158; 262 NW2d 9 (1978). That statute provides as follows:

> A physician, hospital, clinic or other person or institution *lawfully* rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance . . . may charge a reasonable amount for the products, services and accommodations rendered. The charge

[1] MCL 500.3107(a); MSA 24.13107(a) was amended and redesignated MCL 500.3107(1)(a); MSA 24.13107(1)(a), effective January 1, 1992.

> shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance. [Emphasis added.]

Although it is not clear from a reading of § 3107(a) whether an insurer must pay for medical expenses incurred in treatment by an unlicensed provider, reading the no-fault act as a whole and MCL 500.3157; MSA 24.13157 specifically, we believe it is clear that the Legislature intended that only treatment lawfully rendered, including being in compliance with licensing requirements, is subject to payment as a no-fault benefit. In *Attorney General v Raguckas,* 84 Mich App 618, 626; 270 NW2d 665 (1978), the Court held that acupuncture is the practice of medicine or osteopathy. The practice of medicine or the administering of medical treatment can be lawfully performed only by licensed physicians. MCL 333.16294; MSA 14.15(16294). Consequently, unless acupuncture is administered by a licensed physician, it is not lawfully rendered. If the treatment was not lawfully rendered, it is not a no-fault benefit and payment for it is not reimburseable.[2] We note that other jurisdictions have reached similar results. See *Pavelic v Nationwide Ins,* 352 Pa Super 11, 13-14; 506 A2d 1310 (1986); *Leonard v Preferred Risk Mutual Ins Co,* 247 Ga 574, 576; 277 SE2d 675 (1981).

Plaintiff has also argued on appeal that, as a registered nurse, Lincoln could provide acupuncture consistent with her licensing as a registered nurse, which includes the treatment and care of patients, as provided in MCL 333.17201; MSA

[2] Making plaintiff and other insureds liable for the costs of medical care provided by unlicensed individuals may appear harsh. However, a remedy was suggested by the Supreme Court in *Nasser, supra,* p 55, n 10, wherein the Court held that a plaintiff should not have to pay for services rendered by an unlicensed practitioner.

14.15(17201). We disagree. Michigan has not yet recognized the independent licensing of acupuncturists. It has been held that only licensed physicians can perform acupuncture because it is a surgical procedure and the risks involved are too great to allow nonphysicians to engage in the practice. *Raguckas, supra,* p 626. Consequently, in the absence of specific legislation providing for the independent licensing of acupuncturists, we do not believe a registered nurse may independently practice acupuncture as part of the care or treatment rendered to patients.

The only possible exception provided by statute is when a licensed physician supervises another individual performing acupuncture. MCL 333.16109(2); MSA 14.15(16109)(2) defines what is required for such supervisory responsibilities:

> (2) "Supervision" means the overseeing of or participation in the work of another individual by a health professional licensed under this article in circumstances where at least all of the following conditions exist:
>
> (a) The continuous availability of direct communication in person or by radio, telephone, or telecommunication between the supervised individual and a licensed health professional.
>
> (b) The availability of a licensed health professional on a regularly scheduled basis to review the practice of the supervised individual, to provide consultation to the supervised individual, to review records, and to further educate the supervised individual in the performance of the individual's functions.
>
> (c) The provision by the licensed supervising health professional of predetermined procedures and drug protocol.

In this case, there was no supervision of Lincoln by someone who was licensed as a physician and also trained or knowledgeable about acupuncture

procedures.[3] Therefore, we believe the lower courts correctly granted summary disposition for the reason that there was no genuine issue of material fact that defendant did not have to pay for Lincoln's services.

Affirmed.

---

[3] But see MCL 333.16215(2); MSA 14.15(16215)(2), as amended by 1990 PA 279, effective March 28, 1991.

DAVIS v CITIZENS INSURANCE COMPANY OF AMERICA

Docket Nos. 130815, 133019. Submitted February 5, 1992, at Lansing. Decided August 3, 1992, at 9:55 A.M.

Emily L. Davis, who was rendered paraplegic following an automobile accident, brought an action in the Branch Circuit Court against Citizens Insurance Company of America, her no-fault insurer, seeking, as personal injury protection benefits, the cost of acquiring a van modified for her use, and for mileage incurred in the use of the van. Following a bench trial, the court, Michael H. Cherry, J., entered judgment for the plaintiff, but subsequently denied her request for penalty interest. The defendant appealed the award of no-fault benefits, and the plaintiff appealed the denial of penalty interest. The appeals were consolidated.

The Court of Appeals *held:*

1. MCL 500.3107(a); MSA 24.13107(a) provides that personal protection insurance benefits are payable for charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. In this case, the cost of the modified van was reasonable, and, in light of the lack of viable alternative transportation, the van was reasonably necessary to enable the plaintiff to receive continued medical treatment. Although the trial court properly awarded no-fault benefits for the acquisition of the van, it erred in awarding benefits for mileage without regard to whether use of the van was for medical or personal purposes. On remand, the trial court must determine the amount of, and limit the award to, documented mileage incurred for medical purposes only.

2. Penalty interest under MCL 500.3142(3); MSA 24.13142(3) must be assessed when a no-fault insurer refuses to pay bene-

---

REFERENCES

Am Jur 2d, Automobile Insurance § 344.

Automobile insurer's liability for statutory excess interest for delayed payment of no-fault claim. 14 ALR4th 761.

What constitutes bad faith on part of insurer rendering it liable for statutory penalty imposed for bad faith in failure to pay, or delay in paying, insured's claim. 33 ALR4th 579.

fits and is later determined to be liable, irrespective of the insurer's good faith in denying coverage. On remand, the trial court must determine the amount of penalty interest due the plaintiff.

Affirmed in part, reversed in part, and remanded.

GRIFFIN, J., concurring, stated that the trial court did not clearly err in its findings with respect to the reasonable necessity for the van under the circumstances of this case, but cautioned that the goal of the no-fault act is to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses, not windfalls.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE.

A person who is rendered a paraplegic in a motor vehicle accident may recover, as personal injury protection benefits, the cost of acquiring a van modified for use by a paraplegic where the cost is reasonable and the van is reasonably necessary to enable the person to receive continued medical treatment (MCL 500.3107[a]; MSA 24.13107[a]).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — PENALTY INTEREST.

Penalty interest must be assessed against a no-fault insurer who refuses to pay benefits and is later determined to be liable for those benefits, irrespective of the insurer's good faith in denying coverage (MCL 500.3142[3]; MSA 24.13142[3]).

Sloan, Newton, Stevens & Yokom (by *Gary C. Newton*), for the plaintiff.

Stanton, Bullen, Nelson, Moilanen & Klaasen, P.C. (by *Charles A. Nelson*), and *Potter & Hamilton* (by *Janet L. Hamilton*), for the defendant.

Before: HOLBROOK, JR., P.J., and GRIFFIN and MARILYN KELLY, JJ.

HOLBROOK, JR., P.J. Plaintiff filed an action in the Branch Circuit Court against defendant for no-fault benefits after an automobile accident rendered her a paraplegic. In Docket No. 130815, defendant appeals as of right a June 26, 1990, judgment awarding plaintiff $24,527, which is the

purchase price of a van modified for use by a person in a wheelchair, as well as documented mileage for the use of the van. In Docket No. 133019, plaintiff appeals as of right a September 6, 1990, order denying the imposition of penalty interest on the benefits under MCL 500.3142; MSA 24.13142. This Court consolidated these appeals by order dated November 8, 1990.

On April 28, 1988, plaintiff was a passenger in an automobile that was struck by a truck. At that time, defendant was plaintiff's no-fault carrier. The accident rendered plaintiff a paraplegic. She is presently confined to a wheelchair. Plaintiff requested that defendant purchase a van modified for use by a person in a wheelchair, but defendant refused, offering instead to pay for the renovation of a van and mileage. Plaintiff then purchased a van modified for use by a person in a wheelchair at a cost of $24,527.

Following a bench trial, the circuit court held that the purchase price of the modified van was a reasonable and necessary expense under the personal injury protection benefits provisions of the no-fault act, MCL 500.3107(a); MSA 24.13107(a). The court reasoned that the van was necessary for plaintiff to lead as full and complete a life as possible given her physical limitations. The court noted that the ambulance service provided by the county would provide only medical transportation. Further, the court found that the public transportation system was geographically limited to the county.

After the court entered the order of judgment, plaintiff filed a bill of costs, which included $4,565.31 in no-fault penalty interest. The trial court denied the request for penalty interest. The court reasoned that the primary obligation under the no-fault act was the immediate payment of

medical costs, and that any carrier refusing to reasonably and promptly pay those costs runs the risk of the statutory penalty interest. Because the amount sought by plaintiff arose from defendant's refusal to purchase the van and not a refusal to pay medical costs, the court refused to impose the statutory penalty interest.

Defendant argues on appeal that it is not liable for the purchase price of the van and a mileage fee when there is alternative transportation available for plaintiff. Defendant contends that the van is primarily used by plaintiff's family for personal use rather than for plaintiff's medical needs. On the other hand, plaintiff argues that a van is reasonably necessary for her care and recovery. She implores us to read the statute liberally to reach its intended result of providing relief for her injury. According to plaintiff, providing transportation for her daily requirements is defendant's responsibility under the no-fault act.

The payment of personal injury protection benefits under the no-fault act includes payment of the following:

> Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. [MCL 500.3107(a); MSA 24.13107(a).]

Three factors must be met for an item to be considered an "allowable expense" under the statute: (1) the charge must be reasonable; (2) the expense must be reasonably necessary; and (3) the expense must be incurred. *Nasser v Auto Club Ins Ass'n,* 435 Mich 33, 50; 457 NW2d 637 (1990), citing *Manley v DAIIE,* 425 Mich 140, 169; 388 NW2d 216 (1986); *Moghis v Citizens Ins Co of*

America, 187 Mich App 245, 247; 466 NW2d 290 (1991). The burden of proof regarding whether a particular expense is reasonable and necessary lies with the plaintiff. *Nasser,* pp 49-50. Whether a van modified for use by a paraplegic is an allowable expense is an issue of first impression.

In *Sharp v Preferred Risk Mutual Ins Co,* 142 Mich App 499, 510-512; 370 NW2d 619 (1985), this Court held that rental expenses were allowable expenses under the no-fault act. The trial court in *Sharp* had held that the plaintiff was entitled to the difference between what apartment rent would cost him if he were uninjured and the more expensive apartments he actually rented. *Id.,* p 510. This Court reversed, ruling that the trial court had construed the rule of law in *Manley v DAIIE,* 127 Mich App 444; 339 NW2d 205 (1983), rev'd 425 Mich 140; 388 NW2d 216 (1986), too narrowly. The Court in *Sharp* concluded that as long as larger and better equipped housing was required for the injured person than would be required for the uninjured person, the full cost was an allowable expense. 142 Mich App 511.

In this case, the cost of the van was reasonable, and obviously the expense was incurred. We also find that the van was reasonably necessary. Transportation is as necessary for an uninjured person as for an injured person. However, the modified van is necessary in this case given the limited availability of alternative means of transportation. The ambulance service is limited to Branch County, traveling outside the county two or three times a week. Although this service is available twenty-four hours a day, seven days a week, advance notice is preferred for clients who, like plaintiff, reside more than five miles from town. Moreover, because the ambulance service is the only one in the county, transportation could be

delayed or unavailable because of medical emergencies. The local transit authority provides door-to-door service to clients who make advance reservations, but it is unavailable during evenings. The van allows plaintiff to travel outside the county for medical purposes and vacations. In addition, the van was reasonably necessary according to plaintiff's treating physician. He testified that when he discharged plaintiff, one of the requirements was that plaintiff use a van for her transportation, allowing her the independence to go to work. Under these circumstances, we find that the modified van is an allowable expense.

We also conclude that the trial court erred in ordering defendant to pay for all of the van's documented mileage. Mileage for personal use is as necessary for an injured person as for an uninjured person. However, we do consider mileage incurred for medical treatment an allowable expense. Accordingly, we remand to the trial court to determine the travel expenses actually incurred for the purpose of obtaining medical treatment. See *Neumann v State Farm Mutual Automobile Ins Co,* 180 Mich App 479, 486; 447 NW2d 786 (1989); *Swantek v Automobile Club of Michigan Ins Group,* 118 Mich App 807, 809-810; 325 NW2d 588 (1982).

Finally, we agree with plaintiff that she is entitled, under MCL 500.3142(3); MSA 24.13142(3), to interest on the award of personal injury protection benefits. Penalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits. *Clute v General Accident Assurance Co of Canada,* 179 Mich App 527, 539; 446 NW2d 839 (1989); *Bach v State Farm Mutual*

Automobile Ins Co, 137 Mich App 128, 131-132; 357 NW2d 325 (1984).

Defendant, relying upon *Kreighbaum v Automobile Club Ins Ass'n,* 170 Mich App 583; 428 NW2d 718 (1988), argues that the trial court correctly refused to award penalty interest because defendant reasonably believed that the benefit was not payable. The plaintiff in *Kreighbaum* sought penalty interest, as well as attorney fees and judgment interest, under the no-fault act. The Court in *Kreighbaum* denied the request, citing *Joiner v Michigan Mutual Ins Co,* 137 Mich App 464, 479; 357 NW2d 875 (1984). However, when *Joiner* again came before this Court on this specific issue, this Court held that penalty interest is triggered when the personal injury protection benefits become overdue with no exception for the good faith of the insurer in denying liability. *Joiner v Michigan Mutual Ins Co,* 161 Mich App 285, 292; 409 NW2d 808 (1987). Consequently, an insurer's good faith in withholding payment of benefits is relevant in awarding attorney fees under the act, but is irrelevant to liability under the penalty interest statute. *Grossheim v Associated Truck Lines, Inc,* 181 Mich App 712, 715-716; 450 NW2d 40 (1989); *Bloemsma v Auto Club Ins Ass'n,* 174 Mich App 692, 698; 436 NW2d 442 (1989), (*After Remand*), 190 Mich App 686; 476 NW2d 487 (1991); *Bach,* p 132. On remand, the trial court shall determine the amount of penalty interest due plaintiff.

The trial court's decision regarding its order granting plaintiff the cost of the modified van is affirmed. We vacate that part of its decision ordering defendant to pay for all of the van's documented mileage, and remand for further proceedings concerning the issue of penalty interest. We do not retain jurisdiction.

Affirmed in part, reversed in part, and remanded.

MARILYN KELLY, J., concurred.

GRIFFIN, J. *(concurring).* I concur in the judgment. I write separately to emphasize the limited scope of our affirmance.

The other no-fault jurisdictions that have considered the issue whether a specially equipped van is a reasonably necessary medical expense under their no-fault acts have done so with mixed results. In *Stewart v Allstate Ins Co,* 103 NJ 139; 510 A2d 1131 (1986), the New Jersey Supreme Court held that the cost of a specially modified van is a medical expense covered by the personal injury protection provisions of the New Jersey Automobile Reparation Reform Act. However, the Superior Court of Pennsylvania in *Langan v Harleysville Ins Co,* 376 Pa Super 372; 546 A2d 75 (1988), refused to follow *Stewart* and construed its former no-fault act much more restrictively. The majority of the Pennsylvania appellate court held that a specially equipped van is an allowable medical expense under the Pennsylvania no-fault act only if it is proved that "such a vehicle is the most economical and *only* feasible method of transporting the injured person 'to secure medical and vocational rehabilitation services' and that the vehicle will be used *solely* for this purpose." *Id.* at 378. Emphasis added. Both cases involved rulings on motions for summary judgment.

In the present case, Branch Circuit Judge Michael H. Cherry refused to grant summary disposition to either party on the basis that the issue was one for the trier of fact. At the conclusion of a nonjury trial, Judge Cherry found the van at issue to be a reasonable medical transportation expense

necessary to accommodate plaintiff's accident-related handicap. On appeal, defendant argues that Judge Cherry erred in finding the public transportation system in Branch County to be inadequate to serve the plaintiff's medical needs. I join the majority in affirming because I cannot conclude that the trial court's finding of fact was clearly erroneous. MCR 2.613(C). As noted by the trial court, the Branch County Transportation Service is limited geographically to Branch County. Plaintiff's doctors, however, practice in neighboring Kalamazoo County. Defendant's position that plaintiff should utilize an ambulance service to be transported out of the county was determined to be unreasonable by the lower court. This finding is not clearly erroneous and therefore must be affirmed.

An important but unpreserved issue is the measure of plaintiff's damages. At trial and on appeal, defendant simply argued that it was not responsible for a specially equipped van or, in the alternative, that it was liable only for the cost of converting a van to special paraplegic use. Defendant apparently overlooks the fact that before the accident, plaintiff and her husband owned two vehicles. The van at issue replaced a vehicle that plaintiff operated before the accident. In my view, the lower court erred in requiring defendant to bear one hundred percent of the initial purchase price of the van. Rather, when the necessary product is a replacement, the measure of damages should be the difference between the cost of the new product and the value of the previously owned product. Additionally, defendant should be afforded a lien on the van and, before its purchase, be given an option to lease such a vehicle or to purchase it in monthly installments. Under appropriate circumstances, an insurer should have the

alternative to contract with a transportation authority to provide for all of its insured's medical transportation needs on a twenty-four hour basis.

While *Manley v DAIIE,* 127 Mich App 444; 339 NW2d 205 (1983), rev'd 425 Mich 140; 388 NW2d 216 (1986), may have construed the no-fault act too restrictively, *Sharp v Preferred Risk Mutual Ins Co,* 142 Mich App 499; 370 NW2d 619 (1985), appears to construe it too broadly. Surely, if the plaintiff in *Sharp* had owned a condominium or a home before his injury, this Court would not require a defendant no-fault insurer to bear the full cost of purchasing a new residence without a deduction or setoff of the plaintiff's previous home ownership interest. The goal of the no-fault act is "to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General,* 402 Mich 554, 579; 267 NW2d 72 (1978). Reparation for actual damages is provided; windfalls are not. See, e.g., *Thompson v DAIIE,* 418 Mich 610, 619; 344 NW2d 764 (1984) (opinion by LEVIN, J.), and *MacDonald v State Farm Mutual Ins Co,* 419 Mich 146; 350 NW2d 233 (1984).

In my view, plaintiff's transportation damages caused by the accident are in part the difference between the cost of the specially equipped van and the value of plaintiff's previous vehicle. However, because this measure of damages was neither argued nor preserved by defendant, I concur with the majority.

I join in Judge HOLBROOK's opinion with respect to the other issues.

DERR v MURPHY MOTOR FREIGHT LINES

Docket No. 136833. Submitted June 2, 1992, at Lansing. Decided August 3, 1992, at 10:00 A.M. Leave to appeal sought.

George J. Derr sought workers' compensation benefits from Murphy Motor Freight Lines, Carrier Insurance Company, and the Michigan Property & Casualty Guaranty Association for a December 13, 1984, work-related injury. A magistrate found that Derr was disabled and granted an open award of benefits. The Workers' Compensation Appeal Board affirmed. The defendants appealed by leave granted, and the plaintiff cross appealed.

The Court of Appeals *held:*

1. The defendants' claim that it was error for a magistrate who was not the original trier of fact to issue an opinion on the merits of this case is irrelevant because the case was reviewed by the WCAB, which is required to conduct fact finding de novo.

2. The appeal board erred in finding that, although the plaintiff forfeited his right to weekly benefits when he refused his employer's offer of favored work, the right was reinstated when Murphy later filed for bankruptcy. MCL 418.301(5); MSA 17.237(301)(5) should not be interpreted to mean than an employee's refusal of favored work ends when the employer goes out of business. The favored-work doctrine requires only that an employer keep an offer open for a reasonable time under all the circumstances. In this case, the offer was kept open for 1½ years.

3. The appeal board's findings that the favored work offered to the plaintiff was reasonable and within his medical restrictions are supported by competent evidence on the record.

The order awarding the plaintiff benefits after the date of his refusal of favored work is reversed.

WORKERS' COMPENSATION — FAVORED-WORK DOCTRINE.

The favored-work doctrine requires an employer to keep an offer of favored work for an injured employee open for a reasonable

REFERENCES

Am Jur 2d, Workers' Compensation § 399.

See the Index to Annotations under Workers' Compensation.

time; an injured employee who refuses such favored work is not entitled to wage-loss benefits following the refusal even though the employer subsequently files for bankruptcy, thereby effectively withdrawing its offer (MCL 418.301[5]; MSA 17.237[301][5]).

Zamler, Mellen & Shiffman, P.C. (by *Joel Jonas*), for the plaintiff.

Sinn, Day, Felker, Chinitz & Lovernick, P.C. (by *Thaddeus F. Felker*), for the defendants.

Before: WEAVER, P.J., and WAHLS and TAYLOR, JJ.

WEAVER, P.J. Plaintiff began working for Murphy Motor Freight Lines as a trailer-truck driver in October 1968. On December 13, 1984, plaintiff injured his back while unloading desks from a truck. Plaintiff attempted to return to work on January 21, 1985, but the pain was too severe. He was placed on medical leave and began to receive workers' compensation benefits. On June 18, 1985, Murphy offered plaintiff a job involving security and clerical duties tailored to meet plaintiff's medical restrictions. However, plaintiff refused the job, stating he was afraid his medication would make him drowsy and unable to drive. Plaintiff brought a claim for workers' compensation benefits.

The magistrate found plaintiff disabled as a result of the December 13, 1984 injury and granted an open award of benefits. Defendants appealed, and the Workers' Compensation Appeal Board affirmed. Defendants now appeal by leave granted, and plaintiff cross appeals. We reverse.

I

Defendants first claim it was error for magistrate Freedman to issue an opinion on the merits

of this case when he was not the original trier of fact.

The case was originally assigned to hearing referee Washington, who took testimony on three days. The statutory changes that substituted magistrates for referees then took effect, and the case was assigned to magistrate Tilles. When Tilles had a heart attack, the case was assigned to magistrate Freedman. Defendants argue the case should be remanded for a new decision after further hearing. We disagree.

This case was reviewed by the WCAB, which is specifically required to conduct fact finding de novo. The WCAB commits legal error if it relies upon the findings or expertise of the referee or magistrate. *Kostamo v Marquette Iron Mining Co,* 405 Mich 105; 274 NW2d 411 (1979). Thus, defendants' complaint is irrelevant.

II

Defendants contend the WCAB erred in awarding plaintiff weekly benefits after it found plaintiff unreasonably refused their offer of favored work. The WCAB found plaintiff forfeited his right to benefits from the date of his refusal, June 19, 1985, but held that it was reinstated as of February 26, 1987, when Murphy filed for bankruptcy.

The favored-work doctrine requires only that an employer keep open an offer for a reasonable time under all the circumstances. *Russell v General Motors Corp,* 172 Mich App 627; 432 NW2d 738 (1988). After that time, the company should be permitted to withdraw its offer with no fear of disadvantage. Id. In this case, the offer was effectively kept open for over a year and a half. During that time, no indication was given by plaintiff that he might be interested in the job. Thus, even

though the company's bankruptcy effectively meant the offer was withdrawn, plaintiff was not once again entitled to compensation benefits.

Plaintiff argues that MCL 418.301(5); MSA 17.237(301)(5) should be interpreted to mean that the employee's refusal ends when the employer either withdraws its offer or goes out of business. Review of the statute[1] does not persuade us of the validity of this argument.

Our holding in this section renders the remainder of defendants' arguments moot.

III

Plaintiff has cross appealed, arguing that the job offer was not reasonable because he could not perform the work offered by Murphy. Plaintiff contends that he rejected the job partly because the medication he was taking caused drowsiness and he was afraid that he would kill someone if he drove to work. Plaintiff therefore contends that the offered work was not reasonable employment because it threatened his health and safety and was not within a reasonable distance from his residence, as required under MCL 418.301(9); MSA 17.237(301)(9).[2]

---

[1] MCL 418.301(5); MSA 17.237(301)(5) provides in pertinent part:

> "If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:
>
> "(a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.

[2] For the purposes of this appeal only, we assume that § 301(9) does in fact apply.

We disagree. The WCAB found that the offered employment was reasonable, falling within plaintiff's medical restrictions, and rejected plaintiff's explanation for his refusal to take the position. These findings are supported by competent record evidence and are therefore conclusive. MCL 418.861; MSA 17.237(861).

We reverse the order of the WCAB awarding plaintiff benefits after June 18, 1985. We do not retain jurisdiction.

VOUKATIDIS v VOUKATIDIS

Docket No. 129640. Submitted April 21, 1992, at Detroit. Decided August 3, 1992, at 10:05 A.M.

George H. Voukatidis and Rita R. Voukatidis were divorced by order of the Wayne Circuit Court, Sharon Tevis Finch, J. He appealed.

The Court of Appeals *held:*

1. Given the substantial disparity in the parties' incomes, the trial court did not abuse its discretion in awarding defendant $1,500 in attorney fees.

2. The property division ordered by the trial court was proper.

3. The trial court did not err in awarding the defendant temporary alimony.

Affirmed.

MICHAEL J. KELLY, J., dissenting in part, stated that the trial court clearly erred in basing its determination of the defendant's ability to carry on or defend the action on a comparison of the parties' incomes. It is the defendant's financial status alone that must be examined to determine her ability to pay.

DIVORCE — ATTORNEY FEES — DISPARITY IN PARTIES' INCOMES.

Attorney fees may be awarded in a divorce action on the basis of a substantial disparity in the parties' incomes.

Kevin A. McNulty, for the plaintiff.

Margaret Barton, for the defendant.

Before: JANSEN, P.J., and MICHAEL J. KELLY and GRIFFIN, JJ.

GRIFFIN, J. Plaintiff appeals as of right from a

REFERENCES

Am Jur 2d, Divorce and Separation § 604.

Amount of attorneys' fees in matters involving domestic relations. 59 ALR3d 152.

May 14, 1990, judgment of divorce entered by the Wayne Circuit Court. We affirm.

Plaintiff first argues on appeal that the trial court abused its discretion in awarding defendant $1,500 in attorney fees. We disagree. Defendant requested $3,500 in fees and was awarded $1,500. Given the substantial disparity in the parties' incomes, we find no abuse of discretion. *Vollmer v Vollmer,* 187 Mich App 688, 690; 468 NW2d 236 (1990).

Plaintiff next contends that the trial court made numerous errors that skewed what otherwise would have been a precise fifty-fifty split of the marital estate. Having reviewed the record, we find no merit with regard to any of plaintiff's claims. Plaintiff's primary contention, that the trial court somehow twice ordered him to pay defendant one-half of the forty-four shares of Ford Motor Company stock, simply has no basis in fact. The record unequivocally reflects that plaintiff held an additional forty-four shares of stock that were not accounted for initially. Similarly, plaintiff's claim that the trial court failed to consider the value of a television set he bought for defendant is also without merit. In its findings, the trial court allowed plaintiff to keep the amount of his savings that accrued following the parties' separation on the basis that plaintiff bought certain items and made various "reasonable expenditures" during this time. Our review also indicates that the court dealt with the value of the parties' automobiles in an equitable fashion. Finally, given the disparate economic positions of the parties, we find nothing inequitable about requiring plaintiff to maintain defendant's health insurance on a temporary basis. Plaintiff has in no way convinced us that we would have reached a different result had we occupied the position of the trial court.

Burkey v Burkey (On Rehearing), 189 Mich App 72, 78; 471 NW2d 631 (1991).

Finally, plaintiff argues that the trial court abused its discretion in awarding defendant temporary alimony. We disagree. The trial court awarded defendant $200 a week for one year. In so doing, the court noted that the parties had endured many years of marriage during which they lived at the standard provided by their combined incomes. Thus, the court found the alimony necessary to equalize the parties' financial positions and to allow defendant to "get on her feet financially." These considerations were proper, and we find no error. *Id.; Thames v Thames,* 191 Mich App 299, 307-308; 477 NW2d 496 (1991).

Affirmed.

JANSEN, P.J., concurred.

MICHAEL J. KELLY, J. *(concurring in part and dissenting in part).* I dissent from the majority's treatment of the award of attorney fees.

Defendant argues that whether she earned $21,000 or $6,000 in 1989, plaintiff earned a considerably larger salary, in the neighborhood of $50,000 and, therefore, because of the disparity in the parties' incomes the award of attorney fees is justified in the exercise of the trial court's discretion. That has not been and should not be the rule regarding attorney fees in domestic relations cases. The proper rule is set out in the final paragraph of *Spooner v Spooner,* 175 Mich App 169, 174; 437 NW2d 346 (1989):

> Plaintiff's attorney requests that he be awarded attorney fees for the instant appeal. MCR 3.206(A) allows for attorney fees if the moving party alleges facts showing that he or she is unable to bear the expense of the action without receiving aid. Attor-

> ney fees are not awarded as a matter of right but only when necessary to enable a party to carry on or defend the litigation. *Chisnell v Chisnell,* 99 Mich App 311, 316; 297 NW2d 909 (1980). Plaintiff's attorney has not alleged sufficient facts to demonstrate that plaintiff would be unable to bear the expense of this action without aid. Attorney fees were not necessary to enable plaintiff to carry on the instant litigation. This Court refuses to award plaintiff attorney fees for the instant appeal.

The majority's reliance on *Vollmer v Vollmer,* 187 Mich App 688, 690; 468 NW2d 236 (1990), is, I believe, unfortunate. I don't know the value of the estate distributed in *Vollmer* and I think to the extent that the majority has endorsed the rubbery standard of *Curylo v Curylo,* 104 Mich App 340; 304 NW2d 575 (1981), it has resurrected an overly broad discretion standard that was intended to be restricted by MCR 3.206(A). I have stated my reasons in previous opinions and dissents and I restate them here.

Attorney fees are not awarded as a matter of right but only when necessary to allow a party to carry on or defend an action. *Vaclav v Vaclav,* 96 Mich App 584, 593; 293 NW2d 613 (1980); *Zecchin v Zecchin,* 149 Mich App 723; 386 NW2d 652 (1986). The trial court in this case did not make a finding regarding the necessity of an award of attorney fees. Clearly, on this record, it could not. The majority notes that defendant's monthly take-home pay is considerably less than plaintiff's and then concludes, ipso facto, that that necessitates an award of attorney fees. I think that is plain wrong. It was clearly erroneous for the trial court to base its determination of defendant's ability to carry on or defend the action on a comparison of defendant's income with plaintiff's. It is defen-

dant's financial status alone that must be examined to determine her ability to pay. See, e.g., *Tomblinson v Tomblinson,* 183 Mich App 589, 593; 455 NW2d 346 (1990). Plaintiff's financial position is of absolutely no consequence to such a determination. *Wilcher v Wilcher,* unpublished opinion per curiam of the Court of Appeals, decided August 27, 1991 (Docket No. 123315).

I would approve the majority's disposition of the other aspects of this appeal, but I would reverse the award of attorney fees.

TROUT UNLIMITED, MUSKEGON-WHITE RIVER CHAPTER v CITY OF WHITE CLOUD

Docket No. 137067. Submitted June 9, 1992, at Grand Rapids. Decided August 3, 1992, at 10:10 A.M.

Trout Unlimited, Muskegon-White River Chapter, and Richard McEwen brought an action in the Newaygo Circuit Court against the City of White Cloud, seeking a declaration that the city had undertaken an illegal reconstruction of a dam in the White River. The court, Anthony A. Monton, J., following a bench trial, entered a judgment of no cause of action, determining that the plaintiffs lacked standing to sue. The plaintiffs appealed.

The Court of Appeals *held:*

1. McEwen, as a riparian landowner, and Trout Unlimited, as a nonprofit corporation whose members advocate the preservation and improvement of cold-water fishing resources, demonstrated legally protected interests that could be affected adversely by the disputed reconstruction of the dam and therefore have standing to maintain their action.

2. The plaintiffs also have standing pursuant to § 2(1) of the Environmental Protection Act, MCL 691.1202(1); MSA 14.528(202)(1), which allows any person or legal entity to maintain an action in circuit court for declaratory and injunctive relief for the protection of a natural resource from pollution, impairment, or destruction.

Reversed and remanded.

ENVIRONMENT — ACTIONS — PARTIES — ENVIRONMENTAL PROTECTION ACT.

The Environmental Protection Act provides standing to bring an

---

REFERENCES

Am Jur 2d, Administrative Law §§ 575, 576; Pollution Control §§ 494-506.

Standing of private citizen, association, or organization to maintain action in federal court for injunctive relief against commercial development or activities, or construction of highways, or other governmental projects, alleged to be harmful to environment in public parks, other similar recreational areas, or wildlife refuges. 11 ALR Fed 556.

Landowner's right to relief against pollution of his water supply by industrial or commercial waste. 39 ALR3d 910.

action for declaratory and injunctive relief against the reconstruction of a dam to a riparian landowner who demonstrates possible adverse effects of reconstruction on the property and to a nonprofit corporation whose members advocate the protection and improvement of cold-water fishing resources that may be affected adversely by reconstruction (MCL 691.1202[1]; MSA 14.528[202][1]).

McCroskey, Feldman, Cochrane & Brock (by *J. Walter Brock*), for the plaintiffs.

Landman, Latimer, Clink & Robb (by *David L. Bossenbroek*), for the defendant.

Before: SHEPHERD, P.J., and CONNOR and M. F. SAPALA,* JJ.

SHEPHERD, P.J. Plaintiffs appeal as of right the circuit court's judgment of no cause of action entered on January 4, 1991. We reverse and remand for new findings consistent with this opinion.

This case involves the repair and construction of a dam in the White River in Newaygo County. Since 1951, defendant has owned the dam, originally built over one hundred years ago, and has maintained a park on the lake behind the dam, providing recreational activities such as picnicking, swimming, fishing, and boating. The dam divides the upper and middle White River. The White Cloud River starts about 7.5 miles upstream from White Cloud. This section of the river, known as the Upper White River, is a blue-ribbon trout stream, a designation applied by the Michigan Department of Natural Resources to a few select rivers in Michigan. The section of the White River downstream from White Cloud to Hesperia, known as the Middle White, is 26.5 miles in length. This

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

section of the river has been designated as a County Scenic River pursuant to the Natural River Act, MCL 281.761 *et seq.*; MSA 11.501 *et seq.* The Middle White ends at the Hesperia Dam, a low-head dam, whose primary function is to prevent the migration of salmon and steelhead so as to allow the development of a brown, brook, and rainbow trout fishery in the Middle and Upper White. The Lower White, which runs from Hesperia to White Lake, is of no concern to this case. Plaintiff Trout Unlimited, Muskegon-White River Chapter (TU) is a private, nonprofit corporation dedicated to preserving and improving cold-water fishing resources. Plaintiff McEwen is both a TU member and a riparian landowner on the Middle White.

On September 9, 1986, it began raining in western Michigan and continued to do so for several days, swelling most of the rivers to their breaking point and washing out nineteen dams. When it appeared that defendant's dam was in imminent danger of collapsing, defendant city officials decided to breach the dam in order to prevent the entire dam from washing away. By the time the rains stopped, the dam was virtually destroyed and the lake was reduced to a stream. Plaintiffs allege that defendant's breach of the dam permitted the release into the Middle White River of sand and silt that had built up in the lake behind the dam, destroying fish cover and spawning beds and killing virtually the entire fish population.

After the flood, defendant applied for and received grants of approximately $500,000 from the Federal Emergency Management Agency (FEMA) and the Community Development Block Grant Program to repair and reconstruct the dam. Defendant also applied to the DNR for the necessary permits to rebuild the dam. On November 18,

1988, the DNR denied a permit for the rebuilding of the dam. In reaching its decision, the DNR stated that the middle section of the White River would be a better trout stream if the White Cloud dam were not repaired.

To allow repair of the dam without a DNR permit, the Legislature amended the Dam Safety Act, MCL 281.1301 *et seq.*; MSA 11.420(1) *et seq.*, by enacting 1988 PA 484, exempting defendant from the DNR permit requirement. The FEMA approved the project after an environmental study determined that repair of the dam would have no significant environmental effect. The dam was rebuilt in the summer of 1990 and is now in full operation.

On January 19, 1990, plaintiffs filed a thirteen-count complaint. On June 12, 1990, plaintiffs filed a motion for partial summary disposition, which, after a hearing, was denied by an order dated July 17, 1990. On July 23, 1990, plaintiffs amended their complaint to include a request for attorney fees. On September 6, 1990, the parties stipulated that no evidence would be submitted at trial concerning damages and requested the trial court to enter an opinion and order in the form of declaratory relief. Six of the thirteen counts in the complaint involve damages and were not tried. At trial, plaintiffs claimed the dam was unlawfully reconstructed and alleged: (1) fraud; (2) violation of the public trust; (3) violation of the constitutional prohibition against local legislation; (4) failure to obtain approval from the DNR; (5) failure to obtain approval from the county; and (6) failure to obtain approval from the Natural Resources Commission. Following a bench trial, the trial court, incorporating its opinion of December 11, 1990, entered a judgment of no cause of action in favor of defendant, ruling that plaintiffs had lacked standing.

Although plaintiffs raise various issues on appeal, the principal issue before us is whether the trial court erred in dismissing plaintiffs' claims on the ground that they lacked standing to assert their claims. Plaintiffs argue that they have standing to sue under the Michigan Constitution and the Environmental Protection Act (MEPA), MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.* Plaintiffs argue that Const 1963, art 4, § 52 recognized that citizens' groups have standing to challenge an activity that may violate the government's duty to manage public lands properly. This article provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water, and other resources of the state from pollution, impairment and destruction.

Plaintiffs also assert standing under the MEPA, which provides for declaratory and equitable relief upon a plaintiff's prima facie showing that a natural resource is involved and that the effect of the activity in question on the environment rises to a level of impairment that will justify the relief. *City of Portage v Kalamazoo Co Rd Comm,* 136 Mich App 276, 280; 355 NW2d 913 (1984). The Michigan Supreme Court in *State Hwy Comm v VanderKloot,* 392 Mich 159; 220 NW2d 416 (1974), held that the MEPA is the primary statute enacted by the Legislature to fulfill its duty to protect our natural resources. Section 2(1) of the MEPA provides in part:

> [A]ny person, partnership, corporation, association, organization or other legal entity may main-

> tain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof . . . for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction. [MCL 691.1202(1); MSA 14.528(202)(1).]

In this case, we find that plaintiffs have standing to raise their claims. To have standing, a plaintiff must demonstrate a legally protected interest that is in jeopardy of being adversely affected. *Health Central v Ins Comm'r,* 152 Mich App 336, 347-348; 393 NW2d 625 (1986). To have standing, a party must allege a sufficient personal stake in the outcome of the controversy to ensure that the dispute sought to be adjudicated will be presented in an adversarial context that is capable of judicial resolution. *Karrip v Cannon Twp,* 115 Mich App 726, 733; 321 NW2d 690 (1982); *Baker v Carr,* 369 US 186, 204; 82 S Ct 691; 7 L Ed 2d 663 (1962); *Sierra Club v Morton,* 405 US 727, 731-732; 92 S Ct 1361; 31 L Ed 2d 636 (1972); *Lujan v Defenders of Wildlife,* 504 US —; 112 S Ct 2130; 119 L Ed 2d 351 (1992). Generally, a plaintiff shows a personal stake in a lawsuit by demonstrating that he has been injured or represents someone who has been injured. *Kaminskas v Detroit,* 68 Mich App 499; 243 NW2d 25 (1976). A nonprofit corporation has standing to advocate interests of its members where the members themselves have a sufficient stake or have sufficiently adverse and real interests in the matter being litigated. *Karrip, supra; White Lake Improvement Ass'n v City of Whitehall,* 22 Mich App 262; 177 NW2d 473 (1970).

Plaintiff McEwen has standing in this case, hav-

ing demonstrated a legally protected interest that is in jeopardy of being adversely affected. As a riparian landowner on the Middle White River, he has standing to challenge the legality of the new dam construction because of the damage that it may cause to his property.

Plaintiff TU also has standing. The proofs established that TU is a nonprofit corporation with a specific purpose of protecting cold-water resources. Further, the vast majority of the local members of TU own property around the White River and use the river. Given that the personal interest and stake of these members in this controversy are sufficiently adverse and real, plaintiff TU has standing to advocate the interests of its members in this action. *Karrip, supra; White Lake Improvement Ass'n, supra.*

Further, plaintiffs have standing under § 2(1) of the MEPA. As stated earlier, § 2(1) provides standing to private parties to bring lawsuits for declaratory and injunctive relief to protect our natural resources. *VanderKloot, supra.* Contrary to the trial court's assertion, plaintiffs' reliance on this statute is not misplaced. Even though plaintiffs made no mention of the MEPA in their complaint and mentioned it for the first time in a posttrial brief on the issue of standing, plaintiffs' claims in this case are based upon the MEPA, which provides for declaratory relief upon plaintiffs' making a prima facie showing of pollution, impairment, or destruction of a natural resource. *City of Portage, supra.* Under the MEPA, the trial court must conduct a dual inquiry to determine whether a natural resource is involved and whether the effect of the activity on the environment rises to the level of impairment to justify the court's intervention. *Kent Co Rd Comm v Hunting,* 170 Mich App 222;

428 NW2d 353 (1988). In *Hunting,* this Court stated:

> In answering the latter question, the trial court should evaluate the environmental situation before the proposed action and compare it with the probable condition of the environment after. *Rush* [*v Sterner,* 143 Mich App 672; 373 NW2d 183 (1985)], p 679. Among the factors to be considered are: (1) whether the natural resource involved is rare, unique, endangered, or has historical significance; (2) whether the resource is easily replaceable (i.e., by replanting trees or restocking fish); (3) whether the proposed action will have any significant consequential effect on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed); and (4) whether the direct or consequential impact on animals or vegetation will affect a critical number, considering the nature and location of the wildlife affected. Finally, esthetic considerations by themselves do not constitute significant environmental impact. *Rush, supra.* [170 Mich App 233-234.]

Accordingly, we reverse the decision of the trial court, which dismissed plaintiffs' claims on the ground that they lacked standing, and remand for new findings consistent with this opinion. We express no opinion regarding the merits of plaintiffs' claims or the nature of the relief the plaintiffs may obtain under the MEPA or plaintiff McEwen may obtain as a riparian owner. We merely hold that plaintiffs have standing to assert their claims in this action.

Reversed and remanded.

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY v COMMISSIONER OF INSURANCE

Docket No. 130911. Submitted July 14, 1992, at Lansing. Decided August 3, 1992, at 10:15 A.M.

American Community Mutual Insurance Company petitioned the Ingham Circuit Court for judicial review of a decision of the Commissioner of Insurance disapproving American Community's proposed insurance application form. The form had been disapproved by the Insurance Bureau because of a provision that excluded an applicant from coverage if the applicant had been denied insurance previously, an unfair trade practice in violation of the Insurance Code. American Community requested a contested case hearing. The Insurance Bureau filed a motion for a summary decision. A hearing referee denied the motion, finding that the case should proceed to a contested case hearing. The Insurance Bureau appealed to the Commissioner of Insurance, who declined to grant additional oral argument, reversed the referee's decision, and found that a summary decision should have been granted because the proposed form was properly disapproved. The Ingham Circuit Court, Thomas L. Brown, J., vacated the commissioner's order and remanded for a complete evidentiary hearing pursuant to the rules for contested case hearings. The commissioner appealed, and American Community cross appealed.

The Court of Appeals *held:*

The commissioner correctly determined that it would be proper to resolve the case under summary decision rules. The order of the circuit court must be reversed and the decision of the commissioner reinstated.

1. The provision in the insurance form excluding an applicant from coverage if insurance had ever been denied is an unfair trade practice in violation of MCL 500.2027(b); MSA

REFERENCES

Am Jur 2d, Administrative Law §§ 403, 419; Appeal and Error § 292; Insurance §§ 19, 22; Statutes §§ 207, 258-260, 265.

See the Index to Annotations under Administrative Law; Appeal and Error; Hearings; Insurance and Insurance Companies; Statutes.

24.12027(b). The form is not an accurate statement of an applicant's legal right not to be refused insurance solely because of a previous denial of insurance coverage. The commissioner's interpretation and application of MCL 500.2027(b); MSA 24.12027(b) was appropriate and effectuated the Legislature's intent in regulating the insurance industry.

2. American Community failed to establish that there was a genuine issue of material fact in this case in order to avoid a summary decision under the commissioner's rules.

3. MCL 24.272(3); MSA 3.560(172)(3), the section of the Administrative Procedures Act that states that parties in contested cases must be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact, was complied with adequately in this case. All the relevant facts necessary for a final decision were part of the record presented to the commissioner, making further evidentiary hearings and discovery unnecessary. Furthermore, the parties were provided with an opportunity for oral argument before the hearing referee with regard to the motion for summary decision, and the case was decided pursuant to the Insurance Bureau's rules for summary decisions. There were no violations of due process. The circuit court erred in vacating the commissioner's decision and remanding for a contested case hearing.

4. The Legislature intended the thirty-day limit in MCL 500.2236(4); MSA 24.12236(4) to mean that an insurer who intends to challenge a ruling of the commissioner has thirty days to request a hearing, not that the commissioner is required to hold the hearing within the thirty-day period. The initial hearing in this case was timely.

5. The commissioner properly denied the insurer oral argument during review of the hearing referee's decision. It is within the commissioner's discretion to grant oral argument at that stage of the proceedings.

Reversed.

1. ADMINISTRATIVE LAW — CONTESTED CASE HEARINGS.

The section of the Administrative Procedures Act providing that parties in contested cases must be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact does not entitle a party to an evidentiary hearing and complete discovery where material facts are not in dispute and further discovery would not aid in deciding the case (MCL 24.272[3]; MSA 3.560[172][3]).

2. STATUTES — JUDICIAL CONSTRUCTION.

The rule that when statutory language is clear and unambiguous, no further interpretation is required does not apply where, under a literal reading of the statute, a result that is absurd, unjust, and clearly inconsistent with the Legislature's intent would occur.

3. INSURANCE — APPEAL AND ERROR — INSURANCE COMMISSIONER'S RULINGS.

The statutory thirty-day limit given an insurer who intends to challenge a ruling of the Commissioner of Insurance means the insurer has thirty days from the date of the notice of the commissioner's ruling to request a hearing, not that the hearing must be held within thirty days of the notice of the ruling (MCL 500.2236[4]; MSA 24.12236[4]).

4. INSURANCE — ADMINISTRATIVE LAW — INSURANCE COMMISSIONER — ORAL ARGUMENT — HEARING REFEREES.

It is within the discretion of the Commissioner of Insurance to allow oral argument when reviewing a decision of a hearing referee (1983 AACS, R 500.2127[4], R 500.2132, R 500.2133; MCL 24.281[1]; MSA 3.560[181][1]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Harry G. Iwasko, Jr.,* and *William A. Chenoweth,* Assistant Attorneys General, for the Commissioner of Insurance.

Miller, Canfield, Paddock & Stone (by *Kevin J. Moody*), for American Community Mutual Insurance Company.

Before: SAWYER, P.J., and CONNOR and A. G. BEST, II,* JJ.

CONNOR, J. Respondent, the Commissioner of Insurance, appeals as of right from an Ingham Circuit Court order of July 2, 1990, remanding this matter for an evidentiary hearing and vacating the commissioner's order of December 11, 1989, disapproving petitioner's proposed insurance appli-

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

cation form. Petitioner filed a cross appeal. We reverse the order of the circuit court and reinstate the decision of the Commissioner of Insurance.

I

All issues presented by the parties on appeal concern whether, on the facts of this case, petitioner's proposed insurance form violated the provisions of the Insurance Code, MCL 500.100 *et seq.*; MSA 24.1100 *et seq.*, prohibiting unfair trade practices. The Uniform Trade Practices Act, MCL 500.2001 *et seq.*; MSA 24.12001 *et seq.*, a part of the Insurance Code, has as its purpose the regulation of the insurance industry, MCL 500.2002; MSA 24.12002. In general, unfair trade practices, as defined in the Uniform Trade Practices Act, are prohibited. MCL 500.2003(1); MSA 24.12003(1).

Petitioner's proposed insurance form was rejected by the Insurance Bureau's staff because it represented an unfair trade practice in violation of MCL 500.2027; MSA 24.12027. That statute provides in pertinent part as follows:

> Unfair methods of competition and unfair or deceptive acts or practices in the business of insurance include:
>
> * * *
>
> (b) Refusing to insure or refusing to continue to insure an individual or risk solely because the insured or applicant was previously denied insurance coverage by an insurer.

Petitioner's proposed application for short-term major medical health insurance, form 600 A (9/89), provided in part as follows:

> QUESTIONS APPLY TO EACH PERSON PROPOSED FOR INSURANCE.
>
> * * *

> If Any of the Following Questions Are Answered YES, Such Person is Ineligible for This Policy.
>
> * * *
>
> [3.] F. Have you ever been declined for life or health insurance? If yes, who: _____
>
> * * *
>
> I have read this application and represent that the information shown on it is true and complete, to the best of my knowledge and belief. I understand and agree:
>
> * * *
>
> 3. Each person named in question 3A, B, C, D, E, or F is excluded from coverage under this policy.

In a letter ruling sent July 10, 1989, petitioner was notified that, on the basis of MCL 500.2027(b); MSA 24.12027(b), its form was disapproved. On August 9, 1989, petitioner requested a contested case hearing pursuant to MCL 500.2236(4); MSA 24.12236(4),[1] contending the disapproval of the form was improper. By a notice of hearing dated September 5, 1989, a contested case hearing was set for October 30, 1989, before a hearing referee.

On October 2, 1989, the Insurance Bureau's staff filed a motion for a summary decision pursuant to an administrative rule adopted with regard to hearing procedures, 1983 AACS, R 500.2111. Consequently, instead of conducting a contested case hearing on October 30, 1989, the hearing referee scheduled that date for arguments on the motion. Following arguments, the motion was denied. The hearing referee determined that this case should continue to proceed to a contested case hearing as petitioner requested.

The bureau's staff appealed that decision di-

[1] The statute was amended subsequently. All references to § 2236 in this case pertain to the statute in effect on July 10, 1989.

rectly to the Commissioner of Insurance, pursuant to 1983 AACS, R 500.2127(4), requesting the commissioner to both reverse the hearing referee's decision and stay the contested case proceedings. In his decision of December 11, 1989, the commissioner declined to grant additional oral argument on the bases that it was not required and that the parties had had ample opportunity to argue before the hearing referee. The commissioner reversed the hearing referee's decision and found that a summary decision should have been granted because petitioner's proposed form was properly disapproved by the Insurance Bureau's staff.

An appeal was filed in the Ingham Circuit Court, and the court vacated the commissioner's order of December 11, 1989, and remanded the case for a complete evidentiary hearing regarding petitioner's proposed form pursuant to the rules for contested case hearings.

II

On appeal to this Court, the commissioner's decision can be reversed only if that decision

> (a) violated the constitution or a statute; (b) exceeded the commissioner's authority or jurisdiction; (c) was made upon unlawful procedure resulting in material prejudice to a party; (d) was not supported by competent, material or substantial evidence; (e) was arbitrary, capricious, or an abuse of discretion; or (f) was affected by any other substantial or material error of law. MCL 24.306; MSA 3.560(206). [*Auto Club Ins Ass'n v Comm'r of Ins,* 144 Mich App 525, 531; 376 NW2d 150 (1985).]

This same standard of review applied to the circuit court's review of the commissioner's decision. *Id.*

III

The commissioner first argues on appeal that his decision should not have been reversed by the circuit court either on procedural grounds or on the merits. In its cross appeal, petitioner contends that it should have had its form approved by the circuit court as a matter of law.

The Legislature has granted the Commissioner of Insurance the power to approve insurance forms before they are used. MCL 500.2236; MSA 24.12236, in relevant part, confers this power onto the commissioner:

> (1) *No basic insurance policy form or annuity contract form shall be issued* or delivered to any person in this state, and no application form where a written application is required and is to be made a part of such policy or contract . . . shall be issued or delivered to any person in this state, *until* a copy of the form thereof is filed with the department of insurance and *approved by the commissioner as conforming with the requirements of this code and not inconsistent with the law.* Failure of the commissioner to act within 30 days after submittal shall constitute approval. . . .
>
> * * *
>
> (3) Upon written notice to the insurer, *the commissioner may disapprove,* withdraw approval or prohibit the issuance, advertising or delivery of *any form* to any person in this state *if it violates any provisions of this code, or contains inconsistent, ambiguous or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy.* The notice shall specify the objectionable provisions or conditions and state the reasons for the commissioner's decision. If the form is legally in use by the insurer in this state, the notice shall give the effective date of the commissioner's disapproval,

> which shall not be less than 30 days subsequent to the mailing or delivery of such notice to the insurer. *If the form is not legally in use, then disapproval shall be effective forthwith.* [Emphasis added.]

This statute provides the standards to be used by the commissioner in disapproving insurance forms. *Underhill v Safeco Ins Co,* 407 Mich 175, 193-194; 284 NW2d 463 (1979). Form approval is required to protect the public from clauses that mislead, deceive, or unreasonably deny coverage. *Progressive Mutual Ins Co v Taylor,* 35 Mich App 633, 642; 193 NW2d 54 (1971). Using the rules of statutory construction, we also interpret insurance laws liberally for the benefit of policyholders, creditors, and the general public. *Allen v Michigan Property & Casualty Guaranty Ass'n,* 129 Mich App 271, 274; 341 NW2d 500 (1983). Consequently, MCL 500.2236; MSA 24.12236 should be interpreted in light of the purpose of protecting the general public from misleading or inaccurate insurance forms before they are put into use.

After reviewing the arguments of both sides as well as the previous tribunals' decisions, we are of the opinion that the commissioner reached a correct result on the merits. We also find, as discussed in section IV, *infra,* this case was properly resolved under summary decision rules.

The commissioner found that petitioner's form violated MCL 500.2027(b); MSA 24.12027(b) because of the provision that excluded an applicant from coverage under petitioner's policy for short-term health insurance if the applicant answered question 3F affirmatively, admitting the applicant had been previously denied insurance coverage. We believe this clearly was an unfair trade practice in violation of MCL 500.2027(b); MSA

24.12027(b), which prohibits an insurer from refusing to insure an individual solely because the individual previously has been denied insurance coverage.

Petitioner contended that its form did not violate MCL 500.2027(b); MSA 24.12027(b) because petitioner really did not do in practice what its form stated would occur, i.e., flatly deny insurance coverage to anyone who had previously been denied insurance without regard to the validity of that denial. In reality, petitioner would merely require an applicant who answered question 3F affirmatively to complete a more detailed form and go through an underwriting process to determine the risk that individual posed for purposes of health insurance coverage. An applicant who could not qualify for petitioner's short-term health insurance policy but subsequently was determined to be an acceptable risk would be offered comparable coverage.[2] On the basis of this argument, petitioner has maintained that there were questions of fact involved in this case that precluded a summary decision.

While we agree with petitioner that there certainly are questions of fact concerning its actual procedures, we believe those procedures are both irrelevant and immaterial to the determination whether its application form should be approved. The Insurance Bureau's administrative rule, 1983 AACS, R 500.2111(c), requires that a summary decision be granted if there is no genuine issue regarding any *material* fact. What petitioner and its agents or employees may do in practice has no bearing upon whether its insurance application

[2] However, even when it is ultimately determined that the reasons for the prior denial were frivolous or no longer applicable, the "comparable coverage" subsequently offered the applicant would require a higher rate to cover the costs incurred as a result of the additional underwriting and investigation.

form contravenes the law. The commissioner would be derelict in his duties if he approved an insurance form that could be utilized to promulgate unfair trade practices merely because the insurer had not yet utilized the form for the improper purpose. In this case, the form on its face flatly and unambiguously states that an applicant cannot obtain short-term health insurance from petitioner if previously denied health or life insurance, without regard to the reason for the previous denial. We are satisfied that this form could be utilized to deceive or mislead consumers who apply for insurance. The policy behind prior form approval is to avoid such a possibility. No actual violations need be established, it is sufficient that the form is not an accurate statement of an applicant's legal right not to be refused insurance solely because he was previously denied insurance coverage. We believe the commissioner's interpretation and application of MCL 500.2027(b); MSA 24.12027(b) was appropriate and effectuated the Legislature's intent in regulating the insurance industry. See, e.g., *Michigan Life Ins Co v Comm'r of Ins,* 120 Mich App 552, 558-559; 328 NW2d 82 (1982).

IV

As alluded to in section III, *supra,* we believe that, as a procedural question, this case was properly resolved by summary decision.

Among the powers granted to the commissioner by the Legislature is the authority to adopt rules and regulations as the commissioner may deem necessary to effectuate the purposes of the insurance laws of this state. MCL 500.210; MSA 24.1210. Such rules and regulations must be promulgated as provided by the Administrative Proce-

dures Act, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* MCL 500.210; MSA 24.1210.

The rules the commissioner has previously promulgated are contained in 1979 AC, R 500.401 *et seq.* More recently, the commissioner has adopted rules for summary decisions in administrative hearings before the Insurance Bureau, 1983 AACS, R 500.2111:

> Rule 11. A party may move for a summary decision in the party's favor upon any 1 of the following grounds:
>
> * * *
>
> (c) There is no genuine issue as to any material fact and the moving party is therefore entitled to a decision in that party's favor as a matter of law.

This rule is to be interpreted to secure a just, speedy, efficient, and fair determination of the issues, but consistent with the parties' rights and due process. 1983 AACS, R 500.2102.

Rule 11 was apparently modeled after the general court rule regarding summary disposition, MCR 2.116. Consequently, we believe prior interpretations and applications of the general court rules can be referred to for guidance in deciding if this case and others are ripe for summary decision under Rule 11.

In order to be entitled to summary disposition, the moving party must establish that there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. *Lepp v Cheboygan Area Schools,* 190 Mich App 726, 730; 476 NW2d 506 (1991). The nonmoving party must produce an affidavit or other documentary evidence to establish there is a genuine issue of material fact. *Star Steel Supply Co v United States Fidelity & Guaranty Co,* 186 Mich App 475, 480; 465 NW2d 17

(1990); MCR 2.116(G)(4). As we discussed in section III, *supra,* petitioner failed to establish that there was a genuine issue of material fact in this case in order to avoid summary decision under Rule 11. The commissioner found, as a matter of law, that petitioner's insurance form was an unfair trade practice that violated the Insurance Code. The affidavit produced by petitioner regarding its procedures failed to allege any genuine issue of material fact that related to petitioner's form, even after construing this evidence in a light most favorable to petitioner. *Lepp, supra,* p 730.

Petitioner also argues that under MCL 24.272(3); MSA 3.560(172)(3) it was entitled to both an evidentiary hearing and discovery despite the rules for summary decision. That subsection provides:

> The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

Petitioner would have us interpret this subsection to mean that an evidentiary hearing and complete discovery are not only available but mandatory in every case.

If we were to adopt petitioner's interpretation, the summary decision procedural rules would be rendered meaningless because the point of a summary decision is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on issues of law. In *Smith v Lansing School Dist,* 428 Mich 248, 257-259; 406 NW2d 825 (1987), the Supreme Court held that summary disposition rules were appropriate in administrative proceedings and that MCL 24.272(3); MSA 3.560(172)(3) did not mandate an evidentiary hearing when the material facts were not at issue. Moreover, the Court found that an evidentiary

hearing was also not required as a discovery procedure.[3] We believe that MCL 24.272(3); MSA 3.560(172)(3) was adequately complied with in this case because all the relevant facts necessary for a final decision were already part of the record presented to the commissioner, and the commissioner had only to formulate his legal interpretation of the statutory language and apply it to the petitioner's proposed insurance form. The language in the form could not be disputed, and other allegations of disputed facts were superfluous.

A summary decision motion under Rule 11(c) is a legal question that can be defeated by establishing there is a genuine issue of material fact. However, if the nonmoving party cannot raise a material issue of fact, an evidentiary hearing is pointless. Similarly, it would be futile to require that discovery be completed before a final decision can be made if discovery could not aid in deciding the case. While summary disposition decisions should ordinarily not be made before discovery has been completed when there is a dispute regarding material facts,[4] in this case the only possible reason petitioner proffered for conducting discovery was to investigate the commissioner's past procedures and decisions related to the enforcement of MCL 500.2027(b); MSA 24.12027(b). The issue in this case involved whether petitioner's form conformed to the requirements of the applicable statute. We fail to see how discovering the agency's prior policies would have affected the commission-

[3] The Supreme Court reversed in part in *Smith, supra,* p 259, because oral argument was not held with regard to the motion to dismiss and MCL 24.272(3); MSA 3.560(172)(3) gives parties the right to argue both orally and in writing on issues of law and policy.

[4] See *Kassab v Michigan Basic Property Ins Ass'n,* 185 Mich App 206, 216; 460 NW2d 300 (1990), lv gtd 439 Mich 864 (1991) (summary disposition is premature if it is granted before discovery on a disputed issue is completed; however, this rule does not extend to cases where further discovery does not stand a fair chance of uncovering factual support for the opposing side's position).

er's ruling because the law is clear, adequately sets forth the commissioner's authority, and provided petitioner with notice of the proscribed conduct. See *Michigan Life, supra,* p 563; *American Way Service Corp v Comm'r of Ins,* 113 Mich App 423, 436-437; 317 NW2d 870 (1982). Consequently, we do not believe the agency's past enforcement of this law would inject any material issues of fact into this case.

We believe the parties were afforded due process protection, because they were provided with the opportunity for oral argument before the hearing referee with regard to the motion for summary decision and this case was decided pursuant to the agency's rules for summary decisions.

We therefore find the circuit court erred in vacating the commissioner's decision and remanding this case back for a contested case hearing. Petitioner's cross appeal also must fail for these reasons.

V

The commissioner raises a procedural issue on appeal pertaining to petitioner's claim in the circuit court that his decision must be vacated because the petitioner was not afforded a timely hearing as provided by statute.

MCL 500.2236; MSA 24.12236 sets forth the time for a hearing involving disapproval of a proposed form. Initially, the commissioner must make a decision within thirty days after a form is submitted for approval. MCL 500.2236(1); MSA 24.12236(1). For a form that was not previously approved and is not in legal use, a disapproval becomes effective immediately upon notice to the insurer of the commissioner's decision. MCL 500.2236(3); MSA 24.12236(3). If dissatisfied with

the commissioner's decision, subsection 4 of MCL 500.2236; MSA 24.12236 allows an insurer to request a hearing:

> Whenever a form is disapproved, or approval is withdrawn under the provisions of this code, *the insurer shall be entitled upon demand to a hearing before the commissioner or a deputy commissioner within 30 days of notice of disapproval* or of withdrawal of approval; and after the hearing, the commissioner shall make findings of fact and law, and either affirm, modify or withdraw his original order or decision. [Emphasis added.]

Petitioner argued below that, under this section, the thirty-day period begins to run from the date of the notice of disapproval, and that the commissioner is required to hold the hearing within this thirty-day period.

Generally, legislative intent controls statutory construction and it is presumed that intent is expressed in the language chosen. *Gobler v Auto-Owners Ins Co,* 428 Mich 51, 62; 404 NW2d 199 (1987). When the language used is clear and unambiguous, no further interpretation is required. *Id.* However, an exception to this rule exists if, under a literal reading of a statute, a result would occur that was absurd, unjust, and clearly inconsistent with the Legislature's purpose behind the statute. *Id.*

In this case, the date of the notice of disapproval was July 10, 1989. Petitioner's request for a hearing was not made until August 9, 1989, which was the thirtieth day after the notice of disapproval. Under petitioner's interpretation of the thirty-day provision, petitioner was entitled to a contested case hearing on the same day it made the request. This reading of the statute would render an absurd and unjust result and is clearly not what the

Legislature intended. Allowing an insurer the right to a hearing on the same day a hearing is requested would be inconsistent with due process. See *Westland Convalescent Center v Blue Cross & Blue Shield of Michigan,* 414 Mich 247, 268; 324 NW2d 851 (1982) (due process requires notice, an opportunity to be heard as well as to present evidence if necessary, and the chance to respond before final action is taken) (Opinion of FITZGERALD, J.).

We believe the Legislature intended the thirty-day time limit in MCL 500.2236(4); MSA 24.12236(4) to mean only that an insurer who intends to challenge the commissioner's ruling has thirty days to request a hearing. Otherwise, there would be no time limit on when an insurer could request a hearing. This interpretation avoids absurd results and is consistent with other time limits set forth in the statute, for instance, that the commissioner must respond to a request for form approval in thirty days, MCL 500.2236(1); MSA 24.12236(1).

We also believe this interpretation of the statute is consistent with the administrative procedure rules the commissioner has adopted with regard to hearing procedures, 1983 AACS, R 500.2101 *et seq.* Under those rules, an insurer must submit a written petition for a contested case, and within thirty days after receipt of the petition, a hearing must be noticed by the commissioner, or other action taken. See 1983 AACS, R 500.2103, R 500.2104. A contested case is commenced by the issuance of a notice of hearing by the commissioner. 1983 AACS, R 500.2105. Given these procedures adopted by the commissioner, we believe our interpretation of MCL 500.2236(4); MSA 24.12236(4) is in accordance with the commissioner's policy regarding hearing procedures in general. See *Auto Club Ins*

Ass'n v Comm'r of Ins, supra, pp 530-531. Consequently, the initial hearing in this case was timely.

VI

The Commissioner of Insurance also contends that he properly denied petitioner oral argument upon review of the hearing referee's decision. The commissioner reasoned that, because petitioner already had been afforded the opportunity to argue before the hearing referee, MCL 24.272(3); MSA 3.560(172)(3) was adequately complied with, and any additional argument before the commissioner was at his discretion. We agree that additional argument was unnecessary, because the issues before the commissioner were legal questions, for which extensive briefs were filed, and the commissioner had the record from the previous arguments.

Under § 72(3) of the Administrative Procedures Act, MCL 24.272(3); MSA 3.560(172)(3), parties are entitled to present oral and written arguments on issues of law and policy during the contested case hearing phase. See *Smith v Lansing School Dist, supra,* p 259. The parties were afforded the right to argue the legal issues presented by the staff's motion for summary decision before the hearing referee on October 30, 1989.

Petitioner has failed to cite to this Court any authority that grants it the right to oral argument before the commissioner during review of a hearing referee's decision. We believe the relevant authority under both the Administrative Procedures Act and the administrative rules adopted by the commissioner make oral argument at this stage discretionary with the commissioner. MCL 24.281(1); MSA 3.560(181)(1); 1983 AACS, R

500.2127(4), R 500.2132, R 500.2133. Consequently, we decline to affirm the circuit court's decision regarding procedural defects because the commissioner appropriately denied oral argument.

Reversed. The Commissioner of Insurance's decision of December 11, 1989, is reinstated.

KEISER v ALLSTATE INSURANCE COMPANY

Docket No. 130579. Submitted March 11, 1992, at Detroit. Decided August 3, 1992, at 10:20 A.M. Leave to appeal sought.

Dennis Keiser brought an action in the Wayne Circuit Court against Allstate Insurance Company, his insurer, seeking no-fault benefits. A mediation panel issued an evaluation in favor of the plaintiff, which the defendant accepted and the plaintiff rejected. A jury returned a verdict for the plaintiff in an amount greater than the mediation evaluation. The Court of Appeals, WEAVER, P.J., and SULLIVAN and R. A. BENSON, JJ., in an unpublished opinion per curiam, decided March 23, 1989 (Docket No. 101312), reversed, holding that the trial court erred in denying a directed verdict for the defendant or judgment notwithstanding the verdict in the absence of proof that the plaintiff had paid for insurance. The Supreme Court denied leave to appeal. 434 Mich 856 (1990). The trial court, James E. Mies, J., as a sanction for the plaintiff's rejection of the mediation evaluation, awarded the defendant's costs and fees incurred up to the conclusion of trial. The plaintiff appealed.

The Court of Appeals *held:*

MCR 2.403(O)(1) provides that if a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. Before an amendment that took effect after the plaintiff's rejection of the mediation evaluation in this case, the court rule did not define "verdict." Because the purpose of mediation sanctions is to impose the burden of litigation costs upon the party that insists upon trial by rejecting a mediation evaluation, "verdict" must be defined to mean the ultimate verdict after appellate review. In this case, the ultimate verdict was less favorable to the plaintiff than the mediation evaluation, thereby making him liable for mediation sanctions.

Affirmed.

REFERENCES

Am Jur 2d, Appeal and Error §§ 1011, 1017; Costs §§ 14 et seq., 26 et seq.

See the Index to Annotations under Appeal and Error; Costs and Expenses; Costs of Actions.

PRETRIAL PROCEDURE — MEDIATION — APPEAL — SANCTIONS.

A party that rejects a mediation evaluation rendered in its favor, which is accepted by the opposing party, is liable for the opposing party's actual costs as a mediation sanction where, although it obtains a jury verdict more favorable than the evaluation, that verdict is reversed on appeal (MCR 2.403[O]).

Kelman, Loria, Downing, Schneider & Simpson (by *Ann Curry Thompson*), for the plaintiff.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. (by *Richard E. Eaton* and *Nancy J. Bourget*), for the defendant.

Before: MACKENZIE, P.J., and WAHLS and BRENNAN, JJ.

WAHLS, J. Plaintiff appeals as of right from an order of the Wayne Circuit Court, which entered a directed verdict in favor of defendant and assessed mediation sanctions against plaintiff pursuant to MCR 2.403(O). On appeal, plaintiff contests the assessment of mediation sanctions.

The facts of this case are straightforward and fairly common, so much so that we are surprised that the issue raised by plaintiff has not been previously addressed in a published opinion of an appellate court of this state. Plaintiff brought an action for no-fault insurance benefits against defendant in February 1983. Mediation took place in October 1985 and resulted in an evaluation of $12,000 for plaintiff. Plaintiff rejected the award; defendant accepted. The case proceeded to trial in August 1986 where, after the trial court denied defendant's motion for a directed verdict, a jury awarded plaintiff an amount far in excess of the mediation evaluation. Defendant appealed to this

Court, which held that the trial court erred when it denied defendant's motion for a directed verdict and motion for judgment notwithstanding the verdict. Plaintiff's pleadings and proofs were insufficient to show that he had paid his insurance premiums. *Keiser v Allstate Ins Co,* unpublished opinion per curiam of the Court of Appeals, decided March 23, 1989 (Docket No. 101312). We reversed the denial of defendant's motion for a directed verdict. Our Supreme Court denied plaintiff leave to appeal. 434 Mich 856 (1990).

Defendant subsequently moved for an assessment of mediation sanctions in the trial court. Plaintiff protested, arguing that he had received a verdict from the jury that was more favorable than the mediation evaluation, and that the final outcome of a case reached by "appellate activity" was irrelevant with respect to MCR 2.403(O). The trial court disagreed and ordered plaintiff to pay defendant's costs and fees. Significantly, the order expressly stated that defendant's recovery was limited to costs and fees incurred during and before trial. No costs or fees were awarded for any appellate or posttrial activity. The only issue on appeal is whether, after a party rejects a mediation evaluation and, following a trial, a verdict more favorable to the rejecting party is returned, MCR 2.403(O) allows the imposition of sanctions on the rejecting party following appellate reversal of the verdict where the final result is no longer favorable to that party. We hold that it does.

At the time mediation occurred, MCR 2.403(O)(1) provided:

> If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is

more favorable to the rejecting party than the mediation evaluation.[1]

The purpose of mediation sanctions is to impose the burden of litigation costs upon the party who insists upon trial by rejecting a mediation award. *Taylor v Anesthesia Associates of Muskegon, PC,* 179 Mich App 384, 386; 445 NW2d 525 (1989); *Wayne-Oakland Bank v Brown Valley Farms, Inc,* 170 Mich App 16, 21; 428 NW2d 13 (1988). The former version of MCR 2.403(O) has been interpreted by panels of this Court as requiring two conditions before sanctions are triggered: (1) the party to be sanctioned rejected the mediation evaluation; and (2) "the action proceeds to trial." *Herrera v Levine,* 176 Mich App 350, 359; 439 NW2d 378 (1989); *Wayne-Oakland Bank, supra; O D Silverstein, MD, PC v Services, Inc,* 165 Mich App 355, 360; 418 NW2d 461 (1987). "The additional language that a 'party must pay the opposing party's costs unless the verdict is more favorable to the rejecting party' should be interpreted in such a manner that it is the rejecting party that must obtain a verdict more favorable to avoid sanctions." *Herrera, supra.* Thus, in the present case, sanctions have been triggered by plaintiff's rejection of the mediation award and the occurrence of a trial. The question is whether plaintiff received a verdict more favorable than the evaluation within the meaning of MCR 2.403(O) so as to avoid the imposition of sanctions. The former version of the rule did not define the word "verdict," although the present version does.[2]

[1] MCR 2.403(O) was later amended, effective December 1, 1987. The amendment provides an express definition of the word "verdict" for the purpose of the rule. We will consider the preamendment version of MCR 2.403(O). *Mehelas v Wayne Co Community College,* 176 Mich App 809, 811, n 1; 440 NW2d 117 (1989).

[2] (2) For the purpose of this rule, "verdict" includes,

(a) a jury verdict,

Plaintiff claims that the question is expressly answered by *Clute v General Accident Assurance Co of Canada,* 177 Mich App 411; 442 NW2d 689 (1989). *Clute* concerned, in part, an award of attorney fees as a mediation sanction pursuant to former Wayne Circuit Court Rule 403, a rule substantially similar to MCR 2.403(O). The defendant had been granted a directed verdict by the trial court, which was affirmed by this Court. The Supreme Court subsequently reversed and remanded the case for entry of summary judgment in favor of the plaintiff. The trial court then awarded attorney fees to the plaintiff pursuant to WCCR 403. On appeal from that order to this Court, a panel of this Court vacated the award on the ground that the original directed verdict was more favorable to the defendant than the mediation evaluation.

> We refuse plaintiff's invitation to extend the Wayne Circuit mediation rule as it then existed to judgments entered *pursuant to motions prior to trial or posttrial appeals.* See *Silverstein v Services, Inc,* 165 Mich App 355; 418 NW2d 461 (1987); *American Casualty Co v Costello,* 174 Mich App 1, 13; 435 NW2d 760 (1989); *Mehelas v Wayne Co Community College,* 176 Mich App 809; 440 NW2d 117 (1989). [*Clute* at 423; emphasis added.]

The procedural history of *Clute* is somewhat similar to that of the present case. However, while the panel's position regarding pretrial motions was amply supported by existing case law, *Silverstein,*

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion filed after mediation.

Unlike the former version of MCR 2.403(O), the present version allows the imposition of sanctions following a pretrial grant of summary disposition. *Johnson v State Farm Mutual Automobile Ins Co,* 183 Mich App 752, 767-769; 455 NW2d 420 (1990). We see no meaningful distinction between the past and present versions of MCR 2.403(O) that would be pertinent to the question before us.

supra; Mehelas, supra,[3] its statement regarding judgments entered pursuant to posttrial appeals was not. *American Casualty Co, supra,* held only that costs and expenses incurred *on appeal* could not be recovered through resort to MCR 2.403(O). *American Casualty Co, supra* at 13. See also *Giannetti Bros Construction Co v City of Pontiac,* 175 Mich App 442, 447; 438 NW2d 313 (1989). Rather, sanctions for appellate expenses are expressly set forth in MCR 7.216(C), which does not provide for mediation sanctions. Thus, the result in *Clute* was not supported by the authority upon which it rested.

We believe that the fact that the instant plaintiff's jury verdict was set aside by this Court is relevant to the imposition of sanctions pursuant to MCR 2.403(O). At the time defendant moved for mediation sanctions, there was but one verdict in this case, a directed verdict in favor of defendant. Because the directed verdict was not more favorable to plaintiff than the mediation evaluation, plaintiff is liable for mediation sanctions. Plaintiff's construction of the rule would frustrate its purpose of imposing the burden of litigation costs on the party that rejects the mediation evaluation and elects to go to trial by allowing him to escape sanctions and burden defendant because of an error of law on the part of the trial court. We conclude that it is the ultimate verdict that the

[3] Defendant argues that *Clute* may be distinguished from the present case because the Supreme Court directed that an order of summary judgment be entered for the plaintiff, and summary judgment is not a "verdict" within the meaning of WCCR 403 or MCR 2.403(O) according to established case law. Under the former version of MCR 2.403(O), sanctions were not available upon summary judgment or disposition because the case had not proceeded to trial. Despite the form of judgment ordered by the Supreme Court in *Clute,* the litigation had "proceed[ed] to trial," thereby triggering sanctions. *Herrera, supra.*

parties are left with after appellate review is complete that should be measured against the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O).[4]

Affirmed.

MACKENZIE, P.J. I concur in the result only.

[4] A result similar to that reached today occurred in *McAtee v Guthrie*, 182 Mich App 215; 451 NW2d 551 (1989). There is no indication in *McAtee*, however, that the issue raised by plaintiff in this case was before that panel.

HOUSE SPEAKER v GOVERNOR

MICHIGAN UNITED CONSERVATION CLUBS v GOVERNOR

MICHIGAN ENVIRONMENTAL PROTECTION FOUNDATION v GOVERNOR

Docket Nos. 148677, 148678, 148679. Submitted May 6, 1992, at Lansing. Decided August 3, 1992, at 10:25 A.M. Leave to appeal granted, 441 Mich —.

Lewis N. Dodak, Speaker of the House of Representatives, and other members of the Legislature brought an action in the Ingham Circuit Court against Governor John M. Engler and Director of the Department of Natural Resources Roland Harmes, seeking an injunction against the implementation of Executive Order 1991-31. The order sought to reorganize the Department of Natural Resources by: abolishing the existing department and creating a new department, eliminating many boards and commissions that are part of the existing department, transferring many of the powers and functions presently exercised by the Natural Resources Commission to the director of the new department, and giving the Governor the power to appoint the chairperson of the commission. The Michigan United Conservation Clubs and some of its members and the Michigan Environmental Protection Foundation and some of its members filed similar actions. The Foundation also sought an injunction against the implementation of Executive Order 1991-33, which sought to create an Environmental Science Board that would advise the Governor on environmental issues. The actions were consolidated by the trial court, Peter D. Houk, J., which granted summary disposition for the plaintiffs and enjoined implementation of Executive Order 1991-31. The court did not address implementation of Executive Order 1991-33, and denied the Foundation's request for an award of costs and attorney fees. The defendants appealed. The Foundation cross appealed.

The Court of Appeals *held:*

REFERENCES

Am Jur 2d, Constitutional Law §§ 303, 305; Governor §§ 4, 5.

See the Index to Annotations under Constitutional Law; Government; Governors.

The trial court properly held that the plaintiffs had standing to sue and were entitled to an injunction prohibiting implementation of Executive Order 1991-31. Because creation of the Environmental Science Board by Executive Order 1991-33 clearly contemplated the creation of the new Department of Natural Resources by Executive Order 1991-31, the preclusion of the implementation of 1991-31 also precludes the implementation of 1991-33. The trial court properly refused to award attorney fees and did not abuse its discretion in refusing to award costs.

1. Speaker Dodak and the other legislator plaintiffs, by challenging Executive Order 1991-31, have asserted substantial interests as legislators that differ in kind from the citizenry at large and thus provide them with the necessary standing to bring this action. The Michigan United Conservation Clubs and the Michigan Environmental Protection Foundation and their members have standing to sue both as taxpayers affected by the executive orders and as nonprofit organizations incorporated to protect the rights of the members.

2. The questions raised are not political questions but rather are justiciable questions of constitutional interpretation.

3. The Governor is not immune from a suit challenging on constitutional grounds his authority to reorganize the executive branch of government.

4. The Governor lacks both constitutional and statutory authority to implement Executive Order 1991-31. The constitutional provision relating to the reorganization of the executive branch, when read in conjunction with the provisions of the schedule and temporary provisions that were adopted in conjunction with and to provide transition to the 1963 Constitution, evidence a clear intent that the Governor's constitutional power to reorganize the executive branch is not self-executing and is subject to the provisions of the Executive Organization Act.

5. Because violation of the Open Meetings Act, the Freedom of Information Act, or the federal civil rights act was neither adequately pleaded nor proved, the trial court properly denied the request for attorney fees. Further, the court did not abuse its discretion by refusing to tax other costs, a public question being involved.

Affirmed.

REILLY, J., dissenting in part, stated that the majority correctly decided the questions of standing, immunity from suit, attorney fees, and costs, but erred in finding the executive

orders invalid. The constitution clearly grants to the Governor the power to undertake the type of reorganization contemplated in the executive orders, with implementation being subject only to disapproval by a majority vote in each chamber of the Legislature.

1. CONSTITUTIONAL LAW — GOVERNOR — EXECUTIVE ORDERS — IMMUNITY FROM SUIT.

   The Governor is not immune in an action seeking declaratory and injunctive relief on the basis that the Governor exceeded constitutional authority in attempting to reorganize the executive branch by executive order (Const 1963, art 5, § 2).

2. CONSTITUTIONAL LAW — GOVERNOR — EXECUTIVE REORGANIZATION — PRINCIPAL DEPARTMENTS.

   Any legislative power that the Governor possesses must be expressly granted by the Michigan Constitution; although the Governor has express power to reallocate functions and reorganize executive departments, no provision of the constitution expressly grants the Governor the power to create a new principal department (Const 1963, art 3, § 2).

3. CONSTITUTIONAL LAW — GOVERNOR — EXECUTIVE REORGANIZATION — TRANSFER OF FUNCTION.

   The Governor, in exercising reorganization powers under the constitution, must use the transfer mechanisms established in the Executive Organization Act; although that act allows the Governor to abolish existing boards and commissions and to transfer their functions to a principal department, it does not grant the Governor authority to abolish the functions of boards, commissions, or principal departments (Const 1963, art 5, § 2; MCL 16.103[c]; MSA 3.29[3][c]).

4. CONSTITUTIONAL LAW — GOVERNOR — EXECUTIVE REORGANIZATION — NATURAL RESOURCES COMMISSION.

   The Governor has neither constitutional nor statutory authority to transfer from the members of the Natural Resources Commission to the Governor the power to select the chairperson of the commission (Const 1963, art 5, § 2; MCL 16.354; MSA 3.29[254]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Susan I. Leffler, Mary Kay Scullion,* and *Raymond O. Howd,* Assistant Attorneys General, for plaintiffs in Docket No. 148677.

M. Carol Bambery, and *Tom Downs,* of Counsel, for plaintiffs in Docket No. 148678.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Deborah Anne Devine* and *Thomas C. Nelson,* Assistant Attorneys General, for the defendant.

Peter W. Steketee, and *Karen Kendrick-Hands,* and *Marcia M. McBrien,* for plaintiff in Docket No. 148679.

Amici Curiae:

Dykema Gossett (by *Richard D. McLellan, William J. Perrone,* and *Lori M. Silsbury*), and *Dickinson, Wright, Moon, Van Dusen & Freeman* (by *Peter H. Ellsworth* and *William C. Bertrand, Jr.*), for George Romney.

Helveston, Waldman, O'Hare, Helveston, Hodges & Barnes, P.C. (by *Theodore Sachs* and *Eileen Nowikowski*), and *Jordan Rossen, Connye Y. Harper,* and *Richard W. McHugh,* International Union, UAW, for International Union, UAW, Michigan State AFL-CIO, Ken Morris, Jesse A. Damesworth, Robert Kellerman, and William Tuinstra.

Before: WAHLS, P.J., and MARILYN KELLY and REILLY, JJ.

MARILYN KELLY, J.

BACKGROUND AND ISSUES ON APPEAL

Defendants appeal as of right from an order of the Ingham Circuit Court which granted summary disposition to plaintiffs and enjoined defendants

from implementing Executive Order 1991-31. They argue on appeal that plaintiffs lacked standing and that the claims are nonjusticiable political questions. They assert that the Governor is absolutely immune from suit and that his executive order was a valid exercise of authority granted him by the Michigan Constitution. Plaintiffs Michigan Environmental Protection Foundation et al. (MEPF) cross appeal, arguing that the trial court erred in denying them attorney fees and costs and in failing to find a second executive order, EO 1991-33, unconstitutional.

EO 1991-31 alters the state's role with respect to its natural resources by expressly abolishing the existing Department of Natural Resources (DNR) and creating a new one. The trial court characterized the order as an attempt to accomplish the most comprehensive reorganization of state government since the implementation of the 1963 constitution. A second order, EO 1991-33, creates an Environmental Science Board to advise the Governor on environmental issues.

The circuit court ruled that all the plaintiffs had standing. It then found that EO 1991-31 violated the separation of powers clause of the Michigan Constitution. Const 1963, art 3, § 2. In addition, it determined that, in issuing EO 1991-31, the Governor exceeded his authority under both the Michigan Constitution and the Executive Organization Act, MCL 16.101 *et seq.*; MSA 3.29(1) *et seq.* It found the Governor lacked authority to appoint the head of the Natural Resources Commission (NRC). It ruled he was not empowered to abolish commissions and boards whose functions include the holding of public hearings. The court concluded by ruling that EO 1991-31 was not violative of the Open Meetings Act, MCL 15.261 *et seq.*; MSA 4.1800(11) *et seq.*, Freedom of Information

Act, MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*, Revised Judicature Act, MCL 600.101 *et seq.*; MSA 27A.101 *et seq.*, or substantive due process. The court refused to award attorney fees on the basis that a public question was involved.[1]

We affirm the actions of the circuit court.

THE PLAINTIFFS HAVE STANDING

Defendants argue initially that plaintiffs lacked standing to bring this action. The requirement of standing ensures that only those who have a substantial interest in a dispute will be allowed to come into court to be heard. *House Speaker v State Administrative Bd,* 190 Mich App 260, 265; 475 NW2d 440 (1991), lv gtd 439 Mich 1013 (1992), citing *Highland Recreation Defense Foundation v Natural Resources Comm,* 180 Mich App 324, 328; 446 NW2d 895 (1989). Plaintiffs must show both a substantial interest in the dispute and that they will be detrimentally affected by the litigation in a manner different than the citizenry at large. *House Speaker,* 266, citing *Muskegon Building & Construction Trades v Muskegon Area Intermediate School Dist,* 130 Mich App 420, 423-424; 343 NW2d 579 (1983).

In *House Speaker,* certain legislators brought suit claiming that the state administrative board's transfer of funds within various state departments exceeded the board's statutory authority and violated the state constitution. They asserted that the intertransfers could be accomplished only by the state budget director, subject to review by legislative appropriations committees. Alternatively, they argued that, if the Management and Budget Act,

[1] Defendants are not appealing from the trial court's ruling that the Governor may not delegate power to persons not authorized by statute to exercise it. They are also not appealing from the ruling that the Governor may not create new levels of adjudicatory hearings.

MCL 18.1101 *et seq.*; MSA 3.516(101) *et seq.*, authorized the transfers, the act was unconstitutional, as it delegated legislative power to the executive branch of state government. This Court determined that, under either theory, the legislators, members of the appropriations committees or their appointors, clearly asserted substantial interests different in kind from those of the citizenry at large. *Id.*, 266-267.

As in *House Speaker,* the legislator plaintiffs here argue that the Governor violated the separation of powers clause by exceeding the scope of legislative power which Michigan's constitution grants him. Const 1963, art 5, § 2. The legislator plaintiffs are: Lewis Dodak, Speaker of the Michigan House of Representatives; Thomas Alley, Chair of the House Committee on Conservation, Recreation and the Environment; Tracey Yokich, member of the House Committee on Conservation, Recreation and the Environment; John D. Cherry, the Senate Minority Floor Leader; and Arthur Miller, the Senate Minority Leader.

The Michigan Legislature is constitutionally mandated to protect the natural resources of this state from pollution, impairment and destruction. The executive order challenged eliminates a substantial number of boards and commissions which the Legislature created for the purpose of protecting the environment. See Const 1963, art 4, § 52. We agree with the trial court that the legislator plaintiffs clearly have asserted substantial interests as legislators different in kind from those of the citizenry at large. *House Speaker,* 267.

Plaintiffs Michigan United Conservation Clubs et al. (MUCC) and MEPF also unquestionably had standing to bring this action and to obtain the relief sought and granted. The trial court ruled that their standing was based on their status as

taxpayers. MCR 2.201(B)(4). MUCC and MEPF are nonprofit corporations, organized for civic, protective or improvement purposes. They and five or more of their members, who own property assessed for direct taxation by the county in which they reside, filed this action. MCR 2.201(B)(4)(a) and (b). In concert with the legislator plaintiffs, these plaintiffs alleged that the executive order exceeded the Governor's authority and that any expenditure of funds by a new DNR would be illegal. MCR 2.201(B)(4).

The standing of MUCC and MEPF may be based, also, on their status as nonprofit corporations which were incorporated to establish and protect the rights and interests of their members. See *Muskegon Building Trades,* 428. Individual plaintiffs are members of MUCC or MEPF and either are also members of, or regularly attend and speak at meetings of, boards and commissions to be abolished under EO 1991-31. These plaintiffs clearly have a substantial interest different in kind from the citizenry at large. See *Muskegon Building Trades, supra.*

NONJUSTICIABLE POLITICAL QUESTIONS ARE NOT INVOLVED

Defendants next assert that the trial court should have used its "equitable discretion" and dismissed this case, because the matters at issue are nonjusticiable political questions. They point out that the doctrine of equitable discretion should be applied, since the Legislature may: 1) elect to reject the two contested executive orders by mustering a majority vote of both the House and Senate; 2) overturn the orders through subsequent legislation; and 3) reduce the orders' effectiveness through the appropriations process.

The federal doctrine of equitable discretion has been applied "where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute." *House Speaker,* 270, citing *Dornan v United States Secretary of Defense,* 271 US App DC 195, 196; 851 F2d 450 (1988). Here, the legislator plaintiffs seek a judicial determination that the Governor unlawfully usurped authority which the constitution granted to the Legislature. They argue that they could not obtain "substantial relief" if the Legislature rejected, overturned or reduced the effectiveness of EO 1991-31 and EO 1991-33; no legislative action could prevent the Governor from once again exceeding his authority in the guise of yet another executive reorganization. We agree and decline to apply the federal doctrine of equitable discretion to this case.

The trial court was correct in determining that this case does not present nonjusticiable political questions. The decision whether the constitution committed a matter to another branch of government, or whether the actions of a branch exceeded the authority committed, is a matter of constitutional interpretation. As such, the decision is the responsibility of the courts as the ultimate interpreter of the constitution. See *Baker v Carr,* 369 US 186, 211; 82 S Ct 691; 7 L Ed 2d 663 (1962).

THE GOVERNOR IS NOT IMMUNE FROM SUIT

Defendants argue that the Governor is absolutely immune from suit in his exercise of legislative authority. They point out that state legislators and the Legislature itself enjoy a broad-based immunity. They are immune from suit for their enactment of legislation and other acts committed within their sphere of legislative activity. *77th*

Dist Judge v Michigan, 175 Mich App 681, 697; 438 NW2d 333 (1989), citing *Supreme Court of Virginia v Consumers Union of the United States,* 446 US 719, 731-734; 100 S Ct 1967; 64 L Ed 2d 641 (1980); *Tenney v Brandhove,* 341 US 367; 71 S Ct 783; 95 L Ed 1019 (1951).

In reviewing the complaint in this case, we see that plaintiffs asserted that the Governor acted outside the authority granted to him by the constitution to reorganize the executive branch. In essence, they alleged that the Governor acted outside his sphere of legislative authority. See *77th Dist Judge, supra.* Even legislators are not immune from suit when acting outside their "sphere" of authority. *Id.*

Plaintiffs have sought a declaratory judgment and an injunction, equitable relief, not money damages. Actions seeking only equitable relief do not normally fall within the purview of governmental immunity. *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139, 152, n 5; 422 NW2d 205 (1988). We conclude, based on the allegations in the complaint and the type of relief requested, that the Governor is not immune from liability. See *77th Dist Judge, supra; Hadfield, supra.*

THE GOVERNOR LACKED AUTHORITY TO CREATE A NEW DNR

The heart of defendants' appeal is that EO 1991-31 represents a valid exercise of authority granted to the Governor by the Michigan Constitution. Const 1963, art 5, § 2. Defendants argue that the Governor had the authority to: reorganize the DNR; transfer functions to the director of the new DNR; appoint the chairperson of the Natural Resources Commission; and abolish commissions whose function it is to hold public hearings.

The Governor derives authority to reorganize the DNR from Const 1963, art 5, § 2, which provides:

> All executive and administrative offices, agencies and instrumentalities of the executive branch of state government and their respective functions, powers and duties, except for the office of governor and lieutenant governor and the governing bodies of institutions of higher education provided for in this constitution, shall be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes.
>
> Subsequent to the initial allocation, the governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature. Thereafter the legislature shall have 60 calendar days of a regular session, or a full regular session if of shorter duration, to disapprove each executive order. Unless disapproved in both houses by a resolution concurred in by a majority of the members elected to and serving in each house, each order shall become effective at a date thereafter to be designated by the governor.

Under the first paragraph of § 2, the Legislature had two years to complete its allocation of functions, powers and duties to the principal departments. Const 1963, Schedule and Temporary Provisions, § 12. Had it failed to complete it within that period, the Governor had specific authority to act in its stead. *Id.* The Legislature did in fact make the allocation in a timely fashion by passing the Executive Organization Act (EOA). The act created nineteen principal departments of state govern-

ment, one of them being the DNR. MCL 16.104; MSA 3.29(4).

In ruling that the Governor exceeded his authority in creating a new Department of Natural Resources, the circuit court found he violated the separation of powers doctrine. Const 1963, art 3, § 2. This doctrine provides that no person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly permitted.

The Supreme Court has laid down two rules of construction which we follow when interpreting the state constitution:

> First, the interpretation given the constitution should be "the sense most obvious to the common understanding"; the one which "reasonable minds, the great mass of people themselves, would give it." Secondly, the "circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished may be considered." [*Soap & Detergent Ass'n v Natural Resources Comm,* 415 Mich 728, 745; 330 NW2d 346 (1982); citations omitted.]

Legislative implementations of constitutional provisions are entitled to weight but do not control our rulings. *Durant v Dep't of Education (On Remand),* 129 Mich App 517, 522; 342 NW2d 591 (1983), modified 424 Mich 364; 381 NW2d 662 (1985).

Former Michigan Governor George Romney argues in his brief amicus curiae that the second paragraph of § 2 is self-executing. As a result, he concludes, the Executive Organization Act should not be considered in our interpretation of this constitutional provision.

The Michigan Supreme Court has specifically found that the provisions of § 2 are not self-execut-

ing. *McDonald v Schnipke,* 380 Mich 14, 26; 155 NW2d 169 (1968). In *Soap & Detergent,* the Court made distinctions between the first and second paragraphs of § 2, but did not differentiate with respect to the question of self-execution. Therefore, we find that the Executive Organization Act is the enabling act of both paragraphs of § 2. See *Soap & Detergent,* 748.

Defendants argue that the holding in *Soap & Detergent* should control the outcome of this case. We disagree. In *Soap & Detergent,* the Governor had transferred the rulemaking power of the Water Resources Commission by executive order to the DNR and its department head, the NRC. The plaintiffs challenged the NRC's authority to promulgate a rule limiting phosphate content in detergents.

In interpreting § 2, the Court recognized that the intent of the constitutional convention was to grant the Governor full legislative power to promote the most efficient possible executive department. *Id.,* 747. The Court indicated that an executive order transferring rulemaking power from one executive agency to another is a change in the organization of the executive branch of government. It ruled that the executive order was within the Governor's power to reorganize the executive branch under the Michigan Constitution.

Soap & Detergent is clearly distinguishable from this case. There, the Governor was merely transferring functions. Here, the Governor was eliminating functions and creating an entirely new DNR. Furthermore, the Court in *Soap & Detergent* recognized that § 2 does not vest unlimited legislative power in the executive branch. *Id.,* 752. In fact, the area of executive exercise of legislative power is limited and specific. *Id.* Although the constitution granted the Governor authority to

allocate functions of new principal departments, that authority took effect only if the Legislature failed to make its allocation within two years. Const 1963, Schedule and Temporary Provisions, § 12.

Any legislative power that the Governor possesses must be expressly granted to him by the constitution. Const 1963, art 3, § 2. Although the Governor has the express power to reallocate functions and reorganize executive departments, no provision of the Michigan Constitution expressly authorizes him to create a new principal department. Our interpretion of art 5, § 2 is supported by the Executive Organization Act, constitutional debates and the "common understanding" of the provision. We agree with the trial court that, in creating a new DNR, the Governor violated the separation of powers doctrine and exceeded his authority under Const 1963, art 5, § 2. Therefore, we find EO 1991-31 unconstitutional.

THE GOVERNOR MAY NOT ABOLISH THE FUNCTION OF COMMISSIONS TO HOLD PUBLIC HEARINGS

Defendants allege that the trial court erred in concluding that the Governor could not abolish eighteen boards and commissions which provide citizens the opportunity for public hearings.

The Governor, in exercising his reorganization powers under the constitution, uses the transfer mechanisms established under the Executive Organization Act. See *Soap & Detergent,* 748-750. One mechanism, called a Type III transfer, allows the Governor to abolish existing boards or commissions and to assign their functions to the principal departments. MCL 16.103(c); MSA 3.29(3)(c). However, although he is empowered to transfer, nowhere is the Governor granted authority to abolish

functions of the boards and commissions or of a principal department.

The boards and commissions which EO 1991-31 would abolish allow citizens to voice their opinions through public hearings. After public input, some of the boards and commissions are statutorily mandated to make recommendations and reports to the Legislature, the Governor, the DNR or a combination of them. See MCL 323.2; MSA 3.522; MCL 320.504(a); MSA 13.244(a). Some commissions have the authority to make substantial decisions or issue permits. MCL 336.15; MSA 14.58(5).[2]

Defendants argue that the executive order merely transfers the functions of these boards and commissions to the head of the new DNR. However, defendants have failed to set forth any credible evidence establishing that the functions would be preserved under the new DNR. They ask, as a leap of faith, that we believe the new DNR director and staff would have time and resources to perform the functions of eighteen boards and commissions. We cannot but believe, instead, that the Governor's actions have eliminated the hearing function. Therefore, we agree with the trial court that the Governor was without authority to abolish the boards and commissions as he did.

TRANSFERS MUST BE SUPERVISED BY THE PRINCIPAL DEPARTMENT HEAD

Defendants argue that the trial court erred in finding that governmental functions transferred must be supervised by the head of the department receiving them.

Powers granted under Const 1963, art 5, § 2 must be exercised pursuant to the Executive Orga-

[2] We found MUCC's brief, which contained an outline of the abolished boards and commissions, particularly helpful.

nization Act, since the constitutional provision is not self-executing. *McDonald, supra.* Although statutes cannot supersede the constitution, constitutional provisions should not be read in isolation. See generally *Soap & Detergent, supra.*

The Executive Organization Act provides that, in Type II and III transfers, the head of a principal department must direct and supervise the administration of the transferred department's functions. MCL 16.107(b); MSA 3.29(7)(b). The Governor's EO 1991-31 retains the NRC as the head of the new DNR. However, it calls for the director of the new DNR, not the NRC, to supervise and direct the functions transferred to the new DNR.

In ruling on this question, the circuit court provided this apt analysis:

> The Order purports to continue the Natural Resources Commission as the head of the New Department. However, the Order eviscerates the Natural Resources Commission by placing the New Department under the executive direction of the Director, and the New Department and the Natural Resources Commission under the supervision of the Governor. This changes the entire nature of the Commission.

We agree with the trial court that the Governor exceeded his constitutional and statutory authority by delegating to the director of the new DNR the authority to supervise and administer the transferred functions.

THE GOVERNOR HAS NO AUTHORITY TO APPOINT THE CHAIR OF THE NRC

Defendants assert that, contrary to the circuit court's ruling, the Governor does have authority to appoint the chair of the Natural Resources Com-

mission. Statutory authority provides that the chair of the NRC is selected by the commission's own members. MCL 16.354; MSA 3.29(254). Nothing in either Const 1963, art 5, § 2 or the EOA gives the Governor power to transfer from the commission's members to himself the selection of the chair. Moreover, the EOA mandates that any statutory authority transferred under it must be transferred to the head of a principal department, which in this case is the NRC. MCL 16.103(b); MSA 3.29(3)(b). Therefore, the Governor lacks authority to appoint the chair of the NRC.

EO 1991-33 CANNOT BE IMPLEMENTED

Cross appellant MEPF argues that the trial court erred in failing to determine whether EO 1991-33 is illegal and unconstitutional. The order creates the Michigan Environmental Science Board, an independent entity within the Department of Management and Budget. It authorizes the board to advise the Governor, the NRC, the new DNR and other agencies regarding the protection and management of the natural resources in the state.

In deciding whether EO 1991-33 is unconstitutional, we must first determine whether the order can be implemented without EO 1991-31. The Michigan Supreme Court has declared that the same rules of construction are used for executive orders as for statutes. *Soap & Detergent,* 757. The Court drew the analogy, because executive orders are quasi-legislative in nature. *Id.* Therefore, we conclude that the statutory doctrine of in pari materia may be applied to executive orders.

The doctrine of in pari materia may be applied when statutes have a common purpose or relate to the same person, thing, or class of persons or things. *People v Rogers,* 438 Mich 602, 608; 475

NW2d 717 (1991), citing *Palmer v State Land Office Bd,* 304 Mich 628, 636-637; 8 NW2d 664 (1943). All statutes which have the same subject or general purpose should be read together as one law. *Rogers, supra.*

In this case, EO 1991-31 and EO 1991-33 have a common purpose: to make major changes in the existing structure of the DNR. The executive orders propose to eliminate the current DNR and to replace it with an agency and an advisory board controlled by the Governor. Based on the similar purpose of these orders, we conclude that it is appropriate to read them in pari materia.

EO 1991-33 provides that the board is to report its findings to the new DNR and to advise it on issues affecting the management of the state's natural resources. Without EO 1991-31, there is no new DNR to which to report. The plain language of EO 1991-33 permits no other conclusion than that it contemplated and assumed the implementation of EO 1991-31. We have declared EO 1991-31 unconstitutional. Therefore, we make the specific finding that EO 1991-33 cannot be implemented.

THE TRIAL COURT PROPERLY REFUSED TO AWARD ATTORNEY FEES AND COSTS

The MEPF argues also that the trial court erred in failing to award it attorney fees and costs. This plaintiff sought attorney fees under the Open Meetings Act, Freedom of Information Act and the Civil Rights Act. MCL 15.271(4); MSA 4.1800(21)(4); MCL 15.240(4); MSA 4.1801(10)(4); 42 USC 1988. The trial court found that EO 1991-31 did not violate the Open Meetings Act (OMA) or the Freedom of Information Act (FOIA). Plaintiff MEPF does not appeal these rulings. The court did not decide whether the order violated the Civil Rights

Act. It denied attorney fees and costs on the basis that a public question was involved.

Attorney fees are generally not recoverable as an element of costs unless expressly allowed by statute or court rule. *DeWald v Isola (After Remand),* 188 Mich App 697, 699; 470 NW2d 505 (1991), citing *Matras v Amoco Oil Co,* 424 Mich 675, 695; 385 NW2d 586 (1986). If a court finds violations of either the OMA or the FOIA, it must award attorney fees. See MCL 15.271(4); MSA 4.1800(21)(4); MCL 15.240(4); MSA 4.1801(10)(4). A court has discretion whether to award attorney fees under the Civil Rights Act. 42 USC 1988.

In this case, the court did not decide whether EO 1991-31 violates the Civil Rights Act. However, it is clear that the civil rights claim was not instrumental in obtaining the permanent injunction against the implementation of EO 1991-31. See *Dorfman v Dep't of Transportation,* 155 Mich App 57, 62-63; 399 NW2d 437 (1986). Therefore, MEPF was not entitled to attorney fees under that claim. *Id.* Further, the court specifically found that EO 1991-31 did not violate the OMA or the FOIA. Since MEPF did not appeal these rulings, we must conclude that it is not entitled to attorney fees; it did not prevail on the claims under which it sought them.

MEPF claimed in its complaint that EO 1991-33 also violated the OMA and the FOIA. There is no need for us to review this issue in light of our disposition of EO 1991-31 and the relationship between the two executive orders. However, review of it is necessary in order for us to determine whether MEPF was entitled to attorney fees.

The FOIA allows for the recovery of attorney fees when the person filing the complaint asserts a right to inspect or receive a copy of a public record. MCL 15.240(4); MSA 4.1801(10)(4). From

the plain language of this section, it is clear that the action filed by MEPF is not the type that the Legislature contemplated to be appropriate for attorney fees. Therefore, we conclude that MEPF is not entitled to attorney fees under this act.

MEPF also asserts a right to attorney fees under the OMA. MCL 15.271(4); MSA 4.1800(21)(4) provides:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

The purpose of the OMA is to promote openness and accountability in government. It is to be interpreted broadly to accomplish this goal. *Booth Newspapers, Inc v University of Michigan Bd of Regents,* 192 Mich App 574, 580; 481 NW2d 778 (1992), citing *Booth Newspapers, Inc v Wyoming City Council,* 168 Mich App 459, 466; 425 NW2d 695 (1988); *Detroit News, Inc v Detroit,* 185 Mich App 296, 300; 460 NW2d 312 (1990). The OMA provides that all decisions and meetings of a public body must be open to the public. MCL 15.263; MSA 4.1800(13).

MEPF claims that EO 1991-33 was enacted to avoid the OMA and the FOIA. It argues that the Science Board is "probably not a public body" as defined under the statute. MCL 15.262(a); MSA 4.1800(12)(a). However, neither the OMA nor case law supports a ruling that the mere formation of an advisory board through an executive order would violate the OMA. Therefore, we decline to award attorney fees to MEPF under this act.

Although MEPF is not entitled to attorney fees, it

may be entitled to costs. MEPF was not a prevailing party on its claims under which it sought attorney fees. However, it was a prevailing party on its permanent injunction claim. See MCR 2.625(B)(2).

The decision whether to award costs was a discretionary one and was in the hands of the trial judge. See MCR 2.625(A)(1) and (B)(2). Michigan courts frequently refuse to award costs when cases involve public questions. *American Aggregates Corp v Highland Twp,* 151 Mich App 37, 54; 390 Mich 192 (1986), citing *Ettinger v Avon Twp,* 64 Mich App 529; 236 NW2d 129 (1975); *Turkish v City of Warren,* 61 Mich App 435; 232 NW2d 732 (1975), modified on other grounds 406 Mich 137; 277 NW2d 475 (1979). That was the basis for refusal of costs in this case. We are unwilling to reverse the judge's exercise of discretion on this issue.

Affirmed.

WAHLS, P.J., concurred.

REILLY, J. *(concurring in part and dissenting in part).* I agree with the majority's reasoning and its conclusion that all the plaintiffs have standing, that the issues presented should be reviewed by this Court, that the Governor is not immune from an action seeking declaratory and injunctive relief when the plaintiffs claim that the Governor is acting outside his constitutional authority, that the Michigan Environmental Protection Foundation is not entitled to relief, and that no costs or attorney fees should be allowed.

However, I respectfully dissent from the majority's conclusion that the Governor violated the separation of powers doctrine and exceeded his authority under Const 1963, art 5, § 2 when he

issued Executive Order 1991-31, by which he created a new Department of Natural Resources in place of the old one, transferred functions among the executive units, and abolished various boards and commissions in the process, and Executive Order 1991-33, by which he created an advisory science board.

My basic disagreement with the majority relates to its interpretation of Const 1963, art 5, § 2 and its view that the enabling legislation, the Executive Organization Act, MCL 16.101 *et seq.*; MSA 3.29(1) *et seq.*, curtails the legislative power of reorganization granted to the Governor under the second paragraph of § 2.

I

The majority has determined that the Executive Organization Act not only gave effect to the first paragraph of § 2, but also applies to the second paragraph of § 2 as well, and effectively supersedes the reorganization powers granted to the Governor under the second paragraph of § 2. To support this position, the majority relies on statements by our Supreme Court in *Soap & Detergent Ass'n v Natural Resources Comm,* 415 Mich 728, 745; 330 NW2d 346 (1982), and *McDonald v Schnipke,* 380 Mich 14, 26, 155 NW2d 169 (1968), which recognized that art 5, § 2 was not self-executing. While I agree that neither the first paragraph nor the second paragraph of § 2 is self-executing, an examination of the rulings in those cases shows there is no basis for the majority's position that the enactment of the Executive Organization Act by the Legislature foreclosed any action by the Governor under the second paragraph of § 2.

In *McDonald,* as in *Soap,* the Supreme Court considered the meaning of the phrase "shall be

allocated by law" in the first paragraph of § 2. The Court ruled in both cases that that language was not self-executing, but required implementation by the Legislature within two years of adoption of the constitution, or by the Governor within the third year following adoption if the Legislature did not act, pursuant to the directive of Const 1963, Schedule and Temporary Provisions, § 12. *McDonald, supra* at 23; *Soap, supra* at 742. *McDonald* never discussed the language in the second paragraph of § 2, which relates to reorganization by the Governor after the initial allocation.

On the other hand, *Soap* discussed the Governor's authority under the second paragraph of § 2 in depth:

> Subsequent to this initial reorganization, the Governor was empowered to make further changes through executive orders which could be disapproved by the Legislature. If not disapproved, the executive orders would have the effect of law. [*Soap, supra* at 742.]

In *Soap,* the Court considered whether the second paragraph of § 2 allowed the Governor to transfer rule-making power from one agency to another. The Court applied its two rules of constitutional construction. First, the Court considered "the sense most obvious to the common understanding," the one that "reasonable minds, the great mass of people themselves, would give it." *Id.* at 745.

> We have no doubt that the plain reading of the constitution would indicate to the common understanding that the term "function" inherently includes the accompanying "power" necessary to give life and substance to the "function." [*Id.* at 747-748.]

Next, the Court considered the second rule of

construction, "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished." *Id.* at 745. After examining the record of the Constitutional Convention, the Court determined:

> [T]he convention's purpose . . . was to grant the Governor *full legislative power* to promote the most efficient possible executive department. Recognition of the broad powers of reorganization granted is found in the provisions for legislative veto of the Governor's reorganization executive order, not in a diminution of power granted to the Governor. [Emphasis added. *Id.* at 747.]

Finally, the Court considered the Legislature's enabling act, the Executive Organization Act, for further support for the logic of the Court's interpretation. "Clearly, the Legislature considered 'powers' subsumed within the broader category of 'functions.' " *Id.* at 750. The Court noted:

> No specific considerations are provided in the Executive Organization Act for the art 5, § 2, activities—the subsequent reallocations by the Governor. Yet in *McDonald* this Court held that the act was the implementing legislation for the constitutional section. The fair implication of this interpretation is that the Governor, *in exercising his powers,* should use the transfer mechanism established in the Executive Organization Act, *i.e.,* the provisions regarding Type I through Type III transfers and the relationship between the departments and the transferred agencies.
>
> This is in fact the mechanism and terminology that has been used by the Governor in his executive orders. . . . Thus, rule-making power has repeatedly been transferred by the Governor, as a "function," within the scope of art 5, § 2. [Emphasis added. *Id.* at 750-751.]

The majority apparently believes that through the quoted language the Supreme Court held that the Executive Organization Act limits the reorganization authority granted to the Governor under the second paragraph of § 2. I disagree.

In making the quoted statement in *Soap,* the Court was considering only the transfer of rule-making powers from one agency to another. As noted by the majority, the only issue before the Court was whether the word "functions" in the second paragraph of § 2 would include the word "powers" in the first paragraph of § 2. The Court was not considering an extensive reorganization plan such as the one sought by the Governor under Executive Order 1991-31.

The language of the Court giving deference to the Executive Organization Act simply recognized that when transferring rule-making powers, as the Governor was authorized to do, the Governor should follow the procedure for transferring functions as prescribed in the Executive Organization Act. The Court did not hold, as the majority has, that the Governor's constitutional legislative powers to reorganize the executive branch may be limited or denied by an act of the Legislature.

To the contrary, the Court in *Soap* fully considered the doctrine of separation of powers and concluded that where, as in art 5, § 2, the constitution explicitly grants powers of one branch to another, there can be no separation of powers problem.

> Article 5, § 2, does not by any means vest "all" or any considerable legislative power in the executive. While it is true that *broad legislative power has been delegated to the Governor to effectuate executive reorganization,* this power is clearly limited. Three limitations must be emphasized. First,

> the area of executive exercise of legislative power is very limited and specific. Second, the executive branch is not the sole possessor of this power; the Legislature has *concurrent power* to transfer functions and powers of the executive agencies. Third, the Legislature is specifically granted the power to veto executive reorganization orders before they become law. [Emphasis added. *Soap, supra* at 752.]

Because the Governor has concurrent legislative power with the Legislature under the second paragraph of § 2 to "make changes in the organization of the executive branch or the assignment of functions among its units," the Governor may accomplish by executive order in that limited area whatever the Legislature might accomplish by the enactment of a statute. Each has veto power over the other.

Legislative power is the authority to make, alter, amend, and repeal laws. *Harsha v Detroit,* 261 Mich 586, 590; 246 NW 849 (1933). State agencies created by legislative acts derive all their powers from those legislative acts, and those powers are at all times subject to the control of the Legislature. Such powers, also, in the absence of any constitutional regulation forbidding it, may be enlarged or diminished, extended or curtailed, or withdrawn altogether, as the Legislature may determine. *Id.* at 591.

The power to amend and repeal legislation, as well as to enact it, is vested in the Legislature, and the Legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the repeal or amendment of statutes; nor may one Legislature restrict or limit the power of its successors. *Atlas v Wayne Co Bd of Auditors,* 281 Mich 596, 599; 275 NW 507 (1937); see also *Frederick v Presque Isle Co Circuit Judge,* 439 Mich 1, 14; 476 NW2d 142 (1991). One

Legislature cannot enact irrepealable legislation or limit or restrict its own power, or the power of its successors, with respect to the repeal of statutes; and an act of one Legislature is not binding on, and does not tie the hands of, future Legislatures. *Atlas, supra* at 599.

Further, the Legislature's power is subject to the limitations and restrictions imposed by the state constitution. A statute that violates provisions of the state constitution will be declared unconstitutional. *Oakland Co Taxpayers' League v Oakland Co Supervisors,* 355 Mich 305, 323; 94 NW2d 875 (1959).

It follows, then, that the Legislature may not limit the broad concurrent legislative power of the Governor in this limited area. Therefore, although the Executive Organization Act was authorized under the first paragraph of § 2, it cannot limit the Governor's legislative powers to reorganize the executive branch "subsequent to the initial allocation" under the second paragraph of § 2. Having been granted concurrent legislative power to make changes in the organization of the executive branch under the second paragraph of § 2, the Governor may, by means of an executive order, make, alter, amend, and repeal laws that determine the organization or structure of the executive branch or of any of its units. The Governor is given the concurrent legislative power to determine which person or unit within his executive branch shall perform designated functions and to shift responsibility for performing the functions to that person or unit. The Legislature's remedy, if it disapproves of the proposals in the executive order, is to exercise its veto powers. If the Legislature fails to disapprove, the executive order becomes the law.

Accordingly, the Governor has the power to

amend or repeal any part of the Executive Organization Act that determines the organization or structure of the executive branch, or any of its units, including the Department of Natural Resources. Further, pursuant to his concurrent legislative power in this limited area, the Governor may effectively amend or repeal by executive order any laws that created the various boards and commissions in the Department of Natural Resources. Because the Department of Natural Resources and the boards and commissions were entities created by statute and were part of the executive organization, they were subject to organizational or structural change by executive order under the second paragraph of § 2. They could be abolished and their functions, including the appointment of the chair of the Department of Natural Resources and the holding of public hearings, could be transferred by executive order.

There is no indication from the language of the executive order, or from the record before us, that the statutorily created authority and functions of these boards and commissions are abolished or eliminated. The plain language of the general provisions of the executive order provides, in pertinent part:

> All the statutory authority, powers, duties, functions and responsibilities of the Commission of Natural Resources and of the Department of Natural Resources . . . and of the director of the Department of Natural Resources and of the agencies, boards and commissions contained therein, including the function of budget, procurement and management-related function, and the functions set out more particularly in Part II below relating to natural resources management and the functions set out more particularly in Part III below relating to environmental protection are hereby

> transferred to the director of a new Michigan Department of Natural Resources . . . .

The transfer of the "statutory authority powers, duties, functions and responsibilities" of these boards and commissions to the director of the new Michigan Department of Natural Resources is a change in departmental organization or structure authorized by the second paragraph of § 2. Although certain boards and commissions have been abolished, their functions remain intact.[1]

The fact that no Governor has ever attempted such an extensive reorganization by executive order in the past is not a basis for declaring that the power does not exist. Constitutional and statutory authority does not wither by disuse. See *Washtenaw Co Road Comm'rs v Public Service Comm,* 349 Mich 663; 85 NW2d 134 (1957).

II

Applying the two rules of construction used in *Soap* to the present case, it is apparent that the

[1] The majority has taken the position that public hearings have been effectively abolished by Executive Order 1991-31 because of the inability of the new Department of Natural Resources director and his staff to handle the work load. The issue whether any statutorily created right to a public hearing has been abolished because of lack of resources was not considered or decided by the lower court and should not be resolved by this Court on the record presented.

However, as was previously noted, pursuant to the express language of Executive Order 1991-31, all the statutory authority, powers, duties, functions, and responsibilities of the various boards and commissions have been transferred to the director of the new Department of Natural Resources. Any statutory duty or responsibility to hold a public hearing would be transferred under the language of Executive Order 1991-31.

Furthermore, there can be no "right" to a public hearing where the requirement of the hearing is established by rules or regulations of an individual agency because the agency has the discretion to amend, restrict, modify, or suspend its own rules. *International Union of Civil Rights & Social Service Employees v Michigan Civil Service Comm,* 57 Mich App 526, 530; 226 NW2d 550 (1975).

Governor was given broad legislative power in the limited area of executive branch reorganization. Although the majority has cited these two rules, it has not applied them.

A

COMMON UNDERSTANDING RULE

A principal rule of constitutional construction is that the people who ratified the Constitution have accepted the words employed in the sense most obvious to the common understanding. *Council No 11, AFSCME v Civil Service Comm,* 408 Mich 385, 405; 292 NW2d 442 (1980).

The meaning of the words of the second paragraph of Const 1963, art 5, § 2, when read in context with the first paragraph of that section, is plain and obvious.

> Subsequent to the initial allocation, the governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature. Thereafter the legislature shall have 60 calendar days of a regular session, or a full regular session if of shorter duration, to disapprove each executive order. Unless disapproved in both houses by a resolution concurred in by a majority of the members elected to and serving in each house, each order shall become effective on a date thereafter to be designated by the governor.

The phrase "subsequent to the initial allocation" means at any time *after* or *following* the legislative or gubernatorial allocation of the functions, powers, and duties of the then existing 123 execu-

tive and administrative offices, agencies, and instrumentalities to "not more than 20 principal departments" as mandated by the first paragraph of § 2, and directed by Const 1963, Schedule and Temporary Provisions, § 12.

The meaning of the following language,

> "the governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature"

is clear and unambiguous. The Governor is given authority to make any change in the organization of the executive branch *or* in the assignment of functions, if the Governor believes the change is necessary for efficient administration. No restriction is imposed. The change may be minor, or it may be sweeping; it may be made even if it requires a change in the law. The "change" may be to add, alter, or delete, as long as it does not involve the creation of more than twenty departments, the limitation imposed by the first paragraph of § 2, or the abolition of a statutorily created function.[2] In this limited area of structuring the executive branch, the Governor stands in the same shoes as the Legislature.

Further, the constitutional grant of authority to the Legislature to promote natural resources under Const 1963, art 4, § 52 is also clear and unam-

[2] *The Random House College Dictionary, Revised Edition,* defines change as:

> 1. to make different the form, nature, content, future course, etc., of (something). 2. to transform or convert. . . . 3. to substitute another or others for; exchange for something else, usually of the same kind.

biguous.[3] The provision imposes a responsibility on the Legislature to preserve our natural resources. The language does not state that the organization and administration of an executive agency, having the responsibility for effectuating legislation protecting our natural resources, is placed under the sole control of the Legislature. Therefore, it is not a limitation on the Governor's concurrent legislative authority to reorganize the executive branch, including the Department of Natural Resources.

B

CIRCUMSTANCES SURROUNDING THE ADOPTION

This "common sense" interpretation is borne out by the application of the "circumstances surrounding the adoption and the purpose to be accomplished" rule of interpretation.

The Constitutional Convention record is replete with discussions of the extent of executive reorganization power given to the Governor after the first three years following the adoption of the constitution has passed, and the initial allocation has been made.[4]

The legislative delegates on the committee, as

[3] Art 4, § 52 provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

[4] 2 Official Record, Constitutional Convention 1961, pp 1842-1843, 1846-1851 sets forth the discussion regarding Mr. Bentley's proposed amendment of the second paragraph of § 2 that would have allowed legislative veto of an executive order by a majority of either house, rather than both houses:

> *Mr. Bentley:* . . . [W]e now come to the provision of the proposal of the executive branch committee dealing with the question of reorganization after the third year following the adoption of the constitution. As it was explained in the previous 2 paragraphs, we have provided for the initial period of 2

years for the legislature to reorganize. We have provided for the governor to act by executive order for the third year. The paragraph which is now under discussion contemplates reorganization actions *after* the third year.

. . . In this connection, Mr. Chairman, I would like to say that we do have, as Chairman Martin outlined, of course, I believe, a 4 year old statute [1958 PA 125] which does provide for the reorganization as carried out by the statute at the present time. . . .

Writing a reorganization plan into the constitution, Mr. Chairman, is admittedly somewhat of a novelty. *I believe there is only one other state at the present time that does have a provision in its state constitution for executive reorganization and legislative approval or disapproval. Nevertheless, the members of the committee on executive branch, I believe unanimously, agreed on the concept of writing it into the constitution as a forward looking step permitting more effective and more efficient reorganization over future years of our state government.* . . . We did differ as to whether it should be difficult or easy, relatively speaking, for the legislature to approve or disapprove those executive reorganization plans as submitted by the governor.

* * *

Mr. Pollock:

* * *

It seems to me, Mr. Chairman, that the problem is one of administrative organization and here, it seems to me, the governor is in a much better position to know what is needed within his own administrative structure than anybody else. I think certainly the legislature should have the power to veto any proposal that is not in the public interest, but I do not think that this should be made easy, and I think it is not too difficult by requiring the majority of both houses. Therefore, I am opposed to the Bentley amendment.

* * *

Mr. Hutchinson: . . . Instead of giving to the legislature the lawmaking function in these reorganization plans, and to the governor a veto, you are giving to the governor, in effect, the power to make the law and you are according to the legislature a veto.

* * *

I call your attention to this again: this is a tremendous political power, this power to reorganize. And I am not willing to agree, offhand, that just because the governor thinks that a particular reorganization is in the best interests of the government, that that necessarily makes it so. I think that the governor also can make some mistakes or be misled, or be influenced by groups or be influenced by considerations, which in the minds of other people, might not be in the best interests

of the state. Consequently, when you subject the governor's reorganization to the test of veto by either house, you are simply applying in a reverse sort of arrangement, the same principle which we have always had.

. . . I think that it would be extremely bad public policy to, in effect, permit the governor to reorganize the executive branch in any way that he saw fit without any real effective legislative veto, and then, at the same time, expect the legislature to come forth and produce the money with which to carry on, perhaps, increased programs and different emphasis upon programs brought about because, as I said yesterday, I can well imagine that a governor may be dissatisfied with the emphasis or the way that a particular program is being carried on in one department and think that he can get a better treatment of it somewhere else, it can be expanded somewhere else; perhaps the head of another department is more friendly with the governor and they can expand the program to the political benefit of the governor, and the legislature will be expected to provide the money, and at the same time you have effectively denied the legislature any positive or effective role in asserting what it thinks to be the best interests of the state of Michigan. After all, the legislature, too, is elected by the people, is answerable to the people, not statewide but by constituency, and for those reasons, I think that the Bentley amendment is a good one, that at least it won't be as bad a system as it would be if you, in effect, denied to the legislature the power of veto.

Mr. Pollock:

* * *

I think the history of administrative reorganizations and the failure to have administrative reorganization clearly points to the excellence of this device, and the only point at issue is whether you want it to be very easy for the legislature to knock down a proposal which, as Mr. Hutchinson—I think, with a great deal of exaggeration—indicates that it is a fearful exercise of power by the governor, it is the kind of administrative authority which any general manager of a business would insist upon having, if he couldn't rearrange his own administrative structure to promote the efficiency of the organization, he wouldn't want to be general manager. It is, of course, a matter of power; but the question of power, and calling it a traditional way of doing things doesn't make a bad institution good. And the fact simply is, as I see it, either you want to promote flexibility in administrative structure, and thus to permit the abolition of useless agencies, the combining of others, or you want to make it so difficult that, in fact, it is not going to be accomplished.

It is true that we have a statute in Michigan, one of the few states that have such a statute, permitting this power by the governor. But again, the experience of our legislature in the exercise of their veto over the governor's power gives nobody any encouragement that it will ever get anywhere if it remains

as easy as that, and that is why the committee, in its wisdom, I think, provided that it would take a veto by both houses . . . .

* * *

Mr. Binkowski:

* * *

But I am not criticizing the legislature for not acting in executive reorganization. However, I think basically the reason for having this form is to place the responsibility with the executive, who should know all about these administrative agencies, and to allow him to initiate the programs, and therefore present them to the legislature. I think the reason for executive reorganization is simply economy and efficiency in government.

Now, I think all of you who have been in government know that we have a certain number of bureaucrats. We have people who build empires. They don't want these empires consolidated or eliminated. If you are going to go ahead, as we have done, and give the executive the responsibility of lowering appropriations, then I think you have to give him the responsibility in this area of his executive departments, so that he can eliminate or consolidate in the best interest of the state. . . .

A third point I would like to call to your attention is that the legislature does appropriate funds, so that if they are unhappy with any extension of power, so called power by the governor, if the governor should create a new agency which they are dissatisfied with, they can effectively reduce the effectiveness of that organization. For these reasons, I oppose the amendment.

* * *

Mr. Durst:

* * *

. . . What I am really saying here is, we should at least consider the desirability of allowing the governor as free a hand as possible to keep this thing in order. . . .

* * *

Mr. Wanger: Mr. Chairman, members of the committee, it is quite clear that efficiency and not politics should be the guide and the motivation behind these executive reorganizations. It is also clear that we need to have some kind of a check upon them, as the committee in its proposal recommends when it allows the legislature to have any voice in this regard.

Now, it seems to me that the merit of the proposed amendment is this: you see, under the proposal as set forth in the committee report, if the governor or his party have strong control of either house, or perhaps just some of the committees thereof, he could ram through a politically motivated reorganization.

It is true that there are reasons on the other side, but let us remember this very simple fact, that reorganization can be

used for political purposes and the temptation may always be there, to some extent, to make such use of reorganization. I, therefore, suggest that, as a practical matter of political management and efficient management, considered side by side together, as they must, it would be best to adopt this amendment to get around that difficulty.

* * *

Mr. DeVries: . . . I think a more important reason for not getting administrative reorganization in the legislature is in the tendency to trade among legislative supporters for various agencies, and to prevent their favorite agencies from being consolidated or reorganized with others. And this always effectively blocks reorganization, particularly when it is easy to get a majority vote. Therefore, I would urge the defeat of the Bentley amendment. It seems to me if you try to depend on the legislature to accomplish rational administrative reorganization you are never going to get it done.

* * *

Mr. Hutchinson:

* * *

. . . I have been told by the members of the governor's committee working on these reorganization plans that, as time goes on, and they attempt to get into more major fields, their task becomes infinitely greater and more difficult, and the likelihood of achievement is much harder. That isn't because people are objecting to economy or anything of the sort. At the base of this thing is what I said before, a fear—and a genuine fear—of the concentration of political power. If you are going to concentrate—and it is a tremendous political power, even though Dr. Pollock thinks I exaggerate; I do not believe I do, I feel very strongly about this, and I want to, as best I can, convey to the delegates here the seriousness of vesting in a single man, who is the head of a political party, this tremendous political power to completely reorganize his executive branch of government to suit his political purposes. I am not here to say that that would customarily happen, but I can envision that it might. It was such kinds of concentration of political power in the hands of people overseas in Europe which completely destroyed liberty. I don't think that the people of Michigan would let it go that far, knowingly, but I would hate to see you write into our state constitution a system where constitutionally such strange things could be brought about under the guise of governmental reorganization.

* * *

Mr. Brake: . . . It isn't a matter of theory with me. I can remember, in the senate, when the governor proposed and the legislature followed him in the complete abolition of a department and its reorganization for the one and only purpose of getting members of one party off the board and putting on the

members of the other. I wouldn't go along, and for a time I was regarded as an outlaw in my party, and I think Mr. Chase will remember that I was the only member of the party that wouldn't stand for it. Oh, it is used, it has been used and it will be used again.

* * *

Mr. Martin: Judge Leibrand, this involves 2 processes. The preceding 2 paragraphs, as has been commented on by some of the delegates, deal with this problem of initial reorganization. After that 3 year period is completed, in which first the legislature, and then if the legislature does not do it, the governor has a chance to work out a general reorganization plan, then you have, into the future and for the future, a continuing reorganization proposal which is different from that as to this initial reorganization, and this continuing reorganization authority, which rests both in the governor and the legislature. After this initial reorganization is completed, then the governor may propose plans and the legislature is given the veto power on those plans as is provided here. And it is that later process of reorganization proposals coming from time to time, from year to year or 10 years to 10 years, that we are dealing with here. . . .

* * *

Mr. Leibrand: What I am trying to get at, Mr. Martin is this: could each successive or subsequent governor reorganize these departments according to his personal interests or the interests of his party, and would these successive reorganizations stand unless vetoed by a majority of the members elect of both houses of the legislature? Would that go on into the future every time we have a new governor?

Mr. Martin: Certainly, any governor can propose a plan of reorganization subject to legislative veto.

Mr. Leibrand: By a majority of the members of both houses?

Mr. Martin: That is correct.

* * *

Mr. Madar:

* * *

Frankly, I say this: that I can't see why you would want to take out of the hands of the executive branch the setting up of the administration of your government. Businessmen operate or try to operate a good businesslike administration. Politicians, on the other hand, want these things in the hands of the legislators where they can manipulate and maneuver. I say this: for the sake of the people of the state of Michigan, give the administrative end the right to do this and if it isn't done properly by the governors, believe me, those people who elected them will also throw them out. Let's get good business administration in the state of Michigan. [Emphasis added.]

well as others, argued that the language now contained in the second paragraph of § 2 gave the Governor powers that were too broad, that the Governor was being placed in the same position as the Legislature and could change the laws relating to executive reorganization for political purposes, that the Governor already had sufficient power to submit reorganization plans to the Legislature under the now-repealed 1958 PA 125, MCL 16.1 *et seq.*; MSA 3.28(1) *et seq.*, and that each incoming Governor could entirely revamp the executive branch. In spite of all these concerns, which were well known and understood by the delegates, the constitutional language in the second paragraph of § 2 giving the Governor concurrent legislative power was adopted.

C

PRESERVATION OF VALIDITY OF ALL CONSTITUTIONAL PROVISIONS

A third rule of constitutional construction has been recognized by our Supreme Court. It provides "that wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does." *Council No 11, supra* at 405. If we hold that the Governor may not reorganize the executive branch after a reorganization has been implemented by the Legislature pursuant to the first paragraph of § 2, we will invalidate the second paragraph of § 2. The preferred interpretation, then, would be to recognize that the Governor's reorganization powers exist after the initial allocation.

Having applied the rules of construction, it is apparent that the second paragraph of § 2 grants

The Bentley amendment was subsequently defeated, and the language of the second paragraph of § 2 was adopted.

the Governor concurrent power with the Legislature to completely reorganize the executive branch, not merely to transfer functions from one agency to another. The Governor's power with respect to reorganization of the executive branch, subject to veto by the Legislature, is akin to that of a chief executive officer of a corporation whose actions are subject to the veto of a board of directors. See *Soap, supra* at 744. Because the Governor's legislative powers to reorganize and to transfer functions are concurrent with the legislative powers given to the Legislature in this area, the Governor has the same authority to make changes in the law as does the Legislature, even to amend the Executive Organization Act.

III

Appellees also argue that the power "to make changes in the organization of the executive branch" does not permit the Governor to abolish the Department of Natural Resources because that phrase in the second paragraph of § 2 was derived from the now-repealed 1958 PA 125, MCL 16.5; MSA 3.28(5), which limited the areas in the organization of the executive branch in which the Governor might propose reorganization. I disagree.

First, although Executive Order 1991-31 states that the existing Department of Natural Resources is abolished, it also, at the same time, establishes a new Department of Natural Resources with a new and different organizational structure to take the place of the one abolished. To argue that the Department of Natural Resources has been abolished by Executive Order 1991-31 when, by that same order, a Department of Natural Resources clearly exists, although with a different structure, places form over substance.

Secondly, the constitutional authority granted the Governor under the second paragraph of § 2 is broader than that granted pursuant to 1958 PA 125. Section 5 of that act provided in pertinent part:

> Reorganization plans shall relate only to abolishing or combining agencies in the executive branch of the state government or to changing the organization thereof or the assignment of functions thereto, and each such plan shall contain, where appropriate the provisions necessary to effect:
> . . . .

Appellees contend that because the phrase "[r]eorganization plans shall relate only to abolishing or combining agencies in the executive branch" was not included in the second paragraph of § 2, the Governor does not have the authority to abolish a department, but may only "change the organization thereof." This argument must fail because the phrase "change the organization thereof" refers to the previous language, "agencies in the executive branch." The language in the second paragraph of § 2 is not so limited. It permits the Governor to "change the organization *of the executive branch*," not just an agency within the executive branch. See the discussion by constitutional delegates relating to extensive grants of power set forth in footnote 4, *supra.*

IV

Finally, the Michigan Environmental Protection Foundation argues that Executive Order 1991-33 is invalid because it is an unconstitutional delegation of rule-making power to a board created by the Governor. However, it is clear from the language of the order that the science board is designed to

act in an advisory capacity only. Executive Order 1991-33 provides that the science board may, at the request of the Governor, review proposed or existing environmental standards, procedures for establishing certain permit or operating license conditions, and staff recommendations for denial or approval of permit and license applications. The board is only authorized to make findings and recommendations to the director of the new Department of Natural Resources, who is responsible for making the final determination. Thus, the role of the board is one that is advisory in nature. See, e.g., *Lucas v Wayne Co Bd of Road Comm'rs,* 131 Mich App 642, 662; 348 NW2d 660 (1984). The Governor has not delegated decision-making powers to the science board, because the ultimate decisions rest with the department director.

V

I conclude, then, that the Governor's proposal in Executive Order 1991-31 to restructure the Department of Natural Resources by abolishing the old department and creating a new one, to reassign the functions of the Natural Resources Commission, to appoint and assign responsibilities to the director, to abolish various boards and commissions, and to transfer their functions is a constitutionally valid exercise of the Governor's legislative authority and does not violate the separation of powers doctrine. The Legislature's remedy, if it does not approve, is to exercise its veto power.

I would reverse the rulings of the trial court that the Governor exceeded his constitutional and statutory authority, that Executive Order 1991-31 was in violation of the separation of powers clause of the Michigan Constitution, that the Governor lacked authority to appoint the new head of the

Natural Resources Commission, and that the Governor was not empowered to abolish commissions and boards whose functions include the holding of public hearings. Further, contrary to the majority, I would uphold the validity of Executive Order 1991-33, creating an investigatory and advisory board.

ALVIN v SIMPSON

Docket No. 134067. Submitted July 14, 1992, at Detroit. Decided August 4, 1992, at 9:00 A.M. Leave to appeal sought.

Laura Alvin, for herself and as next friend of Bradley J. Alvin, and Robert Alvin brought an action in the Wayne Circuit Court against William and Loretta Simpson, alleging strict liability pursuant to MCL 287.351; MSA 12.544 for injuries inflicted by the defendants' dog on Bradley Alvin. The court, James R. Chylinski, J., granted summary disposition for the defendants, ruling that Bradley Alvin was a trespasser on the defendants' premises when bitten by their dog and was not protected by the statute. The plaintiffs appealed.

The Court of Appeals *held:*

MCL 287.351; MSA 12.544 provides in part that the owner of a dog that bites a person, without provocation, while the person lawfully is on private property, including the property of the owner of the dog, is liable for any damages suffered by the person, regardless of the dog's viciousness or the owner's knowledge of its viciousness. The statute further provides that a person lawfully is on the property of the owner of the dog if the person is a licensee or invitee of the owner.

The trial court, in granting summary disposition for the defendants, correctly determined that, given the absence of express or implied permission by the defendants for Bradley Alvin's entry onto their premises, there was no genuine dispute with respect to the fact that Bradley Alvin was a trespasser on the defendants' premises when bitten by their dog.

Affirmed.

Thurswell, Chayet & Weiner (by *Barry J. Goodman* and *Tammy J. Reiss*), for the plaintiffs.

Romain, Donofrio, Kuck & Egerer, P.C. (by *John C. Brennan*), for the defendants.

Before: FITZGERALD, P.J., and HOOD and J. C. KINGSLEY,* JJ.

PER CURIAM. In this dog-bite case, plaintiffs appeal as of right a circuit court order granting defendants' motion for summary disposition of plaintiffs' strict liability claim. We affirm.

Plaintiffs' complaint alleged that ten-year-old Bradley Alvin was lawfully on defendants' premises when he was bitten by defendants' dog. Bradley was playing with friends at the Hoilman residence, which is next door to defendants' residence. Defendants' house had a back yard that was enclosed by a fence. At the request of one of his playmates, who did not live at the Hoilman residence, Bradley climbed the fence and entered defendants' back yard in order to retrieve a ball. As Bradley climbed to the top of the fence on his way back to the Hoilman residence, defendants' dog bit him on the leg.

Plaintiffs sued defendants, alleging causes of action under Michigan's dog-bite statute, MCL 287.351; MSA 12.544, and Michigan's leash law, MCL 287.262; MSA 12.512. The latter claim was dismissed by stipulation of the parties. Defendants filed a motion for summary disposition under MCR 2.116(C)(10), claiming that there was no question of material fact regarding Bradley's status as a trespasser at the time he was bitten. Plaintiffs argued that Bradley was an implied licensee. The trial court concluded as a matter of law that Bradley was a trespasser and granted defendants' motion.

The statute involved, MCL 287.351; MSA 12.544, as amended by 1988 PA 142, provides:

> (1) If a dog bites a person, without provocation while the person is on public property, or lawfully

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

on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

(2) A person is lawfully on the private property of the owner of the dog within the meaning of this act if the person is on the owner's property in the performance of any duty imposed upon him or her by the laws of this state or by the laws or postal regulations of the United States, or if the person is on the owner's property as an invitee or licensee of the person lawfully in possession of the property unless said person has gained lawful entry upon the premises for the purpose of an unlawful or criminal act.

Although the statute does not specifically make provisions for "implied licensees," the plain meaning and application of the statute requires plaintiffs to prove that Bradley was either an invitee or a licensee, expressed or implied, to fall within the purview of protection created by this statute. *Cox v Hayes,* 34 Mich App 527, 531; 192 NW2d 68 (1971). A licensee has been defined as "a person who enters on or uses another's premises with the express or implied permission of the owner or person in control thereof." *Id.,* at 532.[1] Permission may be implied where the owner acquiesces in the known, customary use of property by the public. *Thone v Nicholson,* 84 Mich App 538, 544; 269 NW2d 665 (1978).

[1] In *Cox,* this Court held that the trial court erred in concluding that the plaintiff, a three-year-old deaf-mute, could not be an implied licensee of defendants. The evidence revealed that the only fence separating the chained dog's area from the property around it was a fence that ran along the property line between the defendants' and the plaintiff's lots. The plaintiff frequently played with the defendants' daughter in the defendants' yard at the defendants' daughter's invitation. On the day of the accident, the plaintiff had been playing in the defendants' front yard before she wandered into the back yard.

Plaintiffs offered no evidence to rebut William Simpson's claim that he never gave Bradley permission to enter his yard. Under the circumstances herein, permission cannot be implied. To the contrary, it is clear from the statements in Bradley's deposition that he knew that he was trespassing on defendants' property and did not have permission from defendants, either express or implied, to enter their property. Barbara Hoilman's averments in her affidavit that her children had permission on prior occasions to enter defendants' property to retrieve balls, and that in her opinion such acts do not constitute a trespass, do not create a factual question regarding Bradley.

Giving the benefit of reasonable doubt to plaintiffs, we conclude that no record could be developed that would leave open an issue upon which reasonable minds could differ. *Farm Bureau Ins Co v Stark,* 437 Mich 175, 184-185; 468 NW2d 498 (1985). Consequently, the trial court properly granted summary disposition for defendants.[2]

Affirmed.

---

[2] Plaintiffs' second issue is premised upon a finding that Bradley was a licensee. In light of our conclusion, we need not address this issue.

ALTERMAN v PROVIZER, EISENBERG, LICHTENSTEIN & PEARLMAN, PC

Docket No. 137322. Submitted July 14, 1992, at Detroit. Decided August 4, 1992, at 9:05 A.M.

Allen Alterman brought an action in the Wayne Circuit Court against the law firm of Provizer, Eisenberg, Lichtenstein & Pearlman, P.C., and attorney Arvin J. Pearlman, alleging that they committed malpractice in advising him to settle a federal court action against his employer when he was not mentally competent to do so. The court, John H. Hausner, J., granted summary disposition for the defendants, ruling that, because the issue of mental competency was addressed when the plaintiff's motion to set aside the settlement was denied by the federal court, the plaintiff's action for legal malpractice was barred by collateral estoppel. The plaintiff appealed.

The Court of Appeals *held:*

Generally, a party that raises collateral estoppel in seeking to bar an adversary from relitigating an issue must have been a party, or a privy to a party, in the previous action. The requirement of mutuality has been relaxed in some cases and should be in this case. The issues decided adversely to the plaintiff in his motion to set aside the settlement of the previous action are identical to the issues raised in this action for legal malpractice. The plaintiff had a full and fair opportunity to litigate those issues in the previous action. The trial court did not err in ruling that this action is barred by collateral estoppel.

Affirmed.

ESTOPPEL — COLLATERAL ESTOPPEL — LACK OF MUTUALITY.

The doctrine of collateral estoppel may be invoked under certain circumstances even where there is a lack of mutuality, such as in an action for legal malpractice based on a claim that an attorney allowed a mentally incompetent client to settle a prior

REFERENCES

Am Jur 2d, Estoppel and Waiver § 115.

See the Index to Annotations under Collateral Estoppel; Estoppel and Waiver; Mutuality of Estoppel.

and unrelated action to the detriment of the client where the client after a full and fair opportunity to litigate the issue did not succeed in having the settlement set aside on the ground of mental incompetence.

James F. Schouman, for the plaintiff.

Collins, Einhorn & Farrell, P.C. (by *Morton H. Collins* and *Theresa M. Asoklis*), for the defendants.

Before: FITZGERALD, P. J., and HOOD and J. C. KINGSLEY,* JJ.

PER CURIAM. This is an appeal as of right from the trial court's order granting summary disposition to defendants of plaintiff's legal malpractice claim. At issue is the trial court's application of the doctrine of collateral estoppel. See MCR 2.116(C)(7). We affirm.

Plaintiff suffered a work-related injury in 1986 and sued his employer, a railroad company, in federal court. On defendant Pearlman's advice, he settled that case and agreed to resign from his employment. About ten months later, plaintiff, through other counsel, moved to have the settlement set aside, alleging that, because of medication and stress, he was not mentally competent when he entered into it.

Plaintiff's motion was referred to a magistrate who, after holding an evidentiary hearing, recommended that it be denied. Plaintiff refused to waive the attorney-client privilege so that defendant Pearlman and his staff could testify. The federal court reviewed the record de novo and denied plaintiff's motion. That decision was not appealed.

Plaintiff subsequently filed this lawsuit alleging

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

that Pearlman and his law firm committed malpractice in allowing plaintiff to settle his federal case while he was mentally incompetent. Defendants successfully moved for summary disposition on the ground that, in the absence of an appeal in the action in federal court, relitigation of plaintiff's competency at the time of settlement was barred by the doctrine of collateral estoppel. We agree.

The doctrine of collateral estoppel holds that, where the first and second causes of action are different, "the judgment [rendered in the first cause of action] is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment." *Howell v Vito's Trucking Co,* 386 Mich 37, 42; 191 NW2d 313 (1971). By the "very definition" of the doctrine, "one of the critical factors" is "whether the respective litigants were parties or privy[1] to a party." *Id.* at 42; see also *Lichon v American Universal Ins Co,* 435 Mich 408, 427; 459 NW2d 288 (1990). "In other words, '[t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it had it gone against him.' " *Id.* at 427-428, quoting *Howell.*

Our Supreme Court has recently reaffirmed the vitality of the mutuality requirement in Michigan in the face of a modern trend to abandon it. See *Lichon, supra* at 428. We therefore decline defendants' invitation to do away with the requirement altogether. Nevertheless, our Supreme Court has recognized that "lack of mutuality does not always preclude the application of collateral estoppel. There are several well-established exceptions to

[1] "A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." *Howell, supra* at 43.

the mutuality requirement, such as when an indemnitor seeks to assert in its defense a judgment in favor of its indemnitee, or where a master defends by asserting a judgment for a servant." *Id.* at 428, n 16.

There are no published opinions of this Court allowing nonmutual defensive use of collateral estoppel in the context of a legal malpractice action arising out of a civil case. However, the Supreme Court noted in *Lichon* that "[t]he Court of Appeals has recognized that [in addition to the well-established exceptions listed above] there may be other situations in which the mutuality requirement is relaxed." *Id.* at 428, n 16, citing *Knoblauch v Kenyon,* 163 Mich App 712; 415 NW2d 286 (1987).

In *Knoblauch,* an attorney who had represented the plaintiff in a criminal case was sued for malpractice. *Id.* at 713-715. In the underlying criminal case, the malpractice-plaintiff had asserted ineffective assistance of counsel and had failed after an evidentiary hearing. *Id.* at 713-714. This Court allowed counsel to use that determination defensively in the civil case to collaterally estop relitigation of the competency issue. *Id.* at 725; see also *Schlumm v Terence J O'Hagan, PC,* 173 Mich 345, 357; 433 NW2d 839 (1988) (following *Knoblauch*).

In *Knoblauch,* this Court acknowledged that the parties were not identical, that there was no mutuality, and that none of the recognized exceptions to the mutuality requirement applied. *Knoblauch, supra* at 720. Nevertheless, this Court found that the standard that applied to claims of ineffective assistance of counsel was identical to the standard that applied to civil claims of malpractice and that, therefore, the issue had been fully litigated. *Id.* at 717-719. The Court noted that the mutuality requirement had been eroded, that Supreme Court

cases had not dealt with crossover (criminal to civil) collateral estoppel, and that the reasons articulated in *Howell* for rejecting nonmutual *offensive* collateral estoppel did not apply where the earlier adjudication was used defensively against a party who had had the opportunity to fully litigate it. *Knoblauch, supra* at 724-725. The reasons articulated in *Howell, supra* at 47-51, were: (1) lopsided justice in cases involving successive plaintiffs, (2) fear of increased litigation to avoid adverse judgments, and (3) the unfairness of declaring defendant a loser to a competitor he had never met. The Court also noted that, as a matter of public policy, a criminal defendant who has lost a claim of ineffective assistance should not be able to recover against the attorney in a malpractice action. *Knoblauch, supra* at 725.

Given that the standard for establishing ineffective assistance of counsel has been restricted in *People v Tommolino,* 187 Mich App 14; 466 NW2d 315 (1991), so that it is no longer identical to the standard for a civil claim of malpractice, we do not express an opinion with regard to the continuing validity of *Knoblauch* and *Schlumm* in crossover situations. However, the analysis remains valid in situations involving civil actions and has been applied recently in two unpublished decisions of this Court.

In *Caveney v Kirkpatrick,* unpublished opinion per curiam, decided August 13, 1991 (Docket No. 124149), this Court held that a wife's malpractice action against her divorce attorney based on the inadequacy of the property settlement was barred by an appellate decision in the divorce proceeding holding that the settlement was fair and equitable. Similarly, in *Sumpter v Koskinski,* another unpublished opinion per curiam of the Court of Appeals,

decided January 30, 1991 (Docket No. 116944), a malpractice action based upon the drafting of an antenuptial agreement was barred by a decision finding no breach of duty in connection with the agreement. In the first action, the attorney had been sued as the representative of the deceased husband's estate; in the malpractice action, he was sued in his own name.

To succeed in his malpractice case, plaintiff must prove: (1) the existence of an attorney-client relationship; (2) the acts constituting negligence; (3) that the negligence proximately caused an injury; and (4) the fact and extent of the injury. *Schlumm, supra* at 359. There is no question that the acts allegedly constituting negligence, i.e., allowing or causing plaintiff to settle while he was not mentally competent, are identical to the issue decided in the federal case, i.e., whether plaintiff was competent at the time he signed the settlement agreement. There is also no question that plaintiff had a full and fair opportunity to litigate this issue in federal court.[2]

Therefore, we hold that plaintiff is collaterally estopped from relitigating the issue, even though the parties are not identical, no mutuality exists, and no traditional exceptions apply.

Affirmed.

---

[2] This is totally dissimilar to *Lowman v Karp,* 190 Mich App 448; 476 NW2d 428 (1991), which involved only the issue whether a settlement of an underlying action is an absolute bar to a subsequent action for legal malpractice. The underlying issue was not litigated in that case.

AUTO-OWNERS INSURANCE COMPANY v TITAN INDEMNITY CORPORATION

Docket No. 134446. Submitted July 15, 1992, at Detroit. Decided August 4, 1992, at 9:10 A.M.

Auto-Owners Insurance Company brought an action in the Wayne Circuit Court against Titan Indemnity Corporation, seeking reimbursement for half its attorney fees and half the amount of a settlement it paid in an underlying action it defended. That action was brought by the personal representative of the estate of Michael J. Jones, deceased, and various members of his family against the City of Taylor and others, following Michael's death following the crash of his motorcycle into a Wayne County Sheriff's squad car while fleeing from Taylor police after an attempted stop for a traffic infraction. Auto-Owners was the city's no-fault insurer, and Titan, its comprehensive liability insurer. Titan had refused to defend the city on the ground that its policies excluded liability for automobile-related injuries. The circuit court, James R. Chylinski, J., granted summary disposition for Auto-Owners, finding that the auto-accident exclusion should not control. The court reasoned that because police officers conduct so much of their business from automobiles, an auto-accident exclusion could be used to avoid liability for almost everything. The court, following the dual-causation theory adopted in *Vanguard Ins Co v Clarke,* 181 Mich App 36 (1989), found that the accident had been caused both by the chasing automobile and the allegedly improper policy of the City of Taylor regarding high-speed chases, and required the two insurers to share equally the costs and liability. Titan appealed.

The Court of Appeals *held:*

Vanguard Ins Co v Clarke, 438 Mich 463 (1991), which holds that there is no compelling policy rationale and no sound jurisprudential reason to adopt the theory of dual or concurrent causation in the context of insurance liability to permit departure from the literal interpretation of unambiguous insurance contracts controls the resolution of this case. The exclusion of auto-related injuries is clear and unambiguous and precludes liability on the part of Titan. The fact that police officers conduct a large part of their business from automobiles

is not a compelling policy reason to avoid the exclusion, and, because the death resulted from the operation of a motor vehicle, the City of Taylor did not have a reasonable expectation of coverage from Titan. There were not two causes of the accident.

Reversed.

William A. Joselyn, Sr., for the plaintiff.

Collins, Einhorn & Farrell, P.C. (by *Noreen L. Slank* and *Dale McLellan*), for the defendant.

Before: FITZGERALD, P.J., and HOOD and J. C. KINGSLEY,* JJ.

PER CURIAM. This is a dispute between two insurance companies concerning liability for damages resulting from a high-speed police chase. In response to the parties' cross-motions, the trial court granted summary disposition to plaintiff. We reverse.

Michael J. Jones was killed when his motorcycle crashed into a Wayne County Sheriff's squad car. Mr. Jones was fleeing from Taylor police who had tried to stop him for a traffic infraction. The sheriff's car had been parked across the road to stop Mr. Jones. The accident occurred at about 2:30 A.M.

Mr. Jones' estate and family sued the City of Taylor, the Wayne County Sheriff's Department and the individual law enforcement officers involved. The City of Taylor had no-fault insurance through Auto-Owners Insurance Company. It also had two comprehensive liability policies through Titan Indemnity Corporation. Both Titan policies contained language excluding from coverage "[p]ersonal injury . . . arising out of the ownership maintenance, operation, use, loading or unloading

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

of any automobile" owned, rented, or operated by the city or its employees.

Titan refused to defend the city in the lawsuit. Auto-Owners defended the suit and eventually settled for $65,000. It then brought a declaratory judgment action against Titan, seeking to be reimbursed for half of its attorney fees and half of the settlement amount. Auto-Owners alleged that, during discovery in the underlying action, there was some expert criticism of the city's policy regarding high-speed police chases and some indication that that policy may have contributed to the accident.

Noting a split between panels of this Court, the trial court relied on *Vanguard Ins Co v Clarke,* 181 Mich App 36; 448 NW2d 754 (1989), to hold that the auto-accident exclusion should not control. The court opined that because police officers conduct so much of their business from their automobiles, an automobile exclusion could be used to avoid liability "for almost anything." The court then followed the dual-causation theory adopted in *Vanguard* and found that the accident had been caused both by the chasing automobile and by the allegedly improper policy regarding high-speed chases. The court required the two insurance companies to share costs and liability equally.

In *Vanguard Ins Co v Clarke,* 438 Mich 463; 475 NW2d 48 (1991), the Supreme Court reversed this Court's decision and resolved the conflict noted by the trial court. The Court held that "[w]hatever the merits of dual causality in the tort law context, . . . we do not discern a compelling legal or policy basis as to why that doctrine should nullify an unambiguous insurance policy exclusion for auto-related injuries in a homeowner's policy." *Id.* at 466. The Supreme Court's decision in *Vanguard* controls the resolution of this present appeal.

Where the language in an insurance policy ex-

clusion is ambiguous, it must be construed against the insurer and in favor of the policyholder. *Id.* at 471-472. Additionally, policy exclusions should be examined to determine whether the insured was nevertheless lead to a reasonable expectation of coverage. *Id.* at 472. However, in this case, as in *Vanguard,* the exclusion of auto-related injuries is admittedly clear and unambiguous. See *id.* at 472-473.

In *Vanguard,* the injury was the result of carbon monoxide accumulating in the home and in the attached garage when the insured closed the garage door but left his car running inside. *Id.* at 467. The Supreme Court found that the injury was the result of the use and operation of the automobile because it was the automobile, not the garage door, that emitted the deadly fumes. *Id.* at 473. The Court therefore held that the automobile exclusion precluded liability on the part of the homeowner's insurance company. *Id.* at 474-475.

The Court noted that the injury in that case would not fall through the cracks of both insurance policies because of mutual exclusions. *Id.* at 474. The Court likewise declined to find that allowing double recovery was a sound reason to avoid the exclusion. *Id.* at 474. It further noted that exclusions play a part in the insurer's computation of the price of a policy and concluded that "no sound jurisprudential or policy reason exists to introduce a legal theory or doctrine that departs from the literal interpretation of an unambiguous insurance contract." *Id.* at 475.

After relying on *Vanguard* in the circuit court, Auto-Owners now seeks to avoid *Vanguard* by arguing that the facts of this case do present compelling policy reasons to adopt the dual-causation theory. Auto-Owners also argues that because the insured initially asked both insurers to defend

the lawsuit, it must have had a reasonable expectation of coverage. It further argues that it seeks neither to nullify the exclusion nor to allow double recovery, but instead merely seeks an apportionment of liability. Lastly, it also contends that there were in fact two causes of the injury claimed here. We find these arguments unpersuasive in light of *Vanguard.*

First, the fact that police officers conduct a large part of their business from their automobiles is not a compelling policy reason to avoid the exclusion. Instead, that fact probably plays a large role in the cost of no-fault insurance charged to the City of Taylor by plaintiff Auto-Owners.

Second, the fact that the city may have initially asked Titan to defend the suit does not necessarily mean that it expected coverage from Titan, let alone that it had a *reasonable* expectation of coverage given the unambiguous language of the exclusion. Instead, the city was probably making sure that all possible sources of coverage were contacted.

Third, we disagree with the contention that there were in fact two causes of the accident. The allegedly improper policy concerning high-speed chases, like the garage door in *Vanguard,* "was not itself independently capable of producing the injury for which relief is sought." *Id.* at 473, n 9. Actually, the garage door in *Vanguard* was even more of a proximate cause than the police policy in this case. As in *Vanguard,* the operation of the motor vehicle was "the death-producing instrumentality" in this case. *Id.* at 473.

Lastly, the fact that plaintiff only seeks to share rather than shift liability does not change the fact that, because the accident had only one cause,

plaintiff is obviously seeking to avoid the exclusion. Titan's policy is clear; it leaves no room for the interpretation advocated by plaintiff.

Reversed.

PEOPLE v SPEARMAN

PEOPLE v RUSH

Docket Nos. 130745, 131895. Submitted July 15, 1992, at Detroit. Decided August 4, 1992, at 9:15 A.M. Leave to appeal sought

Following a joint trial in the Recorder's Court for the City of Detroit, Donnie A. Spearman was convicted by the court, Gershwin A. Drain, J., of aiding and abetting second-degree murder, and Dedrea Rush was convicted by a jury of second-degree murder, assault with intent to rob while armed, and possession of a firearm during the commission of a felony. The defendants were minors when the crimes occurred but were tried and sentenced as adults. Both appealed, and the appeals were consolidated.

The Court of Appeals *held:*

1. The trial court properly used the intent to rob the victim to satisfy the mens rea requirement for Spearman's conviction of aiding and abetting second-degree murder. The evidence, especially Spearman's confession, was sufficient to support a finding beyond a reasonable doubt that he acted with wilful and wanton disregard of the possibility that death or great bodily harm would result from the planned robbery.

2. The trial court properly relied on Spearman's confession to find that he acted with malice.

3. The court erred in relying on Rush's confession to determine Spearman's role in the robbery. The confession was admitted only against Rush, who was tried by a jury, and its use against Spearman was improper. The evidence was not so overwhelming that it can be said that the error was harmless beyond a reasonable doubt. Spearman's conviction must be vacated and the case remanded for reconsideration in light of the evidence properly admitted against Spearman.

4. Spearman did not overcome the presumption that his

REFERENCES

Am Jur 2d, Criminal Law §§ 167, 338, 351; Evidence §§ 526, 530, 1142; Homicide §§ 4, 10, 27, 28, 35, 263, 269, 283-285, 461; Juvenile Courts and Delinquent and Dependent Children §§ 16, 29, 34.

See the Index to Annotations under Confessions and Admissions; Corpus Delicti; Criminal Law; Homicide; Juvenile Courts and Deliquent Children.

sentence for aiding and abetting second-degree murder, which was within the minimum sentence range recommended by the sentencing guidelines, was proportional.

5. The trial court did not have jurisdiction to try Rush on the felony-firearm charge because it did not conduct a pretrial waiver hearing with regard to that charge. The automatic waiver statute, MCL 600.606; MSA 27A.606, grants circuit and recorder's courts jurisdiction to try a juvenile defendant for certain enumerated life felonies without conducting a waiver hearing, but does not grant the court ancillary jurisdiction to try the juvenile for nonenumerated nonlife felonies such as felony-firearm. Rush's felony-firearm conviction and sentence must be reversed.

6. The requirement of MCL 764.27; MSA 28.886 that a child under seventeen years of age must be taken immediately before the juvenile division of the probate court when arrested does not apply in automatic waiver cases under MCL 600.606; MSA 27A.606. Therefore, the trial court did not clearly err in refusing to suppress Rush's confession, which was made within two hours of his arrest and before he was taken to the probate court.

7. Testimony that the crime was committed at an abandoned house where crack cocaine had been used was improperly admitted. However, given the overwhelming evidence against Rush, the error was harmless beyond a reasonable doubt and does not require reversal.

8. The trial court's findings regarding the factors to be considered in determining whether to sentence Rush as an adult, MCL 769.1(3); MSA 28.1072(3), were not clearly erroneous. The court did not rely solely on the seriousness of the offense in making its determination and did not err in deciding to sentence him as an adult.

Spearman's conviction of aiding and abetting second-degree murder is vacated and the case is remanded for reconsideration. Rush's second-degree murder and assault convictions are affirmed, and his felony-firearm conviction is reversed.

1. HOMICIDE — SECOND-DEGREE MURDER — AIDING AND ABETTING — MALICE.

The malice required to support a conviction of aiding and abetting second-degree murder may not be inferred solely from an intent to commit another felony but may be inferred from facts and circumstances surrounding the commission of the felony; an aider and abettor who participates in a crime with knowledge of the principal's intent to kill or cause great bodily harm

acts with wanton and wilful disregard of the possibility that death or great bodily harm will result from the crime sufficient to support a finding of malice (MCL 750.317; MSA 28.549).

2. HOMICIDE — SECOND-DEGREE MURDER — CORPUS DELICTI — MALICE — DEFENDANT'S CONFESSION.

The corpus delicti rule does not require that the element of malice necessary for a conviction of second-degree murder be established independently of the defendant's confession; the only things that must be proven independently of the defendant's confession are a death and that the death was the result of some criminal agency (MCL 750.317; MSA 28.549).

3. CRIMINAL LAW — EVIDENCE — JOINT TRIALS — NONTESTIFYING CODEFENDANT'S CONFESSION.

In a joint trial, a nontestifying codefedant's confession is inadmissible against the other defendant.

4. CRIMINAL LAW — CIRCUIT COURTS — JURISDICTION — AUTOMATIC WAIVER — JUVENILES.

Circuit and recorder's court jurisdiction to try a juvenile defendant for certain enumerated life felonies without conducting a waiver hearing does not include ancillary jurisdiction to try the juvenile for nonenumerated nonlife felonies (MCL 600.606; MSA 27A.606).

5. CRIMINAL LAW — JUVENILES — CIRCUIT COURTS — PROBATE COURTS — AUTOMATIC WAIVER OF JURISDICTION.

A juvenile under seventeen years of age who is arrested need not immediately be taken before the juvenile division of the probate court where the prosecutor charges the juvenile as an adult in circuit court under the automatic waiver rules (MCL 600.606, 764.27; MSA 27A.606, 28.886).

6. CRIMINAL LAW — SENTENCES — JUVENILES — APPEAL AND ERROR.

The decision by a circuit court to sentence as an adult a juvenile charged as an adult under the automatic waiver rules will be affirmed where the court's findings, based on substantial evidence and thorough investigation, show either that the juvenile is not amenable to treatment or that, despite potential for treatment, the nature of the difficulty is likely to render the juvenile dangerous to the public if released at age nineteen or twenty-one or to disrupt the rehabilitation of other children; the trial court's findings of fact regarding the factors to be considered in making the determination are reviewed for clear error (MCR 6.931[E][3]; MCL 600.606, 769.1[3]; MSA 27A.606, 28.1072[3]).

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, *Ernest O. Hornung,* Assistant Prosecuting Attorney, in Docket No. 130745, and *Maria A. Petito,* Assistant Prosecuting Attorney, in Docket No. 131895.

John B. Payne, Jr., and Donnie A. Spearman, in propria persona, for Donnie A. Spearman.

Ted C. Farmer, for Dedrea Rush.

Before: FITZGERALD, P.J., and HOOD and J. C. KINGSLEY,* JJ.

PER CURIAM. The charges in this case arose from the shooting death of a pizza delivery man. Defendants Rush and Spearman, both of whom were minors at the time of the crime, were tried together in the circuit court under the automatic waiver law, MCL 600.606; MSA 27A.606. Rush was tried by a jury and Spearman by the court. Rush was charged with first-degree (felony) murder, MCL 750.316; MSA 28.548, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and assault with intent to rob while armed, MCL 750.89; MSA 28.284. Spearman was charged with first-degree (felony) murder.

Spearman was convicted of second-degree murder, MCL 750.317; MSA 28.549, and sentenced as an adult to eighteen to forty years' imprisonment. Rush was convicted of second-degree murder, possession of a firearm during the commission of a felony, and assault with intent to rob while armed. He was sentenced as an adult to the mandatory two years' imprisonment for the felony-firearm

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

conviction and to concurrent terms of twenty to forty years' imprisonment for each of the other two convictions. Both defendants appeal as of right. We vacate Spearman's conviction and remand for reconsideration and affirm in part and reverse in part with regard to Rush.

Defendants, and perhaps others, planned to rob a pizza delivery person by ordering a pizza delivered to a vacant home and waiting for the delivery person.[1] Rush hid behind a bush with a sawed-off shotgun. When the delivery man arrived, Rush jumped out from behind the bush and shot him. All the participants fled; no money was taken.

We will deal first with the arguments raised by Spearman.

Spearman first argues that the trial court impermissibly used the intent to rob to satisfy the mens rea requirement of second-degree murder. We disagree.

Second-degree murder is established where the defendant causes a death with malice and without provocation. *People v Harris,* 190 Mich App 652, 659; 476 NW2d 767 (1991). Malice is defined as the intent to kill or to do great bodily harm, or as the wilful and wanton disregard of the likelihood that the natural tendency of the defendant's actions will be to cause death or great bodily harm. *People v Kelly,* 423 Mich 261, 273; 378 NW2d 365 (1985); *People v Aaron,* 409 Mich 672, 728; 299 NW2d 304 (1980). Malice may not be inferred solely from the intent to commit another felony but it may be inferred from the facts and circumstances surrounding the commission of that felony. *Kelly,* 423 Mich 273; *Aaron,* 409 Mich 727-730.

[1] There was conflicting testimony regarding whether three other men were involved in the planning and commission of the crime. Two of them testified against Rush and Spearman. Apparently, none of the three was charged.

Where, as in this case, a defendant is being held vicariously liable for a killing committed by another, he must be found to have had the same mens rea required to convict the principal, that is, malice as defined above. *Kelly,* 423 Mich 278; *Aaron,* 409 Mich 731. However, "if the aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he is acting with 'wanton and willful disregard' sufficient to support a finding of malice." *Kelly,* 423 Mich 278-279. An aider and abettor may also be held liable "on agency principles" where he acts "intentionally or recklessly in pursuit of a common plan." *Aaron,* 409 Mich 731.

In this case, a person who was present at the home where the crime was planned testified that Spearman said that they were going to rob the pizza man. This witness also testified that he saw Rush with a bulge under his clothes, which the witness concluded was a weapon that he believed that Rush had purchased a few days before the murder. Another person who was present when the crime was planned testified that Spearman asked him to get off the phone so that he could order a pizza. The witness did not remain in the room while Spearman made the call.

Spearman's statement to the police was admitted into evidence outside the presence of Rush's jury. In that statement, Spearman indicated that the robbery was Rush's idea and that the owner of the home where it was planned—whose phone number was given to the pizza parlor to confirm the order—was the one who called for the pizza. Spearman nevertheless indicated that he was aware that, when they arrived at the vacant home to wait for the pizza, Rush hid in the bushes with a sawed-off shotgun. The shotgun had been purchased at a K mart store by or for Rush only two

days before the crime and had been sawed off in the basement of the home where the robbery was planned on the day before the crime. Spearman characterized his own role in the event as that of a "lookout."

The evidence on the record, especially Spearman's confession, was sufficient to support a finding beyond a reasonable doubt that he acted with wilful and wanton disregard of the possibility that death or great bodily harm would result from a planned robbery that involved someone hiding behind bushes with a sawed-off shotgun.

Spearman, relying on *People v Allen,* 390 Mich 383; 212 NW2d 21 (1973), argues that the elements of the crime, specifically malice, must be established independently of his confession. We disagree. According to two recent well-reasoned interpretations of the corpus delicti rule, the only things that must be proven independently of a defendant's confession are the fact of death and the fact that death was the result of some criminal agency. *People v Williams,* 422 Mich 381, 391-392; 373 NW2d 567 (1985); *People v Hughey,* 186 Mich App 585, 587-589; 464 NW2d 914 (1990). Those elements were established in this case by the stipulated testimony of the medical examiner. It was therefore proper to rely on Spearman's confession to find that he acted with malice.

Spearman next argues that the trial court erred in relying on Rush's confession to determine Spearman's role in the robbery. The trial court found that, in addition to being a lookout, Spearman "was on the porch . . . acting as the person who was to receive the pizza." Spearman correctly points out that the only support for this finding was Rush's confession. According to Spearman's own statement—which was the only other evidence placing him at the scene—he acted only as a

lookout and was standing two or three houses away from the appointed delivery site at the time of the shooting.

Spearman correctly points out that a nontestifying codefendant's confession is inadmissible against a defendant. See *People v Banks,* 438 Mich 408, 420-421; 475 NW2d 769 (1991); *People v Watkins,* 438 Mich 627, 646, 651-652; 475 NW2d 727 (1991). In this case, however, the confession was admitted only against Rush, who was being tried by a jury. The court's use of the confession against Spearman was therefore improper. The issue thus is whether this improper use by the trial court was harmless and, if it was not, what remedy is appropriate.

To find a defendant guilty on an aiding and abetting theory, the people must show that (1) a crime was committed either by the defendant or by another, (2) the defendant performed acts or gave encouragement that aided or assisted in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid or encouragement. *People v Rockwell,* 188 Mich App 405, 411; 470 NW2d 673 (1991). Mere presence at the scene, even with knowledge, is insufficient. *Id.,* at 412; *People v Anderson,* 166 Mich App 455, 475; 421 NW2d 200 (1988). However, "other factors such as a close association between the defendant and the principal actor, his participation in planning or executing the crime, and evidence of flight after the crime could be considered in determining whether there was sufficient evidence that he acted in concert with the principal." *Id.; People v Trudeau,* 51 Mich App 766, 772; 216 NW2d 450 (1974). Aiding and abetting "describes all forms of assistance . . . and comprehends all words or

deeds which may support, encourage or incite the commission of a crime." *Rockwell,* 188 Mich App 411-412.

In this case, there was evidence from which the court could properly find that Spearman participated in planning the robbery, that he ordered the pizza, that he was a lookout, and that he fled the scene of the crime. However, the evidence was not so overwhelming that we can say that the error was harmless beyond a reasonable doubt. Whether the trial court would have found Spearman guilty of second-degree murder on an aiding and abetting theory had it not improperly relied on Rush's confession is a question that should be answered by the trial court in the first instance. The trial court can make that determination on the basis of the evidence already submitted at trial but excluding Rush's confession. Spearman's conviction is hereby vacated, and the case is remanded for reconsideration in light of the evidence properly admitted against Spearman. See *People v Simon,* 189 Mich App 565, 567-569; 473 NW2d 785 (1991).

Spearman next argues that his sentence violates the principle of proportionality set out in *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). This argument is without merit. The sentence imposed on Spearman was within the minimum sentence range recommended by the guidelines and is therefore presumptively proportional. *People v Broden,* 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Dukes,* 189 Mich App 262, 266; 471 NW2d 651 (1991). Spearman has not met the heavy burden of overcoming this presumption.

Spearman lastly contends that the trial court violated his right to procedural due process by not giving him advance notice of its intention to depart from the guidelines and an opportunity to be heard on the subject. Because his sentence was not

in fact a departure from the minimum range recommended by the guidelines, we need not consider this argument further.

We now turn to the arguments raised by Rush.

Initially, although not raised by Rush, we are constrained by Administrative Order No. 1990-6, 436 Mich lxxxiv, to hold that the trial court did not have jurisdiction to try him on the felony-firearm charge because it did not conduct a pretrial waiver hearing with regard to that charge. *People v Deans,* 192 Mich App 327, 330-331; 480 NW2d 334 (1991). The automatic waiver statute that grants a court jurisdiction to try a juvenile defendant for certain enumerated life felonies without conducting a waiver hearing does not grant the court ancillary jurisdiction to also try the defendant for nonenumerated nonlife felonies such as felony-firearm. *Id.* Because this is a jurisdictional defect, we must reverse Rush's felony-firearm conviction and the mandatory two-year sentence even in the absence of an objection.

Rush first argues that his signed confession was involuntary and inadmissible because he was held for about two hours after being arrested instead of being taken to the juvenile division of the probate court immediately as required by MCL 764.27; MSA 28.886. Rush confessed during this two-hour delay in the presence of his mother, sister, and brother. All present were informed of Rush's *Miranda* rights.[2] It is undisputed that no one asked for an attorney or requested an end to the questioning.

It is true that, "[e]xcept as otherwise provided in section 606 of the revised judicature act . . ., if a child under 17 years of age is arrested . . . the child shall be taken immediately before the juve-

[2] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

nile division of the probate court." MCL 764.27; MSA 28.886. This Court has recently resolved a conflict regarding the effect of violating this provision for the purpose of obtaining a confession. See *People v Good,* 186 Mich App 180, 186-190; 463 NW2d 213 (1990) (adopting a totality of the circumstances test for determining the voluntariness and admissibility of the resulting confession). Moreover, where the evidence against the defendant is overwhelming, the error may be harmless. *People v Strunk,* 184 Mich App 310, 320-322; 457 NW2d 149 (1990).

We believe, however, that the § 27 requirement does not apply where, as in this case, the prosecutor chooses to charge the defendant under the automatic waiver rules instead of filing a petition with the probate court. See *People v Brooks,* 184 Mich App 793; 459 NW2d 313 (1990); see also *Good,* 186 Mich App 185, n 2 (dicta). In *Brooks,* this Court interpreted § 606 of the Revised Judicature Act, MCL 600.606; MSA 27A.606, as exempting from the probate court's jurisdiction those minors whom the prosecutor chooses to charge as adults under the automatic waiver rules. *Brooks,* 184 Mich App 797-798. We agree with *Brooks* that the procedural rule of § 27 applies only where the juvenile is under the probate court's jurisdiction.

As noted by the *Brooks* panel, § 27 specifically requires minors to be taken before the probate court immediately "[e]xcept as otherwise provided in section 606." MCL 764.27; MSA 28.886. Section 606 grants circuit and recorder's courts jurisdiction to try minors between the ages of fifteen and seventeen who have been charged as adults with certain enumerated life felonies. MCL 600.606; MSA 27A.606. Probate courts have exclusive jurisdiction with regard to such juveniles *only* if the prosecutor chooses to proceed against them as

minors by filing a petition with the probate court. MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1); see also MCL 764.1f; MSA 28.860(6) (allowing prosecutor to treat minors as adults by authorizing the filing of a complaint and warrant instead of the filing of a petition).

As noted by the panel in *Good,* a juvenile's appearance before the probate court under § 27 is closely analogous to an adult's arraignment. *Good,* 186 Mich App 186-188. On the other hand, a juvenile charged as an adult under the automatic waiver rules is specifically granted the right to a speedy arraignment. See MCR 6.907(A). He is also afforded other adult procedural safeguards such as the right to bail under certain circumstances and the right to a speedy trial. See MCR 6.909(A) and (C).

We agree with the *Brooks* panel that the fact that other procedural safeguards are provided indicates that § 27 was not meant to apply in automatic waiver cases. Therefore, given that there is no allegation that Rush's confession was otherwise involuntary, we find that the trial court did not commit clear error in refusing to suppress it.

Rush next complains that testimony that the crime was committed at an abandoned house where crack cocaine had been used was inadmissible similar-acts evidence. We fail to see how this testimony constitutes similar-acts evidence where there was absolutely no evidence that the crime was in any way drug-related. We believe that the proper analysis is whether the evidence was more prejudicial than probative under MRE 403.

MRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice," confusion, and the like. However, evidentiary errors are not grounds for reversal unless

a substantial right was affected. Additionally, because Rush did not object at trial, the error, if any, will not be grounds for reversal absent manifest injustice.

In this case, evidence that the crime was committed at an abandoned crack house did not tend to make the existence of any fact at issue more or less probable than it would have been without such evidence. Therefore, its probative value was nil. See MRE 401. On the other hand, the prejudicial effect of the evidence was potentially high. The evidence was therefore clearly inadmissible under the balancing test of MRE 403. However, given the overwhelming evidence against Rush, the error was harmless beyond a reasonable doubt and does not require reversal.

Finally, Rush contends that the trial court erred in sentencing him as an adult instead of as a juvenile. In deciding whether to sentence a juvenile defendant as an adult in automatic waiver cases, the court "shall" consider the following factors, "giving each weight as appropriate": (a) the defendant's prior record, character, maturity, and pattern of living, (b) the seriousness and circumstances of the offense, (c) whether the crime is part of a repetitive pattern that shows either that the defendant is not amenable to treatment or that he will disrupt the treatment of others, (d) whether, despite the defendant's potential for rehabilitation, the nature of his behavior is likely to render him dangerous when released at age twenty-one, (e) whether the defendant is more likely to be rehabilitated at adult or juvenile facilities, and (f) the best interests of the public and the protection of public security. MCL 769.1(3); MSA 28.1072(3); see also MCR 6.931(E)(3).

We have found no published cases establishing a

standard of review for posttrial dispositional hearings in automatic waiver cases. However, in the usual pretrial waiver case, a probate court's decision to waive jurisdiction will be affirmed "whenever that court's findings, based on substantial evidence and thorough investigation, show either that the juvenile is not amenable to treatment or that, despite his potential for treatment, the nature of his difficulty is likely to render him dangerous to the public, if released at age nineteen or twenty-one, or to disrupt the rehabilitation of other children." *People v Fowler,* 193 Mich App 358, 363; 483 NW2d 626 (1992); see also *People v Dunbar,* 423 Mich 380, 387; 377 NW2d 262 (1985); *People v Schumacher,* 75 Mich App 505, 512; 256 NW2d 39 (1977). Because the criteria to be considered under the two statutes are identical, we hold that the same standard of review applies to postconviction dispositional hearings in automatic waiver cases. Compare MCL 769.1(3); MSA 28.1072(3) with MCL 712A.4(4); MSA 27.3178(598.4)(4).

Both experts who testified at Rush's dispositional hearing recommended that he be sentenced as a juvenile. The trial court, however, rejected their recommendations. The court analyzed each statutory factor and found that Rush had no prior record, that he was physically but not mentally mature, and that there was nothing "terribly negative" in his pattern of living. The court found that the offense committed and the circumstances surrounding it were very serious and militated toward treating Rush as an adult. The court further found that, although Rush was amenable to treatment in a juvenile setting and would not be disruptive, the period of incarceration available if he were treated as a juvenile would be "inadequate to be an appropriate sentence" and that the

best interests of Rush and the public would therefore be served by sentencing him as an adult.

Rush argues that the trial court erred in relying solely on the seriousness of the offense. He points out that, although not mentioned by the court, it is undisputed that the crime was not part of a repetitive pattern. He also asserts that the trial court did not find that he would be dangerous if released at age twenty-one or that his prospects of rehabilitation would be better in the adult system.

As noted by Rush, there are cases decided in the context of pretrial waiver hearings that hold that the court may not rely solely on the seriousness of the offense to justify sentencing a juvenile defendant as an adult. See *Dunbar,* 423 Mich 393; *Schumacher,* 75 Mich App 512. The prosecutor counters that, since those cases were decided, both statutes were amended to allow the court to consider the enumerated factors, "giving each weight as appropriate to the circumstances." The prosecutor argues that this language allows the court to give preemptive weight to any one factor. See MCL 769.1(3); MSA 28.1072(3); see also MCL 712A.4(4); MSA 27.3178(598.4)(4). We are not persuaded by the prosecutor's argument. However, our review of the record convinces us that the trial court did not rely solely on the seriousness of the offense in deciding to sentence Rush as an adult and, therefore, we find it unnecessary to resolve this dispute.

We review a trial court's findings of fact regarding the factors enumerated in the sentencing statute, MCL 769.1(3); MSA 28.1072(3), under the clearly erroneous standard. *People v Passeno,* 195 Mich App 91; 489 NW2d 152 (1992). At the dispositional hearing, the trial court indicated that, after considering all the evidence, it was convinced that the best interests of both the public and Rush

warranted sentencing him as an adult. At sentencing, the trial court further indicated that it felt that a significant sentence was necessary to deter Rush from being involved in any crimes like this in the future. It is therefore clear to us that the trial court considered factors other than the seriousness of the offense. Thus, after carefully reviewing the entire record, we are not left with a definite and firm conviction that a mistake has been made, and therefore we affirm the trial court's decision to sentence Rush as an adult. *People v Gistover,* 189 Mich App 44, 46; 472 NW2d 27 (1991).

In conclusion, we vacate Spearman's conviction and remand the case for reconsideration on the existing record. We further hold that Rush's felony-firearm conviction is reversed for lack of jurisdiction. His assault and murder convictions and the resulting sentences are affirmed.

We do not retain jurisdiction.

GIBBS v SMOCK (ON REHEARING)

Docket No. 132853. Submitted March 11, 1992, at Grand Rapids. Decided August 4, 1992, at 9:20 A.M.

Byron L. Gibbs and Louise M. McCracken brought an action in the Isabella Circuit Court against Alger J. Smock, personal representative of the estate of Ida P. Smock, deceased, and others, seeking a declaration with respect to the ownership of severed mineral rights originally owned by the decedent and bequeathed to the plaintiffs. The probate court order effectuating the bequest, as recorded with the register of deeds, did not contain a specific description of the surface property. Smock contended that, because the dormant minerals act, MCL 554.291 *et seq.*; MSA 26.1163(1) *et seq.*, requires a description of the surface property, the conveyance of the mineral rights to the plaintiffs was ineffective. The circuit court, Paul F. O'Connell, J., rejected Smock's argument and entered judgment for the plaintiffs. The Court of Appeals, FITZGERALD, P.J., and HOOD and CAVANAGH, JJ., reversed in an unpublished opinion per curiam, decided April 7, 1992 (Docket No. 132853), and later granted rehearing.

On rehearing, the Court of Appeals *held:*

The dormant minerals act, which vests ownership of severed mineral rights in the owner of the surface property in the absence of filing a notice of claim of interest every twenty years, has as its primary concern the preservation or abandonment of severed mineral rights, not the mechanics of conveyances or transfers of those rights. Sections 1 and 2 of the act, MCL 554.291, 554.292; MSA 26.1163(1), 26.1163(2), before the expiration of an applicable twenty-year period, do not serve to invalidate a conveyance or transfer that does not contain a description of the surface property.

Affirmed.

GAS AND OIL — DORMANT MINERALS ACT — CONVEYANCES AND TRANSFERS OF MINERAL RIGHTS.

A bequest of mineral rights severed from ownership of the

REFERENCES

Am Jur 2d, Mines and Minerals §§ 103, 105, 116.

See the Index to Annotations under Decedents' Estates; Mines and Minerals; Wills.

surface rights in real property is not rendered invalid under the dormant minerals act for lack of a specific description of the surface property where the applicable twenty-year period of dormancy has not expired (MCL 554.291, 554.292; MSA 26.1163[1], 26.1163[2]).

Timothy J. Schnelle, for Byron L. Gibbs and Louise M. McCracken.

Lynam & Associates (by *Terence V. Lynam*), for Sun Exploration & Production Company, et al.

David J. Dreyer, for Alger J. Smock.

ON REHEARING

Before: FITZGERALD, P.J., and HOOD and CAVANAGH, JJ.

PER CURIAM. Defendant-appellant Alger J. Smock, personal representative of the estate of Ida P. Smock, deceased, appeals as of right from a declaratory judgment in favor of plaintiffs in their action to determine the ownership of certain mineral interests. We affirm.

I

The parties are largely in agreement with regard to the complicated facts of this case. For purposes of this appeal, however, a brief recitation of the facts will suffice.

The mineral rights at issue were severed from the surface estate in 1935. The owner of the mineral rights recorded a lease in 1957. The owner died testate in 1961, and his will did not contain a description of the location of the mineral rights. The probate court entered an order assigning the residue of the owner's estate. The order was recorded with the register of deeds in 1962. This

document contains a provision distributing mineral rights to various parties, but does not specify the location of the surface estate.

On appeal, the issue is whether the dormant minerals act, MCL 554.291 *et seq.*; MSA 26.1163(1) *et seq.*, prevented plaintiffs' interest in the mineral rights from passing because the order assigning the residue did not contain a precise description of the surface estate.[1]

II

The dormant minerals act provides in pertinent part:

> Sec. 1. Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged or transferred by instrument recorded in the register of deeds office for the county where such interest is located for a period of 20 years shall . . . be deemed abandoned, unless the owner thereof shall, within 3 years after the effective date of this act or within 20 years after the last sale, lease, mortgage or transfer of record of such interest . . . whichever is later, record a claim of interest as hereinafter provided. Any interest in oil or gas deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership.
>
> * * *
>
> Sec. 2. Any interest in oil or gas referred to in this act may be preserved by the recording within the period specified in this act a written notice in the register of deeds office for the county where such interest is located, which notice shall be verified by oath, describe the land and the nature

[1] This appeal is not otherwise concerned with the validity of the conveyance.

> of the interest claimed, give the name and address of the person or persons claiming the interest, and state that such person or persons desire to preserve the interest and do not intend to abandon same. . . . [MCL 554.291, 554.292; MSA 26.1163(1), 26.1163(2).]

Smock argues that the property description requirement contained in § 2 also applies to § 1, and the absence of a property description renders the order by which the residue was conveyed defective.[2] We disagree.

The primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature. *Joy Management Co v Detroit,* 176 Mich App 722, 730; 440 NW2d 654 (1989). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *Dep't of Social Services v Brewer,* 180 Mich App 82, 84; 446 NW2d 593 (1989). If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted. *Nat'l Exposition Co v Detroit,* 169 Mich App 25, 29; 425 NW2d 497 (1988).

The purpose of the dormant minerals act is not to abolish severed mineral interests, but to promote the development of mineral interests by reducing the difficulty in locating the owners of severed mineral interests where there has been no recent recording of those interests. *Van Slooten v*

[2] We note that MCL 700.193; MSA 27.5193 governs orders assigning residue. This section provides in pertinent part:

> The order assigning residue shall state the date of death of the decedent and shall name the persons and the proportions or parts of the estate to which each shall be entitled.

Section 193 imposes no requirement that the order assigning residue contain a legal description of the property interest being conveyed.

Larsen, 410 Mich 21; 299 NW2d 704 (1980); *Oberlin v Wolverine Gas & Oil Co,* 181 Mich App 506, 514; 450 NW2d 68 (1991). 1963 PA 42 is defined as "AN ACT to provide for the termination of dormant oil and gas interests in land owned by persons other than the owners of the surface and for the vesting of title to same in the surface owners in the absence of the filing of a notice of claim of interest within a specified period of time." Section 1 of the act merely describes the circumstances under which a mineral interest may be deemed abandoned *if not preserved within twenty years of the last sale, lease, mortgage, or transfer.* Section 1, unlike 2, imposes no requirements on a conveyance of mineral rights. Section 2 provides a method of preservation for those interests that have not been sold, leased, mortgaged, or transferred for a period of twenty years. Neither section is concerned with the conveyance or actual transfer of mineral rights; the act is concerned solely with the preservation and abandonment of mineral rights, and, by its plain and ordinary meaning, does not deem dormant mineral rights terminated until the expiration of the twenty-year period.

The trial court correctly determined that the conveyance of mineral rights effectuated through the order that assigned the residue of the estate of the previous owner was not rendered invalid by the dormant minerals act.[3]

Affirmed.

[3] See *Bates v Keso,* 187 Mich App 409, 410; 468 NW2d 251 (1991), wherein this Court noted that the order assigning residue was properly recorded with the register of deeds. Although not at issue in the case, this Court implied that the order effectively conveyed the mineral rights at issue.

PEOPLE v BENNETT

Docket No. 134266. Submitted February 4, 1992, at Grand Rapids. Decided August 4, 1992, at 9:25 A.M. Leave to appeal sought.

David A. Bennett, a Saginaw Chippewa Indian, was charged in the Isabella Circuit Court with operating a motor vehicle while under the influence of intoxicating liquor, impaired driving, and driving with a suspended license. The court, Paul F. O'Connell, J., quashed the information, ruling that the court lacked jurisdiction because the alleged violations took place within the Isabella Indian reservation, an area under the jurisdiction of the federal government. The prosecution appealed.

The Court of Appeals *held:*

The Isabella reservation was established under a treaty that set apart for the Chippewas' exclusive use all unsold lands within six townships in Isabella County. The defendant was arrested in an area within the reservation that had been sold to an individual before the adoption of the treaty. That area therefore was not part of the reservation under the terms of the treaty and was subject to state jurisdiction.

Reversed and remanded.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Larry J. Burdick,* Prosecuting Attorney, and *Diane M. Kuhn,* Assistant Prosecuting Attorney, for the people.

Daniel R. O'Neil, for the defendant.

Amicus Curiae:

Derril B. Jordan, for Saginaw Chippewa Indian Tribe of Michigan.

Before: MACKENZIE, P.J., and WEAVER and R. B. BURNS,* JJ.

PER CURIAM. Defendant, a member of the Saginaw Chippewa Indian tribe, was arrested in Chippewa Township, Isabella County, for operating a motor vehicle while under the influence of intoxicating liquor, third offense, MCL 257.625(6); MSA 9.2325(6). Defendant was also charged with impaired driving, third offense, MCL 257.625b(4); MSA 9.2325(2)(4), and driving with a suspended license, second offense, MCL 257.904(3); MSA 9.2604(3). Defendant moved in circuit court to quash the information on the ground that the state court lacked subject-matter jurisdiction because he was arrested on land within the boundaries of the Isabella Indian reservation. The court granted defendant's motion to quash. The prosecution now appeals as of right the August 31, 1990, order quashing the information. We reverse and remand.

The sole issue before us is whether defendant was in Indian country. Indian country is defined by 18 USC 1151, in pertinent part, as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . .

The circuit court found that "Leaton Road is a right-of-way running through the Isabella Indian Reservation, and is therefore, by definition, 'Indian Country.' Since federal and tribal jurisdiction are exclusive in Indian Country, it is axiomatic that

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

state criminal jurisdiction over an enrolled member of the tribe in Indian country, including rights-of-way therein, is void, according to the plain meaning of the statute."

The prosecution asserts that defendant was not in Indian country when he was arrested. Rather, the prosecution contends the location where defendant was arrested is outside the areas that are Indian country.

The prosecution first argues that land patented to non-Indians before the effective date of the treaties was never Indian country as defined by statute.

The Isabella reservation was established by the Treaty of October 18, 1864. That treaty provided, in part, that:

> Article II. In consideration of the foregoing relinquishments, the United States hereby agree to set apart for the exclusive use, ownership, and occupancy of the said . . . Chippewas of Saginaw, Swan Creek, and Black River, all of the unsold lands within the six townships in Isabella County, reserved to said Indians by the treaty of August 2d, 1855, aforesaid, and designated as follows, vis:
>
> The north half of township fourteen, and townships fifteen and sixteen north, of range three west; the north half of township fourteen and township fifteen north, of range four west, and townships fourteen and fifteen north, of range five west.

The prosecution argues that any lands within the six described townships that were sold before the execution of the 1864 treaty were never part of the original Isabella reservation and, therefore, could not be considered Indian country for jurisdictional purposes. The prosecution has documented the fact that the area where defendant was ar-

rested was patented to non-Indians in July 1857 pursuant to cash purchases made in 1854.

Indian treaties must be construed "so far as possible, in the sense in which the Indians understood them, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Choctaw Nation of Indians v United States,* 318 US 423, 432; 63 S Ct 672; 87 L Ed 877 (1943). "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Worcester v Georgia,* 31 US (6 Pet) 515, 582; 8 L Ed 483 (1832). Ambiguities are to be construed in favor of the Indians. *Oneida Co v Oneida Indian Nation,* 470 US 226, 247; 105 S Ct 1245; 84 L Ed 2d 169 (1985). Courts may not, however, "ignore plain language that, viewed in historical context and given a 'fair appraisal,' . . . clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish & Wildlife v Klamath Indian Tribe,* 473 US 753, 774; 105 S Ct 3420; 87 L Ed 2d 542 (1985).

In this case, the parties have not presented evidence of the negotiations surrounding the formation of the Treaty of October 18, 1864. However, examining the treaty itself, it appears that the parties intended for the previously sold lands to be excluded from the reservation, because the Chippewas were granted all the "unsold" lands within the six townships. Given the plain language of the treaty, and the lack of evidence to the contrary, we believe the Chippewas would have understood at the time of treaty formation that they were not permitted to settle on or own any

lands previously patented to individuals. *Choctaw Nation of Indians v United States, supra.*

Therefore, defendant was not on a right of way passing through Indian country when he was arrested, and he was subject to criminal prosecution in state court.

Our resolution of this issue renders moot the prosecution's second assignment of error, that lands patented to Indians and subsequently sold to non-Indians are not Indian country.

We reverse the circuit court's order of August 31, 1990, and remand for trial on all charges. We do not retain jurisdiction.

PEOPLE v HALL

Docket No. 119280. Submitted October 1, 1991, at Lansing. Decided April 10, 1992; approved for publication August 13, 1992, at 9:00 A.M.

Marcus J. Hall pleaded guilty in the 52nd District Court of operating a motor vehicle while under the influence of intoxicating liquor. The court, Gerald E. McNally, J., denied his subsequent motion to withdraw the plea. On appeal, the Oakland Circuit Court, Robert L. Templin, J., ordered reversal. The people appealed by leave granted.

The Court of Appeals *held:*

The district court's denial of the defendant's motion to withdraw his plea was not a clear abuse of discretion that resulted in a miscarriage of justice. The circuit court's peremptory reversal was erroneous.

Although a deviation from the requirements of the applicable court rules occurred at the plea proceeding, the deviation did not affect substantial rights of the defendant. Therefore, pursuant to the court rule then in effect, MCR 6.201(E)(7)(b), now MCR 6.610(E)(7)(b), the defendant would be permitted to withdraw his plea only if it would not cause substantial prejudice to the people because of reliance on the plea. Substantial prejudice to the people would have resulted if the defendant was permitted to withdraw his plea because five years elapsed between the time of the defendant's plea and his motion to withdraw, thereby greatly hampering the people's ability to prove the offense.

Reversed.

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

Robert W. Larin, for the defendant.

Before: MARILYN KELLY, P.J., and WAHLS and FITZGERALD, JJ.

PER CURIAM. The people appeal by leave granted from an order of the Oakland Circuit Court that peremptorily reversed a district court order denying defendant's motion to withdraw a 1984 plea of guilty of operating a motor vehicle under the influence of liquor, MCL 257.625; MSA 9.2325. We reverse.

When a motion to withdraw a guilty plea is brought after sentencing, a trial court's decision will not be reversed absent a clear abuse of discretion resulting in a miscarriage of justice. *People v Winegar,* 380 Mich 719, 730-731; 158 NW2d 395 (1968); *People v Rettelle,* 173 Mich App 196, 200; 433 NW2d 401 (1988). A review of the 1984 plea transcript shows that defendant was advised of his *Boykin/Jaworski* [1] rights before the acceptance of his plea. That defendant's plea was freely, voluntarily, and understandingly made may be inferred from the district court's acceptance of the plea. *Guilty Plea Cases,* 395 Mich 96, 126; 235 NW2d 132 (1975). Although defendant is correct that he was not informed of two of the three statutory consequences of his conviction as required by MCL 257.625(9); MSA 9.2325(9) at the time of his plea, defendant does not argue that because of this omission his plea was not made understandingly. Finally, defendant argues that the factual basis for his plea was inadequate. If defendant is correct, then the proper remedy would be to remand this case to allow the prosecutor to establish the missing elements. *People v Mitchell,* 431 Mich 744, 749-750; 432 NW2d 715 (1988). Although the factual basis established at the plea proceeding was

[1] *Boykin v Alabama,* 395 US 238; 89 S Ct 1709; 23 L Ed 2d 274 (1969); *People v Jaworski,* 387 Mich 21; 194 NW2d 868 (1972).

scant, defendant does not argue that the prosecutor would be unable to prove the offense.

At the time of the hearing on defendant's motion to withdraw his plea, MCR 6.201(E)(7)(b) (now MCR 6.610[E][7][b]) provided that if the trial court determined that a deviation from the requirements of the court rules occurred, but that the deviation did not affect substantial rights of the defendant, then the defendant would be permitted to withdraw his plea only if it would not cause substantial prejudice to the people because of reliance on the plea. In this case, the district court found that the deviations described above did not affect substantial rights. We agree. Defendant is no longer subject to the statutory consequences of which he should have been warned before acceptance of his 1984 plea, and does not claim that a factual basis for his plea cannot be shown. Moreover, the prejudice to the people if defendant was permitted to withdraw his plea is manifest; five years elapsed between the time of defendant's plea and his motion to withdraw, thereby greatly hampering the people's ability to prove the offense.[2]

We conclude that the district court's denial of defendant's motion to withdraw his plea was not a clear abuse of discretion that resulted in a miscarriage of justice. Hence, the circuit court's peremptory reversal of the district court's order was erroneous.

Reversed.

---

[2] Our holding does not restrict a defendant's right to challenge the *constitutionality* of a prior conviction in circuit court. *People v Moore*, 391 Mich 426, 440-441; 216 NW2d 770 (1974).

McMILLAN v AUTO CLUB INSURANCE ASSOCIATION

AUTO CLUB INSURANCE ASSOCIATION v McMILLAN

Docket Nos. 123193, 137222. Submitted February 12, 1992, at Detroit. Decided May 14, 1992; approved for publication August 13, 1992, at 9:05 A.M. Leave to appeal sought.

John McMillan, for himself and as guardian and conservator of Charyl McMillan, brought an action in the Oakland Circuit Court against Auto Club Insurance Association, seeking no-fault benefits for a disability sustained by Charyl McMillan. A jury awarded damages in an amount less than McMillan sought. The court, Robert L. Templin, J., denied McMillan's motions for costs, additur or a new trial with respect to damages, and a judgment for no-fault penalty interest notwithstanding the verdict. McMillan appealed.

Auto Club then brought an action in the same court against McMillan, individually and in his representative capacity, seeking a declaration that it had no further liability in connection with Charyl McMillan's disability. The same judge granted summary disposition for Auto Club. McMillan appealed, and the appeals were consolidated.

The Court of Appeals *held:*

1. The trial court erred in denying McMillan's motion for costs. Pursuant to MCR 2.625(A)(1), taxable costs of litigation are allowed the prevailing party in an action unless prohibited by statute or court rule, or unless the trial court directs otherwise for reasons stated in writing and filed in the action. In this case, McMillan was the prevailing party on the single cause of action against Auto Club, even though he received damages in an amount less than requested, and the trial court failed to provide written reasons for denying the motion for costs.

2. The trial court did not abuse its discretion in denying

REFERENCES

Am Jur 2d, Automobile Insurance § 344; Costs §§ 11, 14; Damages §§ 1029-1031.

Automobile insurer's liability for statutory excess interest for delayed payment of no-fault claim. 14 ALR4th 761.

McMillan's motions for additur or a new trial with regard to damages. The jury's award was supported by the evidence.

3. The trial court erred in denying no-fault penalty interest. MCL 500.3142; MSA 24.13142 provides that such interest is available where a claimant presents reasonable proof of a claim and thirty days elapse without the insurer paying the claim. In this case, reasonable proof of McMillan's claim was presented to Auto Club no later than the close of proofs in his action, and McMillan is entitled to penalty interest beginning thirty days after that date.

4. The trial court erred in granting summary disposition for Auto Club in its action against McMillan. Summary disposition should have been granted for McMillan on the ground of res judicata.

Remanded for further proceedings in Docket No. 123193. Remanded for entry of judgment for McMillan in Docket No. 137222.

1. COSTS — SINGLE CAUSE OF ACTION — PREVAILING PARTY.

Where a single cause of action is alleged, the party that prevails on the entire record, even though being awarded damages less than requested, is the prevailing party and is entitled to costs unless a statute or court rule disallows it, or unless the trial court directs otherwise for reasons stated in writing and filed in the action (MCR 2.625[A][1], [B][2]).

2. DAMAGES — ADDITUR — APPEAL.

A trial court, in deciding whether to grant a motion for additur, must examine whether the evidence supports the jury's verdict; the trial court's ruling will not be reversed on appeal absent an abuse of discretion.

3. INSURANCE — NO-FAULT — DENIAL OF CLAIMS — PENALTY INTEREST.

Penalty interest for a no-fault insurer's denial of a claim is not available until the claimant has presented the insurer with reasonable proof of the claim and thirty days have passed without the insurer paying the claim (MCL 500.3142; MSA 24.13142).

Miller & Lemberg, P.C. (by *Wayne J. Miller* and *Lisa A. Welton*), for the plaintiffs.

Brandt, Hanlon, Becker, Lanctot, McCutcheon, Schoolmaster & Taylor (by *David J. Lanctot*)

(*Garan, Lucow, Miller, Seward, Cooper & Becker, P.C.,* by *James G. Gross* and *Mary T. Nemeth,* of Counsel), for the defendant.

Before: Doctoroff, C.J., and Michael J. Kelly and Brennan, JJ.

Per Curiam. Plaintiff John McMillan, individually and as guardian and conservator of Charyl McMillan, filed an action against no-fault automobile insurer Auto Club Insurance Association (ACIA) on September 6, 1986, claiming that Charyl McMillan's disability from her preexisting condition (multiple sclerosis) was the result of an automobile accident that occurred in February 1984, and, therefore, she was entitled to no-fault insurance benefits. Following a jury trial on plaintiff's claims, judgment was entered in favor of plaintiff. The jury found that Charyl McMillan's disability had arisen out of the automobile accident. Plaintiff was awarded damages in the amount of $60,000. Plaintiff then filed posttrial motions for, among other things, taxable costs, additur or a new trial on the issue of damages, and judgment for no-fault penalty interest notwithstanding the verdict. These motions were denied by the trial court in an order dated November 3, 1989. Plaintiff appealed as of right (Docket No. 123193).

On November 30, 1989, ACIA filed an action against plaintiff, seeking a declaratory judgment that it had no further liability to plaintiff in connection with Charyl McMillan's automobile accident. Cross-motions for summary disposition were filed. The trial court granted ACIA's motion for summary disposition in an order dated January 7, 1991. Plaintiff again appealed as of right (Docket No. 137222). Plaintiff's appeals were consolidated by order of this Court.

Plaintiff first argues that the trial court erred in denying his posttrial motion for costs under MCR 2.625. We agree.

Taxable costs of litigation are allowed the prevailing party in an action unless prohibited by statute or court rule, or unless the trial court directs otherwise for reasons stated in writing and filed in the action. MCR 2.625(A)(1); *Check Reporting Services, Inc, v Michigan Nat'l Bank-Leasing,* 191 Mich App 614, 629; 478 NW2d 893 (1991). In this case, the trial court denied plaintiff's request for costs, but failed to state its reasons for doing so in writing as required by the court rule. However, the record reveals that the trial court's reason for denying plaintiff's motion for costs was that, because plaintiff sought $300,000 in damages but obtained only a $60,000 jury verdict, plaintiff was not the prevailing party.

Where there is only one cause of action, the party who prevails on the entire record is deemed to be the prevailing party. MCR 2.625(B)(2). Plaintiff was the prevailing party in this matter. Plaintiff's claim was that Charyl McMillan's disability arose out of a 1984 automobile accident, and, therefore, she was entitled to no-fault insurance benefits. The jury so found, and, therefore, plaintiff succeeded in his claim against defendant. The fact that plaintiff did not obtain the total amount of damages sought does not prohibit him from being the prevailing party under MCR 2.625(B)(2).

The trial court's reliance on *Marina Bay Condominiums, Inc v Schlegel,* 167 Mich App 602; 423 NW2d 284 (1988), is misplaced. *Marina Bay* stands for the proposition that where a party does not succeed on its claim, it is not a prevailing party even if its position is improved as a result of the litigation. The *Marina Bay* case does not stand for the proposition that a party receiving less than all

the damages sought at trial is not a prevailing party.

Plaintiff next argues that the trial court erred in denying his request for additur or, in the alternative, a new trial on the issue of damages. 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); *Wilson v General Motors Corp,* 183 Mich App 21, 38; 454 NW2d 405 (1990). The proper consideration in granting or denying additur is whether the jury award is supported by the evidence. *Palenkas, supra* at 532; *Wilson, supra* at 38. Further, trial courts have discretion in granting new trials, and appellate courts will not interfere absent a palpable abuse of discretion. *Palenkas, supra.*

After reviewing the record, we conclude that the jury award of $60,000, although much less than that sought by plaintiff, is supported by the evidence presented at trial. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for additur or, in the alternative, a new trial.

Next, plaintiff argues that the trial court erred in denying his motion for an award of no-fault penalty interest. No-fault penalty interest is not available until the no-fault claimant has presented the insurer with reasonable proof of the claim and thirty days have passed without the insurer paying the claim. MCL 500.3142; MSA 24.13142. As plaintiff concedes, the jury could have found that reasonable proof of plaintiff's claim had not been presented to ACIA until sometime during the trial. Although we cannot say with certainty at what point during the trial ACIA had reasonable proof of

plaintiff's claim, reasonable proof must have been presented to ACIA by the close of evidence on September 8, 1989. Therefore, as ACIA concedes, plaintiff is entitled to no-fault penalty interests from October 8, 1989.

Plaintiff's next claim is that the trial court erred in granting ACIA's motion for summary disposition in its action for a declaratory judgment that it had no further liability to plaintiffs in connection with Charyl McMillan's automobile accident. We agree.

A party is barred from litigating a claim by the doctrine of res judicata if the same parties have litigated the claim before. Res judicata requires (1) the same parties, (2) the same claim, and (3) a judgment on the merits. *Curry v Detroit,* 394 Mich 327, 331; 231 NW2d 57 (1975). ACIA's action for a declaratory judgment involved the same parties as plaintiff's claim for no-fault disability benefits. The first action included a claim for judgment regarding ACIA's ongoing liability to plaintiff. Lastly, a judgment was rendered on the merits in the first action upon a finding that Charyl McMillan's disability arose out of the 1984 automobile accident. In the first action, plaintiff sought, litigated, and received a judgment providing for ACIA's ongoing responsibility to cover Charyl McMillan's disability. ACIA never objected to the judgment rendered in the first action or sought to appeal it. Instead, ACIA sought a declaratory judgment that is in direct conflict with a judgment entered against it. The doctrine of res judicata bars ACIA from relitigating its responsibility to plaintiff. The trial court erred in granting ACIA's motion for summary disposition and in denying plaintiff's motion for summary disposition.

Lastly, we find no merit in the final issue raised by plaintiff on appeal. The trial court *did* not

decide that its prior ruling on plaintiff's motion for additur collaterally estopped plaintiff from litigating in the second action the interpretation of the jury's verdict in the first action.

Docket No. 123193 is remanded to the trial court for further proceedings consistent with this opinion. Docket No. 137222 is remanded to the trial court for entry of judgment in favor of the plaintiff.

WEBB v FIRST OF MICHIGAN CORPORATION

Docket No. 134608. Submitted May 6, 1992, at Grand Rapids. Decided May 27, 1992; approved for publication August 13, 1992, at 9:10 A.M.

Greg and Mary Webb brought an action in the Kalamazoo Circuit Court against First of Michigan Corporation, alleging that they were induced to make a bad investment as a result of fraudulent representations by the defendant's agent regarding the risks involved and the income potential of the investment. The court, Donald M. Goodwillie, Jr., J., granted summary disposition for the defendant. The plaintiffs appealed.

The Court of Appeals *held:*

1. The agent's statement regarding the rate of return the investment would generate was a promise of future benefit that, by law, cannot constitute fraud.

2. The agent's statement that the investment was risk-free was one of past or existing fact and thus could form the basis of fraud. However, there is no fraud where, as in this case, the means of knowledge regarding the truthfulness of the representation are available to the plaintiffs and the degree of their utilization is not prohibited by the defendant. The plaintiffs cannot claim to have been defrauded where they had available to them information regarding the truthfulness of the representations and chose to ignore it.

Affirmed.

FRAUD — MISREPRESENTATION.

An alleged misrepresentation will not support an action for fraud where the means of knowledge regarding the truthfulness of the representation are available and the degree of their utilization is not circumscribed; a plaintiff who ignores available information cannot claim to have been defrauded.

REFERENCES

Am Jur 2d, False Pretenses §§ 51, 54, 55; Fraud and Deceit §§ 448, 479.

See the Index to Annotations under False Pretenses; Fraud and Deceit.

Gemrich, Moser, Bowser, Fette & Lohrmann (by *Scott Graham*), for the plaintiffs.

Miller, Canfield, Paddock & Stone (by *Michael P. Coakley* and *Kathryn L. Ossian*), for the defendant.

Before: HOOD, P.J., and CONNOR and R. C. KAUFMAN,* JJ.

PER CURIAM. Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition, apparently pursuant to MCR 2.116(C)(10). We affirm.

This is a case of an investment gone bad. In July 1983, plaintiffs invested $40,000 from a lump-sum workers' compensation benefits settlement in the Damson 1983-84 Oil and Gas Income Fund, a limited partnership, on the advice of Steven Malmquist, a broker at defendant, First of Michigan Corporation. Plaintiff Greg Webb testified in a deposition that he made the investment because of the representation that it was risk-free and would yield at least eighteen percent interest. In the months following their investment, plaintiffs became concerned that performance was not as had been "guaranteed." On several occasions, plaintiffs spoke with Roger Prince, the broker who took over the account from Malmquist. On these occasions, they expressed concern about the soundness of the investment. At no time, however, did plaintiffs decide to terminate the investment, but, rather, they played the odds to see what the future would bring. By 1989, plaintiffs' investment decreased in value to such an extent that it could be classified as worthless, prompting them to file this action.

Plaintiffs' complaint named broker Steven

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

Malmquist as a party, in addition to defendant corporation. Malmquist was never served, however, and thus is not a party to this appeal. Rather than file an answer, defendant First of Michigan moved for summary disposition of the four-count complaint. The trial court granted the motion with regard to plaintiffs' fourth claim, which alleged a violation of the Consumer Protection Act, MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*, but denied the motion without prejudice with regard to the remaining claims, which alleged fraud and misrepresentation, unsuitability of investment, and breach of an implied contract. In so ruling, the trial court indicated that material issues of fact existed regarding whether plaintiffs ratified the actions of defendant's agents by retaining their investment in spite of indications that it was not performing as promised.

Upon completion of discovery, defendant renewed its motion for summary disposition with regard to the remaining three counts pursuant to MCR 2.116(C)(7) and (10), arguing that there existed no factual dispute that plaintiffs had ratified the alleged prior misdeeds of Steven Malmquist. The trial court agreed and granted the motion.

On appeal, plaintiffs contend that a genuine issue of fact does exist regarding whether their conduct constitutes ratification such that summary disposition should have been denied. Even were we to agree with plaintiffs that summary disposition based on ratification was improper, we nonetheless conclude that the trial court reached the correct result in dismissing the complaint, but for different reasons.

A review of plaintiffs' complaint indicates that their claims against defendant are based on events surrounding the initial investment in Damson Oil

and Gas. The essence of the complaint is one for fraud occurring when plaintiffs were deciding on an investment strategy. They claim that they had been misinformed about the nature of the risks involved and the interest potential of the Damson investment opportunity. Plaintiff Greg Webb testified in a deposition that Malmquist stated that the investment was "risk-free" with a "guaranteed" eighteen percent interest return rate. Plaintiffs alleged that these statements were knowingly false when made and were made with the intent that plaintiffs make their investment in reliance upon them.

In general, to constitute actionable fraud plaintiffs must establish that (1) defendant made a material representation; (2) it was false; (3) when it was made defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) defendant made it with the intent that it should be acted upon by plaintiff; (5) plaintiff did act in reliance upon it; and (6) plaintiff thereby suffered injury. *Hi-Way Motor Co v Int'l Harvester Co,* 398 Mich 330, 336; 247 NW2d 813 (1976), quoting *Candler v Heigho,* 208 Mich 115, 121; 175 NW 141 (1919).

Viewing the facts most favorably to plaintiffs, there appears to be no dispute that defendant, through its broker Steven Malmquist, made representations regarding the nature of the risk involved and the return investment "guaranteed." The question becomes, however, whether these statements relate to past or existing facts and are thus actionable, or whether they relate to a future promise or expectation that does not constitute fraud. See *Hi-Way Motor Co, supra.* With this in mind, we have little difficulty concluding that the statement regarding the eighteen percent interest return rate was nothing more than a promise of

future benefit that cannot, by law, constitute fraud.

The statement that the investment was "risk-free," however, is more problematic. In the context in which it was made, the statement by the investment broker has the appearance of a mere expression of professional opinion or of "puffing," neither of which would be actionable. See *Hayes Construction Co v Silverthorn,* 343 Mich 421, 426; 72 NW2d 190 (1955); *Van Tassel v McDonald Corp,* 159 Mich App 745, 750-753; 407 NW2d 6 (1987). Giving the benefit of doubt to plaintiffs, as required, we find that under the circumstances the statement was one of past or existing fact and thus could form the basis of a fraud claim. Nevertheless, there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant. *Schuler v American Motors Sales Corp,* 39 Mich App 276, 279-280; 197 NW2d 493 (1972). See also *Van Tassel, supra.* Here, plaintiffs acknowledged receipt of the Damson 1983-84 Oil and Gas Income Fund prospectus and agreement to its terms by signing the subscription agreement form before making their initial investment. The subscription agreement and power of attorney form states that the person signing "warrants, represents, covenants and agrees" that the "undersigned" "understands the nature of the risks involved" in the investment and "the financial hazards involved in the offering, including the speculative nature of the investment and the risk of losing the undersigned's entire investment." Further, the front page of the prospectus states that the investment involves special risks and that the reader should consult the risk factors section. Beginning on page four of the prospectus, the risk

factors involved are explained in detail and cover 3½ pages. Even a cursory review of any of these documents would have enlightened plaintiffs that the investment was not "risk free" as represented by the broker. Accordingly, we hold that plaintiffs cannot claim to have been defrauded when they had information available to them that they chose to ignore.

We affirm the order of the trial court dismissing plaintiffs' complaint for the reasons expressed above. Under the circumstances, we find it unnecessary to address the issue of ratification.

Affirmed.

BERRY v J & D AUTO DISMANTLERS, INC

Docket No. 133131. Submitted April 7, 1992, at Detroit. Decided April 30, 1992; approved for publication August 13, 1992, at 9:15 A.M.

David G. Berry, as personal representative of the estate of Gary M. Berry, deceased, and Barbara S. Berry brought an action in the Wayne Circuit Court against J & D Auto Dismantlers, Inc., alleging premises liability relating to the decedent's accidental death in the defendant's junkyard. The decedent had been a regular customer of the junkyard, purchasing parts he removed from automobiles in the junkyard without supervision from the defendant. He sustained fatal injury when crushed underneath an automobile that he had raised by using two bumper jacks he obtained from other automobiles in the junkyard instead of other lifting devices made available by the defendant. The court, Thomas J. Foley, J., granted summary disposition for the defendant, ruling that there existed no genuine issue of material fact and that the defendant was entitled to judgment as a matter of law. The plaintiffs appealed.

The Court of Appeals *held:*

1. Summary disposition was not precluded by the existence of a factual issue with respect to whether the decedent was a licensee or an invitee of the defendant. Assuming that the decedent was an invitee, the defendant's duty would have been to disclose known defects on the premises that the decedent was unlikely to discover on his own. Because the risks of using bumper jacks at the defendant's premises were known to the decedent, the defendant could not have been under a duty to warn the decedent of those risks.

2. The proximate cause of an injury is ordinarily a question for the trier of fact. However, where reasonable minds cannot differ regarding the proximate cause of an injury, as in this case, the trial court may make a ruling with respect to proxi-

REFERENCES

Am Jur 2d, Negligence §§ 78, 434, 443, 444, 446, 456; Premises Liability §§ 136-140, 142, 144, 153; Trial § 781.

Modern status of the rule absolving a possessor of land of liability to those coming thereon for harm caused by dangerous physical conditions of which the injured party knew and realized the risk. 35 ALR3d 320.

mate cause as a matter of law. Because the defendant could not have reasonably foreseen the decedent's use of the bumper jacks, given that other lifting devices were available for the decedent's use, the trial court did not err in determining that the defendant's alleged negligence in permitting jacks to remain in scrapped vehicles was not the proximate cause of the decedent's death.

3. Summary disposition was not precluded by the existence of a factual question regarding whether the defendant's alleged violation of a city ordinance governing the stacking or piling of materials in a junkyard constituted actionable negligence. Because the decedent's death was in no way caused by the stacking or piling of automobiles, any violation of the ordinance would not have constituted negligence.

Affirmed.

1. NEGLIGENCE — ACTIONS — SUMMARY DISPOSITION.

Summary disposition for a defendant in an action for negligence is proper where reasonable persons would agree that the injury caused to the plaintiff was too insignificantly connected to or too remotely affected by the defendant's alleged negligence.

2. NEGLIGENCE — PREMISES LIABILITY — BUSINESS INVITEES.

A landowner's duty to a business invitee is to disclose known defects that the invitee is unlikely to discover.

3. NEGLIGENCE — PROXIMATE CAUSE — QUESTION OF FACT OR LAW.

The proximate cause of an injury is ordinarily a question for the trier of fact; however, where reasonable minds cannot differ regarding the proximate cause of an injury, the trial court may determine proximate cause as a matter of law.

Law Offices of Lee B. Steinberg, P.C. (by *Barry N Schlussel*), for the plaintiffs.

Kohl, Secrest, Wardle, Lynch, Clark & Hampton (by *Janet G. Callahan*), for the defendant.

Before: WEAVER, P.J., and SULLIVAN and CORRIGAN, JJ.

PER CURIAM. In this premises liability action, plaintiffs appeal as of right an order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiffs' decedent, Gary M. Berry (hereafter plaintiff), was killed in an accident on defendant's premises on October 5, 1987. Defendant operates an automobile scrap yard and salvage operation in Wayne, Michigan. Plaintiff, a part-time mechanic, frequently purchased spare parts from defendant. On other occasions, he was permitted to remove parts from the yard without paying for them. He was quite familiar with the premises and was allowed to move around unescorted.

On the date of the accident, plaintiff went to defendant's scrap yard to obtain a battery cable for a Chrysler Cordoba, which he identified to defendant's employees only as "a Chrysler." He told the owner he had no money, but was allowed to go into the yard anyway.

Battery cables can usually be removed from a Chrysler vehicle from above, once the hood is open, but the Cordoba is an exception. The cables must be removed from underneath the car. Defendant owned both a "hi-lo truck" and another piece of equipment known as a "bobcat," either of which could be used to raise a car body off the ground. Plaintiff, however, did not ask for defendant's assistance in raising the Cordoba. Rather, without defendant's knowledge, he obtained two "bumper jacks" from other cars in the yard and used them to elevate the front of the car. None of defendant's employees observed plaintiff's actions or helped him to raise the vehicle. Plaintiff was killed when one of the jacks slipped from under the car body, which fell on him and crushed his chest.

Plaintiffs brought the present action, alleging various counts of negligence against defendant. Following discovery, defendant moved for summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). The trial court granted the motion. "[Defendant's employees] had

no knowledge of what happened [after plaintiff went out into the yard]. There is no evidence of any knowledge. . . . [T]here was no notice that there was a dangerous condition on this lot . . . . "

A motion under MCR 2.116(C)(10) tests the factual support for a claim. It is properly granted only if it is impossible for the nonmovant's claim to be supported by evidence at trial because of some deficiency that cannot be overcome. *Perez v KFC Nat'l Management Co, Inc,* 183 Mich App 265, 267; 454 NW2d 145 (1990). The party opposing the motion, however, has the burden of showing a genuine issue for trial. *Mirza v Maccabees Life & Annuity Co,* 187 Mich App 76, 80; 466 NW2d 340 (1991). MCR 2.116(G)(4). The reviewing court must determine whether the kind of record that might be developed would leave open an issue of fact upon which reasonable minds might differ. *Wert v Afton,* 190 Mich App 3, 4; 475 NW2d 403 (1991). If all reasonable persons would agree that "the injury caused [to] plaintiff was too insignificantly connected to or too remotely affected by the defendant's negligence," summary judgment is proper. *Davis v Thornton,* 384 Mich 138, 142-143; 180 NW2d 11 (1970). In addition, there is no error if summary disposition of a factual issue is granted if that issue is not material to decision of the case. See *Spencer v Ford Motor Co,* 141 Mich App 356, 363; 367 NW2d 393 (1985).

On appeal, plaintiffs assert that three genuine issues of material fact preclude summary disposition. We disagree.

I

Plaintiffs first claim that the court should have allowed the jury to decide if plaintiff was a business invitee or a mere licensee. It is basic to the

concept of "business invitee" that the presence of the plaintiff on the defendant's premises be intended to benefit the landowner as well as the visitor. There must be some benefit conferred on the landowner. See, e.g., *Gage v Ford Motor Co,* 102 Mich App 310, 318; 301 NW2d 517 (1980); *Leveque v Leveque,* 41 Mich App 127, 130-132; 199 NW2d 675 (1972). Because plaintiff's presence was intended solely for his own benefit, not defendant's, he is properly considered a licensee. In any case, plaintiff's status at the time of the accident is not necessary for decision of this case. A landowner's duty to a business invitee is to disclose known defects that the visitor is unlikely to discover on his own. *Miller v Miller,* 373 Mich 519, 524; 129 NW2d 885 (1964). "The mere existence of a defect or danger is not enough to establish liability." *McCord v United States Gypsum Co,* 5 Mich App 126, 129; 145 NW2d 841 (1966), citing *Kroll v Katz,* 374 Mich 364, 373; 132 NW2d 27 (1965), and Prosser, Torts (2d ed), p 459.

The present case is complicated because plaintiffs cannot identify the alleged "defect" on defendant's property. Initially, plaintiffs complained of the presence of unsafe bumper jacks. On appeal, however, this argument has been abandoned. Plaintiffs now allege that the "inherent muddiness of the unlevel ground" made the use of jacks dangerous. This Court need not consider an argument raised for the first time on appeal. *Bloemsma v Auto Club Ins Ass'n (After Remand),* 190 Mich App 686, 692; 476 NW2d 487 (1991).

It is plain that plaintiff's use of the jacks, not the jacks themselves, created the "hazard" (to the extent that one existed) on defendant's property. Plaintiff, a mechanic and regular visitor to defendant's salvage yard, knew the risks of using bumper jacks to elevate an automobile body. Rea-

sonable minds could not find that the jacks presented a "hidden" danger of which plaintiff should have been warned, even if he were found to be a business invitee.

II

Plaintiffs next contend that a factual question exists regarding whether defendant owed a duty to plaintiff to foresee the danger of plaintiff's using the bumper jacks to raise the Cordoba. The existence of a legal duty is a question of law for the court to decide. *Moning v Alfono,* 400 Mich 425, 436-437; 254 NW2d 759 (1977). Closely related to the question of duty is that of proximate cause. *Balcer v Forbes,* 188 Mich App 509, 511; 470 NW2d 453 (1991). "Both duty and cause depend on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable." *Johnson v Bobbie's Party Store,* 189 Mich App 652, 660; 473 NW2d 796 (1991).

Ordinarily, the determination of proximate cause is left to the trier of fact, but "if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should rule as a matter of law." *Vsetula v Whitmyer,* 187 Mich App 675, 682; 468 NW2d 53 (1991). See also *Richards v Pierce,* 162 Mich App 308, 317; 412 NW2d 725 (1987).

No Michigan case is squarely on point. Defendant relies on *Murday v Bales Trucking, Inc,* 165 Mich App 747; 419 NW2d 451 (1988), which is instructive although not dispositive. In *Bales,* a child was injured when a pile of sand collapsed on her as she was digging a tunnel into it. She sued, alleging that the sand pile was an attractive nui-

sance. The plaintiff argued that because the defendants knew that children played on their property, they should have known that the children were digging in the sand pile and acted accordingly. *Id.* at 748-749, 753.

This Court affirmed the grant of summary disposition to the defendant:

> [B]efore a defendant can be said to have tolerated or acquiesced to conduct of a third party unrelated to him, he must know or have reason to know of such a condition. . . .
>
> [P]laintiff reasons that because defendants knew children played there [on defendant's property] it is reasonable to conclude that defendants should have also recognized that the land, which was used for excavating purposes, presented an unreasonable risk of harm. We are not persuaded . . . . [*Id.* at 753].

Two cases from other jurisdictions also illustrate how proximate cause may be decided as a matter of law.

In *Holbrook v Peric,* 129 Ill App 3d 996; 85 Ill Dec 163; 473 NE2d 531 (1984), the plaintiff was injured when his car struck a truck. The truck was last in a procession of three trucks that were sweeping the shoulder of an expressway near Chicago; the truck was stopped on the shoulder at the time. The plaintiff alleged that he had insufficient warning of the truck's presence, despite its several lights and warning signs. *Id.* at 997-998. His theory was that a sign on the truck's tailgate caused him to become "disoriented" and strike the truck. The court upheld the trial court's grant of summary disposition, holding that reasonable minds could only conclude that the defendant's alleged acts were not the proximate cause of the plaintiff's

injury. The court also rejected the contention that the doctrine of comparative negligence "diminishes the need to protect remotely negligent defendants from liability," noting that if the case had been tried, "the court would have been required to direct a verdict in favor of defendants based on proximate cause." *Id.* at 1001.

Sharp v Fairbanks North Star Borough, 569 P2d 178 (Alas, 1977), also presented a foreseeability question. The plaintiff was a child who was on his way home from an athletic event that the defendant school district had allowed him to participate in, but had not sponsored. *Id.* at 180. The plaintiff went out for lunch with a classmate and his mother; they stopped at a filling station, where the mother told the boys to pump the gas. Fuel spilled on the plaintiff's clothing, which his friend then intentionally ignited, injuring the plaintiff. After settling with the mother, the plaintiff sued the school district, alleging that its lack of supervision over the tournament had led to his injuries. The court held, as a matter of law, that the actions of the classmate's mother "constituted an unforeseeable superseding cause" and that the school district was not liable as a matter of law. *Id.* at 184.

In the present case, plaintiff's use of the bumper jacks to raise the Cordoba body was not reasonably foreseeable by defendant. Deposition testimony revealed that bumper jacks were not used by defendant's employees or other customers because a hydraulic jack was available. The owner provided an affidavit that he had never known plaintiff to use bumper jacks to elevate a car body and that he had no notice that plaintiff would need to raise the unidentified Chrysler to obtain the desired part. Defendant could not have reasonably predicted plaintiff's unusual course of action. Defendant's alleged negligence in permitting the

jacks to remain in the scrapped vehicles cannot have been the proximate cause of plaintiff's death.

Further, Michigan recognizes a duty on the part of an adult plaintiff to exercise reasonable care for his own safety and protection; see SJI2d 10.04 ("It was the duty of the plaintiff, in connection with this occurrence, to use ordinary care for his own safety . . . ."). See also *Jaworski v Great Scott Supermarkets, Inc,* 403 Mich 689, 700; 272 NW2d 518 (1978); *Wigginton v Lansing,* 129 Mich App 53, 61; 341 NW2d 228 (1983). As the Court said in *Hale v Cooper,* 271 Mich 348, 354; 261 NW 54 (1935):

> [D]efendants were entitled to assume that others using the highway in question would under the circumstances at the time use reasonable care themselves and take proper steps to avoid the risk of injury.

See also *Sheahan v Northeast I R C R Corp,* 212 Ill App 3d 732; 156 Ill Dec 816; 571 NE2d 796 (1991) (defendant railroad not required to anticipate that the plaintiff's decedent would disregard warning at gate crossing).

III

Finally, plaintiffs claim that a factual issue arises regarding whether defendant's alleged violation of a City of Wayne ordinance, 832.15(B), constitutes "evidence of negligence." This argument is without merit. The ordinance regulates "the stacking or piling of material within [a] junk yard," requiring that it "not endanger . . . customers . . . ." Plaintiff's death was not caused in any way by the "stacking or piling" of material. A jury could not possibly find that defendant's alleged

violation of the ordinance was even evidence of negligence. Further, violation of an ordinance has no bearing on the question of duty. *Ward v Frank's Nursery & Crafts, Inc,* 186 Mich App 120, 135; 463 NW2d 442 (1990).

No material factual issues remain for consideration. Summary disposition was properly granted.

Affirmed. Costs to defendant.

SMITH v SWARTHOUT

Docket No. 134074. Submitted April 20, 1992, at Grand Rapids. Decided May 13, 1992; approved for publication August 13, 1992, at 9:20 A.M.

James E. Smith, a member of the Ohio National Guard, brought an action in the Crawford Circuit Court against John G. Swarthout, a member of the Michigan National Guard, seeking damages for personal injuries received when his personal vehicle was struck by a vehicle owned by the federal government and driven by Swarthout after Smith had just returned to Camp Grayling, Michigan, following a leave of absence. Both parties were participating in annual National Guard training exercises at Camp Grayling. The court, Alton T. Davis, J., granted summary disposition for the defendant and dismissed the action on the ground of intramilitary immunity. The plaintiff appealed.

The Court of Appeals *held:*

1. The trial court correctly found that both parties were federal employees at the time of the accident, that the Federal Tort Claims Act, 28 USC 2671 *et seq.*, provided the plaintiff's exclusive remedy, and that it lacked jurisdiction to hear claims under the act.

2. There is no state tort remedy available to the plaintiff unless he can show that the FTCA does not apply because the defendant was not acting within the scope of his employment at the time of the accident. The trial court did not have jurisdiction to resolve the merits of the FTCA claim.

3. Because the defendant attempted to obtain certification

REFERENCES

Am Jur 2d, Federal Tort Claims Act §§ 3, 55-58, 65, 66, 71, 118, 119; Military, and Civil Defense § 291.

Federal Tort Claims Act: When is a government officer or employee "acting within the scope of his office or employment" for purpose of determining government liability under 28 USC § 1346(b). 6 ALR Fed 373.

Validity, construction, and effect of 28 USC sec. 2679(b), providing that remedy against the United States for negligent operation of motor vehicle is exclusive remedy against driver-employee. 16 ALR3d 1394.

from the Attorney General of the United States that he was acting within the scope of his office or employment when the accident occurred, pursuant to 28 USC 2679(c) and (d)(1)-(2), and had received no response, the trial court was bound to follow the procedures set forth in 28 USC 2679(d)(3), which allow the court to find and certify that the employee was acting within the scope of office or employment, deem the action to be brought against the United States under the FTCA, substitute the United States as the party defendant, and order the action removed to federal court. The defendant's motion to dismiss should have been treated as a motion for certification by the court. His failure to request certification by the court is not fatal and does not confer jurisdiction on the court to resolve the merits of the case.

4. The case must be remanded to the trial court for a determination whether the defendant was acting within the scope of his employment, i.e., in the line of duty, at the time of the accident.

Vacated and remanded.

1. ARMED SERVICES — NATIONAL GUARD — NEGLIGENCE — FEDERAL EMPLOYEES — ACTING WITHIN SCOPE OF OFFICE OR EMPLOYMENT.

Members of the National Guard are federal employees while engaged in training or duty; in general, the federal government may be sued for the negligent acts of its employees committed within the scope of their office or employment; in the context of national guardsmen, the term "acting within the scope of their office or employment" means acting in the line of duty (28 USC 2671, 2674, 2680).

2. TORTS — FEDERAL TORT CLAIMS ACT — FEDERAL EMPLOYEES — EXCLUSIVE REMEDY — MOTOR VEHICLES.

The Federal Tort Claims Act provides the sole substantive remedy for injury or loss of property, or personal injury or death, resulting from the operation by an employee of the federal government of any motor vehicle while acting within the scope of office or employment; federal courts are the only forums available for such actions; state courts do not have jurisdiction to entertain claims under the act (28 USC 1346[b], 2679[b]).

Grace Dopp Wegner, for the plaintiff.

Bensinger, Cotant, Menkes & Aardema, P.C. (by *Kerr L. Moyer*), for the defendant.

Before: HOOD, P.J., and SHEPHERD and K. N. SANBORN,* JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's grant of defendant's motion for summary disposition and dismissal of his personal injury action on the ground of intramilitary immunity. We vacate and remand.

On August 25, 1985, plaintiff was a member of the Ohio National Guard and defendant was a member of the Michigan National Guard. Both were participating in annual training exercises at Camp Grayling, Michigan. Plaintiff had just returned to camp from a twenty-four-hour leave, apparently driving his own vehicle. Defendant, who was driving a tanker truck owned by the federal government, allegedly made an improper lane change and struck plaintiff. Plaintiff apparently received benefits from the federal government for his injuries.

Plaintiff sued defendant, the State of Michigan, and the Michigan National Guard. Upon the governmental defendants' motion to dismiss, plaintiff stipulated the dismissal and refiled the claims in the Michigan Court of Claims. Eventually, the Court of Claims dismissed those claims, holding that because the tanker truck was owned by the federal government, the state and the National Guard were not liable for injuries caused by it.

Defendant Swarthout then successfully moved the circuit court to dismiss the claim remaining against him. Defendant argued that the action was barred by the doctrine of intramilitary immunity because, at the time of the accident, both parties were federal employees acting in the line of duty. Plaintiff argues on appeal that the trial court erred in dismissing the case because there was no

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

evidence that both parties were federal employees acting within the scope of their employment. Plaintiff also argues that the court erred in failing to follow the certification procedures of the Federal Tort Claims Act (FTCA), 28 USC 2671 *et seq.* We agree in part.

As acknowledged by both parties, "members of the National Guard while engaged in training or duty" are considered federal employees. See 28 USC 2671. In general, the federal government has consented to be sued for the negligent acts of its employees committed within the scope of their office or employment. See 28 USC 2674; see also 28 USC 2680 (exceptions). In the context of national guardsmen, " '[a]cting within the scope of his office or employment' . . . means acting in [the] line of duty." 28 USC 2671.

On the date of the accident in this case, the FTCA was the sole substantive remedy "for injury or loss of property or personal injury or death, resulting from the operation by any employee of the [federal] Government of any motor vehicle while acting within the scope of his office or employment"; the FTCA was explicitly "exclusive of any other civil action or proceeding by reason of the same subject matter against the employee . . . whose act or omission gave rise to the claim." 28 USC 2679(b) (1966 ed); 80 Stat 307. Additionally, federal courts were the only forums available for such actions; state courts do not have jurisdiction to entertain FTCA claims. See 28 USC 1346(b).

The FTCA provides that a federal employee who is sued for negligence committed during the course of employment should give notice to the United States Attorney General, who may then certify that the employee was in fact acting within the scope of employment, have the United States substituted as the defendant, and have the action

removed to federal court. See 28 USC 2679 (c) and (d) (1)-(2) (1988 ed); 102 Stat 4564. "In the event that the Attorney General has refused to certify scope of office or employment . . . the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action . . . shall be deemed to be an action . . . brought against the United States under the [FTCA] . . . and the United States shall be substituted as the party defendant." 28 USC 2679(d)(3) (1988 ed); 102 Stat 4564. The action may then be removed to federal court but may be remanded if the federal court determines that the employee was not acting within the scope of employment. 28 USC 2679(d)(3) (1988 ed); 102 Stat 4564.

In this case, defendant requested certification from the United States Attorney General, but had not received it on the date of dismissal. He did not request that the trial court certify that he was acting within the scope of his employment. Instead, he moved to dismiss on the basis of intramilitary immunity.

In deciding defendant's motion below, the trial court correctly found that both parties were federal employees, that the FTCA was plaintiff's exclusive remedy, and that it lacked jurisdiction to hear FTCA claims. Nevertheless, the court went on to decide the merits of the case under *Feres v United States,* 340 US 135, 146; 71 S Ct 153; 95 L Ed 152 (1950), which holds that the federal government is not liable under the FTCA "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The court relied on *Harris v Missavage,* 165 Mich App 96; 418 NW2d 687 (1987), to hold that the *Feres* doctrine applies even to state-law claims. *Harris* is

the only published Michigan case applying the *Feres* doctrine.

In *Harris,* a national guardsman who was injured during a football game while attending annual training at Camp Grayling successfully sued the camp's doctors for medical malpractice. 165 Mich App 98-99. On appeal, the doctors argued that suit was barred by the *Feres* doctrine because the injury had been incurred during an "activity incident to service" and the alleged malpractice had occurred while defendants were acting "within the scope of their employment." 165 Mich App 102. This Court agreed and reversed. 165 Mich 102-104.

Harris, however, is not controlling in this case for several reasons. First, when suit was brought in *Harris,* and until November 18, 1988, the FTCA was the exclusive remedy *only* for injuries "resulting from the operation . . . of any motor vehicle." See 28 USC 2679(b) (1966 ed); 80 Stat 307. That is, when *Harris* was decided, a state-law claim such as malpractice was in fact available against the negligent federal employee *unless* the injury resulted from the operation of a motor vehicle. The *Harris* Court applied the *Feres* doctrine of intramilitary immunity to that state-law claim.

Additionally, when *Harris* was decided and again until November 18, 1988, the FTCA had no provision for certification of cases where the United States Attorney General had failed or refused to certify that the federal employee was acting during the course of employment. See 28 USC 2679(d) (1988 ed); 102 Stat 4564. Defendant therefore improperly relies on the *Harris* Court's failure to discuss certification. Now, as noted before, the state court may, on defendant employee's motion, issue the certification and substitute the

federal government as defendant. See 28 USC 2679(d)(3) (1988 ed); 102 Stat 4564.

In the present case, the injury arose out of the alleged negligent operation of a motor vehicle by a federal employee and therefore the FTCA, even before the 1988 amendment, provided plaintiff's exclusive substantive remedy. There is no state tort remedy available to plaintiff unless he can show that the FTCA does not apply because defendant was not acting within the scope of his employment at the time of the accident. The trial court had no jurisdiction to resolve the merits of the FTCA claim.

Further, because defendant attempted to obtain certification of his status and had received no response, the trial court was bound to follow the procedures set forth in 28 USC 2679(d)(3), which had already gone into effect. Defendant's motion to dismiss should have been treated as a motion for certification. Defendant's failure to request that the trial court issue this certification, though erroneous, is not fatal and certainly does not confer jurisdiction to resolve the merits.

On remand, the trial court is to decide whether *defendant* was acting within the scope of his employment, that is, in the line of duty, at the time of the accident. Parenthetically, we note that an examination of the facts is necessary and that defendant's affidavit merely stating that he was acting within the scope of his employment is insufficient. Whether *plaintiff* was engaged in an activity "incident to service"—and, therefore, whether suit is barred by the *Feres* doctrine—is a thorny substantive question to be decided by the federal court upon removal in light of the abundant, and often contradictory, federal case law on that point.

The order of dismissal is vacated and the case is remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

GREEN v JEROME-DUNCAN FORD, INC

Docket No. 127056. Submitted April 7, 1992, at Detroit. Decided June 9, 1992; approved for publication August 13, 1992, at 9:25 A.M.

Danny R. Green and Rosemary Green brought a products liability action against Jerome-Duncan Ford, Inc., and Ford Motor Company in the Macomb Circuit Court, alleging that a truck sold by Jerome-Duncan and manufactured by Ford had defective brakes that caused it to go off a road at a curve, roll over, and injure Danny Green. The court, George R. Deneweth, J., struck the deposition testimony of the plaintiffs' sole expert witness, finding it to be inconsistent with the facts attested by the other witnesses, and granted summary disposition for the defendant, ruling that plaintiffs would be unable to establish a defect. The plaintiffs appealed.

The Court of Appeals *held:*

The decision whether to admit expert testimony is within the sound discretion of a trial court and will not be reversed on appeal absent a clear abuse of discretion. A trial court abuses its discretion with regard to an evidentiary matter where its ruling has no basis in law or fact.

In this case, the trial court did not abuse its discretion in excluding the testimony of the plaintiffs' expert on the ground that the expert's analysis of the accident was factually inconsistent with the testimony of other witnesses who had observed the truck and the scene of the accident. Summary disposition for the defendants was proper, given the inability of the plaintiffs to prove that the truck's brakes were defective.

Affirmed.

Lakin, Worsham & Victor, P.C. (by *Larry A. Smith*), for the plaintiffs.

John M. Thomas, and *Martin, Bacon & Martin, P.C.* (by *James N. Martin*), for the defendants.

Before: WEAVER, P.J., and SULLIVAN and CORRIGAN, JJ.

PER CURIAM. In this products liability action, plaintiffs appeal from the grant of summary disposition to defendants, following the trial court's decision to strike the testimony of plaintiffs' only expert witness. We affirm.

Plaintiff Danny R. Green[1] (hereafter plaintiff) was the owner of a 1986 Ford pick-up truck that was involved in an accident in the early hours of New Year's Day, 1987. A friend of plaintiff's, Greg Hornfischer, was driving the truck; plaintiff was asleep in the passenger seat.

The accident occurred on a two-lane, paved highway in Ohio as Hornfischer and plaintiff were en route to visit plaintiff's sister. Hornfischer testified that he was driving approximately forty miles per hour when he saw a sign warning of a curve ahead and reducing the speed limit to thirty-five miles per hour. The road, in fact, curved sharply to the left, at an angle of approximately ninety degrees.

Hornfischer testified that he applied the brakes when he saw the sign, at a distance variously estimated at fifty, one hundred, or two hundred feet before the curve. After he stepped on the brakes "everything went crazy." The truck "started shaking and shuttering." Hornfischer was unable to recall what happened next: the truck went off the road, flipped over at least once, and landed on its wheels in a ditch that ran parallel to the road. Both plaintiff and Hornfischer were injured.

The accident was investigated by a deputy sheriff, Officer Miller. He inspected the road surface without finding any tire marks "on the roadway prior to its [the truck's] entering the ditch." He then issued a citation to Hornfischer for failure to control the vehicle, because "his stated speed

[1] Rosemary Green's claims are derivative of her husband's.

contributed to the cause of the accident." Two of plaintiff's relatives, John Bukovich and Gail Bukovich, also inspected the accident scene. They both observed some skid marks on the road and the shoulder, either before the point at which the road curved or "a little ways into" the curve. No one observed any skid marks "in" the curve itself.

The truck was pulled from the ditch soon after the accident by a tow truck operator, Dale Bloomfield. Bloomfield found that the truck's wheels were locked when he attempted to tow it out of the ditch. He was able to free the rear wheels by running the truck back and forth for a short distance on the highway. He testified that the rear wheels were freed simultaneously, although he was not able to observe the right rear wheel himself from inside the cab of the wrecker. Plaintiff's nephew, Gail Bukovich, who arrived at the scene just before the towing operation began, testified that he saw one rear wheel break free first and the other break free during the second attempt.

The truck was returned to Michigan, where plaintiff filed suit in the Macomb Circuit Court, naming Ford Motor Company, the manufacturer of the truck, and Jerome-Duncan, Inc., the dealership that had sold him the truck, as defendants.[2] Plaintiff's theory was that a defect in the design of the truck had caused the brakes to lock when Hornfischer applied them as he approached the curve. The lock-up allegedly caused the truck to skid, run off the road, and flip over.

Plaintiff engaged the services of an expert witness, Dr. Rudolph Limpert, an automotive engi-

[2] Jerome-Duncan was included because it had performed repair work on the truck's brakes several weeks before the accident. Jerome-Duncan was later dismissed as a defendant by stipulation of the parties and the case proceeded solely as a products liability action against Ford Motor Company.

neer with special expertise in brakes and braking systems. Plaintiff deposed Dr. Limpert on January 24, 1989; the deposition was videotaped for use at trial. Dr. Limpert had not inspected the accident scene in person and based his opinion on deposition testimony (Hornfischer, both Bukovichs, plaintiff, Bloomfield, and Officer Miller), photographs, the police report, and the truck itself.

After some calculation, Dr. Limpert determined that the lock-up and skid happened after the truck had entered the curve. He estimated that the earliest point where the lock-up could have occurred was "thirty to sixty feet" before the end of the curved portion of the road, "approximately three-quarters of the way through the curve."

Dr. Limpert's conclusion was that the brakes had "locked up" when Hornfischer pressed the brake pedal, causing the skid and the accident. He testified that when the truck was only "lightly" loaded (the driver, one passenger and no cargo would be a "light" load), applying the brakes would send too much hydraulic pressure to the rear wheels, causing them to lock. This problem could have been avoided, he said, if the manufacturer had incorporated a "proportioning" valve into the brake system. The valve would have automatically adjusted the pressure transmitted to the rear wheels according to the weight on the rear axle, preventing the brakes from locking and causing a skid.

During the deposition, defense counsel questioned Dr. Limpert about some of his conclusions, which were inconsistent with portions of the factual evidence that had previously been obtained. Dr. Limpert's responses essentially discounted the fact witnesses' testimony. On one point, he said that Hornfischer "does not know what happened" when he applied the brakes. On another, he

agreed that his theory of the accident would predict that both rear wheels, having locked up together, would be freed at the same time; Gail Bukovich, however, had seen them break free individually. Dr. Limpert asserted that he did not think Gail Bukovich could see both rear wheels at the same time. In addition, Dr. Limpert said that a vehicle speeding around a curve would leave marks "in the beginning of the curve," although he did not specifically relate this phenomenon to plaintiff's accident.

After Limpert's deposition, defendants moved to strike his testimony, citing its inconsistencies with the factual record. Specifically, defendants pointed to the absence of skid marks on the curved portion of the roadway, the presence of skid marks before or a short distance into the curve, Hornfischer's testimony that he had applied the brakes well before reaching the curve, and Gail Bukovich's testimony that the rear wheels "unlocked" separately rather than together. The court granted defendants' motion in an order dated August 8, 1989.

Defendants promptly brought a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that, without Dr. Limpert's testimony, plaintiff had no expert testimony to offer at trial and, hence, no case. The court granted the motion on March 5, 1990. Plaintiff appeals.

The value of expert testimony is recognized under the Michigan Rules of Evidence:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. [MRE 702.]

In addition, MRE 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. *The court may require that underlying facts or data essential to an opinion or inference be in evidence.* [Emphasis supplied.]

See also, e.g., *Kohn v Ford Motor Co,* 151 Mich App 300, 314; 390 NW2d 709 (1986).

The requirements for the admission of expert testimony are:

> (1) the witness must be an expert; (2) there must be facts which require an expert's interpretation or analysis; and (3) the witness' knowledge must be peculiar to experts rather than to lay persons. [*Jack Loeks Theatres, Inc v Kentwood,* 189 Mich App 603, 611; 474 NW2d 140 (1991), citing *O'Dowd v Linehan,* 385 Mich 491, 509-510; 189 NW2d 333 (1971).]

The decision whether to admit expert testimony is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion. *King v Taylor Chrysler-Plymouth, Inc,* 184 Mich App 204, 214; 457 NW2d 42 (1990). See also *Mach v General Motors Corp,* 112 Mich App 158, 164-165; 315 NW2d 561 (1982) (alleged defect in bulldozer); *Miller v Ochampaugh,* 191 Mich App 48, 63; 477 NW2d 105 (1991) (dramshop liability). The trial court abuses its discretion in an evidentiary matter where its ruling has no basis in law or fact. *Mulholland v DEC Int'l Corp,* 432 Mich 395, 411; 443 NW2d 340 (1989).

An expert witness need not rule out all alternative causes of the effect in question, but he must have an evidentiary basis for his own conclusions.

Id. at 414. This Court has held that an expert's opinion was objectionable because it was based on assumptions that did not accord with the established facts. *Thornhill v Detroit,* 142 Mich App 656, 658; 369 NW2d 871 (1985). In *Thornhill,* a wrongful death action, it was critical to the plaintiff's expert's theory of the case for the decedent to have been "frothing at the mouth" for only a limited time before the defendants (an EMS crew) came on the scene. There was testimony, however, that the "frothing" had begun earlier. The trial court excluded the testimony of the plaintiff's expert, *id.* at 661, and this Court affirmed. "[T]he opinion was irrelevant to the issues at trial as framed by the facts." *Id.*

We are convinced that the *Thornhill* rationale is applicable to the case at hand. Dr. Limpert's explanation of the accident required the truck's brakes to have locked at a point well into the curve. It would also predict the presence of skid marks at the point where the lock-up began. Yet the only skid marks that were observed were either before the curve or a short distance into it. Those skid marks, indeed, were consistent with an alternative explanation, that the driver (Hornfischer) had entered the curve too fast and begun to skid then, when he applied the brakes.

Hornfischer's testimony is also inconsistent with Dr. Limpert's analysis. While plaintiff is correct that Hornfischer was uncertain about his distance from the curve when he began to brake, there is no doubt that he testified that he braked when he saw the "Curve Ahead" sign, which was obviously *before* he reached the curve. In addition, Hornfischer explicitly described the truck's response to his applying the brake as "shaking and shuttering" or "going crazy," neither of which terms

describes the sensations associated with a brake lock-up.

Dr. Limpert's theory would also require both the rear wheels to have locked up together, because the braking system sent too much hydraulic pressure to them both. That theory would also predict that the two rear wheels would "unlock" together. Yet the only witness who was actually able to observe both rear wheels during the towing operation was Gail Bukovich (Bloomfield testified that he could see only the left rear wheel) and he was unequivocal that the wheels were freed up separately.

When questioned about these inconsistencies, Dr. Limpert was not able to reconcile them other than by disparaging the witnesses' powers of observation. *Thornhill,* then, would direct that Limpert's testimony be excluded. The trial court did not abuse its discretion when it struck the Limpert deposition, i.e., there was a basis both in law and fact for its decision. Without Limpert's testimony, plaintiff had no proof that the truck was defective when it left defendants' control and, thus, no basis for his claim. Summary disposition was proper under MCR 2.116(C)(10).

Affirmed. Costs to defendant.

BERNTHAL v AETNA CASUALTY & SURETY COMPANY

Docket No. 124174. Submitted December 3, 1991, at Detroit. Decided April 10, 1992; approved for publication August 13, 1992, at 9:30 A.M.

Mark E. Bernthal, an optometrist, brought an action in the Macomb Circuit Court against Aetna Casualty & Surety Company, seeking a declaration that Aetna had a duty to defend and indemnify him pursuant to the terms of a general insurance policy covering his business premises that excluded coverage for accidents or injuries caused by rendering or failing to render a professional service. The term "professional service" was not defined in the insurance contract. The underlying action was brought by one of the plaintiff's patients who was injured when an examination chair rotated as she attempted to sit down to have her eyes examined. The court, Kathleen Jansen, J., held that the term "professional service" was ambiguous because the insurer failed to define the term. The court interpreted the term as not including the factual situation that gave rise to the underlying action and granted summary disposition for the plaintiff, finding that the defendant owed a duty to defend and indemnify. The defendant appealed.

The Court of Appeals *held:*

1. The term "professional service" is not ambiguous. It has a plain meaning, making judicial construction unnecessary. The professional service liability exclusion applies to the facts of the underlying action.

2. It is clear that the plaintiff was rendering a professional service when his patient was injured. The safe operation of the examination chair was part of his professional service.

3. The order granting summary disposition for the plaintiff must be reversed and the case remanded to the trial court for entry of an order granting summary disposition for the defendant.

Reversed and remanded.

Ferriby & Houston (by *Susan J. Zbikowski*), for the plaintiff.

Kitch, Saurbier, Drutchas, Wagner & Kenney, P.C. (by *Mark D. Willmarth* and *Linda M. Garbarino*), for the defendant.

Before: SAWYER, P.J., and GILLIS and MARILYN KELLY, JJ.

PER CURIAM. Defendant appeals as of right from the trial court's granting of plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand to the trial court for entry of an order granting defendant's motion for summary disposition.

This declaratory judgment action was brought by plaintiff, an optometrist, for the purpose of establishing defendant insurance company's duty to defend and indemnify plaintiff pursuant to the terms of a general insurance policy covering plaintiff's business premises. The insurance policy excluded coverage for accidents or injuries caused by rendering or failing to render a "professional service." The term "professional service" was not defined in the insurance contract.

The underlying lawsuit prompting this declaratory judgment action stems from injuries sustained by Betty Ann Hugaert at plaintiff's place of business. Hugaert visited plaintiff's office for the purpose of having plaintiff perform an eye examination. Plaintiff's employee performed a blood-pressure test and a visual test on Hugaert. Plaintiff then called Hugaert into his examination room. As she was backing into the examination chair, the chair rotated and Hugaert fell, sustaining various personal injuries including a broken arm and a fractured wrist. The examination chair was equipped with a lock to be used to prevent rotation until a patient was seated. Plaintiff testified in his deposition that it was his practice to lock the chair

after he finished examining a patient and before the next examination began.

Hugaert sued plaintiff, seeking damages under the alternative theories of malpractice and premises liability. Plaintiff then filed this declaratory judgment action for the purpose of determining defendant's duty to defend and indemnify him in the Hugaert lawsuit. The trial court held that the term "professional service" found in the insurance contract was ambiguous because of defendant's failure to define the term, and held that the ambiguity must be construed against defendant. The trial court interpreted the term "professional service" as not including the factual situation that gave rise to the underlying action for personal injuries. Because the facts did not fall within the "professional service" exclusion, the trial court ruled that there existed no genuine issue of material fact that defendant owed a duty to indemnify plaintiff as well as to defend him in the underlying lawsuit.

Defendant's first argument, that the trial court erred in failing to distinguish between the duty to indemnify and the duty to defend, is without merit. It is clear from the record that the trial court considered separately the issues of indemnity and the duty to defend, and concluded that plaintiff was entitled to be both indemnified and defended by defendant.

Defendant next argues that the term "professional service" is unambiguous and that the professional service liability exclusion applies to the facts of the underlying action. We agree.

First, we believe that the trial court erred in deciding that the term "professional service" was ambiguous for the sole reason that defendant failed to define the term in the insurance policy. In fact, we believe that the term "professional

service" has a plain meaning and that judicial construction was unnecessary. See *Friske v Jasinski Builders, Inc,* 156 Mich App 468, 472-473; 402 NW2d 42 (1986).

Secondly, the insurance policy excludes coverage for injuries arising from the rendering of or the failure to render a professional service. We believe it is clear that plaintiff was rendering a professional service when Hugaert was injured. We find the authority cited by defendant in this regard, especially *American Policyholders Ins Co v Michota,* 156 Ohio St 578; 103 NE2d 817 (1952), to be persuasive. In *Michota,* the Ohio Supreme Court included in the definition of the term "professional services" the maintenance, in a safe condition, of a metal hydraulic chair because the maintenance of the hydraulic chair was part of the chiropodist's "professional service."

In the underlying action, Hugaert was injured when the examination chair rotated as she was attempting to sit down to have her eyes examined by plaintiff. The examination chair was a piece of specialized equipment used by plaintiff in examining his patients. We believe that, as in *Michota,* the safe operation of the examination chair was part of plaintiff's professional service. Therefore, Hugaert's injuries arose from the rendering of or the failure to render a professional service. Because the insurance policy excluded coverage for such injuries, defendant is under no obligation to indemnify plaintiff for losses incurred in the underlying action.

The trial court erred in granting summary disposition in favor of plaintiff. We reverse the trial court's order granting plaintiff's motion for summary disposition, and we remand to the trial court for entry of an order granting summary disposition in favor of defendant.

Reversed and remanded.

SAWYER, P.J. I concur in the result only.

GEBHARDT v O'ROURKE

Docket No. 126279. Submitted November 12, 1991, at Detroit. Decided August 13, 1992, at 9:35 A.M. Leave to appeal sought.

Barbara K. Gebhardt brought a malpractice action in the Genesee Circuit Court against attorney Jerome O'Rourke and the law firm of O'Rourke, Goldstein, Joseph & Kelly, P.C., relating to their representation of her at a criminal trial and sentencing. Before bringing the malpractice action, she retained other counsel, successfully moved for a new trial on the basis of, among other things, ineffective assistance of trial counsel, and was acquitted following retrial. The circuit court, Earl E. Borradaile, J., granted summary disposition for the defendants, ruling that the malpractice action was barred by the statute of limitations, MCL 600.5805(4), 600.5838; MSA 27A.5805(4), 27A.5838, because it was brought more than two years after the defendants last represented the plaintiff at her sentencing. The plaintiff appealed.

The Court of Appeals *held:*

A convicted criminal defendant, in order to bring an action for malpractice against trial counsel, first must obtain postconviction relief, and the limitation period for the malpractice action does not commence until such relief is obtained.

In this case, the period of limitation commenced on the date of the plaintiff's acquittal and had not expired when the plaintiff brought her action.

Reversed and remanded.

Kelman, Loria, Downing, Schneider & Simpson (by *Michael L. Pitt*), for the plaintiff.

Smith & Brooker, P.C. (by *Thomas A. Connolly*), for the defendants.

Before: WEAVER, P.J., and WAHLS and TAYLOR, JJ.

WEAVER, P.J. In 1986, plaintiff retained defen-

dants to defend her against charges of criminal sexual conduct in the first degree. Following a jury trial, plaintiff was found guilty, then was sentenced on February 8, 1987. Plaintiff discharged defendants and hired a new firm to represent her. On March 24, 1987, plaintiff's new counsel filed a motion for a new trial. One argument was that a new trial should be granted because of the poor representation given by defendants. On June 13, 1988, the trial court granted plaintiff's motion for a new trial. A judgment of acquittal was entered on July 11, 1988, and became final on April 19, 1989. On May 31, 1989, plaintiff discussed the possibility of suing for legal malpractice.

On November 28, 1989, plaintiff filed a complaint against defendants, alleging legal malpractice, misrepresentation by fraud and deceit, and breach of contract by failing to provide plaintiff with skillful, competent representation. Defendants filed a motion for summary disposition based exclusively on the defense of the statute of limitations. Following a hearing, the court ruled that the suit was time-barred. Plaintiff now appeals. We reverse and remand.

An action for legal malpractice must be brought within two years of the date the attorney discontinued serving the plaintiff or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. MCL 600.5805(4), 600.5838; MSA 27A.5805(4), 27A.5838. Tort actions accrue when all the necessary elements of a cause of action have occurred and can be alleged in a proper complaint. *Connelly v Paul Ruddy's Equipment Repair & Service Co,* 388 Mich 146; 200 NW2d 70 (1972).

The question before us, one of first impression in this state, is when a claim for legal malpractice arising out of a criminal conviction accrues. Plain-

tiff argues that her cause of action did not accrue until April 19, 1988, when the judgment of acquittal became final. We agree.

We follow the Alaska Supreme Court, *Shaw v State Dep't of Admin, PDA,* 816 P2d 1358 (Alas, 1991), in holding that a convicted criminal defendant must obtain postconviction relief before pursuing an action for legal malpractice against trial counsel. We limit this holding to situations where the defendant in the underlying criminal action has indeed pursued appellate remedies. See *Parisi v Mich Twps Ass'n,* 123 Mich App 512; 332 NW2d 587 (1983).

We adopt in support of this holding many of the reasons set forth in *Shaw, supra,* p 1361:

> The requirement of post-conviction relief promotes judicial economy because many issues litigated in the quest for post-conviction relief will be duplicated later in the legal malpractice action. This is because dispositive post-conviction relief is relevant to the issue of proximate causation. *Claudio v Heller,* 119 Misc 2d 432, 463 NYS2d 155 (Sup Ct 1983). As Shaw argues it is also relevant to the issue of damages. See *Johnson v Schmidt,* 719 SW2d 825, 826 (Mo App 1986). If the defendant was denied post-conviction relief, the legal principle of collateral estoppel would serve to eliminate any frivolous malpractice claim. See *Schlumm v Terrence J O'Hagan, PC,* 173 Mich App 345; 433 NW2d 839, 846-47 (1988) (collateral estoppel barred malpractice claim which rested upon the same issues previously decided in plaintiff's ineffective assistance of counsel case); *Weiner v Mitchell, Silberberg & Knupp,* 114 Cal App 3d 39, 170 Cal Rptr 533, 538 (1980) (valid federal conviction cannot be relitigated in malpractice action and must be accepted as the proximate cause of plaintiff's conviction); *Johnson v Schmidt,* 719 SW2d at 826; see 2 R Mallen & J Smith, *Legal Malpractice* § 21.3, at 289 (3d ed 1989); see also D Potel, *Criminal Malpractice; Threshold Barriers to Recovery Against Negligent Criminal Counsel,* 1981 Duke

LJ 542, 551-56 (1981). Thus, by prioritizing post-conviction relief judicial resources will be conserved. Moreover, requiring post-conviction relief as a prerequisite to a legal malpractice action aids in determining whether the statute of limitations bars the action. By adopting the date that post-conviction relief is obtained as the trigger to the statute of limitations, we establish a bright line test which should significantly assist courts in the resolution of statute of limitations issues.

Systemic concerns also support such an approach. Mallen and Smith note "the litigious nature in incarcerated persons who occupy the time of their incarceration by pursuing civil actions against their former attorneys." 2 R Mallen & U Smith, *supra,* at 290. Also of concern is the attorney who, in the course of defending against a malpractice action, might produce privileged or other evidence in his or her defense that might hurt a criminal defendant with a legitimate basis for post-conviction relief. Finally, we note the desirability of allowing a criminal defendant with a valid post-conviction relief claim to pursue that remedy without the distraction of also filing a legal malpractice claim.

We note that this approach parallels that of malicious prosecution actions, which accrue upon rendition of the final judgment on appeal. *Parisi, supra.* It is also consistent with the prior holding of this Court that a client in a criminal action has received effective assistance of counsel when a full and fair determination has been made in that action, and the defendant attorney in a subsequent civil malpractice action brought by that client may defensively assert collateral estoppel as a bar. *Schlumm v O'Hagan, PC,* 173 Mich App 345; 433 NW2d 839 (1988).

Our holding makes it unnecessary to discuss plaintiff's remaining issues. We reverse and re-

mand for further proceedings. We do not retain jurisdiction.

Reversed and remanded.

CONSTANTINEAU v DCI FOOD EQUIPMENT, INC

Docket No. 133523. Submitted June 9, 1992, at Detroit. Decided August 17, 1992, at 9:00 A.M. Leave to appeal sought.

Thomas and Colleen Constantineau brought an action in the Wayne Circuit Court against DCI Food Equipment, Inc., seeking damages for injuries suffered by Thomas Constantineau while he was allegedly a business invitee of the defendant. Following a trial at which disputed proofs were presented concerning whether Thomas Constantineau had been at the place he was injured with the knowledge and consent of the defendant's owner or was there without permission, the jury returned a verdict for the defendant. The court, William L. Cahalan, J., denied the plaintiffs' motion for a new trial or judgment notwithstanding the verdict. The plaintiffs appealed.

The Court of Appeals *held:*

The trial court did not abuse its discretion by denying the plaintiffs' motion.

1. A business invitee can become a trespasser by exceeding the scope of the invitation and entering an area of a premises not encompassed by the invitation. Because there was a disputed question of fact concerning whether the injury occurred in an area that was not within the scope of the invitation extended by the defendant, the trial court properly permitted the jury to weigh the credibility of the witnesses and resolve the question.

2. Because the question whether the scope of the invitation had been exceeded was at issue, the court properly charged the jury concerning the liability of a premises owner for injuries to a trespasser. The court did not abuse its discretion by refusing to give the plaintiffs' requested instructions concerning liability insurance and nondelegable duty, because neither instruction was applicable in view of the theories pleaded and argued.

Affirmed.

REFERENCES

Am Jur 2d, Premises Liability §§ 100-104.

See the Index to Annotations under Guests, Invitees, or Licensees; Premises Liability; Trespass.

NEGLIGENCE — PREMISES LIABILITY — BUSINESS INVITEES — TRESPASSERS.

A business invitee who exceeds the scope of a premises owner's invitation may be found to be a trespasser for the purpose of determining premises liability.

Feikens, Foster, Vander Male & De Nardis, P.C. (by *Gregory J. Muller*), for the plaintiffs.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. (by *Rosalind Rochkind*), for the defendant.

Before: FITZGERALD, P.J., and CAVANAGH and NEFF, JJ.

CAVANAGH, J. In this premises liability case, plaintiffs appeal from the trial court's order denying their motion for a new trial or for judgment notwithstanding the verdict. They claim that the trial court erred in refusing to direct a verdict that plaintiff Thomas Constantineau was a business invitee, in charging the jury, and in failing to find that the verdict was against the great weight of the evidence. We affirm.

It was plaintiffs' theory of the case that Thomas Constantineau, while at defendant's place of business, slipped on a dangerously steep and narrow staircase and suffered severe injuries to both his shoulders. Plaintiffs claimed that defendant breached its duty to warn Thomas Constantineau, a business invitee, of known dangers and to inspect the premises to discover possible unknown dangers.

It was defendant's theory of the case that Thomas Constantineau was a trespasser because he exceeded the scope of defendant's invitation when he went into an area of the building without an escort or permission. Defendant claimed that it had no duty either to make the premises safe or to

warn Thomas Constantineau, a trespasser, of conditions existing on the premises.

According to the record, plaintiff Thomas Constantineau (hereinafter plaintiff), an employee of Crawford Door Sales, went to defendant's place of business on February 13, 1985, to investigate whether an overhead door separating sections of the work area could be motorized. Plaintiff testified at trial that it was during his on-site inspection that he noticed numerous electrical conduits around the door frame where the motor drive would have to be installed. Plaintiff went on to state that he decided to trace the electrical lines to find out which lines were energized and that at all times he was accompanied by the owner of the business, Remo Antoniolli.

Plaintiff further testified that, while tracing the electrical lines, he climbed up into a second-story loft that was being used primarily for storage. It was from this vantage point that he also got the chance to visually inspect work that had been done the day before by a Crawford crew and to look at pizza equipment that was of personal interest to him. On his way down from the loft, plaintiff allegedly slipped on a staircase and fell, severely injuring both his shoulders. According to plaintiff, the owner of the building was with him when he fell and apologized for the fall just before he escorted him out of the building.

In defending against this lawsuit, defendant admitted ownership of the building and that the staircase was defective. However, defendant contested plaintiff's account of the incident through the testimony of Remo Antoniolli. According to Antoniolli, he did have a brief conversation with a salesman from Crawford Door Sales, but it took place at the base of the door that was being inspected. After being told that the door could not

be motorized, Antoniolli assumed that the salesman had left the premises. He testified that he never gave the salesman permission to wander around the premises and knew of no reason why the salesman would have gone up into the loft. Antoniolli clearly stated that he did not invite the salesman up there, foresee that he would go there, or accompany him into the loft.

The jury came back with a verdict of no negligence and plaintiffs moved for a new trial or for judgment notwithstanding the verdict. The trial court denied their motion and this appeal followed.

In their first argument, plaintiffs claim that their motion for a new trial or for judgment notwithstanding the verdict should have been granted because the verdict was contrary to law and against the great weight of the evidence. More specifically, plaintiffs argue that there is no Michigan authority for the legal proposition that a visitor's status while on a defendant's property can change from an invitee to a trespasser and that there was not one single shred of evidence to show that the invitation in this case was in any way limited in terms of geography or time. We disagree.

A new trial may be granted if a verdict is against the great weight of the evidence or contrary to law, or if an error of law has occurred in the proceedings. MCR 2.611(A)(1)(e) and (g). The decision whether to grant a new trial is one addressed to the trial court's discretion, and the trial court's decision will not be reversed absent an abuse of that discretion. *Beasley v Washington,* 169 Mich App 650, 655; 427 NW2d 177 (1988). Judgment notwithstanding the verdict should be granted only when there is insufficient evidence presented to create an issue for the jury. *Wilson v General Motors Corp,* 183 Mich App 21, 36; 454

NW2d 405 (1990). If the evidence is such that reasonable minds could differ, the question is for the jury, and judgment notwithstanding the verdict is improper. *Hodgins Kennels, Inc v Durbin,* 170 Mich App 474, 479; 429 NW2d 189 (1988).

In *Bennett v Butterfield,* 112 Mich 96; 70 NW 410 (1897), the plaintiff was injured while he was a customer in the defendant's store. The plaintiff claimed that he was invited into a place of danger without warning and without proper guards at the entrance to protect him. The evidence, however, established that the plaintiff attempted to enter an elevator without invitation or permission. Consequently, the Supreme Court held that the plaintiff alone was "responsible for the accident and the injury, and [could] not recover." *Id.* at 98. Similarly, in *Hutchinson v Cleveland-Cliffs Iron Co,* 141 Mich 346; 104 NW 698 (1905), no duty was owed to an injured worker who had not been invited to enter that portion of the mill where the injury occurred. Also see 2 Restatement Torts, 2d, § 332, pp 181-183.

In this case, plaintiffs' argument that Thomas Constantineau was at all times an invitee while on defendant's property and that there was no Michigan law supporting the proposition that a visitor's status may change lacks merit. Both *Bennett* and *Hutchinson* suggest that a visitor to a business establishment who ventures into an area without permission or invitation accepts the responsibility for any resulting injuries.

With respect to the argument concerning the great weight of the evidence, plaintiffs offered the factfinder evidence that Thomas Constantineau was a business invitee and that his movement inside defendant's building was with permission and while accompanied by the owner. In contrast, defendant introduced evidence showing that

Thomas Constantineau became a trespasser when he ventured into parts of the building without permission or invitation. In light of this state of the record, there does not appear to be overwhelming evidence in support of either theory, and the disputed evidence that was presented posed a credibility contest for the factfinder to resolve.

Plaintiffs also argue that they were entitled to a new trial or judgment notwithstanding the verdict because of instructional errors that occurred in this case. Again we disagree.

When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. *Petrove v Grand Trunk W R Co,* 174 Mich App 705, 710-711; 436 NW2d 733 (1989). However, the determination whether an instruction is accurate and applicable in light of the circumstances presented by the particular case rests in the sound discretion of the trial court. *Murphy v Muskegon Co,* 162 Mich App 609, 617; 413 NW2d 73 (1987).

Given our decision that the status of a business invitee can change if the scope of the invitation is exceeded, the plaintiff's objections to the instructions that deal with the status of a trespasser cannot be sustained. Secondly, from a review of the record, it appears to us that the trial court did not abuse its discretion in refusing to instruct the jury regarding the irrelevancy of liability insurance and the nondelegable duty owed to the plaintiff. Although accurate, both of these instructions were inapplicable because of the circumstances presented by this case. Defendant neither tried to avoid responsibility for plaintiff's injuries by suggesting that its duty to maintain a safe workplace had somehow been delegated to another entity nor tried to suggest to the jury that its liability insurance should be kept in mind during deliberations.

Affirmed.

WITT v C J BARRYMORE'S

Docket No. 129863. Submitted June 15, 1992, at Detroit. Decided August 17, 1992, at 9:05 A.M.

Patricia A. and Mickey D. Witt, residents of Monroe County, brought an action in the Macomb Circuit Court against C.J. Barrymore's, a corporation whose resident agent is in Macomb County, alleging premises liability and violations of the Ohio dramshop act with regard to injuries sustained by Patricia Witt and loss of consortium suffered by Mickey Witt after Patricia was assaulted and battered by an intoxicated person at the defendant's bar in Toledo, Ohio. The court, Michael D. Schwartz, J., on motion of the defendant, declined jurisdiction and dismissed the action on the ground of forum non conveniens. The plaintiffs appealed.

The Court of Appeals *held:*

1. The doctrine of forum non conveniens is applicable only where the parties are residents of different states, neither are residents of the forum state, and the injury or event giving rise to the suit occurred other than in the forum where the suit was brought. Because the plaintiffs and the defendant are residents of Michigan, the trial court erred in declining jurisdiction.

2. Proper venue of this action, pursuant to MCL 600.1629(1)(a),(b); MSA 27A.1629(1)(a),(b), is in Monroe County where the plaintiffs reside and where part of their cause of action, i.e., their damages, arose.

Remanded for change of venue to Monroe County.

George Parks, for the plaintiffs.

Morbach, Toppin & Brewer, P.C. (by *Richard G. Brewer*), for the defendant.

Before: JANSEN, P.J., and MICHAEL J. KELLY and CORRIGAN, JJ.

CORRIGAN, J. Plaintiff Patricia A. Witt appeals as of right the Macomb Circuit Court's order de-

clining jurisdiction and dismissing her November 7, 1989, complaint. We reverse and remand for action consistent with this opinion.

Plaintiff's complaint alleged that she was injured sometime in November 1987 when an unknown, obviously intoxicated male customer of defendant's bar and restaurant located in Toledo, Ohio, assaulted and beat her. In count I, she claimed that defendant's employees failed to assist her, failed to restrain the drunken customer, and failed to notify the police. She asserted claims of premises liability and Ohio dramshop act violations (Ohio Rev Code Ann § 4399.01) as bases of liability. In count II, plaintiff Mickey D. Witt, Patricia Witt's husband, claimed loss of consortium.

The Witts reside in Monroe County, the Michigan county closest to Lucas County, Ohio, where Toledo is located. Defendant, a Michigan corporation, did business in Toledo, Ohio, and did and does business in Mt. Clemens, where its current resident agent is located. The only connection to Macomb County is the location of defendant's corporate headquarters; this case otherwise has no relation to Macomb County.

Defendant moved the lower court to decline jurisdiction on the ground of forum non conveniens or, in the alternative, to change venue to Lucas County, Ohio.[1] Defendant also claimed that plaintiff failed to satisfy the venue requirements of MCL 600.1629; MSA 27A.1629, because no part of the cause of action arose in Macomb County. At oral argument on the motion in the lower court, defendant suggested that venue could be changed to Monroe County.

[1] Defendant has never explained by what authority a Michigan court could order a change of venue to an Ohio court.

In dismissing the case, the lower court ruled in part:

> The court is aware that the Michigan Venue Statute [MCL 600.1621; MSA 27A.1621] controls this matter. The court also has reviewed the various factors or elements taken into consideration with regard to jurisdiction, respecting jurisdiction and after reviewing the various factors the court cannot see how this court can do justice to one side or either side in this matter. Such factors as the availability of compulsory process of tenants [sic] or the unwilling and the costs of obtaining willing witnesses, the ease of access to source of proofs, distance from the situs of the accident or incident, in this case incident, the enforceability of any judgment obtained, possible harassment by either party, other practical problems contributing to ease, expense and expedition of trial. The court realizes that the main office, after what counsel has said, is here in the City of Mount Clemens or Clinton Township for the defendant, C.J. Barrymore's. Nevertheless, they are doing business down in Toledo, Ohio and accordingly the motion to decline jurisdiction or in the alternative for change of venue is hereby granted.

An appellate court tests a lower court's decision to apply the doctrine of forum non conveniens by applying an abuse of discretion standard. *Cray v General Motors Corp,* 389 Mich 382; 207 NW2d 393 (1973); *Spalding v Spalding,* 355 Mich 382, 384-385; 94 NW2d 810 (1959). In declining jurisdiction in this case, the trial court noted easy access to the sources of proofs in Ohio, the availability of compulsory process in Ohio courts for the attendance of unwilling witnesses and the lower costs of obtaining cooperating witnesses, and convenient access to the injury site, as well as the application of Ohio law.

Michigan is, however, a natural and proper

forum for this lawsuit. Maintenance of suit here is neither vexatious nor oppressive. *Williams v Green Bay & W R Co,* 326 US 549; 66 S Ct 284; 90 L Ed 311 (1945). The flaw in the lower court's reasoning was its failure to recognize that both plaintiffs and defendant are Michigan residents. The doctrine of forum non conveniens applies only where the parties are residents of different states, neither are residents of the forum state, and the injury or event giving rise to the cause of action occurred other than in the forum state. As observed in dicta in *Duyck v Int'l Playtex, Inc,* 144 Mich App 595, 602-603; 375 NW2d 769 (1985):

> Forum non conveniens is applicable only where the parties are residents of different states, neither are residents of the forum state, and the injury or event giving rise to the suit occurred other than in the forum where suit was brought. Under this doctrine, jurisdiction is refused by the court and the suit is dismissed. This doctrine, should it be applied in a suit involving a party who resides in Michigan, would be contrary to this state's concept of one court of justice. Const 1963, art 6, § 1. See also *Anderson v Great Lakes Dredge & Dock Co,* 411 Mich 619; 309 NW2d 539 (1981).

The instant dispute is not "imported litigation," even though the alleged injury occurred out of state, because both plaintiffs and defendant reside in Michigan. Defendant is incorporated here and has its principal place of business here, while plaintiffs live in Monroe County. In ignoring these critical factors, the court abused its discretion.

In this case, however, there is no nexus between plaintiffs' causes of action and Macomb County. Venue plainly does not lie in Macomb County pursuant to MCL 600.1629(1)(a); MSA 27A.1629(1)(a), because no part of the cause of action arose

there. MCL 600.1629(1)(a); MSA 27A.1629(1)(a) provides:

> A county in which all or a part of the cause of action arose and in which either of the following apply is a proper county in which to commence and try the action:
>
> (i) The defendant resides, has a place of business, or conducts business in that county.
>
> (ii) The registered office of a defendant corporation is located in that county.

In *Johnson v Simongton,* 184 Mich App 186; 457 NW2d 129 (1990), this Court recognized that where a defendant challenges venue, the plaintiff has the burden to establish that the county he chose is a proper venue. The Court also recognized that the primary concern is that venue first be proper in the county where all or a part of the cause of action arose, citing *Marsh v Walter L Couse & Co,* 179 Mich App 204, 208; 445 NW2d 204 (1989).

In a cause of action arising from a tortious injury, the plaintiff must establish the defendant's legal duty to the plaintiff, the breach of that duty, proximate causation between the breach of duty and the injury, and resultant damages. *Lorencz v Ford Motor Co,* 439 Mich 370, 375; 483 NW2d 844 (1992). Plaintiff's premises liability and dramshop claims appear to arise from duties owed in Ohio. Additionally, questions concerning breach of duty and proximate cause involve events that transpired in Ohio. Plaintiffs' damages arose either in Ohio or in Monroe County.

Under the controlling venue statute, venue is proper in Monroe County. MCL 600.1629(1)(b); MSA 27A.1629(1)(b) provides:

> If no county satisfies the criteria under subdivision (a), a county in which all or a part of the

> cause of action arose and in which either of the following apply is a proper county in which to commence and try the action:
>
> (i) The plaintiff resides, has a place of business, or conducts business in that county.
>
> (ii) The registered office of a plaintiff corporation is located in that county.

A portion of plaintiffs' claimed economic, noneconomic, and loss of consortium damages appear to have arisen in Monroe County. The lower court did not rule on venue in Monroe County, although defendant had posed it as an option. However, the lower court did not have the benefit of the *Lorencz* decision when it ruled. Accordingly, we remand for transfer of this case to Monroe County pursuant to MCL 600.1629(1)(b)(i); MSA 27A.1629(1)(b)(i). We do not retain jurisdiction.

Remanded.

WINKLEPLECK v MICHIGAN VETERANS' FACILITY

Docket No. 137746. Submitted June 8, 1992, at Grand Rapids. Decided August 17, 1992, at 9:10 A.M. Leave to appeal sought.

Eva Winklepleck, individually and as personal representative of the estate of Kenneth Winklepleck, deceased, brought an action in the Court of Claims against the Michigan Veterans' Facility and the State of Michigan, alleging negligence with regard to the decedent's fatal injury while in the care of the veterans' facility, a health facility operated by the state. The defendants moved for summary disposition on the basis of governmental immunity, contending that the veterans' facility is not a hospital within the meaning of MCL 691.1407; MSA 3.996(107), which provides that no immunity is granted to a governmental agency with respect to its ownership or operation of a hospital. The court, Dennis B. Leiber, J., denied the motion. The defendants appealed by leave granted.

The Court of Appeals *held:*

MCL 691.1407(4)(b); MSA 3.996(107)(4)(b) defines "hospital" as a facility offering inpatient, overnight care, and services for observation, diagnosis, and active treatment of an individual with a medical, surgical, obstetric, chronic, or rehabilitative condition requiring the daily direction or supervision of a physician.

In this case, the defendants submitted affidavits and other documentary evidence in support of their contention that, although the Michigan Veterans' Facility provides services closely resembling those provided in a nursing home, it does not provide medical treatment that requires the daily direction or supervision of a physician and therefore is not a hospital for purposes of the statute. The plaintiff's response to the defendants' motion did not raise any genuine issue of material fact with respect to this contention. The trial court therefore erred in denying summary disposition for the defendants.

Reversed and remanded for entry of an order of summary disposition for the defendants.

REFERENCES

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 61 *et seq.*

Immunity of state or governmental unit or agency from liability for damages in tort in operating hospital, 25 ALR2d 203.

GOVERNMENTAL IMMUNITY — HOSPITALS — MICHIGAN VETERANS' FACILITY.

The Michigan Veterans' Facility, a health facility operated by the state for the benefit of indigent veterans, may claim governmental immunity from tort liability; the facility is not a hospital within the meaning of the statute that denies governmental immunity to hospitals owned or operated by governmental agencies (MCL 36.1 *et seq.*, 691.1407[4][b]; MSA 4.871 *et seq.*, 3.996[107][4][b]).

Thomas, Garvey, Garvey & Sciotti, P.C. (by *Christopher R. Sciotti*), for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Stewart H. Freeman* and *Brian D. Devlin,* Assistant Attorneys General, for the defendants.

Before: SHEPHERD, P.J., and CONNOR and M. F. SAPALA,* JJ.

SHEPHERD, P.J. Plaintiff's decedent, Kenneth Winklepleck, was a resident at the Michigan Veterans' Facility in Grand Rapids. He suffered from multiple sclerosis. In May 1987, as a nurse was lifting Winklepleck from his bed with a hydraulic device, he was dropped and injured his head. He died in June 1987. Plaintiff sued the veterans' facility and the State of Michigan. Defendants moved for summary disposition under MCR 2.116(C)(7) and (10) on the ground that defendant is immune from liability under the governmental immunity statute, MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.* Defendants argued that plaintiff's reliance on the "public hospital exception" to governmental immunity was misplaced because the Michigan Veterans' Facility is not a hospital

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

within the meaning of MCL 691.1407(4)(b); MSA 3.996(107)(4)(b). The trial court found that the facility was a hospital as defined in the governmental immunity statute and denied the motion. Defendants appeal by leave granted. We reverse and remand for entry of an order granting summary disposition to defendants.

The governmental immunity statute provides in pertinent part:

> (4) This act does not grant immunity to a governmental agency with respect to the ownership or operation of a hospital or county medical care facility or to the agents or employees of such hospital or county medical care facility. As used in this subsection:
>
> * * *
>
> (b) "Hospital" means a facility offering inpatient, overnight care, and services for observation, diagnosis, and active treatment of an individual with a medical, surgical, obstetric, chronic, or rehabilitative *condition requiring the daily direction or supervision of a physician.* The term does not include a hospital owned or operated by the department of mental health or a hospital operated by the department of corrections. [MCL 691.1407; MSA 3.996(107). Emphasis added.]

Plaintiff's complaint implicated the foregoing "public hospital exception." Defendants moved for summary disposition, arguing that the facility is not a hospital but rather is a unique institution, akin to a nursing home, operated by the state under statutory authority to provide housing and minimal medical care to the state's indigent and disabled military veterans. Defendants pointed out that the definition of "hospital" in the Public Health Code, MCL 333.1101 *et seq.*; MSA 14.15(1101) *et seq.*, is identical to that in the

governmental immunity statute with one exception not relevant here.[1]

The Public Health Code defines a "health facility or agency" to include a hospital, a home for the aged, or a nursing home, among other things. MCL 333.20106(1); MSA 14.15(20106)(1). A "nursing home" is defined in the Public Health Code as follows:

> "Nursing home" means a nursing care facility, including a county medical care facility, *but excluding a hospital or a facility created by Act No. 152 of the Public Acts of 1885, as amended, being sections 36.1 to 36.12 of the Michigan Compiled Laws,* that provides organized nursing care and medical treatment to 7 or more unrelated individuals suffering or recovering from illness, injury, or infirmity. Nursing home does not include a unit in a correctional facility that is operated by the department of mental health. [MCL 333.20109(1); MSA 14.15(20109)(1). Emphasis added.]

Section 1 of 1885 PA 152 created the Michigan Veterans' Facility. See MCL 36.1; MSA 4.871. Section 11(1) of the act describes eligibility for admission to the facility and provides in part that certain veterans

> who are disabled by disease, wounds, or otherwise, and who have no adequate means of support, and by reason of their disability are incapable of earning their living and who would be otherwise dependent upon public or private charity, shall be entitled to be admitted to a facility, subject to such

[1] The governmental immunity statute provides: "The term does not include a hospital owned or operated by the department of mental health or a hospital operated by the department of corrections." MCL 691.1407(4)(b); MSA 3.996(107)(4)(b). The Public Health Code provides: "The term does not include a hospital licensed or operated by the department of mental health." MCL 333.20106(5); MSA 14.15(20106)(5).

> rules as promulgated by the board of managers pursuant to Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.315 of the Michigan Compiled Laws, to govern the admission of applicants to the facilities. [MCL 36.11(1); MSA 4.878(1).]

Defendants supported their motion for summary disposition with the affidavits of three public health officials. Walter S. Wheeler, III, signed an affidavit in which he stated that, in his capacity as chief of the Bureau of Health Facilities for the Michigan Department of Public Health, he has never considered the Michigan Veterans' Facility a hospital. Rather, he considers it a nursing home operating without a license under the exclusion set forth in MCL 333.21711(3); MSA 14.15(21711)(3).[2] If the facility were operating as a hospital, Wheeler would be compelled to recommend a licensing enforcement action. Wheeler stated that he had never done so.

The Wheeler affidavit did more than merely state his conclusions. Wheeler also explained that the Bureau of Health Facilities considers the veterans' facility to be providing "nursing care and services consistent with those described in [MCL 333.21715; MSA 14.15(21715)]."

MCL 333.21715; MSA 14.15(21715) provides:

> (1) A nursing home shall provide:
>
> * * *

---

[2] MCL 33.21711(3); MSA 14.15(21711)(3) provides:

> A person shall not purport to provide formal or informal nursing care services of the kind normally provided in a nursing home without obtaining a license as provided in this article. This subsection does not apply to a hospital or a facility created by Act No. 152 of the Public Acts of 1885, as amended, being sections 36.1 to 36.12 of the Michigan Compiled Laws.

See also MCL 333.20109(1); MSA 14.15(20109)(1), which excludes the veterans' facility from the definition of "nursing home."

(b) *A program of planned and continuing medical care under the charge of physicians.*

(2) Nursing care and medical care shall consist of services given to individuals who are subject to prolonged suffering from illness or injury or who are recovering from illness or injury. *The services* shall be within the ability of the home to provide and *shall include the functions of medical care such as diagnosis and treatment of an illness;* nursing care via assessment, planning, and implementation; evaluation of a patient's health care needs; *and the carrying out of required treatment prescribed by a physician.* [Emphasis added.]

Thomas C. Lindsay served as "Commandant" or chief executive officer of the Michigan Veterans' Facility from September 1990. In his affidavit he stated, among other things, that the facility provides beds for 763 members, and that the "daily direction and supervision of the medical needs of the members is carried out by a staff of [178] nurses. The members' program of planned and continuing medical care is under the charge of [6] staff physicians."

Lindsay's affidavit further states:

11. The Michigan Veterans' Facility provides three levels of care:

Skilled Nursing: Serves the individual with severe disabilities requiring continuous nursing care and supervision.

Basic Nursing: Serves the individual with moderate disabilities.

Domiciliary Care: Serves the individual who needs very little nursing care but has some limitations which require a structured environment.

12. None of the three levels of care described above is suitable, to my knowledge, to a person with a medical, surgical, obstetric, chronic, or

rehabilitative condition requiring the daily direction or supervision of a physician.

13. Should a Michigan Veterans' Facility member's condition become sufficiently acute that the daily direction or supervision of a physician is required, the member is transferred to a hospital.

14. All admittees to the Michigan Veterans' Facility must meet the criteria of one of these levels of care as a prerequisite to membership.

Upon admission, a history and physical is conducted by a physician and is submitted to the VA, indicating the individual's appropriate level of care.

On an annual basis, a history and physical is conducted attesting to a continuation of one of the three levels of care.

To my knowledge, the Michigan Veterans' Facility has never submitted an application for nor received any reimbursement from any source for providing a level of care greater than these three levels. [Emphasis in original.]

The third affidavit was that of Donald R. Barbachym, D.O., which states in pertinent part:

3. My duties at the Michigan Veterans' Facility are that of Medical Director.

4. The Michigan Veterans' Facility does not treat members with a condition requiring the daily direction or supervision of a physician.

5. Michigan Veterans' Facility members are provided with a planned and continuing medical care under the charge of physicians consistant [sic] with that described in the Public Health Code, MCL 333.21715 [MSA 14.15(21715)]:

* * *

6. The physicians at Michigan Veterans' Facility visit the members and assess their medical needs on average once every thirty days.

7. The Michigan Veterans' Facility does not admit members with medical, surgical, obstetric,

chronic or rehabilitative conditions requiring the daily direction or supervision of a physician, nor are such members, after developing such a condition, permitted to remain in the Facility.

8. I have reviewed the complete medical file maintained by the Michigan Veterans' Facility on Kenneth Winklepleck.

9. I have reviewed these documents and have concluded that at no time during his residence at the Michigan Veterans' Facility did Mr. Winklepleck receive treatment at the Facility for a medical, surgical, chronic, or rehabilitative condition requiring the daily supervision of a physician.

10. I base my conclusion on the following factors:

a. The patient was in the latter phase of his multiple sclerosis, since his history confirms that he first began to note symptoms in 1973. Therefore, in 1987 Mr. Kenneth Winklepleck was in his 15th year of his disease.

b. Mr. Winklepleck was seen by the Michigan Veterans' Facility physicians infrequently, approximately once every thirty days.

c. Mr. Winklepleck's initial examination upon his entry to membership in the Facility indicated that he had a medical history of multiple sclerosis, a slowly progressive central nervous system disease characterized by disseminated patches of demyelination in the brain and spinal cord, resulting in multiple and varied neurologic symptoms and signs, usually with remissions and exacerbations. There is no specific therapy for the disease, and nothing, in the absence of an acute attack, which could be described as an "active treatment" of the condition.

Plaintiff responded below, as she has in this Court, with medical records that she claims "show . . . that Kenneth Winklepleck was under the daily 'supervision or direction of a physician.' " Plaintiff also contends that the affidavits submitted by defendants provide no evidence that the

veterans' facility does not satisfy the governmental immunity statute's definition of "hospital." Also, plaintiff argues that the statutory definition is met by the following description of services found in the facility's "Member Guide Book":

> Skilled nursing care is provided in this new, modern 343-bed unit. An organized program of medical care is available on a regular basis designed to meet the individual's need. The unit is staffed with doctors, nurses, and technicians to provide for the medical needs of the members.
>
> The building also houses the business offices, kitchen and dining facilities, (including provisions for special diets) doctors' and dentists' offices, clinics, x-ray, medical laboratory, occupational and physical therapy, chapel, and chaplains offices.
>
> The Rankin Building was built in 1947, remodeled in 1963 and again in 1975. Here, the member is provided medical care on a less intensive basis than in the main building.
>
> Besides the medical care provided by doctors, nurses, and aides, physical therapy and occupational therapy are available for the member.

It is true that the above services are also offered to patients in hospitals. This, however, does not mean that defendant is a facility offering care to individuals with conditions requiring the daily supervision of physicians, one of the essential statutory tests for determining whether defendant is a hospital. In denying defendants' motion for summary disposition, the trial court ruled:

> I am of the opinion that as a matter of fact and of law that these circumstances compel this Court to determine that the Michigan Veterans' Facility is a hospital within the meaning of [MCL 691.1407(4)(b); MSA 3.996(107)(4)(b)], and that the services performed to the residents are—and specifically *this resident* who in this case was afflicted

> with a chronic condition, *was under the direct and daily control of a physician, even though the physician himself or herself did not personally provide the medical care and attention* to the resident.
>
> Accordingly, this Court is of the opinion that, since the Michigan Veterans Facility is a hospital, it is not exempt from liability and, therefore, the motion for summary disposition brought by the defendnat [sic] is respectfully denied.
>
> I've indicated also that I would proceed under analysis as a (C) (10) motion . . . . [Emphasis added.]

The court then indicated, without elaboration, that denial of the motion was also correct under MCR 2.116(C)(7). We need not address the effect of the different standard applied under this subrule in light of our conclusion that the motion pursuant to MCR 2.116(C)(10) should have been granted.

Summary disposition is proper under MCR 2.116(C)(10) where, except for damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A motion under subrule C(10) tests the factual support for a claim. *Hutchinson v Allegan Co Bd of Rd Comm'rs (On Remand),* 192 Mich App 472, 480; 481 NW2d 807 (1992). Such a motion must be supported by affidavits, depositions, admissions, or other documentary evidence, MCR 2.116(G)(3), and must specifically identify the issues with respect to which the moving party believes there is no genuine issue of material fact, MCR 2.116(G)(4). When a motion under MCR 2.116(C)(10) is so made and supported, the responding party may not rest upon the mere allegations or denials of the pleadings, but must meet the motion with evidence setting forth the specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4); *Hutchinson, supra,* p 481.

Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed that would leave open an issue upon which reasonable minds may differ. *Hutchinson, supra,* pp 480-481. Although courts are liberal in finding a genuine issue of material fact, if the nonmovant fails to meet its burden of showing that a genuine issue of material fact exists, then judgment for the moving party shall be entered if appropriate. MCR 2.116(G)(4); *Prysak v R L Polk Co,* 193 Mich App 1, 6; 483 NW2d 629 (1992).

This case presents essentially three tasks for this Court (the trial court was presented with the same tasks): (1) statutory interpretation, to the extent necessary, of MCL 691.1407(4); MSA 3.996(107)(4), and in particular of the term, "requiring the daily direction or supervision of a physician"; (2) ascertainment of whether there exists a genuine issue of material fact; and (3) application of the statute to the uncontested facts to determine whether the Michigan Veterans' Facility is a "hospital" within the meaning of MCL 691.1407(4); MSA 3.996(107)(4).

We find the second of these three tasks most important to the disposition of this case. The critical question before the court was whether there was a genuine issue of material fact regarding the status of defendant Michigan Veterans' Facility. Bound up with this was the question of the meaning of the term "condition requiring the daily direction or supervision of a physician." Defendants had argued that the facility did not offer services to individuals with a "condition requiring the daily direction or supervision of a physician" and that the facility did not, therefore, meet the statutory definition of "hospital." The trial court rejected this argument, found that Mr. Winkle-

pleck's care was subject to the daily direction or supervision of a physician, and ruled that the facility was a hospital.

Although the trial court would have been the finder of fact had this Court of Claims action gone to trial, the task of determining whether a genuine issue of material fact existed should not have become a minitrial. Thus, to the extent the trial court made findings of fact in resolving the motion for summary disposition, it erred. *In re Peterson Estate,* 193 Mich App 257, 261; 483 NW2d 624 (1992). Instead of "finding as a matter of fact and law" that the facility was, or was not, a hospital, the trial court should have confined itself to deciding whether defendants' motion was properly supported, and, if so, whether plaintiff's response raised a genuine issue of material fact.

In this case, the contested issue involved the type of care offered by the facility. The governmental immunity statute excepts a facility from immunity if it is a "hospital," i.e., if it offers (1) inpatient, overnight care, and (2) services for observation, diagnosis, and active treatment of an individual, (3) with a medical, surgical, obstetric, chronic, or rehabilitative condition, (4) requiring the daily direction or supervision of a physician. MCL 691.1407(4)(b); MSA 3.996(107)(4)(b).

The question raised by defendants' motion was whether plaintiff could come forward with any evidence that the facility offered care and services to an individual with a "condition requiring the daily direction or supervision of a physician." Our review of the record indicates that plaintiff's proffered evidence does not raise a genuine issue of material fact with regard to this question. We conclude that the trial court should have determined that defendants were entitled to summary disposition as a matter of law. MCR 2.116(C)(10).

The medical services described in the Member Guide Book are not inconsistent with those provided by a nursing home. MCL 333.21715; MSA 14.15(21715). The trial court, in its opinion from the bench, noted that Mr. Winklepleck "was afflicted with a chronic condition which required treatment on a regular and consistent basis," and further concluded that the "nurses providing [the daily care at the facility] act under the direct supervision of a doctor or a physician associated with these premises." Although MCL 333.21715; MSA 14.15(21715) directs that a nursing home *shall* provide "a program of planned and continuing medical care under the charge of physicians," and that "[n]ursing care and medical care . . . shall include . . . diagnosis and treatment of an illness . . . and the carrying out of required treatment prescribed by a physician," the trial court seemed to reason that any physician-supervised care at the veterans' facility rendered the facility a hospital. It is one thing to have physicians available or on call on a daily basis for the benefit of those who periodically need the attention of a physician (as is the case in a nursing home). It is quite another thing to offer care to those whose conditions require the daily direction or supervision of a physician. Furthermore, that the activities of nurses might be under the daily supervision of physicians is not controlling. Under the statute, it is the patients' conditions that must require daily supervision of a physician before a facility meets the test of being a hospital.

It further appears that the trial court concluded that the records proffered by plaintiff established that Mr. Winklepleck was in fact suffering from a condition requiring the daily direction or supervision of a physician, and that the facility was therefore a hospital by virtue of the fact that it

was offering services to Mr. Winklepleck. The records proffered do not support this determination.

For example, exhibit B of plaintiff's brief on appeal consists of several pages of "doctor's progress notes," which establish that between December 1982 and May 1987, Mr. Winklepleck was seen by a physician approximately forty-nine times, or on average less than once a month. In 1986, Mr. Winklepleck was seen twice in January, three times in April, and then not seen by a physician again until July 24, 1986. He was not seen after that until October 10, 1986, and then was seen next on December 2, 1986. Plaintiff attaches an exhibit D, captioned "Physician's Orders." There are approximately 120 entries spanning the dates of December 1982 through May 1987. Plaintiff also submitted a group of documents labeled "member's progress notes" (exhibit F), with much more frequent entries.

Plaintiff proffers no expert testimony to the effect that Mr. Winklepleck suffered from a condition requiring the daily direction or supervision of a physician. Plaintiff therefore has not contradicted the affidavit of Dr. Barbachym stating that Mr. Winklepleck did not suffer from, or receive treatment for, such a condition. Similarly, plaintiff has not rebutted Dr. Barbachym's statement that there is no "active treatment" for multiple sclerosis, absent an acute attack.

In summary, plaintiff's documents establish no more than that Mr. Winklepleck received medical care, including visitation by physicians, prescription medication, minor surgery and x-rays at the facility's clinic, and daily nursing care. In light of plaintiff's failure to come forward with any evidence that Mr. Winklepleck suffered from a condi-

tion requiring the daily direction or supervision of a physician, we conclude that the trial court erred in denying defendants' motion. We also note that the trial court's apparent broad construction of the governmental immunity statute's definition of hospital, to include all facilities that provide nursing care at the direction of physicians, contravenes the rule that exceptions to governmental immunity are to be narrowly construed. *Wade v Dep't of Corrections,* 439 Mich 158, 166; 483 NW2d 26 (1992).

We further observe that the trial court unduly focused on the treatment of one person. The issue in the case was whether the facility offers care to individuals with conditions requiring the daily direction and supervision of a physician—not whether a particular patient had deteriorated to such a point but had not yet been transferred to a hospital. Again, we emphasize that there was no evidence that Mr. Winklepleck's condition had so deteriorated. Even if it had, the facility does not unwittingly become transformed into a hospital for the brief interval that one patient is awaiting transfer elsewhere. Although plaintiff did not advocate such a position, the trial court's emphasis on the condition of one patient necessitates our comment that the focus of attention in determining whether the facility is a hospital must be on the services offered by the facility and not on the condition of one patient.

Reversed and remanded for entry of an order granting summary disposition in favor of defendants.

ALLSTATE INSURANCE COMPANY v DEPARTMENT OF INSURANCE

Docket No. 121390. Submitted November 20, 1991, at Lansing. Decided August 17, 1992, at 9:15 A.M.

Allstate Insurance Company petitioned the Ingham Circuit Court for review of an order of the Commissioner of Insurance that held that Allstate's 1984 revised rating plan for automobile insurance violated the provision of chapter 21 of the Insurance Code prohibiting excessive adjacent-territory and overall differentials in insurance rates. The order also required Allstate to refund to its policyholders the excess collected under the revised plan on the ground that the violation of the provisions of chapter 21 constituted a violation of the provision of chapter 20 that permitted such a remedy. The court, Peter D. Houk, J., affirmed the commissioner's order with respect to the finding of a violation of the provisions of chapter 21, but reversed that portion of the order requiring refunds to the policyholders. The Department of Insurance and the Commissioner of Insurance appealed.

The Court of Appeals *held:*

The circuit court properly held that a violation of the provision of chapter 21 of the Insurance Code limiting adjacent-territory and overall differentials in automobile insurance rates was not sufficient by itself to support a finding of a violation of the provision of chapter 21 prohibiting different rates for the same automobile insurance coverage on the basis of residence or location. The Legislature clearly did not intend the provision of chapter 20 to be coextensive with the provisions of chapter 21 and did not intend the refund and penalty remedies of chapter 20 to be applicable automatically upon a showing of a violation of the provisions of chapter 21. The chapter 20 remedies are cumulative and available only upon an independent showing of a violation of chapter 20, which was not done in this case. The circuit court correctly concluded that the portion of the commissioner's decision that ordered a refund was based on a substantial and material error of law and could not be enforced.

Affirmed.

Dykema Gossett (by *Donald S. Young* and *Lori M. Silsbury*), for the petitioner.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Harry G. Iwasko* and *E. John Blanchard,* Assistant Attorneys General, for the respondents.

Before: BRENNAN, P.J., and SHEPHERD and GRIFFIN, JJ.

SHEPHERD, J. This appeal concerns a revised rating plan for private passenger automobile insurance filed by petitioner, Allstate Insurance Company, with the Michigan Insurance Bureau. Respondents, the Department of Insurance and the Commissioner of Insurance, appeal as of right from the circuit court's September 14, 1989, opinion and order. The circuit court's order affirmed the commissioner's April 21, 1988, final decision and order finding Allstate's October 23, 1984, revised rating plan for private passenger automobile insurance to be in violation of the now-amended subsections 2 and 5 of § 2111 of the Insurance Code, MCL 500.2111(2) and (5); MSA 24.12111(2) and (5); see 1980 PA 461, § 2111(2) and (5). The effect of that portion of the order was to determine that rates charged to certain policyholders were too high in relation to the rates charged other policyholders. The circuit court's order also reversed that part of the commissioner's final decision and order that found Allstate's rating plan to be in violation of MCL 500.2027; MSA 24.12027. The effect of the circuit court's holding was to prohibit the respondents from either imposing penalties on the petitioner or requiring that refunds be made to policyholders as a result of the excessive rates. The only remedy would be a pro-

spective change in rates. The latter ruling is now the only matter at issue in this appeal.

In 1979, the Legislature passed the Essential Insurance Act, 1979 PA 145. The purpose of the act was described in the analysis of subsequent legislation, Senate Legislative Analysis, SB 647, March 3, 1986:

> [The Essential Insurance Act] responded to claims that the voluntary insurance market was operating unfairly and that some persons were being denied, or being charged unfairly high rates for, insurance for their homes and cars not because of factors over which they had some control, such as their driving records, but because of other factors over which they had relatively little control, such as where they lived.

In order to address this concern, § 2111(5) of the Insurance Code until February 28, 1986, provided:

> Notwithstanding other provisions of this chapter, automobile insurance risks shall be grouped by territory, and territorial base rates for coverages shall be established as follows:
>
> (a) An insurer shall not be limited as to the number of territories employed in its rating plan. However, an insurer shall not employ more than 20 different territorial base rates for an automobile insurance coverage. A territorial base rate may be made applicable in 1 or more territories contained in the rating plan of the insurer.
>
> (b) An insurer shall not employ a territorial base rate for an automobile insurance package policy that is less than 45% of the highest territorial base rate for the same policy, all other rating classifications being the same.
>
> (c) An insurer shall not employ a territorial base rate in a territory for an automobile insurance package policy that is less than 90% of the territorial base rate employed in any adjacent territory

> for the same policy, all other rating classifications being the same.

The provisions of former § 2111(5)(b) were sometimes referred to as the "high/low constraints." The provisions of former § 2111(5)(c) were sometimes called the "territorial adjacency constraints."

The Insurance Bureau contended that, under Allstate's filing, rates for the $50 deductible varied by twenty-two percent between territories thirteen and fourteen, exceeding by seven percent the maximum differential permitted under a previous order of the commissioner that allowed Allstate's rate differential in adjacent territories to vary by fifteen percent instead of the ten percent ordinarily allowed under former § 2111(5)(c). The rates for the $50 deductible comprehensive in territory eighty-seven, the lowest rated territory, were 41.3 percent of the rates in territory one, the highest rated territory, which was inconsistent with the high/low territorial rate constraint. In other words, the insurance bureau argues that, although the base rates were lawful, the rate differentials that were applied to policies with deductibles as low as $50 were so disparate that the total cost to the consumer, i.e., the premium for any such policy, would be in violation of law. Allstate continues to claim that it never overcharged any policyholder. We need not resolve this dispute, because it is no longer a dispositive issue in this appeal.

The commissioner's final decision and order adopted the hearing officer's proposed decision insofar as it concluded that Allstate violated chapter 21 of the Insurance Code. Specifically, the hearing officer and the commissioner found that the comprehensive deductible factors in the rating

plan in effect from October 23, 1984, to July 23, 1986, violated the high/low and territorial adjacency constraints of § 2111(5)(b) and (c), which remained in effect until February 28, 1986. On that date, 1986 PA 10 took effect and suspended the high/low and territorial adjacency constraints. 1986 PA 10 also amended § 2111(2)(a)(viii) to provide as follows:

> Classifications established pursuant to this section for automobile insurance shall be based only upon 1 or more of the following factors, which shall be applied by an insurer on a uniform basis throughout the state:
>
> (a) With respect to all automobile insurance coverages:
>
> * * *
>
> (viii) Amount of Insurance.

The commissioner and the hearing officer also concluded that Allstate's comprehensive deductible factors violated § 2111(2)(a)(viii).

The commissioner did not follow the hearing officer's proposed decision as it related to the assertions by the Insurance Bureau's staff that Allstate's rating practices violated the Uniform Trade Practices Act, chapter 20 of the Insurance Code, MCL 500. 2001 *et seq.*; MSA 24.12001 *et seq.* The hearing officer rejected the Insurance Bureau's contention that § 2027 was also violated. However, the commissioner disagreed with this part of the proposed decision and found that because Allstate had violated chapter 21, it had also violated § 2027(c), which prohibits charging a different rate for the same coverage on the basis of residence or location of the risk "unless the rate differential is based on sound actuarial principles, a reasonable classification system, and is related to

the actual and credible loss statistics or reasonably anticipated experience in the case of new coverages." The commissioner reasoned, in part, as follows:

> It would be manifestly unsound and unreasonable to establish rates in defiance of legal requirements. It is, therefore, entirely appropriate and necessary to conclude that Allstate, in using deductible factors that are in violation of Sections 2111(2) and 2111(5), has not utilized sound actuarial principles and has established an unreasonable classification system.

On appeal, the circuit court affirmed the commissioner's findings that Allstate violated chapter 21. However, the court reversed the commissioner's finding that Allstate violated § 2027. In addition, the court concluded that imposition of the refund sanction of chapter 20, MCL 500.2038; MSA 24.12038, was "precluded by the terms of the enforcement section of chapter 21," MCL 500.2114; MSA 24.12114.

The commissioner appealed to this Court, arguing that the circuit court erred in reversing his order finding that Allstate violated § 2027 and ordering Allstate to "refund all overcharges to its Detroit area policyholders carrying comprehensive insurance with a deductible." Allstate cross appealed, arguing that the trial court erred in affirming the commissioner's finding that Allstate violated chapter 21. Pursuant to a stipulation of the parties, we entered an order on January 3, 1992, dismissing Allstate's cross appeal. This means that the finding that Allstate's rates were in violation of law remains in effect and that the only issue remaining in this appeal is whether the violation of chapter 21 also constitutes a violation of chap-

ter 20, which has the penalty and refund provisions.

Allstate no longer uses the rating plan at issue. By dismissing its cross appeal, Allstate concedes, at least for purposes of the argument herein, that the plan violated § 2111. Thus, the dispositive issue presented in this appeal is not whether Allstate violated § 2027, but whether the refund remedy is appropriate. We hold that it is not, and we affirm the circuit court's conclusion that the commissioner's imposition of the refund sanction contravened the provisions of chapter 21 and constituted a substantial and material error of law. MCL 24.306(1)(a) and (f); MSA 3.560(206)(1)(a) and (f).

It is undisputed that the claimed violation of § 2027 is based solely on Allstate's violation of § 2111. In other words, the reason the commissioner found that Allstate's rates were not based on "sound actuarial principles" or "a reasonable classification system," as required by § 2027, is because the rates violated the law, specifically, § 2111. The commissioner argues that this case presents no conflict between the provisions of chapter 20 and chapter 21. We disagree.

Upon finding that a regulated person has committed practices prohibited by chapter 20, including a violation of § 2027, the commissioner may order payment of a monetary penalty, suspension or revocation of the person's license or certificate of authority, or refund of any overcharges. MCL 500.2038(1)(a)-(c); MSA 24.12038(1)(a)-(c).

The remedial provisions of chapter 21 are quite different. Section 2114(2) provides:

> If after hearing initiated under subsection (1) or upon the commissioner's own motion pursuant to Act No. 306 of the Public Acts of 1969, as

> amended, the commissioner finds that a filing does not meet the requirements of sections 2109 and 2111, the commissioner shall issue an order stating the specific reasons for that finding. *The order shall state when, within a reasonable time after issuance of the order, the filing shall be considered no longer effective.* A copy of the order shall be sent to the applicant, if any, and to each insurer and rating organization subject to the order. *The order shall not affect a contract or policy made or issued before the date the filing becomes ineffective, as indicated in the commissioner's order.* [Emphasis added.]

Thus, the plain language of § 2114(2) evinces the clear intent of the Legislature to remedy violations of § 2111 by an order of the commissioner that shall state "when . . . the filing shall be considered no longer effective," whereas it is equally clear that a violation of chapter 20 may include the sanction of a refund ordered by the commissioner. Section 2038(1)(c). The commissioner argues that these remedies are cumulative and that because Allstate violated both § 2027 and § 2111, it should be subject to the sanctions contained in both chapter 20 and chapter 21. Assuming without deciding that Allstate has violated § 2027, we cannot agree with the commissioner's argument.

Upon finding that a rate filing does not meet the requirements of chapter 21, the commissioner must issue an order stating when the filing "shall be considered no longer effective." Section 2114(2). The last sentence of § 2114(2) plainly provides that "[t]he order shall not affect a contract or policy made or issued before the date the filing becomes ineffective, as indicated in the commissioner's order." This would appear to be a fairly plain legislative attempt to provide that the exclusive remedy for a violation of chapter 21 is the commissioner's

order terminating the effectiveness of the rate filing. This prospective relief is all that those aggrieved by a filing that violates the provisions of chapter 21 are entitled; no monetary penalties or refunds may be had because such relief would affect contracts or policies made or issued before the commissioner's order.

To buttress its argument that this is the intent behind the plain language of § 2114, Allstate points to proposed statutory language rejected by the Legislature. House Substitute for Senate Bill No 428 (the Senate bill was eventually enacted as 1979 PA 145) apparently would have deleted § 2114 and provided for an entirely different remedial scheme in a proposed § 2113, which would have provided in pertinent part:

> (1) A person aggrieved by an alleged violation of this chapter, chapter 20, chapter 24, or chapter 26, may contest the alleged violation by filing a request with the commissioner in a form and manner as is required by the commissioner.
>
> * * *
>
> (4) *If,* after providing the opportunity for the hearing, *the commissioner finds that a violation has occurred, the commissioner may impose any penalty authorized by law and may provide other appropriate relief, including refunds* of premium and the issuance or renewal of automobile or home insurance coverages. [Emphasis added.]

The Legislature made its intent clear with the rejection of this substitute. *People v Adamowski,* 340 Mich 422, 429; 65 NW2d 753 (1954). Without a clear and cogent reason, a court should not give a statute a construction that the Legislature plainly refused to give. *Id., Elliot v Genesee Co,* 166 Mich App 11, 17; 419 NW2d 762 (1988).

Finally, we note that in a report prepared by the

Insurance Bureau's staff the remedial provisions of chapter 21 were discussed:

> Perhaps the most serious problem the Bureau has encountered under the new law is that *Chapter 21 does not include penalties for violation of the chapter's provisions.* This has made it difficult to effectively enforce certain provisions of the law. [*A Year of Change: The Essential Insurance Act in 1981,* Insurance Bureau, June 4, 1982, p 57. Emphasis added.]

In light of the foregoing it is absolutely clear that the Legislature deliberately refused to vest the commissioner with power to order a refund for noncompliance with chapter 21. We may not pass on the wisdom or fairness of this measure. Our task is to apply the law as it is written, if unambiguous; if judicial construction is necessary because of ambiguity in the statute, our task is to ascertain and give effect to the intent of the Legislature. See *Lorencz v Ford Motor Co,* 439 Mich 370, 376; 483 NW2d 844 (1992).

Distilled to its essence, the commissioner's argument is that this case presents no conflict between the remedial provisions of chapters 20 and 21: Allstate violated chapter 21, for which the appropriate sanction was an order terminating the effectiveness of the rates; Allstate also violated chapter 20, for which an appropriate sanction was an order by the commissioner requiring a refund. This simplification of the commissioner's argument exposes the distortion, perhaps unintentional, therein. Without the chapter 21 violation there would be no basis for a finding that Allstate violated chapter 20. Chapter 21 expressly provides that the sanction for violating chapter 21 "shall not affect a contract or policy made or issued before the date the filing becomes ineffective."

Chapter 21 further provides that to the extent that other provisions of the Insurance Code are inconsistent with the provisions of that chapter, chapter 21 shall govern with respect to automobile and home insurance. MCL 500.2106; MSA 24.12106. The conflict is evident: the Legislature has carefully spelled out its intention that the sanction of a refund order is not a remedy available for a chapter 21 violation. The commissioner, however, argues that the chapter 21 violation gives rise to a chapter 20 violation and that a refund is a proper remedy under chapter 20.

The provisions of chapter 20 of the Insurance Code and the remedies therein are cumulative of the other provisions of the code. MCL 500.2050; MSA 24.12050. The commissioner argues that this section alleviates the tension between the two chapters. It does not. This provision clarifies that the facts giving rise to a violation of chapter 20 may also constitute a violation of some other provision of law and that the remedy for a chapter 20 violation is in addition to whatever other remedies may exist for violations of other provisions of law. However, the fact that the provisions of chapter 20 are to be regarded as cumulative and supplemental to other provisions of law simply does not address the situation with which we are faced here, i.e., a situation in which one set of remedies irreconcilably clashes with another.

In this case, the sole basis for finding the chapter 20 violation is the chapter 21 violation. This is distinct from the situation where one set of actions gives rise to a violation of both chapter 20 and chapter 21. In other words, if, hypothetically, chapter 21 proscribed certain methods of formulating rates and chapter 20 defined the same conduct as an unfair practice, and if an insurer committed such conduct, then both chapters would have been

violated and the sanctions of both chapter 20 and chapter 21 could be imposed. No conflict would exist in that hypothetical case, because the acts committed would constitute a violation of chapter 20 as well as chapter 21. But, in this case, chapter 20 does not establish adjacency or high/low requirements and define failure to comply with such requirements as an unfair or deceptive practice. Rather, chapter 20 requires "sound actuarial principles" and "a reasonable classification system" in certain instances. The commissioner argues that failure to comply with any other provision of the Insurance Code constitutes a violation of chapter 20 and therefore permits the sanction of a refund order.

Although the commissioner argues in apparent good faith that a chapter 20 violation is permitted under these circumstances, it is hard to regard this argument as anything but specious where the chapter 20 violation is expressly and solely premised upon a chapter 21 violation, i.e., premised upon the legal conclusion that chapter 21 was violated, not upon the acts giving rise to the chapter 21 violation. To hold that a chapter 21 violation subjects an insurer to a refund order (a chapter 20 remedy) would frustrate the clear intent of the Legislature. The wisdom of that legislative intent is not at issue, and the imposition of the chapter 20 refund remedy by this Court for what is clearly a chapter 21 violation would require us to employ facile reasoning to elevate form over substance.

We need not belabor the analysis with maxims of statutory interpretation. Nor is it necessary for us to pass upon the commissioner's argument that the phrases "sound actuarial principles" and "reasonable classification system" encompass compliance with other laws. It is enough for purposes of

the instant analysis to understand that the commissioner argues that the terms of § 2027 make compliance with chapter 21 a requirement of chapter 20, and that a chapter 20 violation based on a chapter 21 violation may be remedied under the provisions of chapter 20. This smacks of bootstrapping, of circularity, or of an effort to evade the remedial scheme plainly set forth in chapter 21. However, we need not conclude that this was the commissioner's actual intent, and we do not so intimate. We merely conclude that the Legislature's manifest intention concerning remedies or sanctions for chapter 21 violations would be defeated if we adopted the interpretation of § 2027 advanced by the commissioner. Because the commissioner's interpretation is not supported by similarly strong evidence of Legislative intent, we conclude that the commissioner erroneously ruled that a chapter 21 violation in and of itself gives rise to a § 2027 violation, which may be remedied by chapter 20 remedies. The circuit court correctly concluded that the commissioner's final decision and order was affected by a substantial and material error of law.

Affirmed.

MOOAHESH v DEPARTMENT OF TREASURY

Docket No. 122480. Submitted April 7, 1992, at Detroit. Decided August 17, 1992, at 9:20 A.M.

Kamel Mooahesh, a 1987 winner of the Michigan Lottery who will receive annual installments of his prize until 2006, brought a class action in the Wayne Circuit Court against the Department of Treasury, the Bureau of State Lottery, and others, seeking equitable and declaratory relief against the enforcement of 1988 PA 516, which, effective December 30, 1988, repealed the statutory exemption of state lottery winnings from state and local taxes. The court, Marvin R. Stempien, J., granted summary disposition for the plaintiff, ruling 1988 PA 516 unconstitutional for violating the title-object clause of Const 1963, art 4, § 24. The defendants appealed.

The Court of Appeals *held:*

1. The circuit court did not clearly err in certifying the class represented by the plaintiff to include all winners of state lottery prizes payable in installments, at least one of which was received or was receivable on or before December 31, 1988, and to exclude all such winners who chose not to opt out of a similar class action then pending in the Court of Claims, *Shay v Michigan*. The class, as certified by the circuit court, is narrower than that proposed by the plaintiff and thus is more favorable to the defendants. Neither case law nor court rule precludes the maintenance of two class actions with respect to the repeal of the tax exemption for state lottery winnings. Under the circuit court's class certification, no winner can be a member of both the *Mooahesh* and *Shay* classes.

2. The circuit court had jurisdiction of the plaintiff's claims for equitable and declaratory relief concurrent with the Court of Claims, as well as jurisdiction of his constitutional claims. Contrary to the defendants' contention, constitutional claims against the state are not triable only in the Court of Claims.

REFERENCES

Am Jur 2d, Gambling §§ 17 *et seq*; State and Local Taxation §§ 191 *et seq.*

State lotteries: actions by ticketholders against state or contractor for state, 40 ALR4th 662.

The circuit court correctly ruled that the legal remedy of annual petitions for tax refund under MCL 205.30(2); MSA 7.657(30)(2) provides inadequate relief to the plaintiff and should not prevent him from seeking equitable relief.

3. The circuit court erred in ruling that 1988 PA 516 violated the title-object clause of the constitution. Section 1 of the act provided that state lottery winnings are not to be subtracted from taxable income in tax years after 1987, and § 2 repealed the provision of the Lottery Act that had exempted state lottery winnings from state and local taxes. The single object of 1988 PA 516 was raising revenue to meet deficiencies in state funds. It did not violate the single-object rule because its single object was stated in its title, and the repeal of the statutory exemption of state lottery winnings from state taxes and the mandatory inclusion of state lottery winnings in taxable income was consistent with that object. The act's title gave fair notice to legislators and others interested in its object that only matters germane to raising revenue would be enacted and that the statutory exemption of state lottery winnings from state taxes would be repealed.

4. On remand, the parties and the circuit court, in the interest of judicial economy, should consider the Court of Appeals decision in *Shay v Michigan,* unpublished opinion per curiam, decided February 11, 1991 (Docket No. 120806), which held that the state committed a breach of contract in repealing the tax exemption for state lottery winnings.

Affirmed in part, reversed in part, and remanded.

TAXATION — LOTTERIES — REPEAL OF TAX EXEMPTION FOR STATE LOTTERY PRIZES — CONSTITUTIONAL LAW — TITLE-OBJECT CLAUSE.

1988 PA 516 did not violate the title-object clause of the Michigan Constitution in repealing the Lottery Act provision that had allowed the exemption of state lottery prizes from state and local taxes (MCL 432.34; MSA 18.969[34], Const 1963, art 4, § 24).

Richard A. Lenter, for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Keith D. Roberts* and *George H. Weller,* Assistant Attorneys General, for the defendants.

Before: WEAVER, P.J., and SULLIVAN and CORRIGAN, JJ.

CORRIGAN, J. In this class action, plaintiff and other winners of the Michigan lottery[1] sought relief from the repeal of the statutory exemption of state lottery winnings from Michigan taxes. 1988 PA 516; MCL 432.34; MSA 18.969(34). Defendants appeal the trial court's grant of plaintiff's motion for summary disposition and its ruling that 1988 PA 516 violated the title-object clause of the Michigan Constitution. Const 1963, art 4, § 24. We affirm in part and reverse in part.

In 1987, Kamel Mooahesh, a member of a lottery club, shared one-half of a one million dollar prize won in the state lottery, MCL 432.1 *et seq.*; MSA 18.969(1) *et seq.* The prize money has since been paid and will be paid to him until 2006 in $25,000 annual installments.

At the time Mooahesh purchased his lottery ticket, § 34 of the Lottery Act expressly provided: "No state or local taxes of any kind whatsoever shall be imposed upon the proceeds from a prize awarded by the state lottery." MCL 432.34; MSA 18.969(34). This tax exemption existed continuously from the lottery's inception in 1972 until 1988. On December 30, 1988, however, 1988 PA 516 was enacted. A portion of the act provides:

> For a tax year beginning after 1987, in calculating taxable income, a taxpayer shall not subtract from adjusted gross income the amount of prizes won by the taxpayer under [the Lottery Act]. [MCL 206.30(6); MSA 7.557(130)(6).]

[1] Plaintiff's complaint asserted that the potential class consisted of 1,000 Lotto or Super Lotto winners, plus tens of thousands of winners of smaller prizes. In the motion for class certification, plaintiff described 832 potential class members.

In addition, the act expressly repealed MCL 432.34; MSA 18.969(34):

> Section 34 of the McCauley-Traxler-Law-Bowman-McNeely lottery act, Act No. 239 of the Public Acts of 1972, being section 432.34 of the Michigan Compiled Laws, is repealed effective January 1, 1988. [1988 PA 516, § 2.]

On March 14, 1989, Mooahesh, individually and on behalf of a class consisting of other lottery winners before December 31, 1988, filed a six-count complaint in the Wayne Circuit Court against the Department of Treasury and the Bureau of State Lottery. The complaint was later amended to add two individual defendants, the State Treasurer and the Commissioner of the Bureau of State Lottery. All six counts arose from the passage and enforcement of 1988 PA 516.

The amended complaint alleged that the state breached its contract and that 1988 PA 516 violated the state and federal constitutions. Plaintiff also pleaded other counts not pertinent to this appeal.[2] Each of the counts alleged the $10,000 jurisdictional amount. Plaintiff's generalized prayer for relief sought (1) a declaratory judgment that the state had breached its contract with plaintiff and other members of the class; (2) a declaratory judgment that 1988 PA 516 was unconstitutional; (3) segregation of payments collected pursuant to 1988 PA 516 pending resolution of the dispute; and (4) payment of costs and attorney fees.

[2] Plaintiff's claims included breach of contract and promissory estoppel, violation of 42 USC 1983 against the individual defendants, violation of various provisions of the Michigan Constitution and the Consumer Protection Act [MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*], misrepresentation and conversion. The court dismissed the counts relating to 42 USC 1983 and the Consumer Protection Act.

Defendants moved for summary disposition, contending that exclusive jurisdiction was vested in the Court of Claims. MCL 600.6419; MSA 27A.6419. This motion was denied as to the state and the lottery bureau, but granted as to the treasurer and the lottery commissioner, who were dismissed from the case. Plaintiff has not appealed that order.

Plaintiff then moved for summary disposition, seeking a declaration that 1988 PA 516 violated the title-object clause of the Michigan Constitution, Const 1963, art 4, § 24. That motion was granted.

At the same time that plaintiff brought this action, a similarly situated class filed suit in the Court of Claims. The class was essentially defined as all state lottery winners before December 31, 1988, who had received awards or installment payments in 1988, who filed 1988 state income tax returns, and who paid state income taxes under protest. The Court of Claims granted summary disposition for the plaintiffs, holding that 1988 PA 516 did not apply to those who won the lottery before December 30, 1988. This Court affirmed. *Shay v Michigan,* unpublished opinion per curiam, decided February 11, 1991 (Docket No. 120806). The Court of Claims ruled solely on the breach of contract claim.

I. CERTIFICATION OF THE CLASS

The lower court certified the class represented by plaintiff as follows:

> All winners of State of Michigan lottery prizes, which prizes were paid in installment payments, provided that at least one installment payment was received or receivable on or before December

> 31, 1988; the class shall not include those persons or entities who did not choose to exclude themselves from [a] certain class action presently pending in the Michigan Court of Claims, said action being known as *Shay v State of Michigan* . . . .

On appeal, defendants contend that this certification was in error because the *Mooahesh* class could not be distinguished from the *Shay* class. We do not agree.

This Court will reverse an order of class certification only where it is clearly erroneous. *Grigg v Michigan Nat'l Bank,* 72 Mich App 358, 365; 249 NW2d 701 (1976), rev'd on other grounds 405 Mich 148; 274 NW2d 752 (1979); *Northview Const Co v St Clair Shores,* 395 Mich 497, 507; 236 NW2d 396 (1975). The lower court did not clearly err in certifying the *Mooahesh* class.

MCR 3.501(A)(1) describes the requirements for a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Neither the explicit language of the court rule

nor the corresponding federal court rule, FR Civ P 23, requires that a defined class be unique, i.e., that all its members be ineligible for membership in any other class. Defendants have cited no legal authority for this proposition and this Court has discovered no judge-made law imposing any such limitation. Moreover, as presently defined, no one can be a member of both the *Mooahesh* and the *Shay* classes. Thus, we have no legal or factual basis for concluding that the lower court's decision to certify the *Mooahesh* class was clearly erroneous.

Defendants also complain that the class as certified differs from the class identified in the complaint. Although defendants do not identify the alleged discrepancies, we assume the problem lies in the paragraph of the complaint that refers to "all persons who have won Lotto and/or Super Lotto prizes in the State of Michigan Lottery Contest since its inception in 1973." The trial court's order refers to "All winners of State of Michigan lottery prizes, which prizes were paid in installment payments, provided that at least one installment payment was received or receivable on or before December 31, 1988." These descriptions are functionally identical. The trial court's definition is, if anything, *more* restrictive than that in the complaint, so any inconsistency works to defendants' advantage. We see no reason to reverse the decision of the circuit court on this ground.

II. CIRCUIT COURT JURISDICTION

We next find that the circuit court had jurisdiction of the constitutional issues. Further, we find that plaintiff requested equitable relief and has no adequate remedy at law.

The portions of MCL 600.6419; MSA 27A.6419 pertinent to the present dispute provide:

> Except as provided in [MCL 600.6419a; MSA 27A.6419a and MCL 600.6440; MSA 27A.6440], the jurisdiction of the court of claims, as conferred upon it by this chapter, shall be exclusive. . . . The court has power and jurisdiction:
>
> (a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies.

MCL 600.6419a; MSA 27A.6419(1) provides, in pertinent part:

> [T]he court of claims has concurrent jurisdiction of any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed pursuant to [MCL 600.6419; MSA 27A.6419]. The jurisdiction conferred by this section is not intended to be exclusive of the jurisdiction of the circuit court over demands for declaratory and equitable relief conferred by [MCL 600.605; MSA 27A.605.]

The Court of Claims plainly has exclusive jurisdiction over contract claims against the state and its agencies. It does not have exclusive jurisdiction over demands for declaratory and equitable relief (although, of course, it does have ancillary jurisdiction when applicable). See *77th Dist Judge v Michigan,* 175 Mich App 681, 699; 438 NW2d 333 (1989) (the Court of Claims lacked power to issue injunction in a case involving a district judge's claim of an equal protection violation because of unequal salaries and benefits), and *AuSable Manistee Action Council, Inc v Michigan,* 182 Mich App 596, 599-600; 452 NW2d 832 (1989) (injunction to enforce land-use restrictions proper in circuit court because the Court of Claims did not have jurisdiction over purely equitable claims).

While various counts in the complaint sought money damages, the lower court dismissed many of the counts sounding in tort. The lower court accepted plaintiff's argument that his breach of contract claim merely provided a basis for equitable relief and for declaratory judgment. The circuit court, upon due consideration, concluded that plaintiff was not seeking money damages, but rather a determination whether it was constitutional to take plaintiff's property and a return of property taken improperly. We believe that the circuit court's analysis was correct. The relief plaintiff seeks is more in the nature of an equitable remedy than damages. Plaintiff does not seek damages for an unrelated injury, but rather the return of money allegedly properly belonging to him. Thus, the Court of Claims did not have exclusive jurisdiction; the claims for equitable relief were properly brought in the circuit court.

As for the declaratory judgment, although the Court of Claims may have jurisdiction, the circuit courts enjoy concurrent jurisdiction pursuant to MCL 600.6419a; MSA 27A.6419(1). In *77th Dist Judge, supra,* this Court held that "declaratory judgment is appropriate in the Court of Claims only if the underlying dispute or controversy is of a nature lending itself to an eventual remedy in money damages against the state or one of its branches." 175 Mich App 700. In *AuSable, supra,* where the plaintiff's *only* request was for equitable relief, the Court found jurisdiction proper only in the circuit court. 182 Mich App 599-600. We conclude that, although the Court of Claims has authority to issue a declaratory judgment, the circuit court also has jurisdiction.

The circuit court indisputably had jurisdiction to rule on plaintiff's constitutional claim. See *Kostyu v Dep't of Treasury,* 170 Mich App 123; 427 NW2d

566 (1988); *Meda v City of Howell,* 110 Mich App 179, 183; 312 NW2d 202 (1981). In *Kostyu,* a taxpayer contested the Treasury Department's procedure for estimating his tax liability. In its analysis, this Court said:

> In matters of taxation, the circuit court continues to have jurisdiction to entertain constitutional issues concerning the validity of tax laws . . . . [*Id.* at 128.]

See also *Bales v Hwy Comm,* 72 Mich App 50, 54; 249 NW2d 158 (1976) (a constitutionally created right can be protected in equity); *Thom v State Hwy Comm'r,* 376 Mich 608, 628; 138 NW2d 322 (1965) (no governmental immunity for constitutional claims).

The Court of Claims has exclusive jurisdiction of claims and demands against the state ex contractu and ex delicto. See, e.g., *Greenfield Const Co, Inc v Hwy Dep't,* 402 Mich 172, 230; 261 NW2d 718 (1978); *Advisory Opinion on Constitutionality of 1976 PA 240,* 400 Mich 311, 320; 254 NW2d 544 (1977); *Taylor v Auditor General,* 360 Mich 146; 103 NW2d 769 (1960). That court was not created to provide a forum for testing the constitutional validity of laws. Indeed, its jurisdiction is carefully limited to "claims and demands . . . ex contractu and ex delicto" and ancillary equitable and declaratory matters. To hold, as defendants have argued, that constitutional issues are triable *only* in the Court of Claims ignores the statutory authority that created the court.

Defendants have also asserted that plaintiff should be limited to his legal remedy, i.e., that regardless of its jurisdiction, the trial court should not award any equitable relief because plaintiff has an adequate remedy at law. That remedy is

found in MCL 205.30(2); MSA 7.657(30)(2), which provides in part:

> A taxpayer who paid a tax claimed not to be due may petition the department [of Treasury] for refund of the amount paid within the time period specified as the statute of limitations . . . .

Jurisdiction of courts of equity is recognized where "the facts involved in litigation are such that a claimed legal remedy, although available, will not afford adequate relief." *Wild v Wild,* 360 Mich 270, 276-277; 103 NW2d 607 (1960). A legal remedy cannot be said to give full and ample relief if it is not as effectual as that which equity affords. *Fireman's Fund Ins Co v Harold Turner, Inc,* 159 Mich App 812, 816; 407 NW2d 82 (1987), citing *Powers v Fisher,* 279 Mich 442, 447; 272 NW 737 (1937).

The class here has an available but inadequate legal remedy. The prizes were to be paid in annual installments for twenty years. If the class is restricted to the refund mechanism of § 30, its members would be required to avail themselves of the payment and petition procedure every year, running the risk of inconsistent results and possibly a sequence of appeals to the Tax Tribunal and this Court.

The case of *Knott v Flint,* 363 Mich 483; 109 NW2d 908 (1961), is analogous. The plaintiffs, a number of business owners, objected to a special property tax assessment against them. *Id.* at 485-490. The defendant claimed that the plaintiffs could have paid the taxes and protested them, rather than seeking equitable relief. *Id.* at 492. The Court determined that that remedy, if available, would be inadequate:

> Obviously this would have involved a large num-

> ber of actions, particularly in view of the fact that the assessments were required to be collected in 2 annual installments. That such a course of procedure, if available, would have worked a hardship on plaintiffs is obvious.
>
> If the course of action suggested was available under applicable law it does not necessarily follow that equity was without jurisdiction. This Court has suggested in prior cases that notwithstanding the possibility of following a legal remedy equity may take jurisdiction under circumstances imposing undue hardship. [*Id.* at 492-493.]

The remedy proposed by defendants in this case would "work an obvious hardship." An equitable order is appropriate.

The complete remedy plaintiff sought was not available in the Court of Claims. Jurisdiction in the circuit court therefore was proper.

III. CONSTITUTIONALITY OF 1988 PA 516

Defendants next contend that the lower court erred in ruling that 1988 PA 516 violates Const 1963, art 4, § 24, the title-object clause, which provides in part: "No law shall embrace more than one object, which shall be expressed in its title." We agree.

The question presented is governed by a de novo standard of review. *Seals v Henry Ford Hosp,* 123 Mich App 329; 333 NW2d 272 (1983).

The lower court held that the act violates the one-object provision because repealing the lottery exemption is an object distinct from raising revenue. The lower court also held that the act violates the title-object requirement because its title did not specify that it was intended to repeal the tax exemption on lottery prizes. We are not persuaded that the lower court correctly analyzed this question.

Section 1 of 1988 PA 516 amended MCL 206.30; MSA 7.557(130) by providing:

> For a tax year beginning after 1987, in calculating taxable income, a taxpayer shall not subtract from adjusted gross income the amount of prizes won by the taxpayer under the McCauley-Traxler-Law-Bowman-McNeely Lottery Act . . . being sections 432.1 to 432.47 of the Michigan Compiled Laws. [MCL 206.30(6); MSA 7.557(130)(6).]

Section 2 of 1988 PA 516, immediately following, then repealed § 34 of the Lottery Act, MCL 432.34; MSA 18.969(34).

We first consider the holding that the act violated the single-object rule. As Michigan courts have held in numerous contexts, the one-object requirement should be construed reasonably. See, e.g., *Kuhn v Dep't of Treasury,* 384 Mich 378, 387; 183 NW2d 796 (1971) (state income tax act not unconstitutional); *Green v Court Administrator,* 44 Mich App 259, 263; 205 NW2d 306 (1972) ("reasonableness is the hallmark" of cases interpreting art 4, § 24). Further, every legislative act is presumed constitutional as against constitutional challenges. *Hall v Calhoun Co Bd of Supervisors,* 373 Mich 642, 649; 130 NW2d 414 (1964). Moreover, every reasonable presumption is indulged in support of an act's constitutionality. *Builders Square v Dep't of Agriculture,* 176 Mich App 494; 440 NW2d 639 (1989).

> [A]n act may contain any provision which directly relates to, carries out, and implements the principal object of the act. Legislation should not be invalidated merely because it contains more than one means of attaining its primary object. [*City of Livonia v DSS,* 423 Mich 466, 499; 378 NW2d 402 (1985), aff'g *Greentrees Civic Ass'n, Inc*

v Pignatiello, 123 Mich App 767; 333 NW2d 350 (1983).]

The Legislature may enact new legislation or amend any act to which the subject of the new legislation is "germane, auxiliary, or incidental." *DSS, supra* at 500. A statute may authorize the doing of all things that are in furtherance of the general purpose of the act without violating the one-object limitation of art 4, § 24. *Kuhn, supra* at 388. See also, e.g., *Midland Twp v State Boundary Comm,* 401 Mich 641, 654-654; 259 NW2d 326 (1977).

The purpose of the single-object rule is to avoid bringing into one bill diverse subjects that have no necessary connection. *Builders Square, supra* at 497 (item pricing and deceptive advertising act not unconstitutional). In *Detroit Bd of Street Railway Comm'rs v Wayne Co,* 18 Mich App 614, 622-623; 171 NW2d 669 (1969), this Court aptly summarized the single-object rule in the context of a dispute over a tax repeal:

> It might have been better draftsmanship to have placed the provision concerning the taxability of municipal transportation utilities in the general property tax law (where one might expect to find it) rather than in the home rule act. There is, however, no constitutional requirement that the legislature do a tidy job in legislating. It is perfectly free to enact bits and pieces of legislation in separate acts or to tack them on to existing statutes even though some persons might think that the bits and pieces belong in a particular general statute covering the matter. *The constitutional requirement is satisfied if the bits and pieces so enacted are embraced in the object expressed in the title of the amendatory act and the act being amended.* [Emphasis supplied.]

As the *DSS* Court said, "Legislation should not

be invalidated merely because it contains more than one means of attaining its primary object." 423 Mich 499.

> It is sufficient that "the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose . . . ." [*People v*] *Milton,* 393 Mich 246-247 [224 NW2d 266 (1974)], quoting *Loomis v Rogers,* 197 Mich 265, 271; 163 NW 1018 (1917). [423 Mich 501.]

"To require that every end and means necessary to the accomplishment of this general object should be provided for by a separate act relating to that alone, would not only be senseless, but actually render legislation impossible." *Banner Laundering Co v Bd of Tax Admin,* 297 Mich 419, 436; 298 NW 73 (1941) (use tax constitutional).

The Legislature's object in the act at issue was to raise revenue. The title of 1988 PA 516 reads:

> An act to amend sections 30, 262, 520, and 527a of Act No. 281 of the Public Acts of 1967, entitled "An act to meet deficiencies in state funds by providing for the imposition, levy, computation, collection, assessment, and enforcement by lien and otherwise of taxes on or measured by net income; to prescribe the manner and time of making reports and paying the taxes, and the functions of public officers and others as to the taxes; to permit the inspection of the records of taxpayers; to provide for interest and penalties on unpaid taxes; to provide exemptions, credits and refunds of the taxes; to prescribe penalties for the violation of this act; to provide an appropriation; and to repeal certain acts and parts of acts," sections 30, 520, and 527a as amended by Act No. 254 of the Public Acts of 1987 and section 262 as amended by

Act No. 190 of the Public Acts of 1983, being sections 206.30, 206.262, 206.520, and 206.527a of the Michigan Compiled Laws; to add section 273; and to repeal certain acts and parts of acts on specific dates.

The object of such an act is "necessarily broad-ranging and comprehensive." *Midland Twp, supra* at 654.

Revenues can be raised in any number of ways, as history has made obvious. Taxes may be imposed, increased, or rearranged. The object of "meet[ing] deficiencies in state funds" may reasonably be found to include the repeal of a tax exemption, even if that exemption does not appear in any act specifically devoted to taxation. While it might have been "better draftsmanship," *Bd of Street Railway Comm'rs, supra,* to have provided for a separate amendment to the Lottery Act, the inclusion of the repeal of the tax exemption provision in an act amending the income tax laws does not render the act in violation of the single-object requirement.

Neither are we persuaded that 1988 PA 516 violates the requirement that the object of an act "shall be expressed in its title." It is well established that the title of an act need not be an index of its provisions. *Builders Square, supra* at 499; see also, e.g., *Kull v Michigan State Apple Comm,* 296 Mich 262, 268; 296 NW 250 (1941) (tax imposed on apple production valid although the act also created an agency for the promotion and advertising of apples). If indexing were required, the title would not pass muster, because it plainly fails to list the repeal of the tax exemption. The principle instead is that the general object and not all the details and incidents of a statute need be indicated in the title. *Ace Tex Corp v Detroit,* 185 Mich App

609, 616; 463 NW2d 166 (1990) (inclusion of "sunset" provision in city tax on utility use did not make it unconstitutional). As the Supreme Court said in *People ex rel Wayne Prosecuting Atty v Sill,* 310 Mich 570, 574; 17 NW2d 756 (1945): "The title is good if it is a descriptive caption, directing attention to the subject matter which follows . . . or if it be expressive of the purpose and scope of the enactment."

The title of an act must give fair notice to legislators and others interested in the object of the law to assure them that only matters germane to the object expressed in the title will be enacted. *Continental Motors Corp v Muskegon Twp,* 376 Mich 170, 181; 135 NW2d 908 (1965). The "object" of a law is its "general purpose or aim." *DSS, supra* at 497.

> The constitutional provision was designed mainly to prevent the legislature from passing laws not fully understood. . . . [I]t was intended that the legislature, in passing an act, should be fairly notified of its design . . . and that legislatures and parties interested might understand from the title that only provisions germane to the object therein expressed would be enacted . . . and to avoid bringing into one bill subjects diverse in their nature and having no necessary connection, but with a view to combining in their favor the advocates of all—or what is commonly spoken of as logrolling in legislation. [*Maki v East Tawas,* 385 Mich 151, 157-158; 188 NW2d 593 (1971), quoting *State Mutual Rodded Fire Ins Co v Foster,* 267 Mich 118; 255 NW 174 (1934).]

That the compilers of the law have placed a portion of 1988 PA 516 in the tax code and another portion in the lottery regulations is not dispositive:

> Not infrequently there will be a number of existing acts to which the new legislation would be germane, auxiliary or incidental. The legislative choice will not be held invalid merely because an alternative location for the new legislation might appear to some more appropriate. [*Milton, supra* at 241.]

Perhaps the strongest recent authority for plaintiff's position concerning inadequate notice of the repeal appeared in OAG, 1987-1988, No 6438, pp 80, 90 (May 21, 1987). In that opinion (and indeed in a series of opinions) the Attorney General concluded that the failure of the title of the City Utility Users Tax Act, MCL 141.801 *et seq.*; MSA 5.3194(301) *et seq.*, to reflect its "sunset" or termination date, in effect the repeal of that act's provisions, violated Const 1963, art 4, § 24. The Attorney General opined that the act therefore could not terminate as scheduled on June 30, 1988. In *Ace Tex, supra* at 617, this Court rejected the Attorney General's analysis that the lack of notice of repeal in the title of the act vitiated the termination date:

> Although we would agree that a repeal in one act which affects another act could jeopardize the requirement of notice guaranteed by our constitution if the repeal was not declared in the first act's title, we have not been persuaded that a self-repealer presents the same problem. By declaring its purpose to provide the procedure for imposing and collecting such a tax, we believe the act's title challenges the reader's attention to provisions in the act which might affect its duration.

We do not find that the title of 1988 PA 516 provided insufficient notice to "the legislators and parties interested" that the tax exemption on

lottery winnings was being removed.[3] The act's title indicated that it was "An act to amend . . . an act to meet deficiencies in state funds by providing for the imposition . . . of taxes on . . . net income . . . ." Thus, definitions of "net income," wherever found, would of necessity be included. Further, the amendment applied to an existing act, one of whose functions was "to provide exemptions [from taxation] . . . ." An amendment to an act "to provide exemptions" may reasonably reach changes or elimination of such exemptions. The "object" of eliminating the lottery exemption is not so diverse in character as to violate art 4, § 24.

As set out in *Builders Square, supra* at 497, the goal of the title-object clause is notice, not restriction of legislation. The notice aspect is violated where the subjects are so diverse in nature that they have no necessary connection. Despite its failure to state explicitly in the title that the Lottery Act exemption was being repealed, we are able to declare that the subjects are not so diverse as to have "no necessary connection."

Our decision that 1988 PA 516 does not offend the title-object clause makes it unnecessary to address defendants' argument that if § 2 of the act is unconstitutional, it should be severed, leaving § 1 to repeal MCL 432.34; MSA 18.969(34) by implication.

IV. CONCLUSION

We conclude:

1. The circuit court properly certified plaintiff's class.

[3] At oral argument, defendants' counsel pointed to evidence in the legislative history of 1988 PA 516 indicating that the Legislature was, indeed, aware of the presence of the proposed change in the lottery exemption.

2. The circuit court had jurisdiction to decide plaintiff's equitable claims and requests for declaratory judgment.

3. Plaintiff was entitled to seek equitable relief because his remedy at law was inadequate.

4. The circuit court had jurisdiction to determine the constitutionality of 1988 PA 516, but erred in finding the act unconstitutional for violation of the title-object clause.

Consequently, we remand this matter to the court below for proceedings consistent with this opinion. We direct the court and the parties to the decision in *Shay v Michigan, supra,* in the interest of judicial economy.

We do not retain jurisdiction. No costs, neither party having prevailed in full.

Affirmed in part, reversed in part, and remanded.

PEOPLE v JOHNSON

Docket No. 131550. Submitted July 15, 1992, at Lansing. Decided August 17, 1992, at 9:25 A.M.

Ameal A. Johnson was convicted by a jury in the Saginaw Circuit Court, Joseph R. McDonald, J., of second-degree retail fraud. He then pleaded guilty of being an habitual offender, fourth offense, including a conviction of attempted larceny from a building. Pursuant to MCL 750.356c(2); MSA 28.588(3)(2), and on the basis of his conviction of attempted larceny, he was found to have committed and was sentenced for first-degree retail fraud. He appealed.

The Court of Appeals *held:*

A prior conviction of attempted larceny from a building is not sufficient to raise second-degree retail fraud to first-degree retail fraud. A conviction of an attempt to commit one of the offenses enumerated in the first-degree retail fraud statute is not sufficient to constitute a conviction of that offense. Attempt is a separate, substantive offense punishable under its own statute. The defendant properly was found to be guilty of second-degree retail fraud. The first-degree retail fraud conviction must be vacated and the case remanded for entry of a conviction of second-degree retail fraud and for resentencing.

Vacated and remanded.

CRIMINAL LAW — RETAIL FRAUD — HABITUAL OFFENDERS.

A person who commits second-degree retail fraud and has one or more prior convictions of offenses enumerated in the first-degree retail fraud statute may be convicted of first-degree retail fraud; a conviction of an attempt to commit one of the enumerated offenses is not sufficient to constitute a conviction of one of the enumerated offenses (MCL 750.356c[2], 750.356d; MSA 28.588[3][2], 28.588[4]).

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

REFERENCES

Am Jur 2d, Habitual Criminals and Subsequent Offenders§§ 14, 15.

See the Index to Annotations under Habitual Criminals and Subsequent Offenders.

Casey, Solicitor General, *Michael D. Thomas,* Prosecuting Attorney, *J. Thomas Horiszny,* Assistant Prosecuting Attorney, and *Laura A. Chappelle,* Former Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *P. E. Bennett*), for the defendant on appeal.

Before: SAWYER, P.J., and CONNOR and A. G. BEST, II,* JJ.

SAWYER, P.J. Defendant was convicted of first-degree retail fraud, MCL 750.356c(2); MSA 28.588(3)(2), and thereafter pleaded guilty of being a fourth-felony offender, MCL 769.12; MSA 28.1084. He was sentenced to serve two to fifteen years in prison. He now appeals, and we vacate his conviction and remand the matter to the trial court for entry of a conviction of second-degree retail fraud, MCL 750.356d; MSA 28.588(4), and resentencing accordingly.

Defendant's conviction arises out of the theft of less than $100 worth of merchandise and would normally have constituted second-degree retail fraud. However, MCL 750.356c(2); MSA 28.588(3)(2) provides for conviction of first-degree retail fraud for conduct that would otherwise constitute second-degree retail fraud if the defendant previously has been convicted of one of the offenses enumerated in the statute. Defendant admits a prior conviction of attempted larceny in a building, MCL 750.92; MSA 28.287 and MCL 750.360; MSA 28.592, thus resulting in his conviction of first-degree retail fraud.

The question presented, whether a prior convic-

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

tion of attempted larceny in a building is sufficient to raise second-degree retail fraud to first-degree retail fraud, is one of first impression. MCL 750.356c(2); MSA 28.588(3)(2) provides as follows:

> A person who violates section 356d and has 1 or more prior convictions under this section, section 218, 356, 356d, or 360, or a local ordinance substantially corresponding to this section or section 218, 356, 356d, or 360 is guilty of retail fraud in the first degree.

The question thus is whether a conviction of an attempt to commit one of the enumerated offenses is sufficient to constitute a conviction of one of the enumerated sections. The heart of the question is whether a conviction of an attempt to commit an offense constitutes a conviction of the substantive, underlying offense for which the attempt statute merely provides a different penalty, or whether an attempt is a separate, substantive offense.

Attempt is an inchoate offense, the punishment for which is provided in MCL 750.92; MSA 28.287:

> Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:
>
> 1. If the offense attempted to be committed is such as is punishable with death, *the person convicted of such attempt shall be guilty of a felony,* punishable by imprisonment in the state prison not more than ten [10] years;
>
> 2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for five [5] years or more, *the person*

convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than five [5] years or in the county jail not more than one [1] year;

3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than five [5] years, or imprisonment in the county jail or by fine, *the offender convicted of such attempt shall be guilty of a misdemeanor,* punishable by imprisonment in the state prison or reformatory not more than two [2] years or in any county jail not more than [1] year or by a fine not to exceed one thousand [1,000] dollars; but in no case shall the imprisonment exceed one-half [½] of the greatest punishment which might have been inflicted if the offense so attempted had been committed. [Emphasis added.]

The wording of the statute indicates that the Legislature created the separate, inchoate crime of "attempt." The statute, in three locations, states that a person who is convicted of an attempt is guilty of a felony or a misdemeanor, depending on the nature of the attempt, and the statute proscribes a punishment. This is language that creates a substantive offense of "attempt," not merely one that modifies the punishment applicable to the completed offense where the defendant did not complete the underlying offense.

In fact, the general view is that attempt is a lesser-included offense of the completed offense. In *People v Adams,* 416 Mich 53, 57, 61; 330 NW2d 634 (1982), the Supreme Court concluded that attempt is a cognate lesser-included offense of the underlying offense, overruling a prior case that held that attempt is a necessarily lesser-included offense. The Court reasoned that "the elements of an attempt are not duplicated in the completed offense." *Id.* at 56. See also 2A Gillespie, Michigan Criminal Law & Procedure (2d ed), § 1072, p 736

(attempt is a necessarily included offense in every charge of a crime).[1] Moreover, the criminal jury instructions regarding attempt as a lesser offense refer to attempt as being a "less serious crime." CJI2d 9.2.

For these reasons, we conclude that attempt is a separate, substantive offense punishable under its own statute.[2] Thus, the crime of attempted larceny in a building is separate from the crime of larceny in a building. Furthermore, while larceny in a building (§ 360 of the Penal Code) is one of the enumerated offenses in the first-degree retail fraud statute, attempt (§ 92 of the Penal Code) is not. Therefore, defendant is not guilty of first-degree retail fraud, only second-degree retail fraud.

This conclusion is also consistent with the rule of lenity. The Supreme Court explained the rule of lenity in *People v Gilbert,* 414 Mich 191, 211; 324 NW2d 834 (1982):

> Because courts are wary of creating crimes, penal statutes are to be strictly construed and any ambiguity is to be resolved in favor of lenity:
>
> " 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.' " *Bell v United States,* 349 US 81, 83; 75 S Ct 620; 99 L Ed 905 (1955), quoted approv-

[1] Gillespie seems to have overlooked the change in *Adams* that attempts are now considered cognate included, not necessarily included.

[2] It should be noted that, as acknowledged in the attempt statute, some statutes provide punishment for both the attempt and the underlying offense. However, this is not the case with the larceny in a building statute.

> ingly in *People v Bergevin,* 406 Mich 307, 312; 279 NW2d 528 (1979).
>
> The scope of this statute is at least uncertain; it should be applied only to those acts which the Legislature clearly meant to proscribe.

See also *People v Rehkopf,* 422 Mich 198, 207; 370 NW2d 296 (1985).

Although there certainly are reasons to include attempts to commit one of the enumerated crimes in the first-degree retail fraud statute, the Legislature did not explicitly include attempts. The Legislature could have, if it had so desired, included the phrase "or an attempt to commit" in § 356c(2), but did not. For all this Court knows, the Legislature considered, and rejected, including attempts in the statute. Certainly "[t]he scope of this statute is at least uncertain," *Gilbert, supra* at 211, and, therefore, under the rule of lenity this Court should conclude that an attempt to commit one of the enumerated offenses is insufficient to raise second-degree retail fraud to first-degree retail fraud.

Brief consideration should be given to the one case cited by the prosecutor, *People v Brown,* 186 Mich App 350; 463 NW2d 491 (1990). *Brown* did comment that two of the defendant's three prior felony convictions were for offenses enumerated in § 356c(2), noting those to be larceny in a building and attempted larceny in a building. *Id.* at 352. However, whether attempted larceny in a building is actually an enumerated offense was not an issue before the Court, and, thus, its statement that it is an enumerated offense is not part of the holding of *Brown.* Rather, the Court merely assumed that it was without analyzing the issue.

In light of the resolution of this issue, it is unnecessary for us to address defendant's remaining issues.

Defendant's conviction is vacated and the matter is remanded to the trial court with instructions to enter a conviction of second-degree retail fraud and to resentence defendant accordingly. We do not retain jurisdiction.

ROWELL v SECURITY STEEL PROCESSING COMPANY

Docket No. 129065. Submitted June 2, 1992, at Lansing. Decided August 17, 1992, at 9:30 A.M. Leave to appeal sought.

Ted Rowell sought workers' compensation benefits from Security Steel Processing Company and West American Insurance Company after suffering a heart attack following seven weeks and two days of employment. A hearing referee found that the injury was not work-related and denied benefits. The Workers' Compensation Appeal Board concluded that the injury was work-related and awarded benefits, calculating the average weekly wage by dividing Rowell's total wages by 7.4, the number of weeks it considered him to have worked. The defendants appealed by leave granted.

The Court of Appeals *held:*

For purposes of workers' compensation, the average weekly wage of an employee who worked less than thirty-nine weeks in the employment in which he was injured is based upon the total wages earned divided by the total number of weeks actually worked. A week in which any work is performed must be considered a week actually worked. The total amount of Rowell's wages should have been divided by eight to determine the average weekly wage. The appeal board also erred in awarding Rowell benefits equal to eighty percent of his gross average weekly wage rather than eighty percent of his after-tax average weekly wage.

Reversed and remanded.

Bockoff, Zamler, Mellen & Shiffman, P.C. (by *Joel Jonas*), for the plaintiff.

Conklin, Benham, Ducey, Listman & Chuhran, P.C. (by *Michael J. De Polo*), for the defendants.

Before: WEAVER, P.J., and WAHLS and TAYLOR, JJ.

WAHLS, J. Defendants appeal by leave granted

from an opinion and order of the Workers' Compensation Appeal Board. The issues on appeal concern the WCAB's calculation of plaintiff's "average weekly wage" and benefits. We reverse.

Plaintiff had worked seven full weeks and two days of the eighth week when he suffered a heart attack that arose out of and in the course of his employment. During this period, plaintiff earned total gross wages in the amount of $2,772. The referee found that plaintiff's injury was not work-related and denied benefits. Nonetheless, the referee calculated a gross weekly wage of $346.50, an amount reached by dividing plaintiff's total gross wages by eight weeks. The WCAB concluded that plaintiff had been disabled by a work-related event, but also modified the referee's conclusion regarding plaintiff's average weekly wage:

> Regarding plaintiff's second contention on appeal, we agree with plaintiff that apparently the administrative law judge counted plaintiff's last two workdays as a full week. Therefore, the administrative law judge listed plaintiff [sic] average weekly wage of $346.50 is less [sic] than the statutorily-based (MCL 418.371 [MSA 17.237(371)]) weeks "actually worked," or 7.4 weeks ($375.00).

The WCAB subsequently ordered that plaintiff be awarded weekly benefits in an amount equal to eighty percent of $375, or $300. On appeal to this Court, defendants do not dispute plaintiff's disability, but take issue with the WCAB's calculation of plaintiff's average weekly wage, arguing that an average weekly wage should not be calculated by use of a partial week. We agree.

MCL 418.371(3); MSA 17.237(371)(3) provides:

> If the employee worked less than 39 weeks in the employment in which the employee was in-

> jured, the average weekly wage shall be based upon the total wages earned by the employee divided by the total number of weeks actually worked. For purposes of this subsection, only those weeks in which work is performed shall be considered in computing the total wages earned and the number of weeks actually worked.

This case is factually indistinguishable from *Tagliavia v Barton Malow Co,* 185 Mich App 556; 463 NW2d 116 (1990). The panel in *Tagliavia* held that a week in which any work is performed must be considered a week "actually worked" under subsection 371(3). Thus, the average weekly wage of the plaintiff in *Tagliavia* who had worked six weeks and two days should have been calculated by dividing his total wages by seven weeks, rather than 6.4 weeks. *Id.* at 560. We agree with the reasoning of *Tagliavia* and adopt it as our own. Subsection 371(3) does not allow an employee's average weekly wage to be calculated by resort to fractional weeks. Our decision shall be binding precedent pursuant to Administrative Order No. 1990-6, 436 Mich lxxxiv. The WCAB also erred when it awarded plaintiff benefits equal to eighty percent of his gross average weekly wage, rather than eighty percent of his after-tax average weekly wage. MCL 418.351(1); MSA 17.237(351)(1).[1] We therefore reverse the opinion and order of the WCAB and remand the case for a redetermination of benefits that is consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

---

[1] Plaintiff claims that his average weekly wage should be calculated pursuant to subsection 371(6), rather than subsection 371(3). We reject this argument for the same reasons expressed by the WCAB in *Tagliavia, supra,* and quoted in that opinion.

MAGNUSON v ZADROZNY

Docket Nos. 136239, 137042. Submitted July 22, 1992, at Grand Rapids. Decided August 17, 1992, at 9:35 A.M.

Burton J. and Joyce Magnuson brought an action in the Roscommon Circuit Court against Anna and Alexander Zadrozny. The case went to mediation, and the panel issued an evaluation in favor of the plaintiffs for $18,000. Both sides rejected the evaluation. On September 17, 1990, the defendants served on the plaintiffs an offer of judgment in the amount of $5,000. The plaintiffs rejected the offer and did not make a counteroffer. A jury trial began on October 15, 1990, and resulted in a verdict of $15,000 for Burton Magnuson and $5,000 for Joyce Magnuson. The plaintiffs moved for an award of attorney fees on the basis of the defendants' rejection of the mediation evaluation and for taxable costs. The defendants sought costs and attorney fees necessitated by the plaintiffs' late cancellation of a scheduled deposition of a witness. The court, Carl L. Horn, J., granted both motions. Both sides appealed, and their appeals were consolidated.

The Court of Appeals *held:*

1. The court erred in awarding the plaintiffs costs and attorney fees. The cost provisions of MCR 2.405 control in this case because the rejection of the offer of judgment occurred after the mediation evaluation was rejected. Pursuant to MCR 2.405(D)(2), the plaintiffs are not entitled to recover costs and attorney fees because they did not file a counteroffer. The portion of the judgment awarding costs and attorney fees to the plaintiffs must be reversed.

2. The defendants' offer of judgment, served on the plaintiffs on the twenty-eighth day before trial, was timely. The defendants properly could serve on the plaintiffs their offer of judgment until twenty-eight days before trial. Although normally service may not be made on the twenty-eighth day before

---

REFERENCES

Am Jur 2d, Depositions and Discovery § 395; Pretrial Conference § 38.

See the Index to Annotations under Deposition; Pretrial Conferences.

trial and still be timely, because the twenty-ninth day before trial was a Sunday, the defendants, pursuant to MCR 1.108(1), had until the next day, the twenty-eighth day before trial, to serve their offer.

3. The court did not abuse its discretion in awarding the defendants costs for the late cancellation of the deposition. The order granting the defendants costs associated with the cancellation must be affirmed.

Affirmed in part and reversed in part.

1. PRETRIAL PROCEDURE — MEDIATION AWARDS — OFFERS OF JUDGMENT — REJECTION — COSTS.

Where both a rejection of a mediation award and a rejection of an offer of judgment is made, the cost provisions of the court rule under which the later rejection occurred control; if the same party would be entitled to costs under both rules, costs may be recovered from the date of the earlier rejection (MCR 2.403, 2.405[E]).

2. PRETRIAL PROCEDURE — OFFERS OF JUDGMENT — SERVICE — TIMELINESS.

Until twenty-eight days before trial, a party may serve on the adverse party a written offer to stipulate the entry of a judgment for all or part of a claim, including interest and costs then accrued; service by mail is complete at the time of mailing; although service on the twenty-eighth day before trial normally is not timely, where the twenty-ninth day before trial falls on a Sunday, service on the twenty-eighth day is timely (MCR 1.108[1], 2.107[C][3], 2.405[B]).

3. PRETRIAL PROCEDURE — DEPOSITIONS — FAILURE TO ATTEND — COSTS.

A party that gives notice of the taking of a deposition and then fails to attend and proceed with the deposition may be ordered to pay another party reasonable expenses, including reasonable attorney fees, incurred in attending in person or by attorney pursuant to the notice (MCR 2.306[G]).

Jay Trucks & Associates, P.C. (by *Jay F. Trucks*), for the plaintiffs.

Bensinger, Cotant, Menkes & Aardema, P.C. (by *Patrick J. Michaels*), for the defendants.

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

NEFF, P.J. In these consolidated appeals, defendants appeal as of right from a judgment entered following a jury verdict in favor of plaintiffs in the amount of $15,000 for Burton J. Magnuson and $5,000 for Joyce Magnuson. The judgment also provided that plaintiffs shall receive taxable costs of $2,862.98, interest to the date of judgment of $3,211.16, and attorney fees of $5,943.75. Plaintiffs appeal from a separate order requiring that they pay defendants $331.50 in costs and attorney fees necessitated by plaintiffs' counsel's late cancellation of a scheduled deposition of Christopher Schaiberger, M.D. We reverse in part and affirm in part.

I

The facts of the underlying suit are not at issue in these appeals except as they relate to the issue of the imposition of costs and attorney fees.

This case went to mediation, and the mediation panel issued an evaluation in favor of plaintiffs for a total amount of $18,000. Both sides rejected the mediation evaluation, and, on September 17, 1990, defendants served an offer of judgment in the amount of $5,000 on plaintiffs' attorney. Plaintiffs rejected the offer and did not make a counteroffer. The jury trial commenced on October 15, 1990.

After trial, plaintiffs moved for an award of attorney fees based on defendants' rejection of the mediation evaluation and for taxable costs. Defendants sought costs and attorney fees necessitated by the late cancellation of the scheduled deposition of Dr. Schaiberger. A hearing on the motions was held on December 11, 1990. The court ruled that plaintiffs were entitled to receive costs and attorney fees as a result of defendants' rejection of the mediation evaluation and that defendants were

entitled to costs and attorney fees as a result of the late cancellation of the Schaiberger deposition.

II

Defendants claim that the trial court erred in awarding plaintiffs costs and attorney fees. We agree.

The resolution of this issue depends on the interplay of several court rules. MCR 2.403 deals with mediation, and provides in pertinent part:

> (O) Rejecting Party's Liability for Costs.
>
> (1) If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.

If MCR 2.403(O)(1) were to be considered alone and not in conjunction with any other court rules, defendants would be required to pay plaintiffs' actual costs because the jury verdict was more favorable to plaintiffs than the mediation evaluation. However, because defendants served on plaintiffs an offer to stipulate judgment, MCR 2.405 also comes into play. That court rule states in pertinent part:

> (B) Offer. Until 28 days before trial, a party may serve on the adverse party a written offer to stipulate to the entry of a judgment for the whole or part of the claim, including interest and costs then accrued.

Because plaintiffs did not expressly reject the

offer in writing or accept it as provided in MCR 2.405(C)(1), defendants' offer was deemed rejected pursuant to MCR 2.405(C)(2). MCR 2.405(D) provides for the imposition of costs following a rejection of an offer to stipulate judgment, and states in pertinent part:

> (2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs.

MCR 2.405(E) deals with the relationship between the cost provisions of MCR 2.405 and the cost provisions of MCR 2.403, where there has been, as in this case, both a rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer pursuant to MCR 2.405. It states:

> Relationship to Mediation. In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control, except that if the same party would be entitled to costs under both rules costs may be recovered from the date of the earlier rejection.

The offer of judgment made in this case was rejected by plaintiffs after the mediation evaluation was rejected. Accordingly, under MCR 2.405(E), the cost provisions of MCR 2.405 control. The only exception mentioned in the court rule applies where the same party is entitled to costs under both rules. This exception is inapplicable in this case because plaintiffs are not entitled to costs under both rules. According to MCR 2.405(D)(2),

plaintiffs are not entitled to recover actual costs under MCR 2.405 because they did not file a counteroffer.

On appeal, plaintiffs do not seem to take issue with the above analysis. Rather, they argue that they are entitled to recover actual costs because of defendants' rejection of the mediation evaluation and because defendants' offer of judgment was not timely and was therefore inoperative. We find that defendants' offer of judgment was timely and that plaintiffs' failure to make a counteroffer deprived them of their ability to recover actual costs.

The issue whether the offer was timely is resolved by construing the language of MCR 2.405(B). Again, this portion of the court rule states:

> Until 28 days before trial, a party may serve on the adverse party a written offer to stipulate to the entry of a judgment for the whole or part of the claim, including interest and costs then accrued.

Plaintiffs argue that defendants' offer was stamped as received by the circuit court on September 18, 1990, and that this date was clearly too late under the court rule. However, MCR 2.405(B) refers to serving an offer on the adverse party, not filing it with the court. Service by mail is complete at the time of mailing. MCR 2.107(C)(3). Thus, service of defendants' offer was effected on September 17, 1990, the date of mailing. Trial began on October 15, 1990.

Plaintiffs claim that, even using the September 17, 1990, date as the date of service, the offer was not timely. They claim that a party may serve an offer up to, but not during, the last four weeks before trial.

The critical inquiries in resolving this issue are the meaning of the phrase in MCR 2.405(B) "*[u]ntil* 28 days *before* trial" (emphasis added), and how that period of time is computed.

MCR 1.108 deals with computation of periods of time prescribed or allowed by the court rules, and states in pertinent part:

> In computing a period of time prescribed or allowed by these rules, by court order, or by statute, the following rules apply:
>
> (1) The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or holiday on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or holiday on which the court is closed pursuant to court order.

Using this rule, the day of trial is the day of the act after which the designated period begins to run. Counting backwards twenty-eight days from the day before trial and counting the last day of the period, the offer at issue here is timely.

Even looking to dictionary definitions to define the words "until" and "before," and applying MCR 1.108, the same result is mandated.

Black's Law Dictionary (6th ed) defines "until" as:

> Up to time of. A word of limitation, used ordinarily to restrict that which precedes to what immediately follows it, and its office is to fix some point of time or some event upon the arrival or occurrence of which what precedes will cease to exist.

Similarly, *The Random House College Dictio-*

nary: Revised Edition (1984) defines "until" as: "[U]p to the time that or when; till. . . . before."

Black's defines "before" as: "Prior to; preceding; in front of."

Random House defines "before" as: "[I]n front; in advance; ahead . . . in time preceding; previously . . . earlier or sooner . . . in front of; ahead of; in advance of . . . previous to; earlier than."

Looking just to dictionary definitions, it appears that neither the first day of trial, October 15, 1990, nor the twenty-eighth day before trial, September 17, 1990, is to be counted. Thus, unless one reads "until" to mean "up to and including," under the dictionary definitions, service of the offer on September 17, 1990, appears not to have been timely. However, September 16, 1990, the day before the twenty-eighth day before trial, fell on a Sunday, a nonbusiness day under MCR 1.108(1). Thus, applying MCR 1.108(1), defendants had until September 17, 1990, to serve their offer.

Plaintiffs urge this Court to construe the language of MCR 2.405(B) using dictionary definitions and argue that where an action must be taken a minimum number of days before a certain event, the minimum should not be shortened by the fact that the last day falls on a nonbusiness day. The clear language of MCR 1.108(1) provides for no such exception.

On the basis of the foregoing, we find that defendants' offer of judgment was timely and that the trial court erred in awarding actual costs to plaintiffs. We therefore reverse that portion of the judgment awarding costs and attorney fees to plaintiffs.

III

Plaintiffs claim that the trial court abused its

discretion in awarding defendants costs for the late cancellation of the deposition of Dr. Schaiberger. We disagree.

At the hearing held on December 11, 1990, counsel for plaintiffs admitted that the details contained in defendants' motion were correct, but argued that defendants were not entitled to costs.

The trial court did not state the authority relied upon in granting these costs to defendants. However, MCR 2.306(G) provides in pertinent part:

> (1) If the party giving the notice of the taking of a deposition fails to attend and proceed with the deposition and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to the other party the reasonable expenses incurred in attending, including reasonable attorney fees.

The trial court properly assessed costs against plaintiffs for the late cancellation of the deposition. There was no abuse of discretion. We therefore affirm the order granting defendants costs associated with the cancellation of the deposition.

Reversed in part and affirmed in part.

HOWARD v WHITE

Docket Nos. 127980, 128050. Submitted March 11, 1992, at Detroit. Decided August 17, 1992, at 9:40 A.M.

Kim Howard and Dennis Kitchen, employees of the City of Detroit, brought an action in the Wayne Circuit Court against Eddie W. and Martha Ann White and the City of Detroit, seeking damages for injuries allegedly suffered when the city-owned vehicle in which they were riding collided with the Whites' vehicle at an intersection in the city. The plaintiffs alleged that the collision was proximately caused by the failure of the city to maintain the traffic signal at the intersection in proper working order. The court, William L. Cahalan, J., granted summary disposition for the city on the basis of the exclusive remedy provision of the Workers' Disability Compensation Act. Both the Whites and the plaintiffs appealed. The appeals were consolidated.

The Court of Appeals *held:*

The dual capacity doctrine recognizes that an employee may maintain an action against an employer where the nature of the action is such that the employer as the defendant in the action has a second persona that is completely independent from and unrelated to its status as an employer. The statutory duty of the city to maintain the traffic signal in good working order was unrelated to the obligations it owed the plaintiffs as their employer. Accordingly, the exclusive remedy provision is not applicable, and the court erred in granting summary disposition for the city.

Reversed.

MACKENZIE, P.J., dissenting, stated that, because the plaintiffs alleged that at the time the accident occurred they were in the city-owned vehicle on a job assignment, it is clear that they were injured in the course of their employment as city refuse collectors as a result of the failure of their employer to provide a safe work environment, a situation clearly within the exclusive remedy provision of the Workers' Disability Compensation Act. Summary disposition was properly granted on the basis of the exclusive remedy provision.

Shulman & Burns (by *Marc I. Shulman*), for Kim Howard.

Donald M. Fulkerson, for Dennis Kitchen.

Coticchio, Zotter, Sullivan, Molter, Skupin & Turner, P.C. (by *Ronald A. Molter*), for Eddie and Martha Ann White.

Donald Pailen, Corporation Counsel, and *Leona L. Lloyd,* Assistant Corporation Counsel, for the City of Detroit.

Before: MACKENZIE, P.J., and WAHLS and BRENNAN, JJ.

BRENNAN, J. Appellants appeal as of right from an April 9, 1990, order granting summary disposition to the City of Detroit pursuant to MCR 2.116(C)(8) on the basis that plaintiffs' claims were barred by the exclusive remedy provision of the Workers' Disability Compensation Act. We reverse.

Plaintiffs are employees of the City of Detroit. Both were injured in an automobile collision with defendants White. At the time of the accident, plaintiffs were allegedly driving a City of Detroit vehicle and returning to their work site from lunch. It was later discovered that the traffic signal at the intersection where the incident occurred had been malfunctioning for some time preceding the accident. Therefore, in addition to filing suit against defendants White for negligent operation of their vehicle, plaintiffs sued the city pursuant to MCL 691.1402; MSA 3.996(102) for failure to maintain the traffic signal. The city subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(8), claiming that plaintiffs' claims were barred by the exclusive

remedy provision of the WDCA, MCL 418.131; MSA 17.237(131). The court agreed and granted the motion.

Appellants argue that the trial court erred in granting summary disposition to the city on the basis that plaintiffs' claims were barred by the exclusive remedy provision of the WDCA. Appellants contend that the dual capacity doctrine removes the bar to their claim against the city because their injuries did not arise out of or during the course of employment and the city has an independent statutory duty to plaintiffs to maintain their traffic signals.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Formall, Inc v Community National Bank,* 166 Mich App 772, 777; 421 NW2d 289 (1988). 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. *Id.* The motion should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.*

The dual capacity doctrine is an exception to the exclusive remedy provision and allows an employee to state a cause of action in tort against his employer where the employer occupies a second capacity that confers upon it obligations independent of those imposed on it as an employer. *Handley v Wyandotte Chemicals Corp,* 118 Mich App 423, 429; 325 NW2d 447 (1982). In order for the doctrine to apply, the employer's second persona must be so completely independent from and unrelated to its status as an employer that the law recognizes it as a separate legal person. 2A Larson, Workmen's Compensation Law, § 72.81, p 14-229. See also *Benson v Dep't of Management & Budget,*

168 Mich App 302, 308; 424 NW2d 40 (1988); *Cassini v Detroit,* 156 Mich App 573, 575; 402 NW2d 1 (1985). *Wells v Firestone Tire & Rubber Co,* 421 Mich 641, 653; 364 NW2d 670 (1984).

> The dual capacity test is concerned not with how separate or different the second function is from the first, but with whether the second function generates unrelated obligations. . . . However, the dual capacity doctrine will not apply where the plaintiff's cause of action is, in reality, based upon the employer-employee relationship. The exception exists only where the employer-employee relationship is entirely unrelated or only incidentally involved with the cause of action. [*Handley, supra,* p 429.]

In the present case, plaintiffs allege that the city had an independent duty to maintain the traffic signal in a safe condition pursuant to MCL 691.1402; MSA 3.996(102).[1] It is this duty that invokes the dual capacity doctrine. This duty was totally unrelated to the obligations the city had as plaintiffs' employer. The city clearly had a second persona completely independent from and unrelated to its status as an employer, justifying its recognition as a separate legal entity. Further, the employer-employee relationship in this case was a mere coincidence and was entirely unrelated to plaintiffs' cause of action. Plaintiffs' action is not based on the employer-employee relationship. Moreover, accepting as true plaintiffs' allegations that they were on their lunch hour when the incident occurred, their injuries did not arise out of or during the course of their employment. See *McClure v General Motors Corp (On Rehearing),* 408 Mich 191, 209; 289 NW2d 631 (1980). Accord-

[1] See *O'Hare v Detroit,* 362 Mich 19; 106 NW2d 538 (1960).

ingly, we find that the trial court erred in granting summary disposition.

Reversed.

WAHLS, J., concurred.

MACKENZIE, P.J. *(dissenting).* I respectfully dissent. In my view, the trial court properly granted summary disposition in favor of defendant City of Detroit.

An action in tort against one's employer is precluded by the exclusive remedy provision of the Workers' Disability Compensation Act, MCL 418.131; MSA 17.237(131), if it seeks recovery for personal injury arising out of and in the course of employment and if the cause of action is based on the employment relationship. *Holody v Detroit,* 117 Mich App 76, 79; 323 NW2d 599 (1982).

In this case, paragraphs 8 and 9 of plaintiffs' complaint allege as follows:

> 8. At the time of the aforementioned collision, Kim Howard was an employee of the defendant City of Detroit and driving a van owned by the defendant City of Detroit, vehicle number 886-703, (hereinafter referred to as "vehicle number 886-703"), *while on a job assignment.*
>
> 9. At the time of the aforementioned collision, Dennis Kitchen was an employee of the defendant City of Detroit and was riding in the right front passenger seat of vehicle number 886-703 *while on a job assignment* with Kim Howard. [Emphasis added.]

Further, the record indicates that, at the time of the hearing on defendant's motion, plaintiff Kitchen had sought and was receiving workers' compensation benefits and plaintiff Howard was in the process of negotiating a workers' compensation

settlement with defendant. Thus, it is apparent that plaintiffs' position has been that their injuries arose out of and in the course of their employment relationship with defendant.

In order for the dual capacity doctrine to apply, the employer-employee relationship must be entirely unrelated to or only incidentally involved with the incident that is the basis for the cause of action against the employer. *Newberry v Uniroyal, Inc,* 133 Mich App 800, 804; 350 NW2d 324 (1984). In this case, the majority concludes that defendant's status as plaintiffs' employer was merely coincidental to plaintiffs' cause of action. I cannot agree with that conclusion. The reason plaintiffs were on the road at the time they were injured was to perform their job as refuse collectors. Their work was in no sense "coincidental" to their claim.

Plaintiffs' cause of action is tantamount to an assertion that the city provided them with an unsafe work environment, a situation clearly within the exclusive remedy provision of the Workers' Disability Compensation Act. Because I am satisfied that the trial court correctly granted summary disposition in favor of defendant, I would affirm.

PEOPLE v SHAFER

Docket No. 141359. Submitted June 16, 1992, at Lansing. Decided August 18, 1992, at 9:00 A.M.

Thomas L. Shafer pleaded guilty in the Genesee Circuit Court, Judith A. Fullerton, J., of delivery of 50 or more but less than 225 grams of cocaine and was sentenced to lifetime probation. The people appealed by leave granted.

The Court of Appeals *held:*

A sentence of lifetime probation is not available for conviction of delivery of 50 or more but less than 225 grams of cocaine. The trial court erred in ruling that MCL 333.7401(4); MSA 14.15(7401)(4) permitted imposition of life probation. The defendant's sentence must be vacated and the case remanded for resentencing by the same judge.

Vacated and remanded.

CONTROLLED SUBSTANCES — SENTENCES — LIFETIME PROBATION.

A sentence of lifetime probation may not be imposed for conviction of delivery of 50 or more but less than 225 grams of cocaine; lifetime probation may be imposed for conviction of possession with intent to deliver or delivery of less than fifty grams of certain controlled substances or possession of twenty-five to fifty grams of certain controlled substances (MCL 333.7401[2][a][iii],[iv],[3],[4], 333.7403[2][a][iv], 771.1[1],[3]; MSA 14.15[7401][2][a][iii],[iv],[3],[4], 14.15[7403][2][a][iv], 28.1131[1],[3]).

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Gladys L. Christopherson,* Assistant Prosecuting Attorney, for the people.

Samuel A. Ragnone, P.C. (by *Samuel A. Ragnone*), for the defendant.

REFERENCES

Am Jur 2d, Criminal Law §§ 567 *et seq.*

See the Index to Annotations under Parole, Probation, and Pardon.

Before: SULLIVAN, P.J., and MACKENZIE and I. B. TORRES,* JJ.

PER CURIAM. The people appeal by leave granted from defendant's sentence of lifetime probation following his conviction of delivery of 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). We vacate and remand for resentencing.

Defendant's sentence was based on MCL 333.7401(4); MSA 14.15(7401)(4), which authorizes departure from the minimum term of imprisonment set forth at subsection 2(a)(iii) upon a finding by the trial court of substantial and compelling reasons to do so. The people argue that the trial court erred in ruling that MCL 333.7401(4); MSA 14.15(7401)(4) permitted imposition of lifetime probation for delivery of 50 or more but less than 225 grams of cocaine. We agree.

MCL 333.7401(3); MSA 14.15(7401)(3) provides:

> A term of imprisonment imposed pursuant to subsection (2)(a) . . . 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) . . . 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. [Emphasis added.]

The only offenses within the Public Health Code for which lifetime probation is allowed are possession with intent to deliver or delivery of less than

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

fifty grams of certain controlled substances, § 7401(2)(a)(iv), or possession of twenty-five to fifty grams of certain controlled substances, MCL 333.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(iv). Defendant was thus not convicted of an offense for which lifetime probation is specifically authorized.

Further, it is clear by reference to the probation statute that probation is not available when a defendant has been convicted under § 7401(2)(a)(iii), as defendant was. MCL 771.1(1) and (3); MSA 28.1131(1) and (3) provide, in relevant part:

> (1) In all prosecutions for felonies or misdemeanors, *except* murder, treason, criminal sexual conduct in the first or third degree, robbery while armed, and *major controlled substance offenses not described in subsection (3),* if the defendant has been found guilty upon verdict or plea, and if it appears to the satisfaction of the court that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant shall suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.
>
> (3) The sentencing judge may place a defendant on life probation pursuant to subsection (1) if the defendant is convicted for a violation of section 7401(2)(a)(iv) or 7403(2)(a)(iv) of the public health code . . . or conspiracy to commit either of those 2 offenses. [Emphasis added.]

Because defendant did not commit either of the two offenses for which lifetime probation is authorized in the probation statute, and no such punishment is authorized by the Public Health Code, his probationary sentence is plainly illegal. See *People v Larkins,* 142 Mich App 679; 369 NW2d 882 (1985). We therefore vacate defendant's sentence of lifetime probation and remand for resentencing.

Although a probationary term is not authorized, defendant may still be sentenced to an indeterminate sentence departing below the statutory minimum, provided the court finds substantial and compelling reasons for such a departure. MCL 333.7401(4); MSA 14.15(7401)(4). Permissible factors to consider when deciding whether departure is appropriate were recently set forth in *People v Windall Hill,* 192 Mich App 102; 480 NW2d 913 (1991). These factors should be considered on resentencing if an indeterminate sentence departing from the statutory minimum is imposed.

Finally, we conclude that the people have not presented sufficient reasons to justify resentencing before another judge.

Vacated and remanded for resentencing. We retain no further jurisdiction.

PEOPLE v STONE

PEOPLE v BYRD

Docket Nos. 135426, 135942. Submitted July 22, 1992, at Grand Rapids. Decided August 18, 1992, at 9:05 A.M.

Jason Stone and Marlon A. Byrd, both juveniles, were convicted by separate juries following a joint trial in the Calhoun Circuit Court, Ronald A. Lebeuf, J., of armed robbery. Each was sentenced to 7½ to 15 years in prison. The defendants appealed, and the appeals were consolidated.

The Court of Appeals *held:*

1. The court did not err in denying Byrd's motion for a mistrial after the prosecutor questioned a police officer regarding a statement made by Stone. The statement was not admitted; the question was stricken, and Byrd was not prejudiced.

2. The court did not err in admitting evidence that Byrd was identified by a tracking dog. There was sufficient corroborating evidence of his identification to allow admission of the evidence.

3. Stone was not denied the right to an impartial jury when Byrd was forced, in the presence of Stone's jury, to try on a jacket that matched the description of one worn by the robbers and that was found near the defendants when they were apprehended.

4. Stone was not denied equal protection by the court's refusal to approve funds to enable him to hire an independent psychologist to testify at the dispositional hearing. He had access to a competent psychologist appointed by the juvenile division of the probate court. The fact that the psychologist did not come to the conclusion that Stone desired is not relevant, and no bias was shown.

5. The court made adequate findings regarding the likelihood of rehabilitation under the adult and juvenile systems with regard to the defendants.

6. Byrd was properly assessed fifteen points for prior record

REFERENCES

Am Jur 2d, Criminal Law § 538; Evidence §§ 378, 379.
Evidence of trailing by dogs in criminal cases, 18 ALR3d 1221.

variable 6 because he was on juvenile probation at the time of the offense. The guidelines were properly scored.

7. The court abused its discretion in sentencing the defendants to 7½-year minimum terms. There were no special circumstances, and rehabilitation of the defendants was still possible.

Convictions affirmed, remanded for resentencing.

1. CRIMINAL LAW — EVIDENCE — TRACKING-DOG EVIDENCE.

Evidence regarding identification of a suspect by a tracking dog is admissible where a proper foundation is laid that shows: the handler was qualified to use the dog, the dog was trained and accurate in tracking humans, the dog was placed on the trail where circumstances indicated the alleged guilty party had been, and the trail had not become so stale or contaminated as to be beyond the dog's competency to follow it; in addition, other corroborating evidence must be presented before identification on the basis of tracking-dog evidence is sufficient to support a guilty verdict.

2. SENTENCES — SENTENCING GUIDELINES — PROPORTIONALITY.

A sentence must be proportionate to the seriousness of the crime and the defendant's prior record; departure from the sentencing guidelines is permitted where there are special characteristics of the offense or the offender, and the court specifically explains the characteristics; a sentence within the guidelines range conceivably may violate the principle of proportionality.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Conrad Sindt,* Prosecuting Attorney, and *Ronald S. Pichlik,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Gail Rodwan*), for Jason Stone.

Patrick K. Ehlmann, for Marlon Byrd.

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

PER CURIAM. Following a joint trial, with separate juries, defendants Stone and Byrd were convicted of armed robbery, MCL 750.529; MSA

28.797, and sentenced to 7½ to 15 years in prison. Defendants appeal as of right. We affirm the convictions, but remand for resentencing.

On August 9, 1989, at approximately 8:30 A.M., two young black men entered a branch of the City Bank & Trust Company and announced a holdup. One carried a sawed-off shotgun. They took money from two cashiers' drawers, locked the three employees in the vault, took the keys, and left. One of the employees saw them running down the street.

About an hour later, Michigan State Police Trooper Gary Lisle arrived with his tracking dog. They tracked a scent to a nearby wooded area where they found the defendants hiding in a ditch. They also found some clothes, the stolen money, a ring of keys, and a sawed-off shotgun nearby.

Several people testified that they saw two teenage men in the area that morning. One witness testified that she saw defendant Byrd and another man in the area of the bank around 8:00 A.M. The bank employees were unable to identify defendants as the perpetrators because the robbers had worn clothing around their faces. Some of the clothing found on or near the defendants did not match the descriptions given by the employees. Stone's teacher testified that she overheard him deny and then admit that he had participated in the robbery.

Byrd and Stone testified that they played basketball that morning. After buying some pop at a store, they were walking down the street when they began to argue. Byrd chased Stone into the wooded area, where they found two jackets. Stone found a gun and some keys in one jacket. They played with the gun while they smoked some marijuana. When they heard the police, they hid in the ditch.

On appeal, Byrd argues that the court erred in

denying his motion for a mistrial after the prosecutor questioned a police officer about a statement by Stone.

The prosecutor asked the police officer if either defendant had made a statement. The police officer replied that Stone had. After some discussion, the court denied the motion and advised both juries that the question had been stricken and should be ignored.

The court did not abuse its discretion in denying the motion for a mistrial. *People v Gonzales,* 193 Mich App 263, 265; 483 NW2d 458 (1992). Because no statement was actually admitted in the trial, the right to cross-examination was not implicated. Byrd's jury was instructed to ignore the question and was aware that Stone's jury had not heard the statement. Byrd was not prejudiced.

Next, Byrd contends that the court erred in admitting the tracking-dog evidence because there was no other direct evidence of his guilt.

Tracking-dog evidence is admissible only after certain foundational requirements are met. In addition, there must be other corroborating evidence presented before identification based on tracking-dog evidence is sufficient to support a guilty verdict. *People v Laidlaw,* 169 Mich App 84, 93-94; 425 NW2d 738 (1988). Byrd does not dispute the foundational requirements. After review of the record, we conclude that there was sufficient corroborating evidence of Byrd's identification. He was seen in the area and was apprehended near jackets matching the description of those worn by the perpetrators and the gun used in the crime, as well as the money and keys taken from the bank. The court did not abuse its discretion.

Stone argues that he was denied the right to an impartial jury when Byrd was forced to try on one of the jackets in the presence of Stone's jury.

During the trial, the prosecutor was allowed to have both defendants stand before the juries and try on the jackets. One witness testified that they had the jackets switched. This demonstration did not lead to the positive identification of either defendant by the witnesses. In fact, both defendants testified that they had tried on the jackets when they found them in the woods.

This type of evidence is considered demonstrative and nontestimonial in nature. *People v Markley,* 99 Mich App 658, 661; 298 NW2d 615 (1980), rev'd on other grounds 413 Mich 852 (1982). Thus, it does not implicate Stone's right to cross-examination. The jury was free to find it irrelevant for identification purposes. The fact that Byrd also tried on the jackets in the presence of Stone's jury does not make the demonstration more or less prejudicial because Stone admitted that they were together at the time of the crime. Stone had an opportunity, during the demonstration, through cross-examination of the witness and during his own testimony, to refute the claim that the jackets were worn by either of the defendants. Stone was not denied a fair trial.

Next, Stone argues that he was denied equal protection by the court's refusal to approve funds to enable him to hire an independent psychologist to testify at the dispositional hearing. At that hearing, the prosecutor presented the testimony of a psychologist appointed by the juvenile court. The psychologist prepared a report for the juvenile court in anticipation of a discretionary waiver hearing with regard to another charge. The psychologist recommended in his report and in his testimony at the dispositional hearing that Stone be sentenced under the adult system.

The question whether an indigent defendant is entitled to access to a psychologist of his own

choosing in a posttrial proceeding has never been addressed by Michigan appellate courts. Most jurisdictions that have addressed the issue regarding an indigent's right of access to psychiatric assistance have done so in the context of preparation of a defense. Some have also addressed the assistance issue in the context of capital punishment.

The United States Supreme Court has held that three factors are relevant when determining whether the participation of a psychiatrist is important enough to the preparation of a defense to require a state to provide an indigent defendant with access to competent psychiatric assistance.

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. [*Ake v Oklahoma,* 470 US 68, 77; 105 S Ct 1087; 84 L Ed 2d 53 (1985).]

The Court found the private interest extremely high and the governmental interest in the accuracy of the criminal proceeding extremely compelling, while the state's interest in denying assistance was found to be not substantial. *Id.,* 78-79. It concluded that where the sanity of a defendant is a significant factor at trial, the defendant must have access to a competent psychiatrist. However,

> [t]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed,

> and as in the case of the provision of counsel we leave to the States the decision on how to implement this right. [*Id.*, 83.]

Several states have held that *Ake* does not require the appointment of a psychiatrist of the defendant's own choosing who will reach conclusions that satisfy the defendant. The concern is that the defendant have access to a competent psychiatrist. The appointment, by the court, of an expert employed by the state, independent of the prosecution, has been held to be sufficient. See *Palmer v State,* 486 NE2d 477 (Ind, 1985); *State v Indvik,* 382 NW2d 623 (ND, 1986); *Dunn v State,* 291 Ark 131; 722 SW2d 595 (1987); *Beaver v Commonwealth,* 232 Va 521; 352 SE2d 342 (1987); *Ake v State,* 778 P2d 460 (Okla Crim App, 1989). See also *State v Williams,* 603 SW2d 562 (Mo, 1980), and anno: *Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist,* 85 ALR4th 19.

In this case, the private interest is less compelling because Stone's guilt had already been decided. His liberty was no longer at stake, rather, the concern was where he would spend his confinement. Assuming, arguendo, that Stone was entitled to access to a competent psychologist, he was afforded that right. The fact that the psychologist did not come to the conclusion he desired is not relevant. Stone asserts that because the psychologist was appointed by the juvenile court he cannot be considered unbiased. We disagree. Neither the juvenile court nor the circuit court has an interest in seeing that Stone stay within their system. In fact, this same psychologist recommended that Byrd be punished within the juvenile system. We decline to presume bias. Stone was not denied equal protection.

Both Byrd and Stone contend that the court erred in sentencing them as adults. Defendants were fifteen at the time they committed the offense.

The prosecutor has the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by imposing a sentence against the juvenile as though the juvenile were an adult offender. MCR 6.931(E)(2). The court must consider several enumerated factors, giving each weight as appropriate to the circumstances. MCR 6.931(E)(3). Defendants contend that the court failed to consider whether they would more likely be rehabilitated by the adult or juvenile facilities.

After review of the record, we conclude that the court made adequate findings regarding the likelihood of rehabilitation under the adult and juvenile systems. As the court noted, both defendants had had previous contact with the juvenile system and had failed to respond to the rehabilitative programs offered to them. Moreover, the only juvenile program left would allow them to eventually be placed in the community on an unsupervised basis. The court did not err.

Last, defendants argue that their 7½-year minimum sentences are disproportionate. The guidelines for Byrd recommended a three- to eight-year minimum sentence. The guidelines for Stone recommended a two- to six-year minimum sentence. The court cited the defendants' prior records and the offense as reasons for the sentences.

Byrd also asserts that he was incorrectly assessed fifteen points for prior record variable 6, indicating a postconviction relationship existed at the time of the offense. Byrd was on juvenile probation at the time of the offense.

The instructions to PRV 6 indicate that a "rela-

tionship to the criminal justice system" applies to relationships determined by juvenile convictions or charges. The guidelines were properly scored.

A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn,* 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). The sentencing guidelines are intended to assist the court in assessing the appropriate sentence and promote statewide consistency in sentencing. *People v Crook,* 162 Mich App 106, 109; 412 NW2d 661 (1987). Departures are permitted, but are suspect and subject to careful scrutiny on appeal. *Milbourn,* 656-657. When a court departs from the guidelines because of the special characteristics of the offense or the offender, it must specifically explain those characteristics. *People v Fisher,* 166 Mich App 699, 715; 420 NW2d 858 (1988). A deviation from the range may be based on factors already considered in the guidelines calculations, but such a deviation must be made only with caution. *Milbourn,* 660, n 27. A sentence within the guidelines range conceivably can violate the principle of proportionality. *Id.,* 661.

In Stone's case, the court did not articulate any special characteristics of the crime that prompted departure. In addition, Stone's prior record had already been factored in the guidelines. Although armed robbery is always a serious crime, as reflected in the guidelines recommendations, we find nothing in the record before us that makes this particular armed robbery more heinous than others, justifying a departure from the guidelines. Although the victims were scared, none was physically injured, nor did they appear to be harassed.

In Byrd's case, the court thought it was depart-

ing from the guidelines, even though the sentence was actually six months less than the maximum minimum sentence. Nevertheless, the court mentioned Stone's sentence and stated that the defendants should be treated the same.

Both defendants were young and had not been previously treated in the adult system. Rehabilitation was still possible. There were apparently no special circumstances of this crime that made it especially heinous. Under the circumstances, we conclude that the court abused its discretion in sentencing defendants to 7½-year minimum terms.

Defendants' convictions are affirmed. We remand for resentencing of both defendants.

VAN HORN v CHINA TOWNSHIP CLERK

Docket No. 128205. Submitted June 25, 1992, at Lansing. Decided August 18, 1992, at 9:10 A.M. Leave to appeal sought.

Alton J. Van Horn and others brought an action in the St. Clair Circuit Court against the China Township Clerk and others, seeking a writ of mandamus compelling the defendants to include in the ballot of the next general or special election a referendum on the proposed incorporation of China Township as a charter township. The court, James T. Corden, J., granted summary disposition for the defendants, ruling that they correctly declined to hold a referendum on the ground that some of the petitions for referendum submitted by the plaintiffs did not comply with the requirements of MCL 168.544c; MSA 6.1544(3), the provision of the Election Law governing nominating petitions. The plaintiffs appealed.

The Court of Appeals *held:*

The plaintiffs' petitions were circulated pursuant to, and meet the requirements of, the charter township act, MCL 42.3a(4); MSA 5.46(3a)(4), which governs petitions for referendum on incorporation as a charter township.

Reversed and remanded

ELECTIONS — CHARTER TOWNSHIP INCORPORATION — REFERENDUM.

A petition for a referendum on incorporation as a charter township is subject to the requirements of the charter township act, not the Election Law (MCL 42.3a, 168.544c; MSA 5.46[3a], 6.1544[3]).

J. Martin Brennen, Jr., for the plaintiffs.

Cummings, McClorey, Davis & Acho, P.C. (by *Gail P. Massad*), for the defendants.

Before: HOLBROOK, JR., P.J., and WEAVER and MCDONALD, JJ.

REFERENCES

Am Jur 2d, Initiative and Referendum §§ 7, 9.

See the Index to Annotations under Initiative and Referendum.

PER CURIAM. Plaintiffs appeal from an April 9, 1990, order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) in this action seeking a writ of mandamus and damages for defendants' failure to schedule a referendum on the question of township incorporation. We reverse.

In 1989, the board of supervisors of China Township, St. Clair County, adopted a resolution of intent to incorporate as a charter township. Pursuant to MCL 42.3a(2)(b); MSA 5.46(3a)(2)(b), plaintiffs circulated petitions of disagreement to place the question of incorporation before the township voters on a referendum ballot. Although plaintiffs timely submitted petitions containing a sufficient number of signatures to require that the question of incorporation be submitted at the next general or special election, the question was not placed on the November 1989 general election. The township board found four of the seven petitions submitted invalid because they allegedly failed to conform to statutory requirements. Specifically, the petitions were deemed invalid because both Alton Van Horn and his wife, Donna Van Horn, signed four of the petitions as "co-circulators."

Plaintiffs filed this action seeking a writ of mandamus and damages for the township's actions. The circuit court granted defendants' motion for summary disposition, finding the four contested petitions failed to comply with MCL 168.544c; MSA 6.1544(3), which governs the form and contents of nominating petitions circulated under the Election Law.

On appeal, plaintiffs claim the trial court erred in ruling the petitions invalid as petitions circulated under the authority of the general election law, MCL 168.544c(9); MSA 6.1544(3)(9), where the petitions were circulated pursuant to the authoriz-

ing statute for referendums on the incorporation of townships, MCL 42.3a; MSA 5.46(3a), rather than pursuant to the general election law. We agree with plaintiffs and find the petitions of disagreement valid under the authorizing statute for referendums on township incorporation, MCL 42.1 *et seq.*; MSA 5.46(1) *et seq.*

MCL 42.3a(4); MSA 5.46(3a)(4) provides:

> The petition under subsection (2)(b) shall be signed by not less than 10% of the number of electors of the township voting for township supervisor at the last election in which a supervisor was elected. The township clerk shall check the signatures on the petitions with those of the electors signing the petitions as they appear on the registration cards of the township. If petitions bearing the required number of signatures of electors have been filed, the clerk shall do and perform all acts required for the submission of the question of incorporation at the next general or special election. The wording of the ballot shall be in accordance with section 2.

There is no question that plaintiffs have met the requirements set forth for the circulation of the petitions authorized under this section. Because the petitions were circulated pursuant to this statute and not under the general election law, compliance with the authorizing statute is sufficient. *Renne v Oxford Twp,* 5 Mich App 415; 146 NW2d 819 (1966), aff'd on other grounds 380 Mich 39; 155 NW2d 852 (1968).

Reversed and remanded for further proceedings.

AUTOMOBILE CLUB OF MICHIGAN COMMITTEE FOR LOWER RATES NOW v SECRETARY OF STATE (ON REMAND)

Docket No. 154812. Submitted August 25, 1992, at Detroit. Decided August 27, 1992, at 9:00 A.M. Leave to appeal denied, 440 Mich 911, 1209.

The Automobile Club of Michigan Committee for Lower Rates Now brought an action for mandamus in the Court of Appeals, seeking to compel the Secretary of State and the Board of State Canvassers to certify and transmit to the Legislature a petition for the initiation of legislation amending various provisions of the Insurance Code governing no-fault automobile insurance. The Court of Appeals issued an order dismissing the action on July 23, 1992 (Docket No. 154331). The Supreme Court, in lieu of granting an emergency application for leave to appeal, vacated the order of dismissal, directed the defendants to certify and transmit the petition, and remanded the matter to the Court of Appeals for consideration of whether the board lacked the authority to consider issues other than whether there were sufficient valid signatures to qualify the petition for certification. 440 Mich 892 (1992). The Supreme Court also permitted certain other insured motorists and several organizations to intervene as defendants.

The Court of Appeals *held:*

1. The Board of State Canvassers has the authority to consider questions relating to the form of an initiative petition.

2. An initiative petition must include a title for the proposed legislation. Where it does, the board may not reject the petition on the ground that the title or the proposed legislation violates the state constitution.

3. The initiative petition in this case included a title. Constitutional infirmities alleged by the defendants and the intervening defendants relating to title-object violations, Const 1963, art 4, § 24, and the failure to republish at length certain statutory provisions in their proposed amended forms, Const 1963, art 4,

REFERENCES

Am Jur 2d, Initiative and Referendum § 23.

See the Index to Annotations under Initiative and Referendum.

§ 25, may not be considered before the initiative is submitted for a vote by the electorate.

4. The identification of the plaintiff as the proponent of the initiative, as stated on the petition, does not violate MCL 168.482; MSA 6.1482 or MCL 168.544d; MSA 6.1544(4). Neither of these provisions of the Election Law expressly prohibits such identification.

ELECTIONS — PETITIONS FOR INITIATION OF LEGISLATION — TITLE.

A petition for the initiation of legislation must have a title for the legislation proposed; the Board of State Canvassers may reject a petition that does not include a title, but it may not reject a petition on the ground that the title or the proposed legislation violates the state constitution; the constitutional validity of the title or the legislation is a matter to be determined by the judiciary only after the initiative is submitted for a vote by the electorate (Const 1963, art 4, § 24).

Dickinson, Wright, Moon, Van Dusen & Freeman (by *Peter H. Ellsworth, Jeffery V. Stuckey,* and *William C. Bertrand, Jr.*), and *Miller, Canfield, Paddock & Stone* (by *Michael J. Hodge* and *Kevin J. Moody*), for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Gary P. Gordon,* Assistant Attorney General, for the defendants.

Honigman Miller Schwartz & Cohn (by *John D. Pirich, Timothy Sawyer Knowlton,* and *Sandra L. Jasinski*), for the intervening defendants.

ON REMAND

Before: SAWYER, P.J., and MACKENZIE and NEFF, JJ.

PER CURIAM. Pursuant to the Michigan Supreme Court's July 30, 1992, order of remand, we are called upon to give plenary consideration to "the issues of whether the State Board of Canvassers lacks the authority to consider issues other than

whether there are sufficient valid signatures to qualify the proposal for certification and to consider the intervening defendants' claim that the proposal is invalid because of defects other than the signature requirement." 440 Mich 892 (1992).

Notwithstanding the extensive briefs and appendices, the issues presented are fairly straightforward. The state's largest automobile insurer, AAA Michigan, created the Automobile Club of Michigan Committee for Lower Rates Now, with headquarters at the same location as the insurance company. This committee then retained a professional organization to circulate initiative petitions designed to amend the Insurance Code in a manner that would ostensibly lower automobile insurance rates for the benefit of the motoring public, but which intervening defendants contend would be in a manner solely beneficial to the economic bottom line of automobile insurance companies, principally AAA.

I

The petitions, as circulated, consist of six pages. The last five pages constitute the text of the proposed legislation. On these pages, there is neither a title to the legislation nor any reference to a title.

On the cover page, however, the opening paragraph sets forth what proponents of the initiative contend should be treated as the title:

> A Petition for amending certain provisions of the Michigan Insurance Laws, specifically sections 2109, 2111 and 2111a of Chapter 21, commonly known as the Essential Insurance Act, sections 3101, 3104, 3107, 3109a, 3111, 3115, and 3135 of Chapter 31, commonly known as the No-Fault

Insurance Act, section 202 of Chapter 2 and section 3009 of Chapter 30, and for enacting section 3010 of Chapter 30.

What follows is a paragraph purporting to describe the principal features of the legislation proposed to be enacted through the initiative process, which intervening defendants contend is misleading.

Intervening defendants identify two other purported defects. The initiative proposes to make substantial changes to § 2111 of the Insurance Code, but the body of only certain affected subsections, not the entire section as rewritten, is included in the "full text of the proposed legislation" on the pages attached to the initiative petition. As a result, intervening defendants claim that § 2111 is not "republished at length" as required by Const 1963, art 4, § 25.

Intervening defendants also contend that a statement in the petition that it is "paid for by Automobile Club of Michigan Committee for Lower Rates Now" constitutes a prohibited form of extraneous material designed to improperly influence registered voters to sign the petition. Thus, intervening defendants claim that "placement of a partisan political description directly on the petition form violates §§ 482 and 544d [of the Election Law[1]] by incorporating political campaign material on the petition, itself."

II

With regard to the requirement that the initiative petition contain a title, Const 1963, art 2, § 9, unlike its predecessor, Const 1908, art 5, § 1, does not go into detail regarding the form of initiative petitions. Instead, the current constitution, in the

[1] MCL 168.482, 168.544d; MSA 6.1482, 6.1544(4).

last sentence of that section, provides that "[t]he Legislature shall implement the provisions of this section." One limit, however, imposed in the first clause of art 2, § 9, is that the "power of initiative extends only to laws which the Legislature may enact under this constitution."

In that respect, identical language appeared in Const 1908, art 5, § 1. This language formed the basis for the holding in *Leininger v Secretary of State,* 316 Mich 644, 648; 26 NW2d 348 (1947), that an initiative petition lacking a statutory title was fatally defective and could not be submitted to the electorate for approval, by virtue of the provision of Const 1908, art 5, § 21 [now Const 1963, art 4, § 24], that "[n]o law shall embrace more than 1 object, which shall be expressed in its title." The *Leininger* Court held:

> This makes the title an essential part of every law. That this title requirement applies to laws enacted by the initiative, as well as to those enacted by the legislature, there can be no doubt, particularly in view of the provision of section 1 [of art 5], that no law shall be enacted by the initiative that could not, under the Constitution, be enacted by the legislature. . . .
>
> * * *
>
> It follows that the petition did not meet the constitutional requirements prerequisite to its transmittal to the legislature. Nor could the legislature, had it been so disposed, have cured the defect in view of the inhibition of section 1 against legislative change or amendment. [*Id.* at 648-649.]

The *Leininger* Court noted that it was carving out a very narrow exception to the general rule of *Hamilton v Secretary of State,* 212 Mich 31; 179 NW 553 (1920), where it was held that substantive constitutional challenges to legislation proposed

through the petition process are premature if presented before apparent adoption of such measures at an appropriate general election. Substantive constitutional questions are to be resolved in conjunction with the usual rules of constitutional adjudication, which require, among other things, concrete facts against which to test the measure and a party with standing to raise the constitutional challenge.

If a proposed initiative contains a title, but it is alleged that the title is defective for one of a variety of reasons, the rule of *Hamilton* supersedes the rule of *Leininger,* and the courts will decline to consider whether the title fails to meet the constitutional requirements, thereby invalidating the legislation, before submission of the proposed legislation to the people. *Beechnau v Secretary of State,* 42 Mich App 328; 201 NW2d 699 (1972).

In *Newsome v Bd of State Canvassers,* 69 Mich App 725, 730-731; 245 NW2d 374 (1976), this Court said:

> It is plaintiffs' position that the petitions failed constitutionally because if they contain a title, it embraces more than one object. On the authority of *Beechnau v Secretary of State,* 42 Mich App 328; 201 NW2d 699 (1972), we decline to pass on this question prior to submission of the proposed legislation of [sic] the people. We note parenthetically that the plaintiffs' reliance upon *Leininger v Secretary of State,* 316 Mich 644; 26 NW2d 348 (1947), is misplaced. The holding there rested upon a specific provision of the Constitution of 1908. The Constitution of 1963 retains no such provision. Furthermore, the petition in *Leininger* contained no title whatsoever. The petition before us is in fact headed by a clear statement of the object of the proposed measure. Moreover, the Supreme Court has specifically disapproved of *Leininger, supra,* see *Kuhn* [*v Dep't of Treasury,* 384 Mich 378; 183 NW2d 796 (1971).]

In holding that *Leininger* is no longer good law, the *Newsome* panel went too far. In *Kuhn v Dep't of Treasury,* 384 Mich 378, 385; 183 NW2d 796 (1971), the Supreme Court said, in relevant part:

> Previous decisions of this Court requiring strict compliance with constitutionally mandated procedures for exercise of the powers of initiative and referendum should not be read as limiting the occasions upon which those powers may be exercised. See *Leininger v Secretary of State* [316 Mich 644; 26 NW2d 348 (1947)]; *Scott v Secretary of State* [202 Mich 629; 168 NW 709 (1918)]; *Thompson v Secretary of State* [192 Mich 512; 159 NW 65 (1916)].[11]

[11] The cited cases deal with the detailed procedures set forth in the 1908 Constitution, as amended, for the exercise of the powers of initiative and referendum. Michigan Const 1908, art 5, § 1. The present Constitution largely eliminates such procedural detail. Michigan Const 1963, art 2, § 9. See the Convention Comments following the section.

In *Leininger,* the majority did refer to specific language in Const 1908, art 5, § 1, which has no counterpart in the present constitutional initiative provision, namely, "Any initiative or referendum petition may be presented in sections, each section containing a full and correct copy of the title and text of the proposed measure." However, as the earlier quotations from *Leininger* established, that was merely one of two alternative bases for the ultimate holding that a petition with no title is defective.

The alternative and still valid reason put forth in *Leininger* was the limitation in both the Constitutions of 1908 and 1963 that no law may be proposed by initiative that the Legislature may not pass under the constitution, which by reference incorporates the title requirements of Const 1963, art 4, § 24, formerly Const 1908, art 5, § 21.

Four weeks after its decision in *Kuhn,* the Supreme Court again cited *Leininger* with apparent agreement with its basic principles:

> The careful reader of *City of Jackson v Comm'r of Revenue* [316 Mich 694, 716-718; 26 NW2d 569 (1947)], will note that the Court applied to its decision that which was urged upon it in several of the briefs of the many counsel participating, namely, the "election-cures-error" doctrine. On page 716 the Court opened this discussion by saying:
>
> "We are not here deciding a case where there is a fatal defect in the petitions, as a result of which the proposition should be withheld from submission to the voters. Such were the situations in the *Scott* and *Leininger* cases, *supra,* [202 Mich 629, and 316 Mich 644]. Here we have a situation where we find there were no such fatal defects, but we are asked to nullify the act of the voters in adopting an amendment." [*Carman v Secretary of State,* 384 Mich 443, 455; 185 NW2d 1 (1971).]

Leininger was again cited as recently as *Frey v Dep't of Management & Budget,* 429 Mich 315, 323; 414 NW2d 873 (1987), in a manner which, even if *Kuhn* vitiated *Leininger,* reaffirms the *Leininger* doctrine: "In *Leininger* . . . we held that the title-object clause appearing in Const 1908, art 5, § 21 (now art 4, § 24) applied to initiated laws."

Therefore, an initiative petition must provide a title for the proposed legislation. We hold that the opening paragraph, previously quoted, is a title.

In *Leininger,* the Court held that the first two sections of the proposed legislation, which constituted a statement of purpose of the legislation without adding substance to the codified laws, could not serve as a substitute for a proper and separate title. The Court noted the longstanding historical practice of the Legislature "in Michigan

to cause the title of an act to precede and the body of the act to follow the enacting clause. Never has it been the practice to incorporate the title in the body of the act." 316 Mich 649. The Court then held that the word "title" as here employed in the Constitution "must be deemed to be consonant with the common usage and well known legislative practices in that respect at the time of the Constitution's adoption." *Id.*

In this case, however, the language at the top of the first page of the petition is separate from the body of the legislation. The doctrine of substantial compliance applies to this situation. *Carman, supra.* The statement that the petition for initiation of legislation is "for amending certain provisions of the Michigan insurance laws, specifically §§ 2109," is equivalent to the sorts of titles that the Legislature regularly provides for amendatory legislation.[2] If that constitutes a "clear statement of the object of the proposed measure" heading the petition, then it suffices as a title. *Newsome, supra.*

The intervening defendants object, however, that the title is misleading and inaccurate. It refers, for example, to "certain provisions of the Michigan Insurance Laws," which intervening defendants claim is a reference to a nonexistent legislative codification. The sections referred to are all part of the "Michigan Insurance Code of 1956." However, once this Court determines that there is a title, whether the title is sufficient or deficient is a question not to be adjudicated before submission of the proposed legislation to the people. *Beechnau, supra.*

Intervenors also object that the title is not on the same pages as the body, and point to the boldface petition language claiming "the full text

[2] E.g., 1991 PA 21.

of the proposed legislation" is on the attached pages. This argument misconstrues "text" as encompassing the title and the body of legislation; however, "text" and "body" are synonymous and distinct from "title." *Webster's Third New International Dictionary* (1965) includes in the definitions of "text":

> 2a: the main body of printed or written matter on a page exclusive of headings, running title, footnotes, illustration, or margins.

III

The next contention is that the petitions are invalid because of the violation of Const 1963, art 4, § 25 with respect to the proposed amendment of § 2111 of the Insurance Code. Article 4, § 25 provides:

> No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length.

These petitions, with respect to § 2111, republish at length only subsections beginning with 6 to the end of the amended section, and thus, on its face, the petitions arguably violate Const 1963, art 4, § 25 in this respect. Is the issue cognizable at this time rather than only after submission to the electorate?

Intervening defendants seem to assume, without citation of relevant supporting authority, that if the initiative is constitutionally defective in this respect, then it is wholly defective and it cannot be submitted to the electorate. However, it seems apparent that the usual doctrines of constitutional

adjudication apply. If legislation is unconstitutional in part because one of numerous sections otherwise validly enacted violates Const 1963, art 4, § 25, then it is only that section, and not the entire bill, that is unconstitutional. That was the result achieved in this Court's decision in *Berrien Co v Michigan,* 136 Mich App 772, 788-789; 357 NW2d 764 (1984), where this Court found that a portion of an appropriations bill violated the reenactment and publication requirements of art 4, § 25. Accordingly, that portion of the appropriations act was deemed unconstitutional; the entire act was not, however, stricken as unconstitutional.

This result is consistent not only with judicially developed principles of constitutional law, but with legislative codification of those principles as set forth in MCL 8.5; MSA 2.216:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

Thus, if this initiative legislation had been enacted by the Legislature, this Court might declare that § 2111 is invalid as being in violation of art 4, § 25, thus reinstating the preamendment version of § 2111, the attempted amendment consequently being a nullity. That would not preclude amendment of any other portion of the Insurance Code, by this or other legislation.

Accordingly, this alleged defect does not warrant precluding submission of the initiative to the electorate, just as this Court would not be warranted in enjoining the Legislature from adopting a bill that contained such a defect. The time to consider whether to declare the affected portion invalid is after its adoption.

IV

Lastly, intervening defendants contend that the description of the proponent on the face of the petition as the "Automobile Club of Michigan Committee for Lower Rates Now" somehow violates §§ 482 and 544d of the Election Law. A reading of the two sections fails to reveal any language addressing a question of this kind.

The "tear sheet" part of the initiative petition, that part headed by "LOWER RATES NOW!" in inch-high upper case letters, does not render the petitions invalid as somehow being not in the "form prescribed by the Secretary of State." *Council About Parochiaid v Secretary of State,* 403 Mich 396; 270 NW2d 1 (1978). The identification of the proponents of initiative legislation is not specifically prohibited by §§ 482 and 544d.

V

Accordingly, we conclude that, while the Board of State Canvassers possesses the authority to consider questions of form, and thus "issues other than whether there are sufficient valid signatures to qualify the proposal for certification," the intervenors' claim that the proposal is invalid because of defects other than the signature requirement is either premature or without substantive merit. We note, however, that what we decide is

only that the petition is facially adequate in form to be submitted to the electorate. We express no opinion about the constitutional sufficiency of the title, the question of compliance with Const 1963, art 4, § 25, or the wisdom of the proposal.

It should be noted that the Attorney General, although disavowing any position on intervening defendants' substantive challenges, asks this Court to consider whether the statutory timetable should be judicially revised to assure that this initiative proposal can be submitted at the November 1992 general election. We decline to do so because it is not within the purview of the Supreme Court's order of remand.

DIRECTOR OF BUREAU OF WORKERS' DISABILITY COMPENSATION v DURANT ENTERPRISES, INC

Docket No. 132348. Submitted April 15, 1992, at Lansing. Decided April 28, 1992; approved for publication September 3, 1992, at 9:00 A.M.

The director of the Bureau of Workers' Disability Compensation and others brought an action in the Ingham Circuit Court against Durant Enterprises, Inc., seeking a declaration that Durant was liable for workers' disability compensation owed by its subsidiary, Hamady Bros. Food Markets, Inc. The court, Carolyn Stell, J., granted the plaintiffs summary disposition, finding Durant liable pursuant to a guarantee given to the Bureau of Workers' Disability Compensation by Durant when Hamady was permitted to be a self-insurer. Durant appealed.

The Court of Appeals *held:*

The trial court properly determined that Durant was liable pursuant to its guarantee. There are no words of limitation or restrictions in the guarantee that conflict with the court's interpretation.

Affirmed.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Caleb B. Martin, Jr.,* Assistant Attorney General, for the plaintiffs.

Before: CAVANAGH, P.J., and CONNOR and R. J. SNOW,* JJ.

PER CURIAM. In this action for declaratory relief, defendant appeals from the trial court's order of summary disposition granted pursuant to MCR 2.116(C)(10). Defendant contends that the trial court erred in finding that it had defaulted on its

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

contractual guarantees and that it had to specifically perform by making prompt and full payment of all of its workers' disability compensation liability arising under the Workers' Disability Compensation Act. MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.* We affirm.

The director of the Bureau of Workers' Disability Compensation agreed that Hamady Bros. Food Markets, Inc., defendant's subsidiary, could be a self-insurer if defendant would act as a guarantor. Consequently, defendant executed a document guaranteeing the "prompt and full payment of all liability of Hamady Bros. Food Markets, Inc., arising under and by virtue of 1969 PA 317 commonly known as the Michigan Workers' Disability Compensation Act of 1969." The document further provided that the "guarantee inures to the benefit of and may be enforced by any and all employees of said Hamady Bros. Food Markets, Inc. having a claim against it under said Act, or by the State of Michigan, Department of Labor, Bureau of Workers' Disability Compensation, for the benefit of any such employee or employees of said Hamady Bros, Food Markets, Inc."

In 1989, when Hamady stopped paying its disabled employees their benefits pursuant to a plan of reorganization approved by the United States Bankruptcy Court, the director requested that defendant honor its guarantee to pay such benefits. When the defendant declined, the director filed this lawsuit, alleging that defendant's refusal to honor its guarantee was a breach of its contractual duty to promptly pay all workers' compensation liability of Hamady.

While the suit was pending, payments of disability benefits to Hamady employees were made through the Self-Insurers' Security Fund (SISF) under the provisions of MCL 418.537; MSA

17.237(537). The SISF is required by this statute to pay the disability benefits of insolvent employers.

On April 25, 1990, plaintiffs filed a motion for summary disposition, arguing that there was no genuine issue of fact and they were entitled to prevail because defendant had admitted during discovery the validity of the guaranty. In response, defendant claimed that a settlement agreement entered into between the SISF and the Hamady unsecured creditor's committee had satisfied all of Hamady's indebtedness under the act. On May 2, 1990, the trial court granted plaintiffs' motion for summary disposition and ordered defendant to "make prompt and full payment of all workers' compensation liability of Hamady Bros. arising under the Workers' Disability Compensation Act."

On appeal, defendant now argues that the trial court erred in ordering the prompt and full payment of all workers' compensation liability without limiting, as did the guaranty, those entities or individuals who may enforce, and be benefited by, the guaranty. According to defendant, the part of the contract explaining that the "guarantee inures to the benefit of and may be enforced by any and all employees of said Hamady Bros. Food Markets, Inc. having a claim against it under said Act, or by the State of Michigan, Department of Labor, Bureau of Workers' Disability Compensation, for the benefit of any such employee or employees of said Hamady Bros. Food Markets, Inc.," is a limiting provision that was not addressed by the trial court. Apparently, defendant's interpretation of this provision would block any recovery by the SISF because the SISF was not listed as an entity that could enforce or be benefited by the guaranty. We disagree.

When interpreting a contract, summary disposi-

tion is proper absent any offer of proof giving rise to issues of fact. *Burroughs Corp v Detroit,* 18 Mich App 668, 674-675; 171 NW2d 678 (1969). In this case, there are no issues of fact that would preclude the entry of summary judgment and there are no words of limitation in the contract that would conflict with the trial court's interpretation. The defendant guaranteed the "prompt and full payment of all liability," language that in our opinion is absolute and unqualified. The agreement then goes on to list the beneficiaries in a manner that we cannot interpret as restrictive or exclusive. For these reasons, we find no error.

Affirmed.

ALLSTATE INSURANCE COMPANY v CASTANIER

Docket No. 123204. Submitted November 6, 1991, at Lansing. Decided May 21, 1992; approved for publication September 3, 1992, at 9:05 A.M. Leave to appeal denied, 441 Mich —.

Allstate Insurance Company brought an action in the Bay Circuit Court against Gary A. Castanier, personal representative of the estate of Gary M. Castanier, deceased, Thomas E. Bock, personal representative of the estate of Terry L. Thayer, Jr., deceased, Terry L. Thayer, Sr., Sandra Thayer, and others, seeking a declaration that it was not liable under a homeowner's insurance policy covering the Thayers following a fatal collision of the decedents' off-road vehicles on land not owned by the Thayers. The court, William J. Caprathe, J., found language in the insurance policy excluding coverage for accidents involving motorized land vehicles designed for recreational use off public roads and owned by an insured that occurred away from the residence premises to be ambiguous and construed it to provide coverage. The plaintiff appealed by leave granted.

The Court of Appeals *held:*

The policy language is not ambiguous, and clearly excludes coverage under the circumstances of this case. The court erred in concluding that the various acts of negligence alleged against Terry Thayer, Sr., were also not excluded from coverage. Coverage is not afforded where, as in this case, an insured's claim for coverage is wholly derivative of another insured's claim that is excluded under the policy. The court erred in denying the plaintiff's motion for summary disposition.

Reversed.

1. INSURANCE — JUDICIAL CONSTRUCTION — AMBIGUITY.

A contract of insurance, although inartfully worded or clumsily arranged, is not ambiguous or fatally unclear if it fairly admits of but one interpretation.

REFERENCES

Am Jur 2d, Automobile Insurance §§ 2, 3, 126, 229-232.
See the Index to Annotations under Automobile Insurance.

2. INSURANCE — WORDS AND PHRASES — "LAND MOTOR VEHICLE" — "MOTORIZED LAND VEHICLE".

The plain meaning of the term "land motor vehicle" in an insurance policy is a vehicle with a motor that travels on land; there is no meaningful distinction between the terms "motorized land vehicle" and "land motor vehicle."

3. INSURANCE — EXCLUSIONS — DERIVATIVE CLAIMS.

Coverage is not afforded under an insurance policy for a claim that is wholly derivative of another claim that is excluded under the policy.

Collison & Collison, P.C. (by *Joseph T. Collison*), for the plaintiff.

Patterson, Gruber, Kennedy, Gill & Milster (by *Brian M. Kennedy*), for Gary A. Castanier, personal representative of the estate of Gary M. Castanier, deceased.

Before: MACKENZIE, P.J., and SULLIVAN and G. S. ALLEN,* JJ.

PER CURIAM. In this declaratory judgment action, plaintiff appeals by leave granted from an order denying its motion for summary disposition and granting partial summary disposition in favor of defendants Castanier and Thayer. We reverse.

In January 1988, Gary Castanier and Terry Thayer, Jr., were involved in a fatal collision of their off-road vehicles on the banks of the Kawkawlin River. It is alleged that Thayer's father gave him alcohol before the collision occurred and that his father was aware that he was operating his vehicle at night without headlights and at an excessive rate of speed while intoxicated. A wrongful death action was commenced on behalf of the estate of Gary Castanier against the estate of

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

Terry Thayer, Jr., as well as his parents, Terry Thayer, Sr., and Sandra Thayer. Plaintiff is the Thayers' homeowners' insurer, and it is undisputed that Terry Thayer, Jr., was an insured under the policy.

Plaintiff contended that coverage was excluded under the following provision of the homeowners' policy:

> We do not cover bodily injury or property damage arising out of the ownership, maintenance, use, loading or unloading of any motorized land vehicle or trailer. However, this exclusion does not apply to:
>
> * * *
>
> b) any motorized land vehicle designed principally for recreational use off public roads, unless that vehicle is owned by an insured person and is being used away from the residence premises.

The trial court found this provision to be ambiguous and thus construed it to provide coverage. Plaintiff claims that the court erred. We agree.

When the terms of an insurance policy are plain and unambiguous, their plain meaning should be given effect. *Allstate Ins Co v Goldwater,* 163 Mich App 646, 649; 415 NW2d 2 (1987). If a policy, though inartfully worded or clumsily arranged, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear. *Goldwater, supra,* p 648.

The quoted policy provision is identical to the provision at issue in *Goldwater.* We agree with the *Goldwater* Court that, while the provision's language "may initially appear confusing, [it is not] ambiguous; it clearly excludes coverage for an accident involving a motorized land vehicle designed for recreational use off public roads, owned

by an insured, that occurred away from the residence premises." *Goldwater, supra,* p 649. Contrary to defendants' argument, we attach little, if any, significance to the fact that *Goldwater* did not construe the policy term "motorized land vehicle." Our Supreme Court recently concluded that the plain meaning of the term "land motor vehicle" is "a vehicle with a motor that travels on land." *Farm Bureau Mutual Ins Co v Stark,* 437 Mich 175, 182; 468 NW2d 498 (1991). We can find no meaningful distinction between the terms "motorized land vehicle" and "land motor vehicle." The inclusion of the term "motorized land vehicle" does not render the policy ambiguous. *Stark, supra.*

In this case, Castanier was fatally injured in an accident involving "a vehicle with a motor that travels on land," *Stark, supra,* designed for off-road recreational use, owned by an insured, away from the insured's residence. The contract clearly excludes coverage under these circumstances. *Goldwater, supra.* The trial court thus erred in denying plaintiff's motion for summary disposition.

We also disagree with the trial court's conclusion that the various acts of negligence alleged against defendant Terry Thayer, Sr., were not excluded from coverage. Coverage is not afforded where, as in this case, an insured's claim for coverage is wholly derivative of another insured's claim that is excluded under the policy. *Allstate Ins Co v Freeman,* 432 Mich 656; 443 NW2d 734 (1989). See also *State Farm Fire & Casualty Co v Huyghe,* 144 Mich App 341; 375 NW2d 442 (1985). Further, we decline to adopt the dual-causation theory advanced by defendants. See *Vanguard Ins Co v Clarke,* 438 Mich 463; 475 NW2d 48 (1991). The injuries resulting from the collision in this

case were excluded from coverage regardless of the label the allegations were given in the complaint.

Our disposition of these issues makes it unnecessary to address plaintiff's remaining claim. In any event, we note our agreement with plaintiff that the trial court erred in holding that material issues of fact existed regarding the policy's exclusion pertaining to criminal or intentional acts. Plaintiff was not required to show that Thayer intended to injure Castanier, but, rather, that a reasonable person would have expected an injury to occur. See *Freeman, supra,* p 688. We are satisfied that a reasonable person would have expected injury to result from driving an off-road vehicle at night without headlights at an excessive speed while intoxicated.

Reversed.

ALPENA FRIEND OF THE COURT ex rel PAUL v DURECKI

Docket No. 128559. Submitted November 5, 1991, at Lansing. Decided June 16, 1992; approved for publication September 3, 1992, at 9:10 A.M.

The Alpena Friend of the Court, on behalf of Virginia Paul, petitioned the Alpena Circuit Court for an order to show cause why Arnold Durecki should not be held in contempt for his refusal to pay child support pursuant to a 1962 judgment of divorce. Following a hearing, the court, Robert R. Ferguson, J., ordered Durecki to show cause, holding that each child support payment became an enforceable judgment as it became due, that the ten-year statute of limitation for judgments was applicable, but that the respondent's 1988 partial payment of the arrearage acted as an acknowledgment of the judgment debt that waived the defense of the statute of limitation. The respondent appealed.

The Court of Appeals *held:*

The respondent's partial payment of the arrearage acted as an acknowledgment of the continuing validity of the judgment debt that waived the defense of the statute of limitation and allowed enforcement of the obligation. The respondent's claim that there should be no waiver of the defense of the statute of limitation because the 1988 payments were made under duress caused by threatened contempt proceedings is without either legal or factual support.

Affirmed.

DIVORCE — CHILD SUPPORT — ENFORCEMENT OF JUDGMENTS — LIMITATION OF ACTIONS — WAIVER.

Partial payment of a child support arrearage acts as an acknowledgment of the continuing validity of the judgment debt and thereby waives the defense of the statute of limitation in a

REFERENCES

Am Jur 2d, Divorce and Separation § 1073; Limitation of Actions §§ 360 *et seq.*

Statute of limitations, laches, or acquiescence as defense to action or proceeding for alimony or support of child allowed by court order or decree. 70 ALR2d 1250.

proceeding to enforce the judgment debt (MCL 600.5809[3]; MSA 27A.5809[3]).

Donald G. Field, for the respondent.

Amicus Curiae:

Roland C. Fancher, Alpena Friend of the Court.

Before: MACKENZIE, P.J., and SULLIVAN and G. S. ALLEN,* JJ.

PER CURIAM. Respondent appeals from an opinion and order, which essentially denied his motion to dismiss proceedings to enforce payment of his child support arrearage. We affirm.

Respondent and the relator were divorced in 1962. At the time of the divorce, they had two minor children. Respondent was ordered to pay child support of $10 a week for each child. This amount was never modified.

The record establishes that respondent was chronically in arrears on his child support obligation despite repeated attempts to collect from him. The record also suggests that there had been ongoing negotiations between respondent and petitioner regarding payment of the arrearage. In 1988, respondent made ten payments to petitioner in an effort to reduce the arrearage. This case arises from a bench warrant issued in June 1989, when respondent's arrearage was approximately $8,400.

At a hearing on the bench warrant, respondent indicated that his last support payment was due on August 21, 1977, the date the younger child reached the age of majority. Respondent argued that the proceedings against him should be dis-

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

missed because enforcement of the support obligation was being sought more than ten years after that date, contrary to the ten-year statute of limitation for actions founded upon a court judgment, MCL 600.5809(3); MSA 27A.5809(3). The petitioner's position was that the ten-year limitation period did not apply to this case, but that even if it did, respondent's payments made after the expiration of the limitation period waived the statute of limitation defense.

The trial court ruled that the ten-year limitation period applied, citing MCL 552.603; MSA 25.164(3), which provides that a support order is a final judgment on or after the date each support payment is due. However, the court agreed with the petitioner that payments made after the limitation period operated as an acknowledgment of respondent's child support obligation and as a waiver of the defense of the statute of limitation.

On appeal, respondent contends that the trial court erred in concluding that he waived the limitation period as a defense by making payments on the arrearage. Petitioner has not cross appealed the court's decision regarding the applicability of the statute of limitation. We note, however, that this Court recently held that the ten-year limitation period of MCL 600.5809(3); MSA 27A.5809(3) applies to an action to collect a child support arrearage. *Ewing v Bolden,* 194 Mich App 95; 486 NW2d 96 (1992).

In arguing that his payments did not waive the statute of limitation defense, respondent relies on MCL 600.5865; MSA 27A.5865 and MCL 600.5866; MSA 27A.5866, which allow revival of time-barred obligations to pay contractual debts on the basis of certain writings. These statutes are inapposite to the situation in this case, however. As stated by our Supreme Court in *Miner v Lorman,* 56 Mich

212, 216; 22 NW 265 (1885), in discussing the identical predecessor statutory provisions:

> The statute does not prescribe what effect part payment of a demand shall have, but it is familiar law that it operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage, by plea of the statute of limitations, of any such lapse of time as may have occurred previous to the payment being made. The payment is not a contract; it is not in itself even a promise; but it furnishes ground for implying a promise in renewal from its date, of any right of action which before may have existed.

In *Collateral Liquidation, Inc v Palm,* 296 Mich 702; 296 NW 846 (1941), our Supreme Court again explained that a payment is equivalent to a new promise to pay on an obligation and extends the application of the statute of limitation. More recently, this Court held in *Federal Deposit Ins Corp v Garbutt,* 142 Mich App 462; 370 NW2d 387 (1985), that a partial payment made on a note after it matures serves to revive the statute of limitation, and a cause of action begins to accrue on that date. See also *Bonga v Bloomer,* 14 Mich App 315; 165 NW2d 487 (1968). Consistent with these authorities, we find no error in the trial court's ruling in this case. Respondent had a legal obligation to make child support payments, and his acknowledgment of the continuing vitality of that debt waived the defense of the statute of limitation and allowed enforcement of the obligation.

Respondent's claim, that the rule of *Miner* and its progeny does not apply in this case because his payments were involuntary, is without merit. The basis of respondent's claim of involuntariness—

that the 1988 payments were made under duress because they were made to avoid being held in contempt of court—is without both record and legal support. See *Neilands v Wright,* 134 Mich 77; 95 NW 997 (1903).

Affirmed.

SCHULTES v NAYLOR

Docket No. 129828. Submitted May 7, 1992, at Detroit. Decided June 2, 1992; approved for publication September 3, 1992, at 9:15 A.M.

Karen L. Rapp Schultes brought a wrongful discharge action in the Wayne Circuit Court against Michael A. Naylor, General Motors Corporation, and others, alleging breach of contract, intentional infliction of emotional distress, and unlawful sexual discrimination. The court, Richard P. Hathaway, J., granted summary disposition for the defendants. The plaintiff appealed.

The Court of Appeals *held:*

1. Both the written employment contract between the plaintiff and General Motors and the employee handbook clearly indicated that the plaintiff's employment was to be month to month. Therefore, her employment was terminable at will, as opposed to for just cause only, and her discharge for insubordination, which was preceded by reprimands for excessive tardiness, inability to work with fellow employees, and abuse of telephone privileges, was consistent with the terms of employment.

2. The plaintiff failed to establish a prima facie case of sexual discrimination in the absence of a showing of disparate treatment or intentional discrimination. None of the male employees with whom the plaintiff compared herself refused, as did the plaintiff, to reimburse General Motors for the cost of personal telephone calls. The plaintiff failed to show that the reasons stated for her discharge were mere pretext for intentional discrimination.

Affirmed.

1. MASTER AND SERVANT — EMPLOYMENT CONTRACTS — EMPLOYEE HANDBOOKS.

An employment relationship is terminable at will by either party

REFERENCES

Am Jur 2d, Civil Rights §§ 154 *et seq.*; Job Discrimination §§ 138 *et seq.*; Master and Servant §§ 27 *et seq.*.

See the Index to Annotations under Discharge From Employment or Office; Equal Employment Opportunity; Sex Discrimination.

where the employee signs an agreement that employment will be month to month and receives an employee handbook so stating.

2. CIVIL RIGHTS — SEXUAL DISCRIMINATION — DISPARATE TREATMENT.
A prima facie case of sexual discrimination is established on the basis of disparate treatment upon a showing that the plaintiff is a member of a class deserving of protection under the Civil Rights Act and that, for the same conduct, the plaintiff was treated differently than a person of the opposite sex (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*).

3. CIVIL RIGHTS — SEXUAL DISCRIMINATION — INTENTIONAL DISCRIMINATION.
A prima facie case of intentional sexual discrimination in the termination of employment is established upon a showing that the plaintiff was a member of an affected class, that the plaintiff was discharged, that the defendant was predisposed to discriminate against persons in the class, and that the defendant actually acted upon that disposition in deciding to terminate employment (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*).

Christensen & Bannigan, P.C. (by *Thomas H. Bannigan*), for the plaintiff.

Bodman, Longley & Dahling (by *Joseph A. Sullivan* and *Martha B. Goodloe*), for the defendants.

Before: SAWYER, P.J., and NEFF and FITZGERALD, JJ.

PER CURIAM. Plaintiff appeals from a May 24, 1990, order dismissing her claims of sexual discrimination, breach of contract, and intentional infliction of emotional distress. MCR 2.116(C)(10). We affirm.

This appeal arises out of an employment relationship between plaintiff and defendant, General Motors Corporation. In November 1982, plaintiff was hired by GM and placed in the Risk Management Department. Initially, management was dissatisfied with plaintiff's job performance because of her consistent tardiness, inability to deal with

other workers effectively, and failure to complete work in a timely fashion. In 1985, plaintiff applied for a new position in the Corporate Strategic Planning Group of GM. Notwithstanding the interviewers' concerns about her past job performance, plaintiff was given a transfer to the CSPG, and worked there until her termination.

In August 1987, plaintiff took a leave of absence in order to have a child. When she returned to work, she was consistently reprimanded for tardiness. In February and March 1988, plaintiff's absences and tardiness became excessive. When the supervisors' efforts to reconcile the problem failed, they consulted with the personnel department to seek a solution. As part of the investigation into plaintiff's performance, an employee in personnel requisitioned plaintiff's phone records for her office extension. These phone records revealed that plaintiff made nearly $1,700 in phone calls at GM's expense.[1]

GM management sent plaintiff a letter informing her that she would be billed for the phone calls that were not related to her employment responsibilities with GM. The letter also reprimanded plaintiff for her excessive tardiness, inability to deal with her co-workers, and abuse of her phone privileges. Management sent an additional letter to plaintiff asking that she submit a payment plan for her personal phone calls by the following day. Plaintiff responded to the letter with a note that stated, in part, as follows:

> I have discontinued efforts to review the bills. For the following reasons, my plan for repayment of the phone bills of [plaintiff's extension] is as

[1] A good portion of the calls were made to plaintiff's relatives in Rhode Island and New Jersey. In addition, the records revealed that plaintiff used her GM-issued phone credit card to make calls from California while she was on vacation.

follows: I will pay zero amount of such telephone bills.

Plaintiff was subsequently discharged from her duties with GM and thereafter filed this action.

Plaintiff first argues that it was error for the trial court to summarily dismiss count I of her complaint, which alleged breach of contract. We disagree.

When she was hired, plaintiff was interviewed by Wayne Morrison, a GM employee. Plaintiff alleged that Morrison told her that she would remain at GM as long as she did her job. However, on the day she was hired, plaintiff signed an employment agreement stating that she was employed month to month only. The agreement contains a total integration clause and indicates that oral modifications are not permitted. Plaintiff also signed a number of subsequent compensation statements that acknowledged that the terms of the original employment agreement controlled her relationship with GM. Finally, the employee handbook, a copy of which plaintiff received, describes the employment terms as month to month.

Toussaint v Blue Cross & Blue Shield of Michigan, 408 Mich 579; 292 NW2d 880 (1980), stands for the proposition that employment contracts terminable only for cause are enforceable to the same degree as other contracts. *Id.* at 610. See also *Valentine v General American Credit, Inc,* 420 Mich 256, 258; 362 NW2d 628 (1984). It is clear from *Toussaint* that an employer who makes oral representations that employment may be terminated only for cause may be bound contractually if those representations are supported by company policy. *Toussaint, supra* at 598. Our Supreme Court has held that oral manifestations by an employer that an employee's job is secure must be

clear and unequivocal. *Rowe v Montgomery Ward & Co, Inc,* 437 Mich 627, 645; 473 NW2d 268 (1991). The representation must be based upon more than just an employer's statement regarding hopes for a long relationship. *Id.* at 640.

This Court has evaluated the same form contract and GM handbook involved in this case and concluded that they create an at-will employment relationship. See *Singal v General Motors Corp,* 179 Mich App 497, 504-505; 447 NW2d 152 (1989) (relying on *Taylor v General Motors Corp,* 826 F2d 452 [CA 6, 1987]). Plaintiff has not produced any evidence corroborating her claim that GM made oral manifestations regarding a just-cause employment relationship. Accordingly, plaintiff has failed to rebut the clear indication in her employment agreement that she was terminable at will.[2]

Count II of plaintiff's complaint alleges sexual discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* This claim is based on plaintiff's comparison of herself with male employees who also "abused" their phone privileges. The trial court concluded that "this is a case where it really is not one that centers on sexual discrimination but, rather, it is one without any factual dispute and I believe it is one of insubordination." We agree with the trial court.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the claim at issue. *Marsh v Dep't of Civil Service (After Remand),* 173 Mich App 72, 77; 433 NW2d 820 (1988). Under MCR 2.116(G)(5), the court must consider the affidavits, pleadings, depositions, and

[2] It is also clear that none of the individuals named as defendants are liable because they were not parties to either the express or implied contract plaintiff alleges was formed on the day she was hired.

other documentary evidence presented by the parties. The benefit of doubt is to be given to the nonmoving party. If the trial court determines that there is a significant deficiency in the claim that cannot be cured by a full development of the factual record, then summary disposition under MCR 2.116(C)(10) is appropriate.

In order to avoid summary disposition in this case, plaintiff had to establish a genuine issue of material fact regarding whether a prima facie case of discrimination exists. See *Meeka v D & F Corp,* 158 Mich App 688, 694; 405 NW2d 125 (1987). To establish a prima facie case of sexual discrimination under the disparate-treatment theory, a plaintiff must show that she was a member of a class deserving of protection under the statute, and that, for the same conduct, she was treated differently than a man. *Marsh, supra* at 79. The crux of the sexual discrimination case is that there are similarly situated individuals who have been treated differently because of their sex. *Id.* It is plaintiff's burden to establish a prima facie case of sexual discrimination with evidence that is legally admissible and sufficient to state a prima facie claim. *Id.* at 80.

Our review of plaintiff's proofs reveals a factual deficiency that cannot be overcome. None of the male employees to whom plaintiff compared herself refused to reimburse GM for their phone usage. If plaintiff had shown that these men did refuse to pay, but were not terminated, her case would be much stronger. In light of her failure to make this showing, none of the men were similarly situated and, thus, the trial court properly dismissed this claim.

Finally, plaintiff contends that she was not terminated for insubordination. Specifically, plaintiff contends that defendants' insubordination justifica-

tion was merely a pretext for discriminating against her on the basis of sex. We disagree.

A second way to make a prima facie showing of discrimination based upon sex is to prove that the discrimination was intentional. *Hickman v W-S Equipment Co, Inc,* 176 Mich App 17, 21; 438 NW2d 872 (1989). In order to succeed under this theory, a plaintiff must show that she was a member of an affected class, that she was discharged, that the defendant was predisposed to discriminate against persons in the class, and that the defendant actually acted upon that disposition when the termination decision was made. *Id.*

In this case, plaintiff is obviously a member of a protected class and was discharged. The only question is whether she has made the requisite showing of a pretext for intentional discrimination in order to sustain the action. This question must be answered in the negative. All the incidents to which plaintiff points are actions taken by defendants in order to extract from plaintiff compliance with the rules under which all employees of GM were expected to work.[3] Plaintiff did not produce any evidence at the hearing on the motion for summary disposition that indicated a pattern of discrimination against women within GM. Rather, plaintiff made unsubstantiated allegations of discrimination against her that were insufficient to create a genuine issue of material fact regarding intentional discrimination.

Affirmed.

[3] Plaintiff's contention that she followed GM's directive to submit a plan for reimbursement for the phone calls is without merit. Plaintiff's letter, which indicated that her plan was to pay zero, was nothing more than an enticement for GM to take action.

GINTHER v ZIMMERMAN

Docket No. 138746. Submitted July 23, 1992, at Grand Rapids. Decided September 8, 1992, at 9:00 A.M.

Dean and Sharon Ginther brought an action in the Grand Traverse Circuit Court against Joseph J. Zimmerman, the law firm of Zimmerman, Kuhn & Beacup, its predecessor in interest, and other members of the firms, seeking damages for the alleged failure to draft the will of May H. Shippey in a manner that would have given effect to her intent that the plaintiffs receive a certain parcel of land on her death. The plaintiffs premised their claim both on the basis of legal malpractice and as third-party beneficiaries of a contract for legal services between Mrs. Shippey and the defendants. The court, Charles M. Forester, J., granted summary disposition for the defendants. The plaintiffs appealed.

The Court of Appeals *held:*

Where the intent of a testator as expressed in a testamentary instrument is not frustrated, an attorney owes no duty that will give rise to a cause of action to persons not named in the instrument. The plaintiffs did not allege that they were named in the will or that the testator's intent as expressed in the will was frustrated; therefore, the trial court properly granted summary disposition for the defendants.

Affirmed.

WILLS — ACTIONS — ATTORNEYS — UNNAMED PERSONS.

A person who is not named in a will has no cause of action against the attorney who drafted the will where the intent of the testator as expressed in the will is not frustrated.

Fraser, Trebilcock, Davis & Foster, P.C. (by *C. Mark Hoover* and *Kathleen E. Kane*), for the plaintiff.

REFERENCES

Am Jur 2d, Attorneys At Law § 236.

What constitutes negligence sufficient to render attorney liable to person other than immediate client. 61 ALR4th 464.

Schureman, Frakes, Glass & Wulfmeier (by *Jack Carpenter, Charles D. Brown,* and *Priscilla L. Schwarze*), for the defendants.

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

NEFF, P.J. Plaintiffs appeal as of right from the circuit court's order granting summary disposition to defendants. We affirm.

In their amended complaint, plaintiffs alleged that defendants committed legal malpractice when they failed to carry out the estate plan of May Hubbard Shippey by which plaintiffs would have received certain real estate. Plaintiffs also set forth a third-party-beneficiary theory, alleging that defendants breached their contract with Mrs. Shippey to properly draft testamentary documents and that Mrs. Shippey intended that plaintiffs directly benefit from that contractual arrangement.

I

The allegations of plaintiffs' complaint are summarized as follows: On January 30, 1980, May Hubbard Shippey executed a will, one provision of which would convey to plaintiffs, if they survived her, an approximately 67.95-acre parcel of property located on Elk Lake in Antrim County. That parcel is referred to by the parties as the "original purchase" parcel. After the execution of that will, Mrs. Shippey told plaintiffs that she had decided to immediately convey the parcel to them. On July 24, 1980, she instructed defendant Rollert to effectuate her intent to convey that parcel to plaintiffs while reserving a life estate for her in the house and 5.3 acres of surrounding property. That parcel is referred to by the parties as the "homestead" parcel.

On February 4, 1981, defendant Kuhn filed a deed he had prepared that conveyed to plaintiffs the original purchase parcel less the homestead parcel. However, the homestead parcel was not conveyed in that deed subject to Mrs. Shippey's life estate.

On February 2, 1982, Mrs. Shippey executed her last known will, which was prepared by defendant Zimmerman. That will did not convey the homestead parcel to plaintiffs. Mrs. Shippey died on June 30, 1989.

II

The circuit court's order states that summary disposition was granted pursuant to MCR 2.116(C)(10). However, a full reading of the decision and the case law cited therein reveals that the court actually decided the issue on the ground that plaintiffs failed to state a claim upon which relief can be granted. An order granting summary judgment under the wrong court rule may be reviewed under the correct rule. *Johnson v Davis,* 156 Mich App 550, 553; 402 NW2d 486 (1986).

III

The precise question raised is one of first impression in Michigan. That question is whether persons claiming to be intended beneficiaries of a will can maintain an action against the attorney who drafted the will where no attorney-client relationship exists between those persons and the attorney.

Plaintiffs concede that, pursuant to *Pantely v Garris, Garris & Garris, PC,* 180 Mich App 768, 778; 447 NW2d 864 (1989), an element of an action for legal malpractice is the existence of an attor-

ney-client relationship. However, plaintiffs argue for the abrogation of that element. Plaintiffs rely on *Friedman v Dozorc,* 412 Mich 1; 312 NW2d 585 (1981), and cases from foreign jurisdictions for their argument.

Friedman involved a negligence claim brought by a physician against the attorneys who had represented the adverse party in a previous unsuccessful malpractice suit against the physician. Our Supreme Court held that the physician had failed to state an actionable negligence claim because an attorney owes no duty to an adverse party in litigation. *Id.* at 16. The Court based that holding on its conclusion that

> the public policy of maintaining a vigorous adversary system outweighs the asserted advantages of finding a duty of due care to an attorney's legal opponent. [*Id.* at 25.]

The Court went on to address other arguments of the physician and amici, one of which was that privity of contract no longer shields a professional from liability to foreseeable third parties. While noting that it had held in *Williams v Polgar,* 391 Mich 6; 215 NW2d 149 (1974), that an abstracter of title is subject to liability to foreseeable third parties who rely on the abstract, the Court stated that it was basing its decision in *Friedman* on public policy considerations and not on the privity of contract doctrine. *Friedman* at 28.

In *Cramer v Metropolitan Savings Ass'n (Amended Opinion),* 136 Mich App 387, 397-398; 357 NW2d 51 (1984), this Court interpreted *Friedman* to mean that lack of duty, and not the privity doctrine, is the proper ground for summary disposition of a claim of legal malpractice against an adversarial attorney.

In a more recent case, our Supreme Court considered the question whether an insurance company could maintain a malpractice action against the attorney it hired to defend its insured. *Atlanta Int'l Ins Co v Bell,* 438 Mich 512; 475 NW2d 294 (1991). In the lead opinion in that case, Justice BRICKLEY observed that traditional legal doctrine mandates that only a person in the privity of an attorney-client relationship could sue an attorney for malpractice. *Id.* at 518. The essential purpose of that rule is to prevent consideration of the interests of those outside the relationship from interfering with the attorney's duty to loyally represent a client. *Id.*

Justice BRICKLEY went on to note, however, that the situation in *Bell* demonstrated that the lack of an attorney-client relationship by itself was an inadequate predicate for the analysis of malpractice liability, in view of the fact that the situation in *Bell* did not present a conflict between the interests of the insurer and the policy concerns of attorney loyalty. *Id.* at 520. He went on to resolve the issue under the principle of equitable subrogation. *Id.*

Thus, both in *Friedman* and in the lead opinion in *Bell,* the issue of attorney malpractice was addressed in terms other than the doctrine of privity.

IV

Some foreign courts have decided the issue in terms of privity, refusing on the ground that an attorney has no duty to nonclients to find a cause of action for legal malpractice where no attorney-client relationship exists. *Dickey v Jansen,* 731 SW2d 581 (Tex App, 1987); *Lilyhorn v Dier,* 214

Neb 728; 335 NW2d 554 (1983); *Viscardi v Lerner,* 125 AD2d 662; 510 NYS2d 183 (1986).

Other courts have ruled that an attorney may be liable to named beneficiaries of a will where the intent of the testator, as discernible from the face of the instrument, was frustrated either by faulty drafting or by improper attestation.

For instance, in *Guy v Liederbach,* 501 Pa 47; 459 A2d 744 (1983), the Pennsylvania Supreme Court found that the named legatee had a cause of action as an intended third-party beneficiary of the contract between the testator and her attorney to draft a will where the legacy was voided because the legatee witnessed the will, as the attorney instructed.

In *Lucas v Hamm,* 56 Cal 2d 583; 364 P2d 685 (1961), the plaintiffs alleged that the defendant attorney agreed with the testator to prepare a will by which the plaintiffs were to be the beneficiaries of a trust. However, in drafting the instrument, the attorney violated the rule against perpetuities, resulting in the plaintiffs receiving less than intended. The court concluded that the plaintiffs could recover as third-party beneficiaries, because the main purpose of the testator in reaching the agreement with the attorney was to benefit the persons named in the will.

In *Heyer v Flaig,* 70 Cal 2d 223; 449 P2d 161 (1969), the testatrix retained the defendant attorney to draft a will and told the attorney that she wanted her entire estate to pass to her daughters, the plaintiffs. She also told the attorney that she intended to marry. She did in fact marry ten days after executing the will. The will purported to leave the entire estate to the daughters, but failed to mention the husband, who claimed a portion of the estate as a posttestamentary spouse. *Id.* The Supreme Court of California ruled that the plain-

tiff daughters had stated a cause of action in tort based on the attorney's duty to the intended testamentary beneficiaries. *Id.*

In a subsequent California case, the appellate court characterized the views expressed in *Lucas* and *Heyer* as follows:

> *[A]n attorney may be held liable to the testamentary beneficiaries only* if the above stated test is fully met, that is, *if due to the attorney's professional negligence the testamentary intent expressed in the will is frustrated and the beneficiaries clearly designated by the testator lose their legacy as a direct result of such negligence.* [*Ventura Co Society for the Prevention of Cruelty to Children and Animals, Inc v Holloway,* 40 Cal App 3d 897, 903; 115 Cal Rptr 464 (1974) (emphasis in original)].

The court in *Ventura* cited *Lucas* and *Heyer* for the proposition that an attorney who undertakes to prepare a will assumes a duty to the intended beneficiaries as well as to the client and that lack of privity does not preclude an action based on either a third-party-beneficiary theory or a negligence theory.

A Florida appellate court adopted the quoted language from *Ventura* in ruling that the plaintiff did not state a cause of action where there was no indication from the will that the intent of the testator had been frustrated. *DeMaris v Asti,* 426 So 2d 1153, 1154 (Fla App, 1976). The court went on to say:

> There is no authority—the reasons being obvious —for the proposition that a disappointed beneficiary may prove, by evidence totally extrinsic to the will, the testator's testamentary intent was other than as expressed in his solemn and properly executed will.

Other jurisdictions have followed the California and Florida courts. In *Schreiner v Scoville,* 410 NW2d 679, 682 (Iowa, 1987), the Supreme Court of Iowa concluded:

> [A] lawyer owes a duty of care to the direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary instruments.

In *Kirgan v Parks,* 60 Md App 1, 12; 478 A2d 713 (1984), the court held:

> [A] testamentary beneficiary (or one claiming to be an intended beneficiary) has no cause of action against the testator's attorney for alleged negligence in drafting the will when, as in this case, the will is valid, the testamentary intent *as expressed in the will* has been carried out, and there is no concession of error by the attorney. [Emphasis in original.]

We have found only one jurisdiction in which an unnamed beneficiary was found to have stated a cause of action. In *Hale v Groce,* 304 Or 281; 744 P2d 1289 (1987), the plaintiff alleged that the defendant attorney was instructed by his client to prepare testamentary instruments in which a specified sum to the plaintiff was to be included. The gift was not included in either the will or the related trust. The complaint alleged a claim that the attorney had negligently failed to include the bequest. The plaintiff also alleged a claim that the attorney had failed to carry out a contractual promise to the client and that the plaintiff was the intended beneficiary of that promise.

The Supreme Court of Oregon held that the complaint stated claims under both theories,

> as the intended beneficiary of defendant's profes-

> sional contract with the decedent and a derivative tort claim based on breach of the duty created by that contract to the plaintiff as its intended beneficiary. [*Id.* at 283.]

The court stated that it believed that the plaintiff was a "classic 'intended' third-party beneficiary of the lawyer's promise to his client." The court went on to say that under third-party analysis, the contract creates a "duty" to the intended beneficiary, the negligent nonperformance of which gives rise to an action in negligence. *Id.* at 286.

We disagree with the result reached in *Hale.* We believe that where the intent of the testator as expressed in the testamentary instrument is not frustrated, an attorney owes no duty that will give rise to a cause of action to persons not named in the instrument. However, we express no view regarding an attorney's liability to direct and intended beneficiaries named in the instrument where the intent of the testator, as expressed within the four corners of the instrument, has been frustrated. That situation is not before us.

In the present case, plaintiffs do not allege that they were named in the will or that the testator's intent, as expressed in the instruments, was frustrated. Therefore, the circuit court's order granting summary disposition to defendants is affirmed.

APPLEKAMP v APPLEKAMP

Docket No. 139522. Submitted May 7, 1992, at Marquette. Decided September 8, 1992, at 9:05 A.M.

On May 21, 1987, Joann S. Applekamp obtained a default judgment of divorce in the Ontonagon Circuit Court, William G. Cloon, Jr., J., against William D. Applekamp. She was awarded one-half of an anticipated disbursement to the defendant of shares in an employee stock ownership plan. The defendant did not move to have the default set aside. The plan was terminated in 1991, and the defendant received $66,468.40 for 767.72688 shares at $84.38 a share. At the time of the disbursement, the defendant had been credited with 188.23024 shares for 1986, 154.85511 shares for 1987, 152.65909 shares for 1988, and 291.98244 shares were unallocated. The plaintiff moved to enforce the default judgment, and the court awarded $22,999.34 as her share of the plan disbursement, representing one-half of the shares earned by the defendant in 1986 and 1987 valued at $84.38 a share and 34.6 percent of the unallocated shares valued at the same price. The defendant appealed, claiming that the plaintiff should have been awarded $2,296.40, one-half of the value of the shares that were vested on May 21, 1987, and valued according to the share price on that date.

The Court of Appeals *held:*

In a contested divorce proceeding, the valuation of marital property for purposes of distribution must not be dependent upon the happening of events after the divorce. That rule, however, does not apply where the distribution of property is pursuant to a default judgment. Because the defendant failed to seek relief from the default judgment, he is bound by its terms and the trial court's determination that the plaintiff's share of the anticipated disbursement of the defendant's employee stock ownership plan must be valued using the 1991, rather than the 1987, share price. However, the award of the shares credited to the defendant in 1987 and the unallocated

REFERENCES

Am Jur 2d, Divorce and Separation §§ 428, 429, 937-939, 948, 949.

See the Index to Annotations under Default Judgments; Value and Valuation.

shares must be modified to $16,629.08 to reflect the fact that the parties were married for only a portion of 1987.

Affirmed as modified.

DIVORCE — DEFAULT JUDGMENTS — PROPERTY DIVISION.

The rule in contested divorce proceedings that the valuation of marital property for purposes of distribution must not be dependent on the happening of events after the divorce does not apply where judgment is entered and property is distributed upon the default of a party; accordingly, valuation of a party's employee stock ownership plan for distribution pursuant to a default judgment of divorce may be based on a postjudgment share price.

Goodman & Makinen (by *Michael E. Makinen*), for the defendant.

Before: GRIFFIN, P.J., and WEAVER and MCDONALD, JJ.

GRIFFIN, P.J. This is a divorce case in which the sole issue is the value of an employee stock ownership plan (ESOP) defendant had with his employer, Copper Range Company. Plaintiff was awarded half of the value of the ESOP pursuant to a default judgment of divorce entered on May 21, 1987. In an order dated January 2, 1991, the circuit court granted plaintiff's motion to enforce the judgment and awarded plaintiff $22,999.34 as her share of the ESOP. Defendant's subsequent motions for relief from this order were denied, and he now appeals as of right. We affirm the decision of the trial court, but modify its award to plaintiff.

I

The facts of this case are relatively straightforward. On October 1, 1986, plaintiff Joann Applekamp (now Strancel), filed for divorce from her husband, defendant William Applekamp. Defendant failed to plead or otherwise defend the action,

and a default judgment of divorce was entered on May 21, 1987. The judgment, prepared by plaintiff's attorney, contained the following provision regarding distribution of the ESOP:

> It is further ordered and adjudged that the parties shall split the 1986 state and federal tax refunds, the anticipated Copper Range Profit Sharing or Escrow Payment, and the *anticipated Copper Range Stock Disbursement,* with each party to receive one-half (½) of each of the above items. Further, the defendant shall provide to the plaintiff proof as to the amounts received from each payment at the time of paying to the plaintiff her share. [Emphasis added.]

At the time of the divorce defendant had 188.23024 vested shares of Copper Range stock in his ESOP, at $24.40 a share. Thereafter, sometime in 1989, Copper Range Company was bought out by another company, and Copper Range employees voted to terminate the ESOP. Defendant's holdings in the ESOP at the time of the buy out were as follows:

> 188.23024 shares credit as of 12/31/86;
> 154.85511 shares credit as of 12/31/87;
> 152.65909 shares credit as of 12/31/88;
> 291.98244 shares of unallocated stock.

Pursuant to the purchase agreement, each employee received $84.38 a share. As a result, defendant received a payment of $66,468.40 for 767.72688 shares of Copper Range Company stock.

On August 15, 1989, plaintiff filed a motion to enforce the judgment, seeking to recover half of the $66,468.40 payment to defendant. Plaintiff claimed that she was entitled to this amount pursuant to the judgment of divorce, which

awarded her half of the "*anticipated* Copper Range stock disbursement." In response, defendant argued that plaintiff was entitled to only half of $4,592.81, the value of the vested stock in the ESOP at the time of the divorce.

Following a hearing, the trial court agreed in part with plaintiff and purported to award her half the value of the stock that had accrued by the date of the divorce, at the increased value of $84.38 a share. In pertinent part, the court's opinion reads as follows:

> The defendant argues that the plaintiff only should be entitled to one-half of the shares already issued by the defendant as of the date the divorce became final, at the then very low value placed upon the stock by the company as reflected on defendant's Exhibit 501-H and mentioned by the witness, Charles Lempke [sic]. The plaintiff contends consideration should be given to awarding her one-half of all of the stock eventually purchased at the much higher value as set forth on plaintiff's Exhibit 2-H.
>
> Based upon the evidence received by the court at the time of the hearing on the motion, and bearing in mind that a divorce action is equitable in nature, this court concludes the plaintiff is entitled to 50 percent of all stock issued to the defendant in 1986, 50 percent of all stock issued to the defendant in 1987 to the date the divorce became final, and with no indication as to exactly when the stock was received by the defendant and also bearing in mind the hearing was in late April and the judgment not signed until late May and by law a request could have been made for a new trial or other relief from the judgment an additional period of time into the month of June, the court concludes for computation purposes the plaintiff is entitled to one-half of the stock issued the defendant in 1987 but she is not entitled to any of the stock issued the defendant in 1988. As

to the unallocated shares, the court further concludes the plaintiff is entitled to the percentage of shares already awarded to her, which would be 34.6 percent of the unallocated shares. *The court also concludes that she should be entitled to the amount per share eventually realized by the defendant since fluctuations in value previously were only speculative and in equity the final figure actually paid per share result in a fair and equitable distribution of the stock in accordance with the judgment.* Again for the sake of brevity, the court adopts and incorporates by reference the figure set forth on plaintiff's Exhibit 4-H, and awards the plaintiff the sum of $22,999.34 together with interest thereon at the allowable legal rate provided for judgments from the date the funds actually were received by the defendant until paid to the plaintiff. [Emphasis added.]

II

On appeal, defendant claims that the valuation of the ESOP was in error. Specifically, defendant contends that the trial court committed an error of law when it failed to determine plaintiff's award solely on the basis of the value of the stock at the time of the divorce. In support of his position, defendant relies heavily on *Burkey v Burkey (On Rehearing),* 189 Mich App 72; 471 NW2d 631 (1991). In *Burkey,* this Court held that it was error for the trial court in a divorce action to refuse to value an ESOP account and include it as part of the marital estate. In so holding, the panel in *Burkey, id.* at 76, stated:

. . . The present value of an ESOP plan can be readily determined at any given time by looking at the value of the stock or other investments made by the plan. All that must be done to determine present value is to determine the number of

> shares in the employee's account and multiply that figure by the value of those shares. Defendant in the case at bar was annually notified what number of shares were owned by her, their value, and, therefore, the value of the ESOP account itself.
>
> The trial court correctly determined that the valuation reached by the trial court could not be dependent upon the happening of future events after the divorce. *Kilbride v Kilbride,* 172 Mich App 421, 435-436; 432 NW2d 324 (1988). Accordingly, the trial court ignored any changes which might occur to the ESOP after divorce, such as additional contributions and fluctuation in the price of the stock.

Upon review, we find the present case distinguishable from *Burkey. Burkey* controls where the valuation of an ESOP is contested. Additionally, we agree with *Burkey* that in the context of a contested proceeding, it is unwise public policy to order a property distribution that is based upon the occurrence of speculative future events. Where the trial court is called upon to distribute the property of the parties, the court must employ its equitable powers to fashion an award that is "fair and just." *Sparks v Sparks,* 440 Mich 141; 485 NW2d 893 (1992). Property distributions that are contingent upon the occurrence of uncertain future events call into question the fairness and equity of court-ordered decrees. Such concerns, however, are less salient when the property is distributed pursuant to the consent of the parties or by default. *Keyser v Keyser,* 182 Mich App 268; 451 NW2d 587 (1990), *Van Wagoner v Van Wagoner,* 131 Mich App 204; 346 NW2d 77 (1983), *Kline v Kline,* 92 Mich App 62; 284 NW2d 488 (1979), and *Tinkle v Tinkle,* 106 Mich App 423; 308 NW2d 241 (1981). As we have stated in the context of a property settlement:

> The validity of property settlements reached through negotiations is generally upheld in the absence of fraud, duress, or mutual mistake. Consent judgments reached by agreement of the parties differ from litigated judgments reached after trial on the merits. The former primarily rest on the consent of the parties, rather than upon the judgment of the court, and generally cannot be set aside without the approval of the parties thereto. [*Madden v Madden,* 125 Mich App 54, 58-59; 336 NW2d 231 (1983), rev'd on other grounds 419 Mich 858 (1984).]

If the trial court had ordered the present award in a contested divorce, we might be constrained to find error.[1] Here, however, the judgment was entered by default. As noted by the trial court, defendant never obtained relief from the default.

Default judgments in divorce cases are governed by MCR 3.208(B)(1), MCR 2.603, and MCR 2.612. A party in default generally may not proceed with the action until the default has been set aside. *Michigan Bank-Midwest v D J Reynaert, Inc,* 165 Mich App 630, 648; 419 NW2d 439 (1988). By not obtaining relief from the judgment in this case, defendant was bound by its terms. In short, we agree with the trial court's observation that the postjudgment proceedings were limited solely to interpreting the "anticipated" language incorporated in the previous judgment of divorce. Furthermore, we are not persuaded by defendant's argument that the court's interpretation of the judg-

[1] We note, however, that there is language in *Burkey* that would appear to allow the ESOP to be valued at a future date:

> The actual date to be used for valuation of an asset is within the discretion of the trial court. *Curylo v Curylo,* 104 Mich App 340, 351; 304 NW2d 575 (1981). In this case, the court used December 31, 1987, since neither party presented information to enable valuation of the stock in the ESOP as of a different date. [*Burkey, supra* at 76-77.]

ment ignored the plain meaning of the word "anticipated."

The lower court's award, however, must be modified. The court awarded plaintiff half the value of the stock for the entire year of 1987. The parties were married for only the first four months and three weeks of 1987. This error, in turn, affects the proportion of the unallocated shares to which plaintiff is entitled. Accounting for this error, the breakdown should have been as follows:

	Plaintiff	Defendant
12/31/86 Stock Layer (total 188.23024 shares)	94.11512	94.11512
12/31/87 Stock Layer (total 154.85511 shares) plaintiff entitled to half of unvested shares through 5/21/87	29.91035	124.94476
12/31/88 Stock Layer (total 152.65909 shares)	0	152.65909
Total Vested Shares	124.02547 shares	371.71897 shares
Percent of Total	25.01803%	74.98197%
Proportionate Share of Unallocated Stock (291.98244) shares)	73.04825 shares	218.93419 shares
Total Shares	197.07372 shares	590.65316 shares
Value Per Share	$ 84.38	$ 84.38
Total Award	$16,629.08	$49,839.32

In accordance with these calculations, we modify plaintiff's ESOP award from $22,999.34 to $16,629.08. In all other respects, the decision of the lower court is affirmed.

Affirmed as modified. No costs to either party.

SKINNER v SQUARE D COMPANY

Docket No. 127703. Submitted April 21, 1992, at Detroit. Decided September 8, 1992, at 9:10 A.M. Leave to appeal sought.

Doris L. Skinner, for herself and as personal representative of the estate of Chester W. Skinner, deceased, and Jeffrey W. Skinner brought a products liability action in the Oakland Circuit Court against Square D Company after Mr. Skinner was electrocuted by a machine on which he had installed a switch manufactured by the defendant. The court, Fred M. Mester, J., granted summary disposition for the defendant, finding that the plaintiffs had not shown that the allegedly defective switch was a proximate cause of the accident. The plaintiffs appealed.

The Court of Appeals *held:*

No genuine issue of material fact exists concerning whether the alleged defect proximately caused Mr. Skinner's death. Plaintiffs failed to advance a plausible theory regarding how the allegedly defective switch caused the accident. The court did not err in granting summary disposition.

Affirmed.

MICHAEL J. KELLY, J., dissenting, stated that the plaintiffs presented a plausible theory supported by testimony, exhibits, and inferences that presented a question for the jury with regard to the proximate cause of the accident. The court erred in granting summary disposition.

1. PRODUCTS LIABILITY — PRIMA FACIE CASE — CAUSATION.

A prima facie case for products liability requires proof of a causal relationship between the defect and the damage of which the plaintiff complains; a prima facie case does not require that the plaintiff offer evidence that positively excludes every other possible cause; it is enough if the plaintiff can establish a logical sequence of cause and effect, notwithstanding the existence of other plausible theories that may have evidentiary support.

REFERENCES

Am Jur 2d, Products Liability §§ 224 *et seq.*.

See the Index to Annotations under Products Liability.

2. PRODUCTS LIABILITY — CAUSATION — BURDEN OF PROOF.
The element of causation in a products liability action cannot be established solely on the basis of theory or conjecture; the plaintiff bears the burden of proving causation, and, where the matter of causation is one of pure speculation or conjecture, it is the trial court's duty to direct a verdict for the defendant.

3. PRODUCTS LIABILITY — CAUSATION — SUMMARY DISPOSITION.
Mere conjecture regarding causation in a products liability action does not meet the burden of proof imposed on a party opposing a motion for summary disposition to come forward with documentary evidence indicating that a genuine issue of material fact exists (MCR 2.116[G][4]).

Lawrence P. Nolan & Associates, P.C. (by *Lawrence P. Nolan*), for the plaintiffs.

Dickinson, Wright, Moon, Van Dusen & Freeman (by *Barbara Hughes Erard* and *Susan Bieke Neilson*), for the defendant.

Before: JANSEN, P.J., and MICHAEL J. KELLY and GRIFFIN, JJ.

GRIFFIN, J. Plaintiffs brought this products liability action against defendant, Square D Company, following the death of plaintiffs' decedent, Chester W. Skinner. Mr. Skinner was electrocuted by his own homemade tumbling machine on which he had installed a switch manufactured by defendant. Plaintiffs appeal as of right a circuit court order entering summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

I

This is a tragic case. Plaintiffs' decedent was in the business of cleaning and finishing metal parts. To this end, Mr. Skinner routinely used a homemade tumbling machine that he had designed and

built himself. Essentially, the machine consisted of a large metal drum mounted on a frame. Rough metal parts were placed inside the drum along with a quantity of abrasive detergent. An electric motor then rotated the drum in one direction to wash the parts. After allowing the drum to rotate for a period of time, the operator would reverse the direction of the tumbler and the finished parts would be ejected from the drum.

Because of the way Mr. Skinner had designed the machine, reversing the direction of the drum's rotation was a dangerous task. The motor that turned the drum was controlled by a switch manufactured by defendant. Mr. Skinner had connected the Square D switch to the motor by using three wires with insulated "alligator clips" on the ends. In order to reverse the direction of the machine, the operator was required to disconnect two of the alligator clips from the motor by hand and reverse them. For obvious reasons, it was important for the operator to make sure that the Square D switch was in the off position before disconnecting the wires from the motor.

On February 21, 1986, Mr. Skinner was in his shop, working in the room with the tumbling machines. Mrs. Skinner and two other women, Beulah McBride and Violet Whiting, were in another room, racking parts. Suddenly, the women heard Mr. Skinner cry out. They ran into the room where Mr. Skinner was, and found him standing with his hands above his head, each hand grasping an alligator clip. Electric current was passing through Mr. Skinner's body. Aware of what was happening, Mr. Skinner cried out to the women, "don't touch me"! He then freed his left hand from the alligator clip and reached for the Square D switch. Mr. Skinner threw the switch into the off position, twisted, and fell over dead.

II

It is plaintiffs' theory in this case that a defect in the design of the Square D switch proximately caused Mr. Skinner's electrocution. Plaintiffs allege that the switch was defective because it had a large "dead zone" that allowed the switch to be positioned in such a way that it would appear to the operator to be off when it was actually on.

Defendant argues, and the trial court agreed, that even assuming the switch was defective, there is no evidence that Mr. Skinner was actually confused or misled by the position of the switch at the time he was electrocuted. Thus, defendant submits, no genuine issue of material fact exists concerning whether the alleged defect proximately caused Mr. Skinner's death. After a thorough review, we are constrained to agree with defendant's argument.

It is well established in Michigan law that a prima facie case for products liability requires proof of a causal relationship between the defect and the damage of which the plaintiffs complain. *Mulholland v DEC Int'l Corp,* 432 Mich 395, 415; 443 NW2d 340 (1989). It is also true that a prima facie case does not require that a plaintiff offer evidence that positively excludes every other possible cause. Rather, it is enough if the plaintiff can establish a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support. *Id.*

The element of causation, however, cannot be established solely on the basis of theory or conjecture. *Jordan v Whiting Corp,* 396 Mich 145, 151; 240 NW2d 468 (1976). It is the plaintiff who bears the burden of proving causation, and where the matter is one of pure speculation or conjecture, it

becomes the duty of the trial court to direct a verdict for the defendant. See *Mulholland, supra* at 416-417, n 18, quoting Prosser & Keeton, Torts (5th ed), § 41, p 269. Similarly, mere conjecture does not meet the burden of proof imposed on a party opposing a motion for summary disposition to come forward with documentary evidence indicating that a genuine issue of material fact exists. *Little v Howard Johnson Co,* 183 Mich App 675, 683; 455 NW2d 390 (1990).

Applying these principles to this case, we are persuaded that the trial court did not err in granting defendant's motion for summary disposition. Throughout this litigation, both sides have advanced various theories regarding how the accident occurred. However, at no time did plaintiffs advance a plausible theory regarding how the defective switch caused the accident. We agree with the following observations contained in defendant's brief:

> Throughout the course of this litigation, plaintiffs have failed to appreciate that their burden is not simply to produce evidence that the switch could possibly, theoretically be confusing to someone at some time. They must produce evidence from which a jury could reasonably conclude that Mr. Skinner was in fact confused by the Square D switch on the machine he was operating just before he was electrocuted and that this confusion led to his death. See . . . *Derbeck v Ward,* 178 Mich App 38, 44 [443 NW2d 812] (1989); and *Jubenville v West End Cartage, Inc,* 163 Mich App 199 [413 NW2d 705] (1987).
>
> The absurdity of plaintiffs' confusion theory is exposed as soon as one realizes that the operator of the tumbling machine did *not* depend upon the way the switch handle appeared to determine whether the machine was "on" or "off." Even if Mr. Skinner pushed the handle of the switch

> incompletely or even if it somehow teased its way into an ambiguous position, Mr. Skinner could not have thought the machine was off if in fact it was still running! The noise of the tumbler barrel and the motor is deafening and the motion of the barrel is continuous. Thus, even if Mr. Skinner were careful and tried to turn the machine off before unfastening and refastening the alligator clips, he *would have had to have known* that the switch had not turned the power off because the machine would still have been running. He could not have ignored the roar of the motor and overlooked the tumbler as it turned continuously directly in front of him! [Emphasis in original.]

The scenarios advanced by plaintiffs in an attempt to establish causation are well characterized by defendant as "Agatha Christie theories." We acknowledge that proximate cause is usually a question of fact and that summary disposition is appropriate only in exceptional cases. See *Derbeck v Ward, supra.* In this case, we have carefully reviewed all plaintiffs' scenarios and find none to be supported by fact or reason. Without a plausible theory of causation, plaintiffs' claim must fail and summary disposition is warranted. For this reason, we conclude that the trial court did not err in granting defendant's motion for summary disposition.

III

We turn now to plaintiffs' remaining arguments on appeal. Plaintiffs next contend that the trial court erred in granting defendant summary disposition without ruling specifically on plaintiffs' separate claims of failure to insulate and failure to warn. We disagree.

Plaintiffs argue that the Square D switch was defective because it was not made of insulated

material and that there is evidence that this defect contributed to Mr. Skinner's electrocution. We find this argument disingenuous and accordingly reject it. It does appear that the experts agree that when Mr. Skinner grabbed the switch, he provided a secondary ground for the current that increased the magnitude of the shock he received. The testimony relied on by plaintiffs, however, does not indicate that it was only at that instant that the shock became fatal. Contrary to plaintiffs' assertion, Dr. Klingler, a witness for the plaintiffs, did not conclude that it was the act of shutting the power off that caused Mr. Skinner's death:

> *Q. [attorney for the defendant]*: Is it your opinion that if the operating mechanism on this switch had been insulated, that Mr. Skinner would not have been electrocuted?
>
> *A. [Dr. Klingler]*: I just don't know. He may have received an extreme shock. He may still have been electrocuted.
>
> I don't know. I can't say about that.

Dr. Klingler also admitted that his testimony was speculative. When asked if Mr. Skinner could have been electrocuted before he had a chance to reach for the switch, Klingler replied, "Oh, sure." Similarly, the pathologist who conducted an autopsy, Dr. Kallet, testified that Mr. Skinner had already completed the circuit by the time he grabbed for the switch, with the current entering his right hand and exiting through the balls of his feet. We find no basis for relief on this issue.

Finally, plaintiffs contend that a question of fact exists regarding whether defendant was negligent in failing to place a warning label on the defective switch box. Our finding that plaintiffs have not shown that the defect was a proximate cause of the accident renders this issue moot.

Affirmed.

JANSEN, P.J., concurred.

MICHAEL J. KELLY, J. *(dissenting).* I respectfully dissent.

It does not require citation of authorities to posit that in Michigan the red-, black-, bold-letter law with regard to proximate cause is that it is a question of fact to be decided by a jury. Doubts about remoteness, intervening acts, and superseding causes almost invariably present questions for the jury. There are two exceptions: when reasonable minds cannot differ, and when the relation between the defect and the injury involves mere conjecture, not reasonable inference. Only in such cases does proximate cause become a question for the court.

In this case, the majority adopts defendant's arguments in its brief to the effect that Mr. Skinner could not have been misled by the ambiguity of the switch, because the machine was on and was therefore rotating, and the motor was so loud that plaintiffs' decedent *could not have thought the machine was off.* Such claims are fact-dependent and fact-disputed. We are not reviewing a trial. This was a summary disposition. If the trial court had viewed the evidence in the light most favorable to plaintiffs, then the majority would not have been misled by defendant's brief into assuming that this cumbersome, Rube Goldberg machine was rotating, tumbling, and roaring at the critical time when plaintiffs' decedent was engaged in his usual, customary, and normal procedures for reversal of the drum rotation. Reversal of rotation of the drum was a three-step process. First, the electric power to the motor had to be cut off using the switch manufactured by defendant. Next, two of

the three wires that ran to the motor had to be reversed. A three-phase power source was used and three wires ran from the switch. At the end of each wire was an insulated "alligator clip." Each clip would be attached to one of the three leads from the motor. In order to reverse the motor, two of the three clips would be reversed on the leads from the motor. As the third and final step, the switch would be thrown back to the on position for current to flow to the motor and turn the drum. The only testimony with regard to Mr. Skinner's activity in that regard was from his own employees who testified that Mr. Skinner had the reputation of being careful around the shop, and that he always shut off the switch before he reversed the alligator clips.

In *Mulholland v DEC Int'l Corp,* 432 Mich 395, 415; 443 NW2d 340 (1989), the Supreme Court stated:

> A plaintiff in a product liability action need not offer evidence which positively excludes every other possible cause. It is enough that the plaintiff establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support.

Neither defendants nor the majority have obviated plaintiffs' theory and the inferences to be drawn from the testimony of the plaintiffs' witnesses. It was plaintiffs' theory that Mr. Skinner looked at the switch and, because of its ambiguous position, believed it to be off. He then grasped the clips and was electrocuted because the switch was, in fact, on. To be sure, there are inconsistencies in the testimony of the witnesses. The witnesses did not make clear whether the machine was operating after the Skinners returned from dinner, but it

was clearly established by experts for both parties that the power could be on with the switch in an ambiguous position, the tumbler not turning, and the motor not running, because the reversible wires were disconnected. Those are the wires that decedent was holding onto when the witnesses responded to his screams. It does not take a journeyman electrician, let alone a distinguished professor, to make sense of that possible occurrence.

At the hearing with regard to the motion for summary disposition, defendant's attorney admitted, for purposes of the hearing, that the switch was defective. Until that time, plaintiffs' heavy guns were loaded to show a defect. The trial court was misdirected into deciding a question of fact concerning contributory or comparative negligence that, although the court might be very apt at anticipating a jury decision regarding the question, was inappropriately decided. The motion was decided by the trial court over the telephone, and it ruled:

> Plaintiff has produced no evidence to show a specific fact issue to support his theory that the switch somehow caused plaintiff's decedent's death.

Although pictures of the switch and of the tumbling machine were part of the trial exhibits, it is obvious that the trial court did not have the benefit of the demonstration of the ambiguity of the Square D on-off switch handle that was presented to this Court at oral argument. Ambiguous is a bull's-eye description of that switch handle. Plaintiffs presented a plausible theory supported by the testimony, exhibits, and inferences that presented a question for the jury. It was not for the trial court to decide "the responsibility of the

Square D Company in regards to this." Proximate cause is a question for the jury.

Recently, in *Hickey v Zezulka (On Resubmission),* 439 Mich 408; 487 NW2d 106 (1992), the Supreme Court held that a Michigan State University Department of Public Safety officer charged with negligence and civil rights violations was entitled to a comparative negligence charge regarding the jail suicide of the plaintiff's decedent.[1] I do not analogize that Mr. Skinner was guilty of an intentional wrongful act such as was Mr. Hickey, but the trial court's encroachment on the jury's prerogative in this case seems to posit some such intentional and wilful misconduct. It is of course contrary to the testimony of the plaintiffs' witnesses and, in fact, construes the defendant's claims in the light most favorable to defendant. Defendant's alternative claims were that Mr. Skinner, somehow in the process of climbing up or down off a pallet, slipped and fell, grabbing the hot wires or that he was trying to reverse the direction of the tumbling machine without first turning off the power. Neither of those theories relies on the motion-commotion noise influence relied on by the majority. The parties deposed five experts, each of whom testified with regard to his theory of the circumstances surrounding Mr. Skinner's fatal accident. In three of those theories there is support for plaintiffs' position that the physical circumstances combined with the admittedly defective, ambiguous, switch to present a paradigm accident waiting to happen. Questions of proximate cause and comparative negligence were for the jury.

I would reverse.

---

[1] "[P]laintiff's complaint alleged negligence, gross negligence, and intentional and grossly negligent acts in violation of Hickey's civil rights under 42 USC 1983." *Hickey, supra,* 417.

In re ROSEBUSH

Docket No. 111082. Submitted October 8, 1991, at Detroit. Decided September 8, 1992, at 9:15 A.M.

Francis and Jacqueline Rosebush petitioned the Oakland Circuit Court for an order allowing the discontinuance of artificial means of life support for their minor daughter, Joelle Rosebush. The Oakland County Prosecutor, who earlier obtained a preliminary injunction against such action, responded in opposition. Joelle, at age ten, had been left in a persistent vegetative state after her spinal cord was severed and she suffered a heart attack as a result of trauma sustained in an automobile accident. Although her brain stem was not destroyed and she was not "brain dead" as defined by MCL 333.1021 *et seq.*; MSA 14.15(1021) *et seq.*, her physicians believed that she would never regain consciousness or be able to breathe on her own. The court, Richard D. Kuhn, J., entered the order sought by the petitioners. The prosecutor appealed.

The Court of Appeals *held:*

Minors and other legally incompetent individuals have the right to decline life-sustaining medical treatment. The parents of a minor may act as surrogates in the exercise of that right upon considering the minor's expressed preference, if any, or best interests. Judicial involvement in the decision to withhold or withdraw life-sustaining treatment for a minor need occur only where the parties directly concerned disagree about treatment, or where other appropriate reasons are established for a court's involvement.

1. Michigan recognizes and adheres to the common-law doctrine of informed consent, a logical corollary of which provides that a person has the right to decline any and all forms of medical intervention, including lifesaving or life-prolonging treatment. The right to refuse lifesaving medical treatment is not lost because of incompetence or youth. Inasmuch as minors lack the legal capacity to make decisions concerning their

---

REFERENCES

Am Jur 2d, Death §§ 578, 605.

Power of court to order or authorize discontinuation of extraordinary medical means of sustaining human life. 79 ALR3d 237.

medical treatment and their parents speak for them in matters of medical treatment, parents may act as their minor children's surrogates in making decisions concerning treatment, including the decision whether to withdraw or withhold lifesaving or life-prolonging measures.

2. It is the public policy of this state to respect the roles played by patient, family, physician, and spiritual adviser in the process of deciding medical treatment. Accordingly, judicial intervention in the process of deciding whether to withhold or withdraw life-sustaining treatment for a minor is proper only where there is disagreement among parties directly concerned, or where compelled by other appropriate reasons.

3. The parents of a minor, in deciding whether life-sustaining treatment should be withheld or withdrawn, are subject either to the "substituted judgment" standard or the "best interests" standard. Where the minor was of mature judgment and it can be ascertained what choice the minor would have made, the substituted judgment standard applies, and the parents must make the decision on the basis of what the minor would have decided if able to do so. Where the minor was immature and it cannot be ascertained what choice the minor would have made, the parents must make a good-faith determination of whether the withholding of life-sustaining treatment would serve the minor's best interests. Factors relevant to that determination include, but are not limited to: the minor's present level of physical, sensory, emotional, and cognitive functioning; the degree of physical pain resulting from the medical condition, treatment, and termination of the treatment; the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for recovery with and without treatment; various treatment options; and the risks, side effects, and benefits of each of those options.

4. MCL 333.1021 *et seq.*; MSA 14.15(1021) *et seq.*, which provides that death of a person receiving life-sustaining treatment occurs upon the irreversible cessation of spontaneous brain functions, governs the determination of when such a person dies. The act does not prevent the removal of life-support apparatus until the patient has been declared brain dead.

5. Criminal liability for homicide may not be imposed on the parents or the physician of a minor from whom life-sustaining medical treatment is withheld. Criminal agency as the cause of death, a necessary element of homicide, is lacking in such instance because the decision to withhold treatment is autho-

rized under common law and the withholding of life-sustaining treatment does not cause death, but merely allows the injury or illness to take its natural and inevitable course.

Affirmed.

SAWYER, J., dissenting in part, stated that the formulation of guidelines for the removal of life-support systems in cases other than this is a legislative function that the judiciary, pursuant to the constitutional principle of separation of powers, should not undertake.

PARENT AND CHILD — MEDICAL TREATMENT OF MINORS — WITHHOLDING OR WITHDRAWAL OF LIFE-SUSTAINING TREATMENT.

The common-law doctrine of informed consent accords the parents of a minor the right to determine whether life-sustaining treatment should be withheld or withdrawn from the minor; in making a decision, the parents should consider the minor's preference or best interests; judicial involvement in the decision-making process may occur only where the parties directly concerned disagree about treatment, or where other appropriate reasons compel such involvement.

Vlcko, Lane, Payne & Broder, P.C. (by *Andrew J. Broder* and *Lynn Stevens Naoum*), for the petitioners.

Richard Thompson, Prosecuting Attorney, *Robert C. Williams,* Chief, Appellate Division, and *Michael J. Modelski,* Assistant Prosecuting Attorney, for the respondent.

Amici Curiae:

Joseph P. Zanglin, for Right to Life of Michigan, Inc.

Kerr, Russell & Weber (by *Richard D. Weber* and *Joanne Geha Swanson*), for Michigan State Medical Society.

Dykema Gossett (by *Bettye S. Elkins, Kathleen McCree Lewis, Teresa A. Brooks,* and *Daniel R. Shemke*), for Michigan Hospital Association.

Jaffe, Snider, Raitt & Heuer, P.C. (by *Brian G. Shannon*), for American Academy of Neurology.

Giles R. Scofield and *Fenella Rouse* (*Groves, Decker & Wyatt* by *David M. McCleary,* of Counsel), for Society for the Right to Die, Inc., and Concern for Dying, Inc.

Before: MACKENZIE, P.J., and SAWYER and JANSEN, JJ.

MACKENZIE, P.J. This is an appeal from an order allowing petitioners, the parents of Joelle Rosebush, to authorize the removal of life-support systems for their minor daughter. Although the issues raised in this appeal were rendered technically moot upon Joelle's death, appellate review is nevertheless appropriate because the issues involve questions of public significance that may recur and yet evade review. *Highland Recreation Defense Foundation v Natural Resources Comm,* 180 Mich App 324, 327; 446 NW2d 895 (1989). See also *In re LHR,* 253 Ga 439; 321 SE2d 716 (1984); *In re Lawrance,* 579 NE2d 32, 37 (Ind, 1991); *In re Guardianship of Hamlin,* 102 Wash 2d 810; 689 P2d 1372 (1984).

I

Joelle Rosebush was born on May 20, 1976. On January 12, 1987, she was involved in a traffic accident. Her spinal cord was severed at the C-1 level, just below the skull, and she went into cardiac arrest. The spinal cord injury left Joelle completely and irreversibly paralyzed from the neck down and unable to breathe without a respirator. The lack of oxygen during cardiac arrest destroyed most, if not all, of Joelle's cerebral functions, and left her in a persistent vegetative

state. It was uncontroverted that Joelle would never regain consciousness and would never be able to breathe on her own. Joelle's brain stem was not destroyed, however, and her injuries did not leave her "brain dead" as defined under Michigan law. See MCL 333.1021 *et seq.*; MSA 14.15(1021) *et seq.*

Joelle was hospitalized at William Beaumont Hospital of Royal Oak until June, 1987. In spite of the prognosis of no recovery and Joelle's steadily deteriorating condition, petitioners, hopeful of future improvement in Joelle's condition, rejected the option of discontinuing life-support at that time. Joelle was then moved to the Neurorehabilitation Center at the Georgian Bloomfield Nursing Home. By March 1988, it became clear to petitioners that Joelle's condition had not improved and that she would never progress from her vegetative condition. Petitioners then decided to authorize the removal of life-support systems. This decision was made after consultation with Joelle's treating physicians, the staff of the Neurorehabilitation Center, the family's Catholic priest, and the family's attorney.

In March 1988, Joelle's medical case manager sought the assistance of doctors at Children's Hospital of Michigan—Detroit in effectuating petitioners' decision to discontinue life-support. The bioethics committee at Children's Hospital subsequently authorized Joelle's transfer to that facility for further evaluation. The transfer was blocked, however, after staff members at the Neurorehabilitation Center contacted respondent, who obtained an ex parte temporary restraining order, and later a preliminary injunction, prohibiting Joelle's transfer or the removal of life-support systems.

Following seven days of trial, the court dissolved the preliminary injunction and authorized peti-

tioners "to make any and all decisions regarding the medical treatment received by their daughter, including but not limited to, the authority to order the removal of the ventilator that sustains Joelle's respiratory functions." Joelle died on August 13, 1988, shortly after her respirator was deactivated.

II

A

Courts variously have found a right to forego life-sustaining medical treatment on the basis of three sources: (1) the common-law right to freedom from unwanted interference with bodily integrity, (2) the constitutional right to privacy or liberty, or (3) statute. See generally, Meisel, *The Right to Die* (New York: Wiley Law Publications, 1989), pp 49-54. We hold that, in Michigan, there is a right to withhold or withdraw life-sustaining medical treatment as an aspect of the common-law doctrine of informed consent.[1] The trial court did not err in determining that petitioners had the legal authority to order the removal of life-support systems.

B

Michigan recognizes and adheres to the common-law right to be free from nonconsensual physical invasions and the corollary doctrine of informed consent. Accordingly, if a physician treats or operates on a patient without consent, the physician has committed a battery and may be required to respond in damages. *Zoski v Gaines,* 271 Mich 1, 9-10; 260 NW 99 (1935); *Young v*

[1] This disposition makes it unnecessary to decide the validity of the constitutional or statutory bases in Michigan.

Oakland Gen Hosp, 175 Mich App 132, 139; 437 NW2d 321 (1989); *Banks v Wittenberg,* 82 Mich App 274, 279-280; 266 NW2d 788 (1978).

The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, the right to refuse medical treatment and procedures. *Werth v Taylor,* 190 Mich App 141, 145; 475 NW2d 426 (1991). Thus, a competent adult patient has the right to decline any and all forms of medical intervention, including lifesaving or life-prolonging treatment. *Id.,* citing *Cruzan v Director, Missouri Health Dep't,* 497 US —; 110 S Ct 2841; 111 L Ed 2d 224 (1990), and *In re Quinlan,* 70 NJ 10; 355 A2d 647 (1976).[2]

The right to refuse lifesaving medical treatment is not lost because of the incompetence or the

[2] It is generally recognized, however, that the right to refuse life-sustaining treatment may, in rare cases, be outweighed by countervailing state interests. Four such state interests have been identified: (1) the preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide, and (4) the maintenance of the ethical integrity of the medical profession. See *In re Guardianship of Grant,* 109 Wash 2d 545; 747 P2d 445 (1987), modified 757 P2d 534 (1988); Meisel, *supra,* pp 96-100; anno: *Judicial power to order discontinuance of life-sustaining treatment,* 48 ALR4th 67. Nevertheless, when dealing with incompetent patients for whom there is no medical probability of substantial recovery, as in this case, courts have found that countervailing state interests do not preclude recognition of the right to have life-sustaining treatment discontinued. "Therefore, the state's interest in the preservation of life has been held to be insufficient to outweigh the individual right where the life which would be preserved would be one in a merely vegetative state or one enduring only a prolonged process of dying . . . and the state interest in the prevention of suicide has been seen as inapplicable or insignificant where there was no intent to die and where death would be the result of natural processes. . . . Similarly, the state interest in the protection of third parties has been held to be inapplicable or insignificant where no third parties were dependent upon the patient in question or where affected third parties themselves supported termination of treatment. . . . Finally, the state's interest in maintaining the ethical integrity of the medical profession has been held not to preclude recognition of an individual's right to discontinuance of life-sustaining treatment where prevailing standards of medical ethics do not condemn the contemplated course of action." 48 ALR4th, p 73.

youth of the patient. *In re LHR, supra,* p 446.[3] However, because minors and other incompetent patients lack the legal capacity to make decisions concerning their medical treatment, someone acting as a surrogate must exercise the right to refuse treatment on their behalf.[4] See generally, Meisel, *supra,* chs 8 and 13; *Guidelines for State Court Decision Making in Authorizing or Withholding Life-Sustaining Medical Treatment* (Williamsburg, Va: National Center for State Courts, 1991); Younger, ed, *Hospital Law Manual, Attorney's Volume, Volume II,* Dying, Death, and Dead Bodies, pp 28-35 (Rockville, Md: Aspen Publishers, Inc, 1992); anno: *Judicial power to order discontinuance of life-sustaining treatment,* 48 ALR4th 67.

---

[3] See also *In re Guardianship of Grant, supra; Gray v Romeo,* 697 F Supp 580 (D RI, 1988); *Rasmussen v Fleming,* 154 Ariz 207; 741 P2d 674 (1987); *Foody v Manchester Memorial Hosp,* 40 Conn Super 127; 482 A2d 713 (1984); *In re AC,* 573 A2d 1235, 1247 (DC App, 1990); *In re Guardianship of Browning,* 568 So 2d 4 (Fla, 1990); *John F Kennedy Memorial Hosp v Bludworth,* 452 So 2d 921 (Fla, 1984); *Corbett v D'Alessandro,* 487 So 2d 368 (Fla App, 1986), review den 492 So 2d 1331 (Fla, 1986); *Brophy v New England Sinai Hosp, Inc,* 398 Mass 417; 497 NE2d 626 (1986); *In re Spring,* 380 Mass 629; 405 NE2d 115 (1980); *In re Jobes,* 108 NJ 394; 529 A2d 434 (1987); *In re Peter,* 108 NJ 365; 529 A2d 419 (1987); *In re Visbeck,* 210 NJ Super 527; 510 A2d 125 (Ch Div, 1986); *In re Colyer,* 99 Wash 2d 114; 660 P2d 738 (1983); *Barber v Superior Court,* 147 Cal App 3d 1006; 195 Cal Rptr 484 (1983); *Severns v Wilmington Medical Center, Inc,* 421 A2d 1334 (Del, 1980); *In re Guardianship of Barry,* 445 So 2d 365 (Fla App, 1984); *In re PVW,* 424 So 2d 1015 (La, 1982); *Custody of a Minor,* 385 Mass 697; 434 NE2d 601 (1982); *In re Hier,* 18 Mass App 200; 464 NE2d 959 (1984), review den 392 Mass 1102; 465 NE2d 261 (1984); *In re Conservatorship of Torres,* 357 NW2d 332 (Minn, 1984); *In re Clark,* 210 NJ Super 548; 510 A2d 136 (Ch Div, 1986); *Leach v Akron Gen Medical Center,* 68 Ohio Misc 1; 426 NE2d 809 (1980); *In re Guardianship of Ingram,* 102 Wash 2d 827; 689 P2d 1363 (1984); *In re Guardianship of Hamlin, supra; In re Lawrance, supra.*

[4] The advance directive of a mature minor, stating the desire that life-sustaining treatment be refused, should be taken into consideration or enforced when deciding whether to terminate the minor's life-support treatment or refuse medical treatment. See *In re Swan,* 569 A2d 1202 (Me, 1990); *In re EG,* 133 Ill 2d 98; 139 Ill Dec 810; 549 NE2d 322 (1989). Cf. *Bakker v Welsh,* 144 Mich 632; 108 NW 94 (1906).

It is well established that parents speak for their minor children in matters of medical treatment. See *Parham v JR,* 442 US 584; 99 S Ct 2493; 61 L Ed 2d 101 (1979); *Zoski, supra; Bakker v Welsh,* 144 Mich 632; 108 NW 94 (1906). Because medical treatment includes the decision to decline lifesaving intervention, *Werth, supra,* it follows that parents are empowered to make decisions regarding withdrawal or withholding of lifesaving or life-prolonging measures on behalf of their children.[5]

C

Having determined that minors have the same right to decline life-sustaining treatment as their competent adult counterparts, and that parents may act as surrogate decision makers to exercise that right, we next consider what restrictions, if any, should be placed on the parents' decision-making authority and what role, if any, the courts should play in the decision-making process. We hold that the decision-making process should generally occur in the clinical setting without resort to the courts, but that courts should be available to assist in decision making when an impasse is reached. We further hold that, in making decisions for minors or other incompetent patients, surrogate decision makers should make the best approximation of the patient's preference on the basis of available evidence; if such preference was never expressed or is otherwise unknown, the surrogate should make a decision based on the best interests of the patient.

[5] See generally, Meisel, *supra,* ch 13. Of course, where the parents of a minor child for some reason are themselves incompetent to act as surrogate decision makers, and other family members are unavailable or unwilling to act as surrogates, a guardian should be appointed to exercise the minor's rights on behalf of the minor. See Meisel, *supra,* p 417.

D

Our research has found two cases involving the discontinuation of life-sustaining treatment for minor children who were in a persistent vegetative state.[6] In *In re Guardianship of Barry,* 445 So 2d 365 (Fla App, 1984), the parents petitioned to terminate life-support systems for their ten-month-old son, who was permanently comatose. The circuit court granted the petition, and the Florida Court of Appeals affirmed. In so doing, the court stated:

> Where, as here, the parents' informed decision is backed by uncontroverted medical evidence that their young child is terminally ill and that his condition is incurable and irreversible, their decision, we think, overrides any interest of the state in prolonging their child's life through extraordinary measures. We can conceive of no state interest great enough to compel the parents to continue to submit their child to a life support system in this instance. To do so would merely prolong the death of a child terminally ill, wholly lacking in cognitive brain functioning, completely unaware of his surroundings, and with no hope of development of any awareness. The means now being employed are measures which even the physicians testified they would not now initiate given their present knowledge of the situation. It is, we think, the right and the obligation of the parents in such an instance to exercise their responsibility and prerogative, as did Mr. and Mrs. Barry, of making an informed determination as to whether these extraordinary measures should be continued. See *In re Quinlan.* [445 So 2d 371.]

[6] A third case, *In re PVW,* 424 So 2d 1015 (La, 1982), also concerned the removal of a permanently comatose minor from life-support systems. That case is inapposite to this case, however, because it primarily involved the construction of a Louisiana statute allowing the discontinuation of life-support treatment under certain circumstances.

The *Barry* court rejected the state's request that judicial review be required before life-support methods may be withheld from a minor who is not brain dead:

> [W]here, as here, the question concerns a young child, we do not think the parents must always qualify as legal guardians and seek judicial sanctions to discontinue these extraordinary measures. A decision by parents supported by competent medical advice . . . should ordinarily be sufficient without court approval. Of course, diagnosis should always be confirmed by at least two physicians. We must remember that the conscience of society in these matters is not something relegated to the exclusive jurisdiction of the court.
>
> Although judicial intervention need not be solicited as a matter of course, still the courts must always be open to hear these matters on request of the family, guardian, affected medical personnel, or the state. In cases where doubt exists, or there is a lack of concurrence among family, physicians, and the hospital, or if an affected party simply desires a judicial order, then the court must be available to consider the matter. Medical personnel and hospitals may well consider the suggestion made by Dr. Solomon in his testimony that an advisory committee should be available to assist families and physicians in these matters. [445 So 2d 372.]

In *In re LHR, supra,* the parents of an infant in an irreversible chronic vegetative state sought to remove life-support systems from the child, and the hospital treating the child sought a declaratory judgment regarding whether life-support activity could be terminated. The Supreme Court of Georgia concluded that it could, stating:

> We conclude that the right to refuse treatment or indeed to terminate treatment may be exercised

by the parents or legal guardian of the infant after diagnosis that the infant is terminally ill with no hope of recovery and that the infant exists in a chronic vegetative state with no reasonable possibility of attaining cognitive function. The above diagnosis and prognosis must be made by the attending physician. Two physicians with no interest in the outcome of the case must concur in the diagnosis and prognosis. Although prior judicial approval is not required, the courts remain available in the event of disagreement between the parties, any case of suspected abuse, or other appropriate instances.

In the narrow case before us no hospital ethics committee need be consulted. This in no way forecloses use of such a committee if this is the choice of the hospital, physician or family. Once the diagnosis is made that the infant is terminally ill with no hope of recovery and in a chronic vegetative state with no possibility of attaining cognitive function, the state has no compelling interest in maintaining life. The decision to forego or terminate life-support measures is, at this point, simply a decision that the dying process will not be artificially extended. While the state has an interest in the prolongation of life, the state has no interest in the prolongation of dying, and although there is a moral and ethical decision to be made to end the process, that decision can be made only by the surrogate of the infant. Since the parents are the natural guardians of the infant, where there are parents no legal guardian and no guardian ad litem need be appointed.

We conclude that the decision whether to end the dying process is a personal decision for family members or those who bear a legal responsibility for the patient. We do not consider this conclusion an abdication of responsibility of the judiciary. While the courts are always available to protect the rights of the individual, the condition of this individual is such that the decision is one to be made by the family and the medical community. As previously noted, the courts remain open to

> assist if there is disagreement between decision makers or question of abuse. [253 Ga 446-447.]

See also Meisel, *supra,* chs 6 and 8; *Guidelines for State Court Decision Making, supra,* pp 101-122. But see *Superintendent of Belchertown State School v Saikewicz,* 373 Mass 728; 370 NE2d 417 (1977).

We agree with the principles set forth in *Barry* and *In re LHR.* After the trial court's decision in this case, our Legislature enacted MCL 700.496; MSA 27.5496, which allows competent adults to appoint a patient advocate to make medical-treatment decisions, including the withdrawal of life-sustaining treatment, on their behalf. While the statute provides for judicial intervention under certain limited circumstances, we believe that this legislation demonstrates that the overriding public policy of this state is to respect the roles played by the patient, family, physicians, and spiritual advisors in the making of decisions regarding medical treatment, as well as the policy that courts need not delve into that decision-making process unless necessary to protect the patient's interests. Although the legislation applies only to competent adults, we are satisfied that the public policy of judicial nonintervention also extends to decisions concerning the medical treatment of incompetent persons and minors. *In re LHR, supra.* We therefore hold that, in general, judicial involvement in the decision to withhold or withdraw life-sustaining treatment on behalf of a minor or other incompetent patient need occur only when the parties directly concerned disagree about treatment, or other appropriate reasons are established for the court's involvement. See *Guidelines for State Court Decision Making, supra,* pp 101-122.

E

While the decision of a competent adult patient regarding the cessation of life-sustaining measures will generally control that patient's care, a different standard must necessarily guide the surrogate of an incompetent patient, including the parent of an immature minor child, where the incompetent or the minor has never expressed his wishes. Two basic standards have evolved for surrogates to decide whether to withdraw or withhold consent to life-sustaining treatment: the "substituted judgment" standard and the "best interests" standard.[7] See generally, *Guidelines for State Court Decision Making, supra,* pp 72-78; Meisel, *supra,* ch 9.

Under the substituted judgment standard, the surrogate exercising an incompetent patient's rights must make the decision whether to forego life-sustaining treatment on the basis of what the patient would have decided had the patient been able to do so. Meisel, *supra,* p 278. The parameters of the standard were concisely set forth in *In re Conroy,* 98 NJ 321, 365; 486 A2d 1209 (1985):

> Under the limited-objective test, life-sustaining treatment may be withheld or withdrawn from a patient in Claire Conroy's situation when there is some trustworthy evidence that the patient would have refused the treatment, and the decision-maker is satisfied that it is clear that the burdens outweigh the benefits of that life for him. By this we mean that the patient is suffering, and will continue to suffer throughout the expected dura-

[7] Respondent suggests a third standard, based on the presence of clear and convincing evidence that the incompetent patient made a firm and informed decision, while competent, to forego life-sustaining treatment under similar circumstances. We summarily reject this standard, because its adoption would always preclude the termination of life-support efforts for minors and other persons who have never been legally competent, in direct contradiction of the right to refuse medical treatment. Compare *In re Guardianship of Hamlin, supra.*

> tion of his life, unavoidable pain, and that the net burdens of his prolonged life (the pain and suffering of his life with the treatment less the amount and duration of pain that the patient would likely experience if the treatment were withdrawn) markedly outweigh any physical pleasure, emotional enjoyment, or intellectual satisfaction that the patient may still be able to derive from life. This limited-objective standard permits the termination of treatment for a patient who had not unequivocally expressed his desires before becoming incompetent, when it is clear that the treatment in question would merely prolong the patient's suffering.

Under the proper circumstances—where a patient was formerly competent or is a minor of mature judgment—the substituted judgment standard is an appropriate test. See *Guidelines for State Court Decision Making, supra,* pp 72-83. However, as applied to immature minors and other never-competent patients, the substituted judgment standard is inappropriate because it cannot be ascertained what choice the patient would have made if competent. Meisel, *supra,* p 275. See also *In re Guardianship of Barry, supra,* pp 370-371; *In re LHR, supra,* p 444; *Rasmussen v Fleming,* 154 Ariz 207; 741 P2d 674 (1987). We therefore conclude that, where the patient has never been competent, the decision-making test that better guides the surrogate is the best interests standard.

The best interests standard was summarized in *In re Guardianship of Grant, supra,* as follows:

> There will be many situations where it cannot be ascertained what choice the patient would make if competent. In such cases, the guardian must make a good-faith determination of whether the withholding of life sustaining treatment would

> serve the incompetent patient's best interests. The following is a nonexclusive list of the factors which should be considered in making this determination:
>
> [E]vidence about the patient's present level of physical, sensory, emotional, and cognitive functioning; the degree of physical pain resulting from the medical condition, treatment, and termination of the treatment, respectively; the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for recovery with and without treatment; the various treatment options; and the risks, side effects, and benefits of each of those options.
>
> *Conroy,* 98 NJ at 397, 486 A2d 1209 (Handler, J. concurring in part and dissenting in part). [109 Wash 2d 567-568.]

The trial court in this case properly recognized the best interests standard as an appropriate standard to use in deciding whether to remove life-support systems for Joelle.

III

Respondent has suggested that the determination of death act, MCL 333.1021 *et seq.*; MSA 14.15(1021) *et seq.*, precludes the removal of a patient's life-support apparatus until after the patient has been determined to be brain dead. We agree with the trial court's conclusion, that "the statute only addresses one question: is the patient dead, so that life-support may be disconnected without fear of liability?"

The determination of death act provides:

> A person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice in the community, there is the irreversible cessation of spontaneous

> respiratory and circulatory functions. If artificial means of support preclude a determination that these functions have ceased, a person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice in the community, there is the irreversible cessation of spontaneous brain functions. Death will have occurred at the time when the relevant functions ceased. [MCL 333.1021; MSA 14.15(1021).]
>
> Death is to be pronounced before artificial means of supporting respiratory and circulatory functions are terminated. [MCL 333.1022; MSA 14.15(1022).]
>
> The means of determining death in section 1 shall be used for all purposes in this state, including the trials of civil and criminal cases. [MCL 333.1023; MSA 14.15(1023).]

Courts may look to the legislative history of an act, as well as the time during which the act was passed, to ascertain the reason for the act and the meaning of its provisions. *People v Hall,* 391 Mich 175, 191; 215 NW2d 166 (1974). In the case of the determination of death act, the legislation was a response to the problem that, with the advances in life-sustaining medical technology, the traditional indicia of death—lack of pulse or breathing—were no longer meaningful when artificial life-support means were used. "[T]he concern of the drafters, as evinced by the legislative history cited to the court, was to provide a clear benchmark, a bright line test to be used by physicians for determining the time of death of persons who are maintained on life-support apparatus." *Crobons v Wisconsin National Life Ins Co,* 594 F Supp 379, 384 (ED Mich, 1984), aff'd 790 F2d 475 (CA 6, 1986).

We hold that the determination of death act was intended only to determine when a person receiving life-sustaining treatment has died. It was not

intended to prevent the removal of life-support apparatus until a patient has been declared brain dead.

IV

Respondent has also suggested that the termination of life-support treatment for Joelle should subject petitioners and Joelle's doctors to criminal liability for homicide.

No court has reached the conclusion that the withholding or withdrawal of life-sustaining measures should be a ground for imposition of criminal liability. Meisel, *supra,* pp 57-58; anno: *Homicide: Physician's withdrawal of life supports from comatose patient,* 47 ALR4th 18. See also Uniform Rights of the Terminally Ill Act, § 10(a), 9B ULA 609, 620. The trial court in this case declined to impose criminal liability, and we agree.

The corpus delicti of a felonious homicide consists of a death and the existence of criminal agency as its cause. *People v Mondich,* 234 Mich 590, 593-594; 208 NW 675 (1926). The decision to withdraw or withhold consent to life-sustaining treatment and the implementation of such a decision does not amount to criminal agency because the decision and its implementation are authorized under the common law. Moreover, the implementation of a decision to terminate life-support treatment is not the cause of the patient's subsequent death. Instead, the discontinuance of life-support measures merely allows the patient's injury or illness to take its natural and inevitable course. See *In re Guardianship of Grant, supra,* p 564. As stated in *In re Welfare of Colyer,* 99 Wash 2d 114, 123; 660 P2d 738 (1983), "[a] death which occurs after the removal of life sustaining systems is from natural causes, neither set in motion nor intended

by the patient" or the patient's surrogate. The trial court did not err in refusing to impose criminal liability for the removal of Joelle's life-support systems.

Affirmed.

JANSEN, J., concurred.

SAWYER, J. *(concurring in part and dissenting in part).* While I agree that Judge Kuhn properly allowed removal of the life-support system in the case at bar, I cannot agree with the majority's formulation of guidelines to govern future cases of this nature.

It is a well-settled principle of constitutional law that government is divided into three branches: the legislative, executive, and judicial. Const 1963, art 3, § 2; *Int'l Union v Michigan,* 194 Mich App 489, 499; — NW2d — (1992). The Michigan Constitution provides that no person exercising the powers of one branch shall exercise powers properly belonging to one of the others, except as expressly provided. Const 1963, art 3, § 2. I believe that the majority's pronouncement of guidelines addressing cases beyond the one at bar is dangerously close to a usurpation of powers properly belonging to the Legislature. Accordingly, I would limit our holding in this case to the decision as it affects Joelle Rosebush.

Courts in foreign jurisdictions have recognized the unique policy and societal implications of removing the life-support system of a person in a persistant vegetative state. See *In re Conroy,* 98 NJ 321; 486 A2d 1209 (1985); *In re Storar,* 52 NY2d 363; 420 NE2d 64 (1981). Because of the complex and sensitive nature of issues that are related to the removal of life-support systems, these courts urged that judicial policy making give

way to the legislative process in order to insure that the interests of the constituency are served. *Id.* Similarly, this Court has recognized that where moral and public policy matters are at issue, intermediate appellate judges should forgo their desire to create new law in favor of the legislative process. *Proffitt v Bartolo,* 162 Mich App 35, 58; 412 NW2d 232 (1987) (evaluation of wrongful birth and life claims).

I believe that this case presents a task too large in scope and important in effect for this Court to establish guidelines that will dictate future activity in this area. Perhaps Justice POTTER best explained the separation of powers doctrine in *In re Fowarding Co,* 294 Mich 57; 292 NW 678 (1940), when he stated:

> There is a distinction between legislative and judicial acts. The Legislature makes the law—courts apply it. To enact laws is an exercise of legislative power; to interpret them is an exercise of judicial power. To declare what the law shall be is legislative; to declare what it is or has been is judicial. The legislative power prescribes rules of action. The judicial power determines whether, in a particular case, such rules of action have been transgressed. The legislature prescribes rules for the future. The judiciary ascertains existing rights. [*Forwarding, supra* at 63 (quoting from Justice POTTER's dissent in *In re Application of Consolidated Freight Co,* 265 Mich 340, 343; 251 NW 431 (1933).]

While I agree with the majority's recognition of the parental right to refuse medical treatment for an incompetent child, I hesitate to prescribe rules for future cases that concern such important public policy and societal concerns.

MERETTA v PEACH

Docket No. 130227. Submitted March 5, 1992, at Lansing. Decided September 8, 1992, at 9:20 A.M.

Leonard V. Meretta brought an action in the Livingston Circuit Court against Janet J. Peach, Great Lakes Federal Savings, and Dennis J. and Cheryl K. Fend, seeking to foreclose Peach's mortgage. Peach had financed the purchase of her house through Commerce Mortgage Corporation, which assigned the note and mortgage to Commerce Mortgage Investments, Ltd., an affiliate of Diamond Mortgage Company. Commerce Mortgage Investments, Ltd., assigned the mortgage and note to A.J. Obie, Inc., which assigned them to Meretta as security for his investments. Meretta was aware of a servicing agreement between Commerce Mortgage Investments, Ltd., and Diamond that authorized Diamond to collect principal and interest due on mortgages. Peach sold the property to the Fends. Great Lakes closed the transaction and made a prepayment of the mortgage to Diamond, but Diamond was adjudged bankrupt and never paid Meretta the amount owing. When the Fends refused Meretta's demand for payment, he initiated this action. The court, Stanley J. Latreille, J., granted summary disposition for Meretta, finding as a matter of law that Diamond was not authorized to accept the prepayment of the mortgage held by Meretta. The defendants appealed.

The Court of Appeals *held:*

Questions of fact exist with regard to whether Diamond acted as Meretta's agent, whether it is the usual practice in the mortgage industry for servicing companies to accept prepayments, whether Meretta had knowledge of the practice, and whether Diamond had apparent authority to accept prepayment of the mortgage on behalf of Meretta. A genuine issue of material fact also existed with regard to whether Meretta is estopped from denying that Diamond had apparent authority to accept prepayments. Summary disposition was inappropriate in this case.

Reversed and remanded.

Andrew S. Muth, P.C. (by *James K. Fett* and *Andrew S. Muth*), for the plaintiff.

McGinty, Brown, Jakubiak, Frankland, Hitch & Henderson, P.C. (by *Charles E. Henderson*), for the defendants.

Before: MARILYN KELLY, P.J., and MCDONALD and G. S. ALLEN,* JJ.

MARILYN KELLY, P.J. This case arose out of the collapse of the Diamond Mortgage Company. Plaintiff was the assignee of defendant Peach's mortgage. After the assignment, Peach paid off the mortgage in full. The prepayment was made through the servicing company, Diamond Mortgage, which failed to forward it to plaintiff before going bankrupt. Plaintiff brought this action to foreclose on Peach's mortgage. The trial judge granted him summary disposition.

Defendants argue on appeal that Diamond Mortgage had actual or apparent authority to accept prepayment of the mortgage. They argue also that payments they made prior to receiving actual notice of the mortgage's assignment effected a pro tanto discharge of the mortgage. Also, since the note was not properly executed, plaintiff's security interest was lost. Finally, Peach is entitled to credit for payments she made to the servicing agent until notified to pay another. We reverse.

Defendant Peach financed the purchase of her house though Commerce Mortgage Corporation. Commerce assigned the note and mortgage to Commerce Mortgage Investments, Ltd. (CMI), an affiliate of Diamond Mortgage. CMI assigned the mortgage and note to A.J. Obie, Inc., which assigned them to plaintiff as security for his investments. Plaintiff considered Obie, CMI, and Diamond to be one and the same. In fact their mailing

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

addresses were identical. Plaintiff was aware of the servicing agreement between CMI and Diamond which authorized Diamond to collect principal and interest due on mortgages.

In time, defendants Dennis and Cheryl Fend purchased the Peach property from Peach. Defendant Great Lakes Federal Savings and Loan closed the transaction between Peach and the Fends and made the prepayment of the mortgage to Diamond Mortgage. Diamond Mortgage filed bankruptcy, never turning over to plaintiff the amount owing. After discovering Diamond's fraud, plaintiff demanded payment from the Fends and then initiated this action to foreclose on the Peach mortgage.

Defendants argue initially that the trial court erred in granting summary disposition, because Diamond Mortgage had actual or apparent authority as plaintiff's agent to receive a prepayment of the mortgage. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. Courts are liberal in finding a genuine issue of material fact. *St Paul Fire & Marine Ins Co v Quintana,* 165 Mich App 719, 722; 419 NW2d 60 (1988). Where there is a disputed question of agency, any testimony, either direct or inferential, tending to establish agency creates a question of fact for the jury to determine. *Jackson v Goodman,* 69 Mich App 225, 230; 244 NW2d 423 (1976), citing *Miskiewicz v Smolenski,* 249 Mich 63, 70; 227 NW 789 (1929).

An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account. 1 Restatement Agency, 2d, § 15, p 82. The test of whether an agency has been created is whether the principal has a right to control the actions of the agent. *Little v Howard*

Johnson Co, 183 Mich App 675; 455 NW2d 390 (1990).

In this case, a fact question exists concerning whether Diamond acted as plaintiff's agent. A jury could find that plaintiff had control over Diamond, since he could have terminated Diamond's collection activities. That fact was evidenced by a showing that, at the time in question, he was collecting payments from another mortgagor, directly.

The authority of an agent to bind the principal may be either actual or apparent. Actual authority may be express or implied. Implied authority is the authority which an agent believes he possesses. After the agency relationship and the extent of the agent's authority have been shown, the principal has the burden of proving that the agent's authority was limited. 3 Am Jur 2d, Agency, § 359, p 870.

An agent has implied authority from his principal to do business in the principal's behalf in accordance with the general custom, usage and procedures in that business. See 1 Restatement Agency, 2d, § 36, p 124. However, the principal must have notice that the customs, usages and procedures exist. *Id.*

In the case on appeal, defendants argue that it is a usual practice in the mortgage industry for servicing companies to accept prepayments. Whether this custom does in fact exist and whether plaintiff had knowledge of it are fact questions not properly disposed of in a motion for summary disposition.

Moreover, there exists in this case a genuine issue of material fact as to whether Diamond Mortgage had apparent authority. Apparent authority may arise when acts and appearances lead a third person reasonably to believe that an

agency relationship exists. 3 Am Jur 2d, Agency, § 19, p 524.

Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. *Smith v Saginaw Savings & Loan Ass'n,* 94 Mich App 263, 271; 288 NW2d 613 (1979). In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. *Id.* The question here is whether an ordinarily prudent person, conversant with mortgage lending, would be justified in assuming Diamond had the authority to accept prepayment of the mortgage. *Id.,* 271-272.

Plaintiff argues that no apparent authority could exist, because he had recorded the assignment of the mortgage; a reasonable person would have made the prepayment only to the noteholder.

However, plaintiff's recording does not answer the question whether Diamond Mortgage had authority to accept prepayments for plaintiff. Defendants were never given notice that they were required to forward payments directly to plaintiff as opposed to his servicing agent. A question of fact exists whether, based on plaintiff's actions, defendants were reasonable in their belief that Diamond had authority to accept the prepayment.

Finally, there is a genuine issue of material fact as to whether plaintiff is estopped from denying that Diamond Mortgage had apparent authority to accept prepayments.

> Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal the particular act, and

such particular act has been performed, the principal is estopped from denying the agent's authority to perform it. [*Central Wholesale Co v Sefa,* 351 Mich 17, 26-27; 87 NW2d 94 (1957), citing *Faber v Eastman, Dillon & Co,* 271 Mich 142, 145; 259 NW 880 (1935).]

Based on our conclusion that summary disposition was inappropriate in this case, we decline to address defendants' remaining issues.

Reversed and remanded. We do not retain jurisdiction.

PEOPLE v FIORILLO

Docket No. 133510. Submitted May 6, 1992, at Lansing. Decided September 8, 1992, at 9:25 A.M.

Louis J. Fiorillo, who owns and operates a pharmacy in Isabella County, was charged in the Ingham Circuit Court with Medicaid and health care fraud following the execution in Isabella County of a search warrant issued by the 55th District Court in Ingham County. The circuit court, James T. Kallman, J., quashed the information, ruling in part that the search warrant was invalid because it was issued and executed in different counties. The prosecution appealed.

The Court of Appeals *held:*

There are no constitutional or statutory provisions preventing the district court from issuing a search warrant to be executed outside the county of its issuance.

1. Const 1963, art 6, § 1 provides that the judicial power of the state is vested exclusively in one court of justice divided into the Supreme Court, the Court of Appeals, the circuit court, the probate court, and courts of limited jurisdiction as may be established by the Legislature.

2. The statute under which the district court was created established one district court divided into administrative units called judicial districts and conferred it with jurisdiction that is not limited territorially. Because there is only one district within the state, there is no need for explicit statutory authorization allowing the district court to issue statewide search warrants.

Reversed and remanded.

COURTS — DISTRICT COURT — SEARCH WARRANTS.

A search warrant issued by a district court may be executed in any county within the state (Const 1963, art 6, § 1; MCL 600.8101[1]; MSA 27A.8101[1]).

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

REFERENCES

Am Jur 2d, Searches and Seizures §§ 71, 107.

See the Index to Annotations under Search and Seizure.

Casey, Solicitor General, and *Ronald W. Emery,* Assistant Attorney General, for the people.

Hall & Lewis (by *John W. Lewis*), for the defendant on appeal.

Before: WAHLS, P.J., and MARILYN KELLY and REILLY, JJ.

MARILYN KELLY, J. This is a case of first impression. The prosecution appeals, arguing that the circuit court erred in ruling that a search warrant issued by a district court can be executed only in the county of issuance. Its alternative issue is that, even if the search warrant were invalid, the evidence was properly seized. We reverse.

Defendant owns and operates a pharmacy in Isabella County. The prosecutor filed a complaint in the 55th District Court, Ingham County, charging defendant with health care and Medicaid fraud. MCL 752.1003(1); MSA 28.547(103)(1); MCL 400.607(1); MSA 16.614(7)(1). The crimes charged can be prosecuted in Ingham County. MCL 400.611(1); MSA 16.614(11)(1). The prosecutor obtained the evidence against defendant pursuant to a search warrant issued in Ingham County and executed in Isabella County.

After the district court bound defendant over for trial, the circuit court quashed the information, finding the search warrant invalid. The judge remanded to the district court, instructing it to determine whether sufficient evidence existed to bind over defendant absent the illegally seized evidence. On remand, the prosecution argued that the stricken evidence was admissible based either on the inevitable discovery doctrine or on defendant's lack of privacy in the items seized. The district court again bound defendant over for trial.

The circuit court then quashed the information and dismissed the case.

On appeal, the prosecution argues that there is no constitutional or statutory provision limiting the district court's authority to issue a search warrant for execution outside its territorial boundaries. It reasons, therefore, that a warrant issued in one county can be executed outside the county of issuance and that the district court has statewide jurisdiction to issue search warrants. The Michigan Constitution provides:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house. [Const 1963, art 6, § 1.]

Defendant argues that the statutory language chosen, "courts of limited jurisdiction," means the limitation applies to territory as well as subject matter.

However, the statutes interpreting the limited jurisdiction of the district court do not limit the territory.[1] The statute creating the district court refers to the court in the singular and states that the court is divided into administrative units called judicial districts. MCL 600.8101(1); MSA 27A.8101(1). The Michigan Supreme Court has recognized that Michigan has but one district court. *Judges of the 74th Judicial Dist v Bay Co,* 385 Mich 710, 723; 190 NW2d 219 (1971).

In contrast, the statute conferring jurisdiction

[1] See MCL 600.8301; MSA 27A.8301; MCL 600.8302; MSA 27A.8302; MCL 600.8306; MSA 27A.8306; MCL 600.8308; MSA 27A.8308; MCL 600.8311; MSA 27A.8311.

on the Detroit Recorder's Court limits its jurisdiction to crimes committed within the corporate limits of the City of Detroit. MCL 725.10a; MSA 27.3950(1). See also MCL 726.11; MSA 27.3561, repealed by 1980 PA 440, § 5; *People v Washington,* 134 Mich App 504, 509; 351 NW2d 577 (1984). Likewise the repealed statute conferring jurisdiction on the Common Pleas Court in Detroit gave it the same jurisdiction as the justices of the peace had before the courts were consolidated. MCL 728.1 *et seq.*; MSA 27.3651 *et seq.*, repealed by 1972 PA 211, § 1; 1980 PA 438, § 5. The jurisdiction of justices of the peace was limited to the township or city in which they were elected. MCL 600.6601; MSA 27A.6601, repealed by 1974 PA 297, § 2.

Unlike the Detroit Recorder's Court and the abolished Common Pleas Court of Detroit, the statutes conferring jurisdiction on the district court are not territorially limited. Likewise, the statute governing the issuance of search warrants does not limit the authority of the warrants territorially. MCL 780.651; MSA 28.1259(1).

No constitutional or statutory limits exist which prevent the district court from issuing search warrants to be executed outside the county of issuance. Since there is only one district court within the state, there is no need for explicit statutory authorization allowing the district court to issue statewide search warrants. We conclude that the circuit court erred in suppressing the evidence and quashing the information.

Based on our disposition of this matter, we decline to address the prosecution's alternative theory on appeal.

Reversed and remanded to the circuit court for trial. We do not retain jurisdiction.

WILSON v LEAGUE GENERAL INSURANCE COMPANY

Docket No. 128931. Submitted June 2, 1992, at Detroit. Decided September 8, 1992, at 9:30 A.M. Leave to appeal sought.

Tamatha F. Wilson brought an action in the Wayne Circuit Court against League General Insurance Company, seeking no-fault benefits pursuant to a policy issued to her mother, Wanda Henson, a Michigan resident. The plaintiff was injured in Tennessee when she lost control of an automobile she had purchased in Texas while attending college there. The accident occurred while she was driving from Texas to her mother's home in Michigan. The plaintiff had not obtained insurance for the vehicle, was not listed on her mother's policy, and allegedly considered her permanent residence to be with her mother in Michigan. The court, Claudia House Morcom, J., granted summary disposition for the defendant. The plaintiff appealed.

The Court of Appeals *held:*

1. MCL 500.3113(b); MSA 24.13113(b) clearly and unambiguously states that the owner of a vehicle involved in an accident is not entitled to personal protection insurance benefits where security for the payment of such benefits, required by MCL 500.3101; MSA 24.13101, was not in effect at the time of the accident. MCL 257.216; MSA 9.1916 does not provide that the requirements of § 3113(b) are applicable only to cars driven on Michigan highways.

2. Assuming the plaintiff's contention that she is a resident relative of her mother to be true, she cannot be a nonresident for purposes of MCL 500.3102; MSA 24.13102. Therefore, her argument that registration was unnecessary under § 3113(b) because of the provisions of § 3102 must be rejected.

Affirmed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — FAILURE TO INSURE.

The owner or registrant of a motor vehicle involved in an

REFERENCES

Am Jur 2d, Automobile Insurance §§ 35, 356.

Effect of statutory exclusion, from personal injury protection of no-fault insurance coverage, of owner, registrant, or occupant of uninsured vehicle. 27 ALR4th 176.

accident is precluded from recovery of no-fault personal protection insurance benefits where the security required by §§ 3101 or 3103 of the no-fault act was not in effect with respect to the vehicle at the time of the accident; the section of the Vehicle Code that provides that every motor vehicle, when driven or moved upon a highway, is subject to the registration and certification of title provisions of the code does not limit the requirements of § 3113(b) only to cars driven on Michigan highways (MCL 257.216, 500.3101, 500.3103, 500.3113[b]; MSA 9.1916, 24.13101, 24.13103, 24.13113[b]).

Logeman, Connors & Bredell, P.C. (by *Robert E. Logeman* and *Lynn Marie Bredell*), for the plaintiff.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. (by *James L. Borin* and *Daniel S. Saylor*), for the defendant.

Before: SAWYER, P.J., and MURPHY and L. P. BORRELLO,* JJ.

MURPHY, J. Plaintiff appeals from an order of the circuit court granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm.

This action arises from a single-car automobile accident in which plaintiff was severely injured. Plaintiff was at that time attending college in Texas. While in Texas, she purchased a used automobile.[1] She did not obtain insurance for the vehicle.[2]

On July 2, 1988, while driving the car from Texas to her mother's home in Michigan, plaintiff

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

[1] Ownership of the vehicle is undisputed. Plaintiff's attorney acknowledged at oral argument that his client was the owner of the vehicle.

[2] Plaintiff does not dispute that the vehicle was involved in the accident in question, nor does she claim that there was in effect the security required by MCL 500.3101; MSA 24.13101.

lost control of her car in a rainstorm in Tennessee and struck a bridge pillar. She sustained serious injuries.

At the time of the accident, plaintiff's mother, Wanda Henson, was insured by a no-fault insurance policy issued by defendant. Plaintiff was not listed on the policy. Plaintiff, however, allegedly considered her permanent residence to be with her mother in Michigan.

Defendant denied coverage for the accident, and plaintiff filed this action, alleging that she was entitled to no-fault benefits under the policy. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) on the ground that plaintiff was not entitled to no-fault benefits. The circuit court granted the motion.

Plaintiff contends that she is entitled to no-fault benefits for her injuries pursuant to MCL 500.3111; MSA 24.13111 because she is a resident relative of Wanda Henson. Defendant contends, however, that, even if plaintiff is a resident relative of Ms. Henson, she is precluded from recovery of benefits pursuant to MCL 500.3113; MSA 24.13113, which provides, in pertinent part:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

Thus, if plaintiff was the owner or registrant of the vehicle involved in the accident, and the security required by § 3101 or 3103 was not in effect

with respect to that vehicle, then she is precluded from recovery of personal protection insurance benefits. *Childs v American Commercial Liability Ins Co,* 177 Mich App 589, 592; 443 NW2d 173 (1989); *Laskowski v State Farm Mutual Automobile Ins Co,* 171 Mich App 317, 324; 429 NW2d 887 (1988).

Plaintiff contends, however, that § 3113(b) bars her recovery only if she was required under § 3101 to register, and therefore insure, the vehicle in Michigan. Section 3101 provides, in pertinent part:

> (1) The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway. [MCL 500.3101; MSA 24.13101.]

Plaintiff contends that only vehicles operated on the highways in Michigan are subject to the registration and insurance requirements of the Michigan no-fault act because § 216 of the Vehicle Code, MCL 257.216; MSA 9.1916, provides, in pertinent part:

> Every motor vehicle . . . , when driven or moved upon a highway, shall be subject to the registration and certificate of title provisions of this act.

Plaintiff also contends that she was not required to register her vehicle until the vehicle had been present in Michigan for thirty days, pursuant to MCL 500.3102; MSA 24.13102, which provides, in pertinent part:

> (1) A nonresident owner or registrant of a motor

> vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to this chapter.

We reject plaintiff's interpretation of § 3113(b) and MCL 257.216; MSA 9.1916. The Legislature is presumed to have intended the meaning plainly expressed in a statute. If the meaning of statutory language is clear, judicial construction is unnecessary and not permitted. *Rosner v Michigan Mutual Ins Co,* 189 Mich App 229, 231; 471 NW2d 923 (1991).

The language of § 3113(b) clearly and unambiguously states that the owner of a vehicle involved in an accident, where the vehicle had no security required by § 3101 at the time of the accident, is not entitled to personal protection insurance benefits. See *Coffey v State Farm Mutual Automobile Ins Co,* 183 Mich App 723, 730; 455 NW2d 740 (1990); *Childs, supra.* MCL 257.216; MSA 9.1916 does not specifically limit the requirements of § 3113(b) of the no-fault act only to cars driven on Michigan highways. Because the language of § 3113(b) is unambiguous, we will not read additional provisions into the language. Further, to so interpret the language would produce the absurd result that a person who is covered by a no-fault policy in this state could own and fail to insure several other vehicles in other states and still be permitted to recover under the one insurance policy for accidents occurring in the other states involving the vehicles for which security had not been obtained.

We also reject plaintiff's argument that registration was unnecessary under § 3113(b) because of

the provisions of § 3102. Plaintiff contends that she is a resident relative of Wanda Henson, who lives in Michigan. Assuming this to be true, plaintiff cannot then be a nonresident for purposes of MCL 500.3102; MSA 24.13102.

Affirmed.

PAVLOV v COMMUNITY EMERGENCY MEDICAL SERVICE, INC

Docket No. 129847. Submitted June 15, 1992, at Detroit. Decided September 8, 1992, at 9:35 A.M. Leave to appeal sought.

Galena Pavlov, as personal representative of the estate of Aleksandr Pavlov, deceased, brought a negligence action in the Oakland Circuit Court against Community Medical Service, Inc., and two of its advanced emergency medical technicians who, before the decedent's fatal heart attack, had examined him for shortness of breath and pain but did not transport him to a hospital. The court, Steven N. Andrews, J., granted summary disposition for the defendants, determining them to be immune from liability pursuant to the emergency medical services act, MCL 333.20737; MSA 14.15(20737), now MCL 333.20965; MSA 14.15(20965). The plaintiff appealed.

The Court of Appeals *held:*

Emergency medical technicians are immune from liability for acts or omissions in rendering services, outside a hospital and consistent with their training, unless the acts or omissions are the result of gross negligence or wilful misconduct. The trial court properly granted summary disposition for the defendants in view of the plaintiff's insufficient allegations of gross negligence and wilful misconduct.

1. The immunity granted by § 20737 to emergency medical technicians applied only to care rendered in emergency situations. An emergency, as defined by MCL 333.20703(1); MSA 14.15(20703)(1), existed throughout the period during which the defendants rendered care to the decedent.

2. The trial court did not err in summarily dismissing the plaintiff's claim of wilful misconduct. The plaintiff failed to present evidence that the defendants had intended to harm the decedent when they treated him.

3. Gross negligence occurs where a plaintiff's prior negligence puts the plaintiff in a position of danger and the defendant's subsequent negligence causes the plaintiff's injury. In this case,

REFERENCES

Am Jur 2d, Negligence §§ 209, 213 *et seq.*, 243-246.

See the Index to Annotations under Negligence; Intentional, Wilful, and Wanton Acts.

the plaintiff failed to offer evidence of prior negligence by the decedent. The trial court properly dismissed the plaintiff's claim of gross negligence.

Affirmed.

MICHAEL J. KELLY, J., concurring, stated that in the context of this case gross negligence is more properly defined as conduct so reckless as to demonstrate a substantial lack of concern for whether injury results, and that, under that definition, the defendants were not grossly negligent.

NEGLIGENCE — EMERGENCY MEDICAL TECHNICIANS — GROSS NEGLIGENCE — WILFUL MISCONDUCT.

Emergency medical technicians are immune from liability unless their acts or omissions are the result of gross negligence or wilful misconduct; wilful misconduct is established upon proof that the emergency medical technician intended to harm a patient; gross negligence is established upon proof that a patient's prior negligence put the patient in a position of danger and that the technician's subsequent negligence caused injury to the patient (MCL 333.20737; MSA 14.15[20737], now MCL 333.20965; MSA 14.15[20965]).

Lopatin, Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick (by *Lee R. Franklin*), for the plaintiff.

Galbraith & Booms (by *Steven B. Galbraith* and *Kevin S. Oliver*), for the defendants.

Before: JANSEN, P.J., and MICHAEL J. KELLY and CORRIGAN, JJ.

CORRIGAN, J. In this negligence action, plaintiff Galena Pavlov appeals as of right from the trial court's grant of summary disposition based on defendants' immunity under the former emergency medical services act (EMSA), MCL 333.20701 *et seq.*; MSA 14.15(20701) *et seq.*[1] We affirm.

Plaintiff and her forty-one-year-old husband Aleksandr were visiting friends on the night of

[1] The former emergency medical services act was repealed and reenacted. 1990 PA 179, codified at MCL 333.20901-20979; MSA 14.15(20901)-(20979).

June 19, 1988, when Mr. Pavlov, who had been drinking alcohol and swimming, began experiencing shortness of breath. After someone called 911, an emergency medical services (EMS) unit was dispatched to the house. The EMS crew found Mr. Pavlov lying down, "complaining of shortness of breath and pain radiating to the left arm." He was given oxygen. An advanced EMS (AEMS) team (defendants Robert Latrielle and Christopher Newell) arrived and performed an electrocardiogram (EKG). The results were normal. The AEMS team removed the oxygen mask and Mr. Pavlov appeared to improve. When he asked if he should be seen by a doctor, defendants replied that he should. Mr. Pavlov said that his family would take him and he signed a release form, waiving transportation to a hospital. Defendants left the premises. Plaintiff then briefly left the room. She returned to find Mr. Pavlov lying on the floor in full cardiac arrest. EMS personnel were summoned again and attempted resuscitation without success. Mr. Pavlov was later declared dead at a local hospital.

Plaintiff timely filed a three-count complaint against the two AEMS technicians and their private employer. She alleged negligence, wilful and wanton misconduct, and gross negligence. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendants asserted immunity under the then governing provisions of the EMSA because plaintiff had failed to state a claim of either wilful misconduct or gross negligence that would avoid the statutory bar. The trial court granted defendants' motion as to all three counts.

I. IMMUNITY UNDER THE EMERGENCY MEDICAL SERVICES ACT

At the time plaintiff's claim arose, Michigan

expressly excepted emergency medical personnel from negligence claims relating to the performance of their duties. The applicable statute provided:

> When performing services consistent with the individual's training, acts or omissions of an . . . emergency medical technician, emergency medical technician specialist, or advanced emergency medical technician, do not impose liability on those individuals in the treatment of a patient when the service is performed outside a hospital. . . . *All persons named in this section . . . are protected from liability unless the act or omission was the result of gross negligence or wilful misconduct.* [MCL 333.20737; MSA 14.15(20737);[2] emphasis added.]

Plaintiff argues that § 20737 grants EMS technicians immunity only when they are acting in emergencies and that defendants' actions in failing to transport the decedent to a hospital ended the "emergency" and "preclude[s] them from claiming statutory immunity from liability . . . ." We disagree.

The statutory scheme itself provided a definition of "emergency." MCL 333.20703(1); MSA 14.15(20703)(1) read:

> "Emergency" means a condition or situation in which an individual declares a need for immediate medical attention for any individual, or where that need is declared by emergency medical personnel or a public safety official. Upon arrival at a scene of an emergency, and after direct communication with the medical control authority and approval of

[2] This section was added to the Public Health Code by 1981 PA 79, § 1. The entire emergency medical services act was repealed effective July 2, 1990, but reenacted in substantially similar form as 1990 PA 179.

> the medical control authority, an individual licensed under this part or a health professional licensed under article 15 who possesses training specific to the provision of emergency medical services, may declare that an emergency no longer exists and transportation by an ambulance is not necessary.

The undisputed evidence reflects that an emergency existed when defendants arrived at the home of the plaintiff's host. EMS had been summoned by a call to the local emergency system via 911. Thus, "an individual [had] declare[d] a need for immediate medical attention for [an] individual [decedent]." The emergency was never declared at an end "after direct communication with the medical control authority and approval of the medical control authority." Indeed, no evidence whatever suggests that defendants attempted "direct communication with the medical control authority" as defined by MCL 333.20705(2); MSA 14.15(20705)(2).

The statutory grant of immunity under MCL 333.20737; MSA 14.15(20737) applies only to care rendered in emergency situations. *Knight v Limbert,* 170 Mich App 410, 414; 427 NW2d 637 (1988). Defendants' first encounter with the decedent was plainly an emergency situation. The emergency was not terminated under the statutory procedure. Therefore, § 20737 was applicable and defendants are immune from liability. The trial court correctly granted defendants' motion for summary disposition of this count.

II. DEFENDANTS' ACTS DID NOT CONSTITUTE WILFUL MISCONDUCT

Plaintiff next claims that defendants' action in removing the oxygen mask may "rise to the level of" wilful misconduct and strip defendants of the

protection of MCL 333.20737; MSA 14.15(20737). We cannot agree.

It has been long established in Michigan law that mere negligence cannot be cast as "wilfulness" simply for the purposes of bringing a complaint. As the Supreme Court said over a century ago, in rejecting a negligence claim:

> The allegation that defendant [acted] willfully . . . implies that the act was done with a set purpose to accomplish the results which followed the act. It involves more than negligence; it implies malice. [*Montgomery v Muskegon Booming Co,* 88 Mich 633, 644; 50 NW 729 (1891).]

Wilful means intentional. *McKimmy v Conductors Protective Assurance Co,* 253 Mich 521, 523; 235 NW 242 (1931). Wilfulness "transcends negligence—[it is] different in kind." *Gibbard v Cursan,* 225 Mich 311, 320; 196 NW 398 (1923); *Finkler v Zimmer,* 258 Mich 336, 341; 241 NW 851 (1932). "The term 'wilful' implies intention, but wilful misconduct lies somewhere between intentional conduct and ordinary negligence." *Serra v DeMaestri,* 66 Mich App 171, 175; 238 NW2d 568 (1975) (child's intentional tort). Or, in the words of another panel of this Court, "willful negligence is quasi-criminal and manifests an intentional disregard to another's safety." *Papajesk v Chesapeake & O R Co,* 14 Mich App 550, 556; 166 NW2d 46 (1968).

Plaintiff here, however, relies on authority construing the phrase "wilful and wanton misconduct." We think the two differ significantly. "Wanton" conduct is "reckless," conduct that "amounts to" wilful injury, see, e.g., *LaCroix v Grand Trunk W R Co,* 379 Mich 417, 424; 152 NW2d 656 (1967), but without intent. As the Supreme Court said in

discussing *Gibbard, supra,* conduct that shows "such indifference to whether harm will result as to be the equivalent of a willingness that it does" fits the "wanton" prong of the "wilful and wanton" standard. *Burnett v City of Adrian,* 414 Mich 448, 455; 326 NW2d 810 (1982). A standard that permits liability for "wilful and wanton conduct" is less restrictive than one that confines liability to "wilful" conduct alone. The former allows liability when the defendant is so careless as to, in effect, intend harm, but the latter requires that intent actually be present.

We cannot accept plaintiff's invitation to engraft onto the statute a standard that is not included in its plain language. We do not possess that legislative power and authority. The governing statute employs only the words "wilful misconduct." Had the Legislature wished to expand the potential liability of emergency medical services providers, it could have used the phrase "wilful and wanton" as it appears in, for example, the recreational users statute, MCL 300.201; MSA 13.1485.[3] The Legislature is deemed to be aware of the existence of the law in effect at the time of its enactments. *Malcolm v East Detroit,* 437 Mich 132, 139; 468 NW2d 479 (1991).

Plaintiff has produced no evidence supporting an allegation that defendants intended to harm the decedent when they treated him on June 19, 1988. Plaintiff's counsel conceded as much at oral argument in the lower court, and defendants cite statements by several of plaintiff's witnesses that defendants did not intend the decedent any harm.

Further, plaintiff's complaint against defendants Latrielle and Newell sounds only in ordinary negligence, despite her references in the complaint to

[3] See, e.g., *Lucchesi v Kent Co Road Comm,* 109 Mich App 254, 259-268; 312 NW2d 86 (1981).

"wilful misconduct." Defendants were accused of "failing to properly assess [the decedent's] condition," "failing to provide emergency medical treatment," and generally failing to use "ordinary care." Alternatively, defendants allegedly showed "reckless and heedless disregard" of the decedent's needs. Defendants are immune from charges of ordinary negligence (see discussion in part I, *supra*) and we have declined to read "wilful misconduct" as "wilful and wanton misconduct," thus eliminating the "reckless and heedless disregard" counts. The trial court correctly dismissed this count pursuant to MCR 2.116(C)(8).

III. DEFENDANTS' ACTS DID NOT CONSTITUTE GROSS NEGLIGENCE

Few aspects of negligence law have proven more frustrating to this state's courts than the construction of the term "gross negligence." The history of this problem was reviewed extensively in *LaCroix v Grand Trunk, supra* at 422-428, but a few words here are appropriate.

"Gross negligence" should be seen in its historical context. It was intended as a plaintiff's doctrine, borrowed from other jurisdictions to avoid the bar of contributory negligence. In *Gibbard, supra,* for example, the plaintiff's decedent a schoolgirl, was killed by a truck as she was walking on the side of the road. For unknown reasons, when she heard the truck approach, she jumped into the truck's path instead of jumping off the road. Under contributory negligence principles, the plaintiff might have been precluded from recovering. By invoking the doctrine of "gross negligence," the Court could turn liability back onto the defendant:

> When will gross negligence of a defendant ex-

> cuse contributory negligence of a plaintiff? In a case where the defendant, who knows, or ought, by the exercise of ordinary care, to know, of the *precedent negligence* of the plaintiff, by his *subsequent negligence* does plaintiff an injury. . . .
>
> The theory of gross negligence is that the antecedent negligence of plaintiff only put him in a position of danger and was therefore only the remote cause of the injury, while the subsequently intervening negligence of the defendant was the proximate cause. [225 Mich 319; citations omitted, emphasis in original.]

The *Gibbard* definition has remained unaltered, despite the adoption in Michigan of comparative negligence (*Placek v Sterling Heights,* 405 Mich 638; 275 NW2d 511 [1979]) and the dissatisfaction with its misuse noted even in *Gibbard, supra* at 321. See, e.g., *Papajesk, supra* at 555. Our Supreme Court specifically declined an opportunity to redefine the phrase in *Burnett, supra* at 455-456, stating that it preferred to wait for a case with a "fully developed factual record." *Id.* at 456.

Gross negligence may be decided as a matter of law if the evidence unquestionably shows its existence. *Shepherd v Barber,* 20 Mich App 464, 466; 174 NW2d 163 (1969). The record here does not reflect gross negligence *as defined in the Gibbard/Burnett line of authority,* i.e., the decedent's antecedent negligence. This Court continues to apply that requirement; see, e.g., *Abraham v Jackson,* 189 Mich App 367, 372; 473 NW2d 699 (1991) (emergency medical technicians transporting patient); *McNeal v DNR,* 140 Mich App 625, 632; 364 NW2d 768 (1977) (maintenance of state park); *Grasser v Fleming,* 74 Mich App 338, 348; 253 NW2d 757 (1977), overruled on other grounds 430 Mich 262, 279; 422 NW2d 657 (1988) (plaintiff "helplessly intoxicated" when served by defendant).

In light of the state of the substantive law on this issue, we are unable to say that the lower court erred in applying the *Gibbard/Burnett* definition to this case. Cf. *In re Bay Co Prosecutor,* 102 Mich App 543, 549; 302 NW2d 225 (1980); *Marshall v Pech,* 95 Mich App 454; 291 NW2d 78 (1980). Furthermore, we are bound to apply that definition because another panel of this Court retained it in *Abraham, supra* at 372. *Abraham* was published in 1991 and so is controlling under Administrative Order No. 1990-6, 436 Mich lxxxiv.

In addition, case law plainly requires that the plaintiff must plead gross negligence correctly if the claim is to be addressed. "In order to properly allege gross negligence, plaintiffs must plead defendants' subsequent negligence." *Mallory v Detroit,* 181 Mich App 121, 125; 449 NW2d 115 (1989), another case construing MCL 333.20737; MSA 14.15(20737). The panel in *Malcolm v East Detroit,* 180 Mich App 633, 643; 447 NW2d 860 (1989), applied the same rule: "[F]or a gross negligence claim to be actionable it must allege that the defendant's negligent conduct occurred subsequent to some negligent conduct on the part of the plaintiff."[4] The Supreme Court reversed the *Malcolm* decision on other grounds, but did not address the definition of "gross negligence" because the plaintiff failed to raise it on cross appeal. 437 Mich 132, 147-148; 468 NW2d 479 (1991). See also *Abraham, supra* at 372.

Plaintiff, however, urges us to ignore the definition of gross negligence set out in *Malcolm, Mal-*

[4] Plaintiff has attempted to remedy this deficiency by pointing to Aleksandr Pavlov's obesity and cigarette smoking as his "precedent negligence." As the trial court noted, however, the decedent's health habits were unknown to defendants at the time they attended to him. In any event, we seriously question whether smoking and overeating are examples of "antecedent negligence" as that term has been used in Michigan law.

lory, and *Abraham* and apply instead the standard found in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c), which provides that " 'gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Plaintiff asks that we construe the EMSA in pari materia with the government tort liability act[5] (GTLA). While we recognize that the Supreme Court did construe the two statutes together in its analysis of *Malcolm* (see 437 Mich 145), the focus of that decision was on the imposition of vicarious liability under those acts. The Court did not simply engraft part of the GTLA onto the EMSA, as plaintiff would have us do here.

Statutes are in pari materia when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object. *Richardson v Jackson Co,* 432 Mich 377, 384; 443 NW2d 105 (1989), citing 2A Sands, Sutherland Statutory Construction (4th ed), § 51.03 (governmental immunity act and marine safety act). An act is not in pari materia with another act, even if it incidentally refers to the same subject, if the scope and aim of the two acts are distinct and unconnected. *Palmer v State Land Office Bd,* 304 Mich 628, 636; 8 NW2d 664 (1943). See also, e.g., *Dome Pipeline Corp v Public Service Comm,* 176 Mich App 227, 232; 439 NW2d 700 (1989) (definitions of "gas" in various acts).

Contrary to plaintiff's assertion, the immunity provisions of the EMSA and the GTLA are not in pari materia when, as here, the defendants are not governmental employees. That is, although both sections refer to the same subject—immunity from liability—their "scope and aim," *Palmer, supra,* are "distinct and unconnected." They do not "re-

[5] 1964 PA 170, codified at MCL 691.1401-1415; MSA 3.996(101)-(115).

late to . . . the same class of persons . . . or have the same purpose or object," *Richardson, supra,* when the potential defendants are not public employees. MCL 691.1407; MCL 3.996(107) broadly grants immunity to all public employees to make it possible for governments to operate relatively free from the fear of liability for unpopular decisions. The stated purpose of the GTLA was to "define and limit" liability of governmental units. By contrast, 1981 PA 79, which added § 20737 to the Public Health Code, amended 1978 PA 368, which was described as "[a]n act to protect and promote the public health . . . ." The Legislature presumably made the coverage of § 20737 broad enough to encourage the development of EMS systems, whether public or private, so as to maximize the availability of such services to the public. We will not disturb that effort by importing into the EMSA the definition of gross negligence specifically crafted for the GTLA[6] when it is not the actions of

[6] We have identified thirty-four Michigan statutes that employ the term "gross negligence." Only MCL 691.1407; MSA 3.996(107) inserts its own definition. See MCL 29.7c; MSA 4.559(7c) (fire fighters); MCL 30.407(5); MSA 4.824(17)(5) (director of emergency management); MCL 30.411(3); MSA 4.824(21)(3) (disaster relief personnel); MCL 30.432(2); MSA 13.31(72)(2) (hazardous waste spills, volunteers); MCL 41.711a; MSA 5.160(1) (ambulance drivers, attendants, police, fire fighters); MCL 299.612a(6), (10)(b), (11)(a), (12)(a); MSA 13.32(12a)(6), (10)(b), (11)(a), (12)(a); MCL 299.613(2)(a); MSA 13.32(13)(2)(a) (hazardous waste, various persons); MCL 300.201(1),(2); MSA 13.1485(1),(2) (recreational land users); MCL 316.605(6); MSA 13.1350(605)(6) (lessors of hunting lands); MCL 317.176; MSA 13.1482(6) (recreational trespass); MCL 330.1427b(2); MSA 14.800(427b)(2) (officer taking persons into protective custody); MCL 330.1439; MSA 14.800(439) (person filing treatment petition under Mental Health Code); MCL 333.6508(2); MSA 14.15(6508)(2) (treatment of substance abusers); MCL 333.9203(3); MSA 14.15(9203)(3) (free immunizations); MCL 333.20965; MSA 14.15(20965) (providers of emergency medical services); MCL 338.981(1)(c); MSA 18.86(11)(1)(c) (mechanical contractors); MCL 339.604(e); MSA 18.425(604)(e) (violations of occupational code); MCL 339.2715(a); MSA 18.425(2715)(a) (optometrists); MCL 380.1178; MSA 15.41178 (administration of medication to students); MCL 484.1604; MSA 22.1467(604) (emergency telephone/telegraph operators); MCL 487.1707(1)(c); MSA 23.1189(707)(1)(c) (officers of financial institutions);

governmental employees that are at issue. Such a step is for the Supreme Court or the Legislature.

The trial court correctly dismissed plaintiff's gross negligence count.

Affirmed. Costs to defendant.

JANSEN, P.J., concurred.

MICHAEL J. KELLY, J. *(concurring).* I concur in the result reached by Judge CORRIGAN, principally because of the uncompelling context within which plaintiff seeks to avoid the immunity afforded the emergency medical technicians by the emergency medical services act.

I believe that viewing the plaintiff's claims in the light most favorable to her, she has failed to supply a factual basis for treating the advanced emergency medical technicians as being guilty of "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). I opt for that definition of gross negligence because that is the only definition that makes sense in the context of emergency medical service. To use a fashionable term, it is ludicrous to attempt to portray human suffering and trauma inflicted by the forces of nature or society as negligence in order to establish gross negligence as defined by case law. The

MCL 500.2124(2); MSA 24.12124(2) (automobile insurers, issuance of policies); MCL 500.2130(2); MSA 24.12130(2) (automobile insurers, exchange of information); MCL 554.455(4)(e); MSA 27.3178(241.25)(4)(e) (custodians of minors' accounts); MCL 559.154(6); MSA 26.50(154)(6) (officers of condominium associations); MCL 600.5839(1); MSA 27A.5839(1) (architects, engineers, and contractors); MCL 691.1407; MSA 3.996(107) (governmental units, employees, etc.); MCL 691.1501(1),(2); MSA 14.563(1),(2) (physicians and nurses, competitive sports); MCL 691.1503; MSA 14.563(13) (medical personnel, emergency care and immunizations); MCL 691.1504(1); MSA 14.563(14)(1) (CPR, volunteers); MCL 691.1505(1); MSA 14.563(15)(1) (block parents); MCL 691.1507; MSA 14.563(17) (ski patrols); MCL 700.173(5); MSA 27.5173(5) (personal representative of estate); MCL 700.553(2); MSA 27.5553(2) (fiduciaries).

Supreme Court has signaled its intention to set this scheme aright in *Burnette v City of Adrian,* 414 Mich 448; 326 NW2d 810 (1982), and *Malcolm v East Detroit,* 437 Mich 132; 468 NW2d 479 (1991), but I do not anticipate that this is the case that will supply the factual basis for a new "best effort" by the Supreme Court. The most critical fault plaintiff has to offer is that the removal of the oxygen mask was fatal, but the medical reason for that removal is easily explicable as reasonable treatment for hyperventilation, for which the use of oxygen is contraindicated. No testimony supports the inference that the fire department EMS team, which were the first arrivals, were any better equipped to afford medical diagnosis and emergency treatment than the advanced EMS team; that the latter was misguided, misled, abused, or confused by the former; that the EKG or other tests were grossly misinterpreted, or that Messrs. Latrielle and Newell made anything more than a commonplace medical misjudgment.

I would be gratified to see the Legislature insert the government tort liability act definition of gross negligence in the present version of the emergency medical services act, MCL 333.20901 *et seq.*; MSA 14.15(20901) *et seq.* I agree with plaintiff that the pre-*Placek v Sterling Heights,* 405 Mich 638; 275 NW2d 511 (1979), case law definitions of gross negligence are obsolete.

BEDKER v DOMINO'S PIZZA, INC

Docket No. 126784. Submitted May 21, 1992, at Detroit. Decided September 8, 1992, at 9:45 A.M.

Robert Bedker, as next friend of Scott M. Bedker, a minor, brought an action in the Wayne Circuit Court against Domino's Pizza, Inc., RPM Pizza, Inc., and Thomas Monaghan, alleging sex discrimination under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, after his employment was terminated because his hair did not conform to the defendants' grooming policy that required men to cut their hair at or above the collar. The court, John A. Murphy, J., granted summary disposition for the defendants. The plaintiff appealed.

The Court of Appeals *held:*

1. Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.*, is substantially the same as Michigan's Civil Rights Act with regard to sex discrimination provisions. Therefore, federal case law interpreting title VII is persuasive authority for resolving cases brought under the Michigan act. Federal courts have held that sex-differentiated hair-length grooming requirements do not constitute sex discrimination under title VII.

2. Title VII protection does not encompass those characteristics not inherently immutable, such as different grooming standards for men and women. Title VII was not intended to interfere with grooming policies that have no significant effect upon the employment opportunities afforded one sex in favor of the other. Title VII may be violated when the grooming code that applies to each sex is not equally burdensome or when the overall grooming code is not enforced in an evenhanded manner.

3. There is no allegation in this case that each sex's individual grooming requirements were not enforced evenhandedly or that the overall grooming policy burdens one sex more than the other so as to favor the employment of one sex.

4. Because the defendants' grooming standards would not

REFERENCES

Am Jur 2d, Civil Rights § 146.

Employer's enforcement of dress or grooming policy as unlawful employment practice under § 703(a) of Civil Rights Act of 1964 (42 USCS § 2000e-2(a)). 27 ALR Fed 274.

violate title VII, they do not violate Michigan's Civil Rights Act.

Affirmed.

CIVIL RIGHTS — SEXUAL DISCRIMINATION — EMPLOYMENT — SEX-DIFFERENTIAL GROOMING REQUIREMENTS.

Sex-differential hair-length grooming requirements for employment do not constitute sexual discrimination under the Michigan Civil Rights Act; the act is violated where the grooming code that applies to each sex is not equally burdensome and favors the employment of one sex over the other or where the overall grooming code is not enforced in an evenhanded manner; a grooming standard that does not violate title VII of the federal Civil Rights Act of 1964 does not violate the sexual discrimination provisions of the Michigan Civil Rights Act (42 USC 2000e *et seq.*; MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*).

Kelman, Loria, Downing, Schneider & Simpson (by *Michael L. Pitt*), for the plaintiff.

Miller, Canfield, Paddock & Stone (by *David B. Gunsberg*), for RPM Pizza, Inc.

Pear, Sperling, Eggan & Muskovitz, P.C. (by *Melvin J. Muskovitz* and *Francyne Stacey*), for Domino's Pizza, Inc., and Thomas Monaghan.

Before: MICHAEL J. KELLY, P.J., and MACKENZIE and BRENNAN, JJ.

BRENNAN, J. Plaintiff appeals as of right from a March 8, 1990, order granting defendants summary disposition. Plaintiff filed suit alleging sex discrimination under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, after his employment was terminated because his hair fell below his shirt collar in violation of defendants' grooming policy. We affirm.

Plaintiff began working for RPM Pizza, Inc., a franchise of Domino's Pizza, Inc., in November 1986 as a counter person. At the time plaintiff was

hired, RPM had in place a single grooming policy applicable to both males and females that provided:

> Hair—there shall be no loose hair. All hair is to be restrained by a baseball cap or a hair net is required. Must be tucked under a hat so hair is not on forehead or visible from the front of the hat. Must be at or above the collar.

In order to comply with the policy, men with longer hair would tuck their hair into a cap. In January 1988, in order to comply with Domino's grooming policy, RPM announced that men would now have to cut their hair at or above the collar to be in compliance with RPM's grooming policy. Plaintiff's employment was terminated after he refused to cut his hair in compliance with the policy. A written version of the modified policy was distributed in March 1988.

Plaintiff subsequently filed this suit. Plaintiff's amended complaint alleged that defendants violated the Civil Rights Act when they applied their unisex grooming policy in a disparate manner by requiring only men to cut their hair at or above the collar. Defendants moved for summary disposition, arguing that RPM's policy was modified to provide for sex-specific grooming policies in conformance with Domino's policy and that there was no disparate treatment. The court granted defendants summary disposition, finding that defendants had in place sex-specific policies and that there was no evidence of disparate treatment with respect to enforcement of the sex-specific grooming policies. On appeal, plaintiff argues that the court erred in granting summary disposition because a question of fact existed whether RPM had in place a sex-neutral, rather than a sex-specific, grooming policy

that was applied in a disparate manner when plaintiff was fired. The court apparently granted summary disposition pursuant to MCR 2.116(C)(10). In deciding a motion brought under this subrule, the court must give the benefit of reasonable doubt to the nonmovant and determine whether a record might be developed that would leave open an issue upon which reasonable minds could differ. *Werth v Taylor,* 190 Mich App 141, 145; 475 NW2d 426 (1991).

The issue whether a male-only hair-length grooming requirement constitutes sex discrimination has never been determined by a Michigan court pursuant to Michigan's Civil Rights Act. However, the issue has been addressed by federal courts in regard to title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.* Michigan's Civil Rights Act is substantially the same as title VII with regard to its sex discrimination provisions. This Court has held that federal civil rights cases interpreting title VII are persuasive authority for resolving cases brought pursuant to the Michigan act. *Northville Public Schools v Civil Rights Comm,* 118 Mich App 573, 576; 325 NW2d 497 (1982). A review of the federal case law reveals that it is irrelevant whether a sex-neutral or sex-specific policy is in effect. Federal courts have held that sex-differentiated hair-length grooming requirements do not constitute sex discrimination under title VII. See *Fagan v National Cash Register Co,* 157 US App DC 15; 481 F2d 1115 (1973); *Dodge v Giant Food, Inc,* 160 US App DC 9; 488 F2d 1333 (1973); *Willingham v Macon Telegraph Publishing Co,* 507 F2d 1084 (CA 5, 1975); *Longo v Carlisle DeCoppet & Co,* 537 F2d 685 (CA 2, 1976).[1] The courts, for the most part, found that title VII

[1] These cases represent only a sampling of the numerous cases reaching this result.

protection does not encompass those characteristics not inherently immutable, such as different grooming standards for men and women. The courts reasoned that title VII was never intended to interfere with grooming policies that have no significant effect upon the employment opportunities afforded one sex in favor of the other. See cases cited above. See also 1 Larson, Employment Discrimination, § 41.11, pp 8-112—8-127.[2]

Plaintiff misconstrues the disparate-treatment test in title VII cases. It is irrelevant whether defendants had a sex-specific grooming policy or a unisex grooming policy with an unwritten requirement that men wear their hair cut above the collar. Courts have held that such unwritten policies do not violate title VII. *Miller v Missouri P R Co,* 410 F Supp 533 (WD Mo, 1976). Title VII may, however, be violated when the grooming code that applies to each sex is not equally burdensome or when the overall grooming code is not enforced in an evenhanded manner. Equal Employment Opportunity Commission Compliance Manual, § 619, p 3602,[3] *Dodge, supra,* p 13, *Willingham, supra,* p 1092, and *Knott v Missouri P R Co,* 527 F2d 1249, 1252 (CA 8, 1975). However, see contra *Fountain v Safeway Stores, Inc,* 555 F2d 753 (CA 9, 1977). An example of uneven enforcement of a grooming code would be if an employer has a dress and grooming policy for men and women but only enforces the male hair-length provision. Equal

[2] We note that in 1975, the Michigan Department of Civil Rights issued a policy statement on grooming requirements. The statement reflects recognition of the fact that virtually all courts are reaching a similar decision, that title VII was intended to protect against sex-based discrimination and was not intended to encompass different grooming standards for men and women. The department decided not to continue to accept or process charges of this nature.

[3] We note that EEOC interpretations are entitled to great deference by the courts. *Griggs v Duke Power Co,* 401 US 424, 434-435; 91 S Ct 849; 28 L Ed 2d 158 (1971).

Employment Opportunity Commission Compliance Manual, § 619, p 3602.

In this case, there is no allegation that each sex's individual grooming requirements were not enforced evenhandedly. Further, plaintiff does not contend that the overall grooming policy burdens one sex more than the other so as to favor the employment of one sex over the other.[4] Accordingly, we find that because defendants' grooming standards would not violate title VII, they do not violate Michigan's Civil Rights Act. Therefore, we find that the trial court properly granted defendants summary disposition, albeit for the wrong reason. *Portice v Otsego Co Sheriff's Dep't,* 169 Mich App 563, 566; 426 NW2d 706 (1988). Plaintiff further argues that the trial court erred in finding that defendants had a sex-specific grooming policy in effect at the time of plaintiff's termination. However, this issue becomes moot in light of our disposition of the first issue.

Affirmed.

---

[4] We note that defendants' policy requires females to secure their hair.

INDEX-DIGEST

ABSCONDING—*See*
BAIL 1

ACTING WITHIN SCOPE OF OFFICE OR EMPLOYMENT—*See*
ARMED SERVICES 1

ACTIONS.
See, also, ENVIRONMENT 1; NEGLIGENCE 1; WILLS 1.
COURT RULES.
1. The common-law rule against splitting a cause of action has been replaced by the court rule regarding the necessary joinder of parties; because joinder is mandatory under the court rule and benefits the defendant, the burden of objecting to misjoinder is on the defendant; the right to claim that separate suits violate the joinder rule is waived where the defendant fails to make such a timely assertion (MCR 2.205[A]). *United Services v Nothelfer,* 195 Mich App 87.
FRIVOLOUS ACTIONS.
2. Sanctions for the bringing of a frivolous action are warranted where the plaintiff, on the basis of a ruling in another action, has reason to believe that an action against the defendant would lack merit (MCL 600.2591; MSA 27A.2591). *Vermilya v Dunham,* 195 Mich App 79.

ACTUAL AUTHORITY—*See*
AGENCY 1

ACUPUNCTURE TREATMENTS—*See*
INSURANCE 14

ADDITUR—*See*
DAMAGES 1

ADMINISTRATIVE LAW.
See, also, INSURANCE 1.
CONTESTED CASE HEARINGS.
1. The section of the Administrative Procedures Act providing that parties in contested cases must be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact does not entitle a party to an evidentiary hearing and complete discovery where material facts are not in dispute and

ADMINISTRATIVE LAW—Cont'd
further discovery would not aid in deciding the case (MCL 24.272[3]; MSA 3.560[172][3]). *American Comm Ins v Ins Comm'r*, 195 Mich App 351.

AGENCY.
See, also, ESTOPPEL 1.
ACTUAL AUTHORITY.
1. *Meretta v Peach*, 195 Mich App 695.

AIDING AND ABETTING—*See*
HOMICIDE 1

AID TO FAMILIES WITH DEPENDENT CHILDREN—*See*
SOCIAL SERVICES 1

ALIMONY—*See*
DIVORCE 1

AMBIGUITY—*See*
INSURANCE 6

ANIMALS.
DOG BITE.
1. A dog owner may be held liable to a licensee or an invitee of the dog owner for damages sustained as a result of being bitten by the dog without provocation, regardless of the dog's viciousness or the owner's knowledge of its viciousness (MCL 287.351; MSA 12.544). *Alvin v Simpson*, 195 Mich App 418.

APPARENT AUTHORITY—*See*
AGENCY 1
ESTOPPEL 1

APPEAL.
See, also, DAMAGES 1; PRETRIAL PROCEDURE 2.
TIMELY APPEALS.
1. An appeal of an order denying a motion for postjudgment relief is an appeal as of right of the underlying judgment if the motion was filed with the trial court within twenty-one days after entry of the underlying judgment and a claim of appeal is filed within twenty-one days after entry of the order denying the motion for postjudgment relief (MCR 7.204[A][1][b]). *Gavulic v Boyer*, 195 Mich App 20.

APPEAL AND ERROR—*See*
CRIMINAL LAW 16
INSURANCE 2

ARMED SERVICES.
NATIONAL GUARD.
1. Members of the National Guard are federal employees while

ARMED SERVICES—Cont'd
engaged in training or duty; in general, the federal government may be sued for the negligent acts of its employees committed within the scope of their office or employment; in the context of national guardsmen, the term "acting within the scope of their office or employment" means acting in the line of duty (28 USC 2671, 2674, 2680). *Smith v Swarthout,* 195 Mich App 486.

ARTICULATION OF REASONS—*See*
CRIMINAL LAW 15
SENTENCES 6

ATTORNEY AND CLIENT.
MALPRACTICE.
1. A convicted criminal defendant, in order to bring an action for malpractice against trial counsel, first must obtain postconviction relief; the limitation period applicable to legal malpractice does not commence until postconviction relief is obtained (MCL 600.5805[4], 600.5838; MSA 27A.5805[4], 27A.5838). *Gebhardt v O'Rourke,* 195 Mich App 506.

ATTORNEY FEES—*See*
DIVORCE 2, 3

ATTORNEYS—*See*
WILLS 1

AUTOMATIC WAIVER—*See*
CRIMINAL LAW 1

AUTOMATIC WAIVER OF JURISDICTION—*See*
CRIMINAL LAW 13

AUTOMOBILES.
See, also, INSURANCE 3.
TITLES.
1. Failure to comply strictly with the statutory provisions relating to the transfer of the title of an automobile does not preclude submission of the question of its ownership to the jury (MCL 257.233; MSA 9.1933). *Botsford Hosp v Citizens Ins,* 195 Mich App 127.

AVERAGE WEEKLY WAGE—*See*
WORKERS' COMPENSATION 1

BAIL.
ABSCONDING.
1. A defendant charged with absconding while on bail may not present evidence of the motive for absconding as part of the defense where the purpose of introducing that evidence would be to invoke the jury's mercy and its power to return a verdict less than warranted by other evidence (MCL 750.119a; MSA 28.396[1]). *People v Demers,* 195 Mich App 205.

BURDEN OF PROOF—*See*
PRODUCTS LIABILITY 1

BUSINESS INVITEES—*See*
NEGLIGENCE 3, 4

BYSTANDERS—*See*
TORTS 1

CAUSATION—*See*
PRODUCTS LIABILITY 1, 2, 4

CHARTER TOWNSHIP INCORPORATION—*See*
ELECTIONS 1

CHILDREN BORN OUT OF WEDLOCK—*See*
SOCIAL SERVICES 1

CHILD SUPPORT—*See*
DIVORCE 4, 5
PARENT AND CHILD 1

CIRCUIT COURTS—*See*
CRIMINAL LAW 1, 13

CIVIL RIGHTS.

SEXUAL DISCRIMINATION.

1. A prima facie case of sexual discrimination is established on the basis of disparate treatment upon a showing that the plaintiff is a member of a class deserving of protection under the Civil Rights Act and that, for the same conduct, the plaintiff was treated differently than a person of the opposite sex (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*). *Schultes v Naylor,* 195 Mich App 640.
2. A prima facie case of intentional sexual discrimination in the termination of employment is established upon a showing that the plaintiff was a member of an affected class, that the plaintiff was discharged, that the defendant was predisposed to discriminate against persons in the class, and that the defendant actually acted upon that disposition in deciding to terminate employment (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*). *Schultes v Naylor,* 195 Mich App 640.
3. Sex-differential hair-length grooming requirements for employment do not constitute sexual discrimination under the Michigan Civil Rights Act; the act is violated where the grooming code that applies to each sex is not equally burdensome and favors the employment of one sex over the other or where the overall grooming code is not enforced in an evenhanded manner; a grooming standard that does not violate title VII of the federal Civil Rights Act of 1964 does not violate the sexual discrimination provisions of the Michigan Civil Rights Act (42 USC 2000e *et seq.*; MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*). *Bedker v Domino's Pizza,* 195 Mich App 725.

COLLATERAL ESTOPPEL—*See*
ESTOPPEL 2

COMPOUND INTEREST—*See*
JUDGMENTS 2

CONFLICTING "OTHER INSURANCE" CLAUSES—*See*
INSURANCE 7

CONFLICT OF LAWS.

JURISDICTION.

1. A Michigan court does not abuse its discretion under the doctrine of forum non conveniens in declining jurisdiction of an action by a franchisee against a franchisor concerning a franchise in Michigan where the franchisee and the franchisor are residents of another state and the franchise agreement was negotiated in, executed in, and made subject to the laws of that other state. *Hacienda Kalamazoo v Hacienda,* 195 Mich App 35.

CONSTITUTIONAL LAW.

See, also, TAXATION 2.

DOUBLE JEOPARDY.

1. Multiple convictions and sentences for counts of first-degree murder and felony murder or felony murder and second-degree murder arising from the death of a single individual violate the constitutional guarantees against double jeopardy (US Const, Am V; Const 1963, art 1, § 15). *People v Passeno,* 195 Mich App 91.
2. Conviction of felony murder and an underlying felony violates the state constitution's guarantee against double jeopardy (Const 1963, art 1, § 15). *People v Passeno,* 195 Mich App 91.

DUE PROCESS.

3. Considerations of due process limit the reach of retroactive legislation that otherwise would impair vested rights. *Downriver Plaza v Southgate,* 195 Mich App 192.
4. Due process requires that liability to a municipal corporation for payment of charges for performance of an act may not be imposed for a past act where an enforceable obligation was not in place when the act occurred and the reason underlying the immunity from liability compels the continuance of the immunity. *Downriver Plaza v Southgate,* 195 Mich App 192.

GOVERNOR.

5. The Governor is not immune in an action seeking declaratory and injunctive relief on the basis that the Governor exceeded constitutional authority in attempting to reorganize the executive branch by executive order (Const 1963, art 5, § 2). *House Speaker v Governor,* 195 Mich App 376.
6. Any legislative power that the Governor possesses must be expressly granted by the Michigan Constitution; although the Governor has express power to reallocate functions and reorganize executive departments, no provision of the constitution expressly grants the Governor the power to create a new

CONSTITUTIONAL LAW—Cont'd

principal department (Const 1963, art 3, § 2). *House Speaker v Governor*, 195 Mich App 376.

7. The Governor, in exercising reorganization powers under the constitution, must use the transfer mechanisms established in the Executive Organization Act; although that act allows the Governor to abolish existing boards and commissions and to transfer their functions to a principal department, it does not grant the Governor authority to abolish the functions of boards, commissions, or principal departments (Const 1963, art 5, § 2; MCL 16.103[c]; MSA 3.29[3][c]). *House Speaker v Governor*, 195 Mich App 376.
8. The Governor has neither constitutional nor statutory authority to transfer from the members of the Natural Resources Commission to the Governor the power to select the chairperson of the commission (Const 1963, art 5, § 2; MCL 16.354; MSA 3.29[254]). *House Speaker v Governor*, 195 Mich App 376.

CONTESTED CASE HEARINGS—*See* ADMINISTRATIVE LAW 1

CONTROLLED SUBSTANCES.

SENTENCES.

1. A sentence of lifetime probation may not be imposed for conviction of delivery of 50 or more but less than 225 grams of cocaine; lifetime probation may be imposed for conviction of possession with intent to deliver or delivery of less than fifty grams of certain controlled substances or possession of twenty-five to fifty grams of certain controlled substances (MCL 333.7401[2][a][iii],[iv],[3],[4], 333.7403[2][a][iv], 771.1[1],[3]; MSA 14.15[7401][2][a][iii],[iv],[3],[4], 14.15[7403][2][a][iv], 28.1131[1],[3]). *People v Shafer*, 195 Mich App 596.

CONVEYANCES AND TRANSFERS OF MINERAL RIGHTS—*See* GAS AND OIL 1

COOPERATION OF RECIPIENT—*See* SOCIAL SERVICES 1

COORDINATION OF BENEFITS—*See* INSURANCE 12

CORPUS DELICTI—*See* HOMICIDE 2

COSTS.

See, also, PRETRIAL PROCEDURE 1, 3.

SINGLE CAUSE OF ACTION.

1. Where a single cause of action is alleged, the party that prevails on the entire record, even though being awarded damages less than requested, is the prevailing party and is entitled to costs unless a statute or court rule disallows it, or

COSTS—Cont'd
unless the trial court directs otherwise for reasons stated in writing and filed in the action (MCR 2.625[A][1], [B][2]). *McMillan v Auto Club,* 195 Mich App 463.

COURT RULES—*See*
ACTIONS 1

COURTS.
DISTRICT COURT.
1. A search warrant issued by a district court may be executed in any county within the state (Const 1963, art 6, § 1; MCL 600.8101[1]; MSA 27A.8101[1]). *People v Fiorillo,* 195 Mich App 701.

JURISDICTION.
2. The doctrine of forum non conveniens is applicable only where the parties are residents of different states, neither are residents of the forum state, and the injury or event giving rise to the suit occurred other than in the forum where the suit was brought. *Witt v C J Barrymore's,* 195 Mich App 517.

CREDITS—*See*
SENTENCES 4, 5

CRIMINAL LAW.
See, also, INJUNCTIONS 1; VENUE 1.
CIRCUIT COURTS.
1. Circuit and recorder's court jurisdiction to try a juvenile defendant for certain enumerated life felonies without conducting a waiver hearing does not include ancillary jurisdiction to try the juvenile for nonenumerated nonlife felonies (MCL 600.606; MSA 27A.606). *People v Spearman,* 195 Mich App 434.

EVIDENCE.
2. Evidence of a victim's prior bad acts of violence directed toward a defendant may be admissible where relevant to the issue of self-defense. *People v Taylor,* 195 Mich App 57.
3. A defendant's flight may result from factors other than guilt, and it is for the jury to determine what caused the defendant to flee. *People v Taylor,* 195 Mich App 57.
4. Evidence of incriminating statements by a nontestifying codefendant that interlock with a defendant's confession is admissible only when an appropriate limiting instruction is given; failure to give the limiting instruction is harmless where the evidence supplied through the codefendant's confession is merely cumulative and the other evidence of the defendant's guilt is overwhelming. *People v Passeno,* 195 Mich App 91.
5. Deoxyribonucleic acid (DNA) identification testing is generally accepted in the scientific community as reliable; trial courts may take judicial notice of such reliability and may admit test results into evidence where the prosecution establishes that generally accepted laboratory procedures have been followed; statistical analysis of the DNA identification testing may be

CRIMINAL LAW—Cont'd

admitted where an adequate foundation and proof of its independence is shown. *People v Adams,* 195 Mich App 267.

6. In a joint trial, a nontestifying codefendant's confession is inadmissible against the other defendant. *People v Spearman,* 195 Mich App 434.

7. Evidence regarding identification of a suspect by a tracking dog is admissible where a proper foundation is laid that shows: the handler was qualified to use the dog, the dog was trained and accurate in tracking humans, the dog was placed on the trail where circumstances indicated the alleged guilty party had been, and the trail had not become so stale or contaminated as to be beyond the dog's competency to follow it; in addition, other corroborating evidence must be presented before identification on the basis of tracking-dog evidence is sufficient to support a guilty verdict. *People v Stone,* 195 Mich App 600.

GUILTY PLEAS.

8. *People v Hall,* 195 Mich App 460.

INTOXICATING LIQUORS.

9. *People v Bennett,* 195 Mich App 455.

JURY.

10. The scope of voir dire is left to the discretion of the trial court; however, the court may not restrict voir dire in a manner that prevents the development of a factual basis for the exercise of peremptory challenges. *People v Taylor,* 195 Mich App 57.

JURY INSTRUCTIONS.

11. A trial court should instruct a jury with regard to appropriate lesser-included misdemeanors if a rational view of the evidence could support a verdict of guilty of the misdemeanor and not guilty of the felony, the defendant has proper notice or has made a request, and the instruction would not result in confusion or injustice. *People v Taylor,* 195 Mich App 57.

JUVENILES.

12. A bifurcated standard is applied in reviewing a trial court's decision to sentence a minor as a juvenile or an adult: first, the court's findings of fact supporting its determination regarding each of the statutory factors to be considered is reviewed for clear error; second, the ultimate decision whether to sentence the minor as a juvenile or as an adult is reviewed for an abuse of discretion (MCL 769.1[3]; MSA 28.1072[3]). *People v Passeno,* 195 Mich App 91.

13. A juvenile under seventeen years of age who is arrested need not immediately be taken before the juvenile division of the probate court where the prosecutor charges the juvenile as an adult in circuit court under the automatic waiver rules (MCL 600.606, 764.27; MSA 27A.606, 28.886). *People v Spearman,* 195 Mich App 434.

RETAIL FRAUD.

14. A person who commits second-degree retail fraud and has one or more prior convictions of offenses enumerated in the first-

CRIMINAL LAW—Cont'd
degree retail fraud statute may be convicted of first-degree retail fraud; a conviction of an attempt to commit one of the enumerated offenses is not sufficient to constitute a conviction of one of the enumerated offenses (MCL 750.356c[2], 750.356d; MSA 28.588[3][2], 28.588[4]). *People v Johnson,* 195 Mich App 571.

SENTENCES.
15. A court that imposes a sentence that exceeds the sentencing guidelines' recommended minimum range must articulate, both on the record at sentencing and on the sentencing information report, its reasons for departure from the sentencing guidelines range; the proper remedy for failure to articulate where the sentence imposed exceeds by three times the minimum sentence recommended by the guidelines is to vacate the sentence and to remand for resentencing. *People v Adams,* 195 Mich App 267.
16. The decision by a circuit court to sentence as an adult a juvenile charged as an adult under the automatic waiver rules will be affirmed where the court's findings, based on substantial evidence and thorough investigation, show either that the juvenile is not amenable to treatment or that, despite potential for treatment, the nature of the difficulty is likely to render the juvenile dangerous to the public if released at age nineteen or twenty-one or to disrupt the rehabilitation of other children; the trial court's findings of fact regarding the factors to be considered in making the determination are reviewed for clear error (MCR 6.931[E][3]; MCL 600.606, 769.1[3]; MSA 27A.606, 28.1072[3]). *People v Spearman,* 195 Mich App 434.

DAMAGES.
ADDITUR.
1. A trial court, in deciding whether to grant a motion for additur, must examine whether the evidence supports the jury's verdict; the trial court's ruling will not be reversed on appeal absent an abuse of discretion. *McMillan v Auto Club,* 195 Mich App 463.

DECEDENTS' ESTATES—*See*
EXECUTORS AND ADMINISTRATORS 1
LIMITATION OF ACTIONS 1

DEFAULT JUDGMENTS—*See*
DIVORCE 6
JUDGMENTS 1

DEFENDANT'S CONFESSION—*See*
HOMICIDE 2

DEFENSES—*See*
BAIL 1

DENIAL OF CLAIMS—*See*
INSURANCE 17

DEPARTURE—*See*
CRIMINAL LAW 15

DEPOSITIONS—*See*
PRETRIAL PROCEDURE 1

DERIVATIVE CLAIMS—*See*
INSURANCE 5

DESIGNERS AND MANUFACTURERS—*See*
PRODUCTS LIABILITY 3

DIES—*See*
PRODUCTS LIABILITY 3

DISPARATE TREATMENT—*See*
CIVIL RIGHTS 2

DISPARITY IN PARTIES' INCOMES—*See*
DIVORCE 3

DISTRICT COURT—*See*
COURTS 1

DIVORCE.

ALIMONY.

1. A trial court, in awarding alimony, should consider the past relations and conduct of the parties, the length of the marriage, the ability of the parties to work, their ages, needs, and health, general principles of equity, and their respective fault in causing the divorce. *Demman v Demman,* 195 Mich App 109.

ATTORNEY FEES.

2. An award of attorney fees in a divorce action lies within the discretion of the trial court. *Demman v Demman,* 195 Mich App 109.

3. Attorney fees may be awarded in a divorce action on the basis of a substantial disparity in the parties' incomes. *Voukatidis v Voukatidis,* 195 Mich App 338.

CHILD SUPPORT.

4. Upon annulling a marriage or entering a judgment of divorce, a circuit court may enter orders that it considers just and proper regarding the care, custody, and support of the minor children of the parties; the court also may enter an order requiring a nonbiological parent to support a minor child of the marital household where the parent knowingly stands in loco parentis to the child (MCL 552.16; MSA 25.96). *Tilley v Tilley,* 195 Mich App 309.

5. Partial payment of a child support arrearage acts as an acknowledgment of the continuing validity of the judgment

DIVORCE—Cont'd
debt and thereby waives the defense of the statute of limitation in a proceeding to enforce the judgment debt (MCL 600.5809[3]; MSA 27A.5809[3]). *Alpena FOC v Durecki,* 195 Mich App 635.

DEFAULT JUDGMENTS.

6. The rule in contested divorce proceedings that the valuation of marital property for purposes of distribution must not be dependent on the happening of events after the divorce does not apply where judgment is entered and property is distributed upon the default of a party; accordingly, valuation of a party's employee stock ownership plan for distribution pursuant to a default judgment of divorce may be based on a postjudgment share price. *Applekamp v Applekamp,* 195 Mich App 656.

MARITAL ESTATE.

7. A party's inheritance may be treated as a marital asset subject to division upon divorce where failure to consider such property would result in an award that is insufficient to maintain either party. *Demman v Demman,* 195 Mich App 109.

PROPERTY DIVISION.

8. The present value of stock options is to be calculated in divorce proceedings by subtracting the cost of the options from the market price of the stock, and consideration should be given to the tax consequences when the options are exercised; the date to be used to determine the market price is within the discretion of the trial court. *Everett v Everett,* 195 Mich App 50.

9. Stock options that have not matured and therefore may never be exercised should not be given the same present value, for purposes of a division of marital property in a divorce action, as matured stock options, the value of which is readily ascertainable. *Everett v Everett,* 195 Mich App 50.

DNA IDENTIFICATION TESTING—*See*
CRIMINAL LAW 5

DOCUMENTS—*See*
EVIDENCE 3

DOG BITE—*See*
ANIMALS 1

DORMANT MINERALS ACT—*See*
GAS AND OIL 1

DOUBLE JEOPARDY—*See*
CONSTITUTIONAL LAW 1, 2

DUAL CAPACITY DOCTRINE—*See*
WORKERS' COMPENSATION 2

DUAL CAUSATION—*See*
INSURANCE 4

DUE PROCESS—*See*
CONSTITUTIONAL LAW 3, 4

ELECTIONS.
CHARTER TOWNSHIP INCORPORATION.
1. A petition for a referendum on incorporation as a charter township is subject to the requirements of the charter township act, not the Election Law (MCL 42.3a, 168.544c; MSA 5.46[3a], 6.1544[3]). *Van Horn v China Twp Clerk,* 195 Mich App 610.
PETITIONS FOR INITIATION OF LEGISLATION.
2. A petition for the initiation of legislation must have a title for the legislation proposed; the Board of State Canvassers may reject a petition that does not include a title, but it may not reject a petition on the ground that the title or the proposed legislation violates the state constitution; the constitutional validity of the title or the legislation is a matter to be determined by the judiciary only after the initiative is submitted for a vote by the electorate (Const 1963, art 4, § 24). *Auto Club v Sec of State (On Rem),* 195 Mich App 613.

ELECTRONIC TETHERS—*See*
SENTENCES 4

EMERGENCY MEDICAL TECHNICIANS—*See*
NEGLIGENCE 2

EMINENT DOMAIN.
PRETRIAL PROCEDURE.
1. Where a condemnor pays or deposits an amount it estimates to be just compensation and rejects a subsequent mediation evaluation for a higher figure, the condemnor is liable to the condemnee for mediation sanctions if the verdict provides for compensation beyond the payment or deposit in an amount equal to ninety percent or more of the difference between the mediation evaluation and the payment or deposit (MCR 2.403[O]). *Detroit v Kallow Corp,* 195 Mich App 227.

EMOTIONAL DISTRESS—*See*
TORTS 1

EMPLOYEE BENEFIT PLANS—*See*
INSURANCE 12

EMPLOYEE HANDBOOKS—*See*
MASTER AND SERVANT 1

EMPLOYEE RETIREMENT INCOME SECURITY ACT—*See*
INSURANCE 12, 13

EMPLOYMENT—*See*
CIVIL RIGHTS 1

EMPLOYMENT CONTRACTS—*See*
MASTER AND SERVANT 1

ENFORCEMENT OF JUDGMENTS—*See*
DIVORCE 5

ENVIRONMENT.

ACTIONS.

1. The Environmental Protection Act provides standing to bring an action for declaratory and injunctive relief against the reconstruction of a dam to a riparian landowner who demonstrates possible adverse effects of reconstruction on the property and to a nonprofit corporation whose members advocate the protection and improvement of cold-water fishing resources that may be affected adversely by reconstruction (MCL 691.1202[1]; MSA 14.528[202][1]). *Trout Unlimited v White Cloud,* 195 Mich App 343.

ENVIRONMENTAL PROTECTION ACT—*See*
ENVIRONMENT 1

EQUITY—*See*
INJUNCTIONS 1

ESTOPPEL.

See, also, ZONING 1.

AGENCY.

1. *Meretta v Peach,* 195 Mich App 695.

COLLATERAL ESTOPPEL.

2. The doctrine of collateral estoppel may be invoked under certain circumstances even where there is a lack of mutuality, such as in an action for legal malpractice based on a claim that an attorney allowed a mentally incompetent client to settle a prior and unrelated action to the detriment of the client where the client after a full and fair opportunity to litigate the issue did not succeed in having the settlement set aside on the ground of mental incompetence. *Alterman v Provizer,* 195 Mich App 422.

EVIDENCE.

See, also, CRIMINAL LAW 2-7; RAPE 1.

EXPERT TESTIMONY.

1. The decision whether to admit expert testimony is within the sound discretion of a trial court and will not be reversed on appeal absent a clear abuse of discretion; a trial court abuses its discretion where its ruling has no basis in law or fact. *Green v Jerome-Duncan Ford,* 195 Mich App 493.

HAIR-MATCHING EVIDENCE.

2. Evidence that a defendant's hair is similar to hair found at the scene of a crime is relevant even if there is no evidence concerning the proportion of the population having that type of hair (MRE 401). *People v Vettese,* 195 Mich App 235.

EVIDENCE—Cont'd
HEARSAY.
3. Documents relating to personalty, including contracts and bills of sale, are included within the rule of evidence that excepts from the hearsay rule statements contained in a document purporting to establish or affect an interest in property where: the circumstances in which the instrument was made and the financial interests at stake promote reliability, the statement at issue is germane to purposes of the document, and subsequent dealings with the property have not been inconsistent with the tenor of the document (MRE 803[15]). *Botsford Hosp v Citizens Ins,* 195 Mich App 127.

EXCLUSIONS—*See*
INSURANCE 5, 19

EXCLUSIVE REMEDY—*See*
TORTS 3

EXECUTIVE ORDERS—*See*
CONSTITUTIONAL LAW 5

EXECUTIVE REORGANIZATION—*See*
CONSTITUTIONAL LAW 6-8

EXECUTORS AND ADMINISTRATORS.
See, also, LIMITATION OF ACTIONS 1.
DECEDENTS' ESTATES.
1. *In re Washburn Estate,* 195 Mich App 42.

EXPERT TESTIMONY—*See*
EVIDENCE 1

EXTENSION OF PERIOD—*See*
LIMITATION OF ACTIONS 1

FAILURE TO ATTEND—*See*
PRETRIAL PROCEDURE 1

FAILURE TO INSURE—*See*
INSURANCE 18

FALSE ARREST—*See*
TORTS 2

"FARM PRODUCTS"—*See*
WORDS AND PHRASES 1

FAULT—*See*
DIVORCE 1

FAVORED-WORK DOCTRINE—*See*
WORKERS' COMPENSATION 3

FEDERAL EMPLOYEES—*See*
ARMED SERVICES 1
TORTS 3

FEDERAL TORT CLAIMS ACT—*See*
TORTS 3

FELONY MURDER—*See*
CONSTITUTIONAL LAW 2

FLIGHT—*See*
CRIMINAL LAW 3

FORUM NON CONVENIENS—*See*
CONFLICT OF LAWS 1
COURTS 2

FRAUD.
MISREPRESENTATION.
1. An alleged misrepresentation will not support an action for fraud where the means of knowledge regarding the truthfulness of the representation are available and the degree of their utilization is not circumscribed; a plaintiff who ignores available information cannot claim to have been defrauded. *Webb v First of Mich Corp,* 195 Mich App 470.

FRIVOLOUS ACTIONS—*See*
ACTIONS 2

GAS AND OIL.
DORMANT MINERALS ACT.
1. A bequest of mineral rights severed from ownership of the surface rights in real property is not rendered invalid under the dormant minerals act for lack of a specific description of the surface property where the applicable twenty-year period of dormancy has not expired (MCL 554.291, 554.292; MSA 26.1163[1], 26.1163[2]). *Gibbs v Smock (On Reh),* 195 Mich App 450.

GOOD CAUSE—*See*
JUDGMENTS 1

GOVERNMENTAL EMPLOYEES—*See*
GOVERNMENTAL IMMUNITY 1

GOVERNMENTAL IMMUNITY.
GOVERNMENTAL EMPLOYEES.
1. Summary disposition is properly granted to a governmental employee on the basis of statutory governmental immunity where it is uncontroverted that the employee was acting within the scope of authority while in the exercise or discharge of a governmental function and the court finds that, on the pleaded

GOVERNMENTAL IMMUNITY—Cont'd
facts, reasonable minds could not conclude that the defendant's conduct had been so reckless as to demonstrate a substantial lack of concern for whether an injury would result (MCL 691.1407; MSA 3.996[107]). *Vermilya v Dunham,* 195 Mich App 79.

HOSPITALS.
2. The Michigan Veterans' Facility, a health facility operated by the state for the benefit of indigent veterans, may claim governmental immunity from tort liability; the facility is not a hospital within the meaning of the statute that denies governmental immunity to hospitals owned or operated by governmental agencies (MCL 36.1 *et seq.*, 691.1407[4][b]; MSA 4.871 *et seq.*, 3.996[107][4][b]). *Winklepleck v Veterans' Facility,* 195 Mich App 523.

GOVERNOR—*See*
CONSTITUTIONAL LAW 5-8

GROSS NEGLIGENCE—*See*
GOVERNMENTAL IMMUNITY 1
NEGLIGENCE 2

GUARANTEES OF PAYMENT OF LIABILITY—*See*
WORKERS' COMPENSATION 4

GUARANTORS—*See*
WORKERS' COMPENSATION 4

GUILTY PLEAS—*See*
CRIMINAL LAW 8
TORTS 2

HABITUAL OFFENDERS—*See*
CRIMINAL LAW 14

HAIR-MATCHING EVIDENCE—*See*
EVIDENCE 2

HARMLESS ERROR—*See*
CRIMINAL LAW 4

HEALTH CARE PROVIDERS—*See*
INSURANCE 9, 10

HEARING REFEREES—*See*
INSURANCE 1

HEARSAY—*See*
EVIDENCE 3

HOMICIDE.

SECOND-DEGREE MURDER.

1. The malice required to support a conviction of aiding and abetting second-degree murder may not be inferred solely from an intent to commit another felony, but may be inferred from facts and circumstances surrounding the commission of the felony; an aider and abettor who participates in a crime with knowledge of the principal's intent to kill or cause great bodily harm acts with wanton and wilful disregard of the possibility that death or great bodily harm will result from the crime sufficient to support a finding of malice (MCL 750.317; MSA 28.549). *People v Spearman,* 195 Mich App 434.

2. The corpus delicti rule does not require that the element of malice necessary for a conviction of second-degree murder be established independently of the defendant's confession; the only things that must be proven independently of the defendant's confession are a death and that the death was the result of some criminal agency (MCL 750.317; MSA 28.549). *People v Spearman,* 195 Mich App 434.

HOSPITALS—*See*
GOVERNMENTAL IMMUNITY 2

IMMUNITY FROM SUIT—*See*
CONSTITUTIONAL LAW 5

IMPLIED AUTHORITY—*See*
AGENCY 1

INDIANS.

RESERVATIONS.

1. *People v Bennett,* 195 Mich App 455.

INDUSTRIAL DEVELOPMENT DISTRICTS—*See*
TAXATION 1

INDUSTRIAL FACILITY TAX—*See*
TAXATION 1

INHERITANCES—*See*
DIVORCE 7

INJUNCTIONS.

CRIMINAL LAW.

1. Criminal prosecutions generally cannot be restrained by injunction; however, equity jurisdiction may be invoked for the purpose of obtaining injunctive relief and a determination regarding the constitutionality of an alleged invalid law where the complainant would suffer irreparable injury from the acts of the public officials in its enforcement. *Jeffrey v Clinton Twp,* 195 Mich App 260.

IN LOCO PARENTIS—*See*
DIVORCE 4

INSURANCE.

ADMINISTRATIVE LAW.

1. It is within the discretion of the Commissioner of Insurance to allow oral argument when reviewing a decision of a hearing referee (1983 AACS, R 500.2127[4], R 500.2132, R 500.2133; MCL 24.281[1]; MSA 3.560[181][1]). *American Comm Ins v Ins Comm'r,* 195 Mich App 351.

APPEAL AND ERROR.

2. The statutory thirty-day limit given an insurer who intends to challenge a ruling of the Commissioner of Insurance means the insurer has thirty days from the date of the notice of the commissioner's ruling to request a hearing, not that the hearing must be held within thirty days of the notice of the ruling (MCL 500.2236[4]; MSA 24.12236[4]). *American Comm Ins v Ins Comm'r,* 195 Mich App 351.

AUTOMOBILES.

3. A determination that an automobile insurer's rating plan violated the provisions of chapter 21 of the Insurance Code prohibiting excessive adjacent-territory and overall differentials in rates was not sufficient by itself to establish a violation of the provision of chapter 20 prohibiting different rates for the same automobile insurance on the basis of residence or location; in the absence of independent proof of a violation of the provision of chapter 20, the refund and penalty remedies found in chapter 20 may not be imposed for a violation of the provisions of chapter 21 (MCL 500.2027[c], 500.2038[1][c]; MSA 24.12027[c], 24.12038[1][c]; former MCL 500.2111[2][5]; MSA 24.12111[2][5] as amended by 1980 PA 461). *Allstate Ins Co v Dep't of Ins,* 195 Mich App 538.

DUAL CAUSATION.

4. There is no compelling policy rationale, and no sound jurisprudential reason, to adopt the theory of dual or concurrent causation in the context of insurance liability to permit departure from the literal interpretation of unambiguous insurance contracts. *Auto-Owners v Titan Indemnity,* 195 Mich App 428.

EXCLUSIONS.

5. Coverage is not afforded under an insurance policy for a claim that is wholly derivative of another claim that is excluded under the policy. *Allstate Ins v Castanier,* 195 Mich App 630.

JUDICIAL CONSTRUCTION.

6. A contract of insurance, although inartfully worded or clumsily arranged, is not ambiguous or fatally unclear if it fairly admits of but one interpretation. *Allstate Ins v Castanier,* 195 Mich App 630.

MULTIPLE POLICIES.

7. The proper treatment of a conflict between "other insurance" clauses of two applicable insurance policies, either of which would cover a specific loss if the other policy did not exist, is to declare the clauses mutually repugnant and to prorate each insurer's liability on the basis of its share of the combined policy limits. *Nat'l Indemnity v Budget,* 195 Mich App 186.

INSURANCE—Cont'd

NO-FAULT.

8. Notice to a no-fault insurer of a claim for property protection benefits does not toll the running of the statutory one-year period of limitation for bringing an action for such benefits (MCL 500.3145[2]; MSA 24.13145[2]). *USF&G Co v Amerisure Ins Co,* 195 Mich App 1.

9. A health care provider that has received Medicaid payments for medical services provided to a patient who suffered injuries in an automobile accident may seek from the patient's no-fault insurer reimbursement of any reasonable charges for services that Medicaid did not pay, even though in the absence of insurance benefits the provider would have had to accept the Medicaid payment as payment in full; the statutory right of subrogation of the state extends only to the amount of the Medicaid payments and does not automatically foreclose other claims (MCL 400.106[1][b][ii]; MSA 16.490[16][1][b][ii]). *Botsford Hosp v Citizens Ins,* 195 Mich App 127.

10. A health care provider need not bring its action against a no-fault insurer for medical services provided to an insured injured in an automobile accident within the statutory one-year limitation period where the health provider's claim is one that arises by subrogation from the patient's claim and the patient commenced an action for medical expenses within the one-year limitation period (MCL 500.3145; MSA 24.13145). *Botsford Hosp v Citizens Ins,* 195 Mich App 127.

11. Work-loss benefits under no-fault automobile insurance are payable for loss of actual income caused by injury in an automobile accident; a person who, because of injury in an automobile accident, loses a job held before the accident, acquires a new job at a lower rate of compensation, and subsequently voluntarily quits the new job suffers a loss of income in the amount of the difference in compensation levels of the two jobs and is entitled to work-loss benefits based on that difference both during employment at the new job and after becoming voluntarily unemployed (MCL 500.3107[b]; MSA 24.13107[b]). *Marquis v Hartford (On Rem),* 195 Mich App 286.

12. An employee benefit plan administered pursuant to the Employee Retirement Income Security Act is not made liable, by operation of a provision for the coordination of benefits under a no-fault automobile insurance policy, for benefits for injuries sustained in a motor vehicle accident where the plan provides a clear and unambiguous exclusion of benefits for such injuries (29 USC 1001 *et seq.*, MCL 500.3109a; MSA 24.13109[1]). *Wolverine Mutual v Rospatch Corp,* 195 Mich App 302.

13. The Employee Retirement Income Security Act preempts claims against uninsured self-funded employee benefit plans brought under the coordination of benefits provision of the Michigan no-fault act; the fact that a self-funded employee benefit plan has stop-loss insurance coverage does not transform it into an insured plan for purposes of the ERISA (29 USC

INSURANCE—Cont'd

1144[a]; MCL 500.3109a; MSA 24.13109[1]). *Wolverine Mutual v Rospatch Corp,* 195 Mich App 302.

14. Acupuncture treatments may be paid as personal protection insurance benefits under a policy of no-fault automobile insurance only where rendered by a licensed physician or a person under the supervision of a licensed physician (MCL 333.16109[2], 333.16294, 500.3107, 500.3157; MSA 14.15[16109][2], 14.15[16294], 24.13107, 24.13157). *Cherry v State Farm,* 195 Mich App 316.

15. A person who is rendered a paraplegic in a motor vehicle accident may recover, as personal injury protection benefits, the cost of acquiring a van modified for use by a paraplegic where the cost is reasonable and the van is reasonably necessary to enable the person to receive continued medical treatment (MCL 500.3107[a]; MSA 24.13107[a]). *Davis v Citizens Ins Co,* 195 Mich App 323.

16. Penalty interest must be assessed against a no-fault insurer who refuses to pay benefits and is later determined to be liable for those benefits, irrespective of the insurer's good faith in denying coverage (MCL 500.3142[3]; MSA 24.13142[3]). *Davis v Citizens Ins Co,* 195 Mich App 323.

17. Penalty interest for a no-fault insurer's denial of a claim is not available until the claimant has presented the insurer with reasonable proof of the claim and thirty days have passed without the insurer paying the claim (MCL 500.3142; MSA 24.13142). *McMillan v Auto Club,* 195 Mich App 463.

18. The owner or registrant of a motor vehicle involved in an accident is precluded from recovery of no-fault personal protection insurance benefits where the security required by §§ 3101 or 3103 of the no-fault act was not in effect with respect to the vehicle at the time of the accident; the section of the Vehicle Code that provides that every motor vehicle, when driven or moved upon a highway, is subject to the registration and certification of title provisions of the code does not limit the requirements of § 3113(b) only to cars driven on Michigan highways (MCL 257.216, 500.3101, 500.3103, 500.3113[b]; MSA 9.1916, 24.13101, 24.13103, 24.13113[b]). *Wilson v League General Ins,* 195 Mich App 705.

OPTOMETRISTS.

19. The term "professional service" in a general insurance policy covering an optometrist's business premises that excluded coverage for accidents or injuries caused by rendering or failing to render a professional service included the maintenance of a specialized chair used in examining patients in a safe operating condition. *Bernthal v Aetna,* 195 Mich App 501.

WORDS AND PHRASES.

20. The plain meaning of the term "land motor vehicle" in an insurance policy is a vehicle with a motor that travels on land; there is no meaningful distinction between the terms "motorized land vehicle" and "land motor vehicle." *Allstate Ins v Castanier,* 195 Mich App 630.

INSURANCE COMMISSIONER—*See*
INSURANCE 1

INSURANCE COMMISSIONER'S RULINGS—*See*
INSURANCE 2

INSURANCE PREMIUMS—*See*
INSURANCE 3

INTENTIONAL DISCRIMINATION—*See*
CIVIL RIGHTS 3

INTEREST—*See*
JUDGMENTS 2, 3

INTERVENTION OF RIGHT—*See*
PARTIES 1

INTOXICATING LIQUOR—*See*
CRIMINAL LAW 9

INVALID LAWS—*See*
INJUNCTIONS 1

INVESTIGATORY STOPS—*See*
SEARCHES AND SEIZURES 1, 2

INVITEES—*See*
ANIMALS 1

IRREPARABLE INJURY—*See*
INJUNCTIONS 1

JOINT TRIALS—*See*
CRIMINAL LAW 6

JOURNEYMEN AND APPRENTICES—*See*
LICENSES 1

JUDGMENTS.

DEFAULT JUDGMENTS.

1. Good cause sufficient to warrant setting aside a default or a default judgment is shown by establishing that a party seeking entry of a default failed to notify the opposing party of its entry (MCR 2.603[A][2]). *Gavulic v Boyer,* 195 Mich App 20.

INTEREST.

2. Compound interest may lead to interest on interest, in that interest is added periodically to the principal, and subsequent interest is assessed on the total of unpaid principal and unpaid accrued interest. *Niggeling v Transportation Dep't,* 195 Mich App 163.

3. The rule in Michigan for the computation of interest in the

JUDGMENTS—Cont'd
case of partial payment of a judgment applies the payment in discharge of accrued interest and the surplus, if any, in discharge of the principal. *Niggeling v Transportation Dep't,* 195 Mich App 163.

RES JUDICATA.
4. *Makowski v Towles,* 195 Mich App 106.

JUDICIAL CONSTRUCTION—*See*
INSURANCE 6
STATUTES 1

JURISDICTION—*See*
CONFLICT OF LAWS 1
COURTS 2
CRIMINAL LAW 1

JURY—*See*
BAIL 1
CRIMINAL LAW 10

JURY INSTRUCTIONS—*See*
CRIMINAL LAW 11

JURY QUESTIONS—*See*
AUTOMOBILES 1

JUVENILE OFFENDERS—*See*
SENTENCES 1, 2

JUVENILES—*See*
CRIMINAL LAW 1, 12, 13, 16

LACK OF MUTUALITY—*See*
ESTOPPEL 2

"LAND MOTOR VEHICLE"—*See*
INSURANCE 20

LEGAL MALPRACTICE ACTIONS—*See*
VENUE 2

LENGTH OF DETENTION—*See*
SEARCHES AND SEIZURES 2

LESSER INCLUDED MISDEMEANORS—*See*
CRIMINAL LAW 11

LICENSEES.
See, also, ANIMALS 1.

LICENSES.
MECHANICAL CONTRACTORS.
1. The Mechanical Contractors Act prohibits local governments from establishing or maintaining local licensing requirements for contractors, journeymen, or apprentices in the mechanical trades who perform work described in the work classifications enumerated in the act (MCL 338.976[3], 338.979; MSA 18.86[6][3], 18.86[9]). *Consumers Power v Flint,* 195 Mich App 295.

LIFETIME PROBATION—*See*
CONTROLLED SUBSTANCES 1

LIMITATION OF ACTIONS.
See, also, ATTORNEY AND CLIENT 1; DIVORCE 5; INSURANCE 8, 10.
DECEDENTS' ESTATES.
1. Where a person dies before bringing a cause of action and the applicable period of limitation has not expired, the period is extended for two years after letters testamentary or letters of administration are granted to the executor or administrator of the person's estate (MCL 600.5852; MSA 27A.5852). *McNeil v Quines,* 195 Mich App 199.

LOTTERIES—*See*
TAXATION 2

MALICE—*See*
HOMICIDE 1, 2

MALICIOUS PROSECUTION—*See*
TORTS 2, 4

MALPRACTICE—*See*
ATTORNEY AND CLIENT 1

MARITAL ESTATE—*See*
DIVORCE 7

MASTER AND SERVANT.
EMPLOYMENT CONTRACTS.
1. An employment relationship is terminable at will by either party where the employee signs an agreement that employment will be month to month and receives an employee handbook so stating. *Schultes v Naylor,* 195 Mich App 640.

MECHANICAL CONTRACTORS—*See*
LICENSES 1

MEDIATION—*See*
EMINENT DOMAIN 1
PRETRIAL PROCEDURE 2, 3

MEDICAID—*See*
INSURANCE 9

MEDICAL TREATMENT OF MINORS—*See*
PARENT AND CHILD 2

MICHIGAN VETERANS' FACILITY—*See*
GOVERNMENTAL IMMUNITY 2

MINOR CHILDREN OF PARTIES—*See*
DIVORCE 4

MISREPRESENTATION—*See*
FRAUD 1

MOTIONS AND ORDERS.
See, also, PLEADING 1; VENUE 1.
SUMMARY DISPOSITION.
1. *Meretta v Peach,* 195 Mich App 695.

"MOTORIZED LAND VEHICLE"—*See*
INSURANCE 20

MOTOR VEHICLES—*See*
TORTS 3

MULTIPLE CONVICTIONS AND SENTENCES FOR SINGLE KILLING—*See*
CONSTITUTIONAL LAW 1

MULTIPLE POLICIES—*See*
INSURANCE 7

MUNICIPAL CORPORATIONS—*See*
CONSTITUTIONAL LAW 4
ZONING 1

NATIONAL GUARD—*See*
ARMED SERVICES 1

NATURAL RESOURCES COMMISSION—*See*
CONSTITUTIONAL LAW 8

NEGLIGENCE.
See, also, ARMED SERVICES 1.
ACTIONS.
1. Summary disposition for a defendant in an action for negligence is proper where reasonable persons would agree that the injury caused to the plaintiff was too insignificantly connected to or too remotely affected by the defendant's alleged negligence. *Berry v J & D Auto,* 195 Mich App 476.
EMERGENCY MEDICAL TECHNICIANS.
2. Emergency medical technicians are immune from liability unless their acts or omissions are the result of gross negligence or wilful misconduct; wilful misconduct is established upon

NEGLIGENCE—Cont'd
proof that the emergency medical technician intended to harm a patient; gross negligence is established upon proof that a patient's prior negligence put the patient in a position of danger and that the technician's subsequent negligence caused injury to the patient (MCL 333.20737; MSA 14.15[20737], now MCL 333.20965; MSA 14.15[20965]). *Pavlov v Community EMS,* 195 Mich App 711.

PREMISES LIABILITY.
3. A landowner's duty to a business invitee is to disclose known defects that the invitee is unlikely to discover. *Berry v J & D Auto,* 195 Mich App 476.
4. A business invitee who exceeds the scope of a premises owner's invitation may be found to be a trespasser for the purpose of determining premises liability. *Constantineau v DCI Food, Inc,* 195 Mich App 511.

PROXIMATE CAUSE.
5. The proximate cause of an injury is ordinarily a question for the trier of fact; however, where reasonable minds cannot differ regarding the proximate cause of an injury, the trial court may determine proximate cause as a matter of law. *Berry v J & D Auto,* 195 Mich App 476.

NO-FAULT—*See*
INSURANCE 8-18

NONTESTIFYING CODEFENDANT'S CONFESSION—*See*
CRIMINAL LAW 4, 6

NOTICE OF DEFAULT—*See*
JUDGMENTS 1

NOTICE TO CREDITORS—*See*
EXECUTORS AND ADMINISTRATORS 1

OFFERS OF JUDGMENT—*See*
PRETRIAL PROCEDURE 3, 4

OPTOMETRISTS—*See*
INSURANCE 19

ORAL ARGUMENT—*See*
INSURANCE 1

ORDINANCES—*See*
ZONING 1

PARENT AND CHILD.
CHILD SUPPORT.
1. Absent adoption, the obligation to support a child remains with the biological parents (MCL 722.3; MSA 25.244[3]). *Tilley v Tilley,* 195 Mich App 309.

PARENT AND CHILD—Cont'd

MEDICAL TREATMENT OF MINORS.

2. The common-law doctrine of informed consent accords the parents of a minor the right to determine whether life-sustaining treatment should be withheld or withdrawn from the minor; in making a decision, the parents should consider the minor's preference or best interests; judicial involvement in the decision-making process may occur only where the parties directly concerned disagree about treatment, or where other appropriate reasons compel such involvement. *In re Rosebush,* 195 Mich App 675.

PARTIAL PAYMENTS—*See*
JUDGMENTS 3

PARTICIPATION IN TETHER PROGRAM—*See*
SENTENCES 5

PARTICULARIZED SUSPICION—*See*
SEARCHES AND SEIZURES 1

PARTIES.

See, also, ENVIRONMENT 1.

INTERVENTION OF RIGHT.

1. A party may intervene as a matter of right where it makes a timely application and shows that representation of its interests by the existing parties is inadequate and the trial court determines that a disposition of the action, as a practical matter, may impair or impede the party's ability to protect its interests (MCR 2.209[A][3]). *Precision Pipe v Meram,* 195 Mich App 153.

PATERNITY—*See*
SOCIAL SERVICES 1

PAYMENT FOR PAST ACTS—*See*
CONSTITUTIONAL LAW 4

PENALTY INTEREST—*See*
INSURANCE 16, 17

PERSONAL PROTECTION BENEFITS—*See*
INSURANCE 9

PERSONAL PROTECTION INSURANCE—*See*
INSURANCE 14-16

PERSONAL PROTECTION INSURANCE BENEFITS—*See*
INSURANCE 18

PETITIONS FOR INITIATION OF LEGISLATION—*See*
ELECTIONS 2

PLEADING.

MOTIONS AND ORDERS.

1. The court rule that provides for the imposition of sanctions if a pleading is signed in violation of the rule applies to pleadings only; because a motion is not a pleading, the rule cannot be used to impose sanctions upon a person who signs a motion that is submitted for an improper purpose (MCR 2.110[A], 2.114). *Richmond Twp v Erbes,* 195 Mich App 210.

POSTJUDGMENT RELIEF—*See*
APPEAL 1

PREMISES LIABILITY—*See*
NEGLIGENCE 3, 4

PRESENT VALUE—*See*
DIVORCE 8, 9

PRETRIAL PROCEDURE.

See, also, EMINENT DOMAIN 1; TRIAL 1.

DEPOSITIONS.

1. A party that gives notice of the taking of a deposition and then fails to attend and proceed with the deposition may be ordered to pay another party reasonable expenses, including reasonable attorney fees, incurred in attending in person or by attorney pursuant to the notice (MCR 2.306[G]). *Magnuson v Zadrozny,* 195 Mich App 581.

MEDIATION.

2. A party that rejects a mediation evaluation rendered in its favor, which is accepted by the opposing party, is liable for the opposing party's actual costs as a mediation sanction where, although it obtains a jury verdict more favorable than the evaluation, that verdict is reversed on appeal (MCR 2.403[O]). *Keiser v Allstate Ins Co,* 195 Mich App 369.

MEDIATION AWARDS.

3. Where both a rejection of a mediation award and a rejection of an offer of judgment is made, the cost provisions of the court rule under which the later rejection occurred control; if the same party would be entitled to costs under both rules, costs may be recovered from the date of the earlier rejection (MCR 2.403, 2.405[E]). *Magnuson v Zadrozny,* 195 Mich App 581.

OFFERS OF JUDGMENT.

4. Until twenty-eight days before trial, a party may serve on the adverse party a written offer to stipulate the entry of a judgment for all or part of a claim, including interest and costs then accrued; service by mail is complete at the time of mailing; although service on the twenty-eighth day before trial normally is not timely, where the twenty-ninth day before trial falls on a Sunday, service on the twenty-eighth day is timely (MCR 1.108[1], 2.107[C][3], 2.405[B]). *Magnuson v Zadrozny,* 195 Mich App 581.

PRETRIAL PUBLICITY—*See*
VENUE 1

PREVAILING PARTY—*See*
COSTS 1

PRIMA FACIE CASE—*See*
PRODUCTS LIABILITY 4

PRINCIPAL DEPARTMENTS—*See*
CONSTITUTIONAL LAW 6

PRIOR BAD ACTS OF VICTIM—*See*
CRIMINAL LAW 2

PROBABLE CAUSE—*See*
TORTS 2

PROBATE COURTS—*See*
CRIMINAL LAW 13

PROBATE PROCEEDINGS—*See*
EXECUTORS AND ADMINISTRATORS 1

PROBATION VIOLATIONS—*See*
SENTENCES 3-5

PROCEDURAL IRREGULARITIES IN ENACTMENT—*See*
ZONING 1

PRODUCTS LIABILITY.

CAUSATION.

1. The element of causation in a products liability action cannot be established solely on the basis of theory or conjecture; the plaintiff bears the burden of proving causation, and, where the matter of causation is one of pure speculation or conjecture, it is the trial court's duty to direct a verdict for the defendant. *Skinner v Square D Co,* 195 Mich App 664.

2. Mere conjecture regarding causation in a products liability action does not meet the burden of proof imposed on a party opposing a motion for summary disposition to come forward with documentary evidence indicating that a genuine issue of material fact exists (MCR 2.116[G][4]). *Skinner v Square D Co,* 195 Mich App 664.

DIES.

3. A designer or manufacturer of a die may not be held liable to an injured press operator for defective design or manufacture where the designer or manufacturer did not have knowledge of unsafe use or the use was not foreseeable. *Davis v Link, Inc,* 195 Mich App 70.

PRIMA FACIE CASE.

4. A prima facie case for products liability requires proof of a

PRODUCTS LIABILITY—Cont'd
causal relationship between the defect and the damage of which the plaintiff complains; a prima facie case does not require that the plaintiff offer evidence that positively excludes every other possible cause; it is enough if the plaintiff can establish a logical sequence of cause and effect, notwithstanding the existence of other plausible theories that may have evidentiary support. *Skinner v Square D Co,* 195 Mich App 664.

"PROFESSIONAL SERVICE"—*See*
INSURANCE 19

PROPERTY DIVISION—*See*
DIVORCE 1, 8, 9

PROPERTY PROTECTION BENEFITS—*See*
INSURANCE 8

PROPORTIONALITY—*See*
SENTENCES 7

PROXIMATE CAUSE—*See*
NEGLIGENCE 5

PUBLIC EMPLOYEES—*See*
WORKERS' COMPENSATION 2

PUBLIC STREETS—*See*
WORKERS' COMPENSATION 2

QUESTION OF FACT OR LAW—*See*
NEGLIGENCE 5

RAPE.
SUBSEQUENT SEXUAL ACTS.
1. Evidence of subsequent similar sexual assaults by a defendant against a victim is admissible where the defendant and the victim are members of the same household. *People v Puroll,* 195 Mich App 170.

REFERENDUM—*See*
ELECTIONS 1

REFUNDS—*See*
INSURANCE 3

REJECTION—*See*
PRETRIAL PROCEDURE 3

RELEVANCY—*See*
EVIDENCE 2

REPEAL OF TAX EXEMPTION FOR STATE LOTTERY PRIZES—*See*
TAXATION 2

REPLACEMENT FACILITIES—*See*
TAXATION 1

RESERVATIONS—*See*
INDIANS 1

RES JUDICATA—*See*
JUDGMENTS 4

RETAIL FRAUD—*See*
CRIMINAL LAW 14

RETROACTIVE LEGISLATION—*See*
CONSTITUTIONAL LAW 3

RIGHT TO FARM ACT—*See*
WORDS AND PHRASES 1

RULES OF EVIDENCE—*See*
EVIDENCE 3

SANCTIONS—*See*
ACTIONS 2
EMINENT DOMAIN 1
PLEADING 1
PRETRIAL PROCEDURE 2

SEARCHES AND SEIZURES.

INVESTIGATORY STOPS.

1. An investigatory stop must be founded on a particularized suspicion, based on an objective observation of the totality of circumstances, that the person stopped has been, is, or is about to be involved in criminal wrongdoing. *People v Chambers,* 195 Mich App 118.
2. In determining whether a detention is too long in duration to be justified as an investigatory stop, the critical inquiry is whether the police diligently were pursuing a means of investigation that likely would confirm or dispel their suspicions quickly, during which it was necessary to detain those stopped. *People v Chambers,* 195 Mich App 118.

SEARCH WARRANTS—*See*
COURTS 1

SECOND-DEGREE MURDER—*See*
HOMICIDE 1, 2

SELF-INSURED EMPLOYEE BENEFIT PLANS—*See*
INSURANCE 13

SELF-INSURERS—*See*
WORKERS' COMPENSATION 4

SENTENCES.
See, also, CONTROLLED SUBSTANCES 1; CRIMINAL LAW 12, 15, 16.
JUVENILE OFFENDERS.
1. A trial court, in imposing sentence for a crime committed by a minor, has discretion to sentence the minor as a juvenile or as an adult, and its decision will not be reversed on appeal absent an abuse of discretion. *People v Lyons,* 195 Mich App 248.
2. A trial court in deciding whether to sentence a minor as a juvenile or as an adult should consider: the juvenile's prior record, character, physical and mental maturity, and pattern of living, the seriousness and circumstances of the offense; whether the offense is part of a pattern of offenses leading to a determination that the juvenile is not amenable to treatment or, if amenable, that the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of others in the treatment program; whether, despite the potential for treatment, the nature of the delinquent behavior is likely to render the juvenile dangerous to the public if released at the age of twenty-one; whether the juvenile is more likely to be rehabilitated by services and facilities available in adult programs; and the best interests of the public welfare and the protection of the public security (MCL 769.1[3]; MSA 28.1072[3], MCR 6.931[E][3]). *People v Lyons,* 195 Mich App 248.
PROBATION VIOLATIONS.
3. The sentencing guidelines serve as an invaluable tool in determining a proportionate sentence for a probation violation and should be used as a starting point in determining the continuum within which the sentence should fall. *People v Smith,* 195 Mich App 147.
4. Time spent in an electronic tether program while on probation may not be credited toward a subsequent prison sentence imposed upon conviction of probation violation. *People v Smith,* 195 Mich App 147.
5. Time spent in a tether program by a defendant on probation who is subsequently found guilty of probation violation does not, upon revocation of probation, entitle the defendant, under the sentence credit statute or the Double Jeopardy Clauses of the federal and state constitutions, to credit toward a prison sentence imposed for the underlying conviction (MCL 769.11b; MSA 28.1083[2]; US Const, Am V; Const 1963, art 1, § 15). *People v Reynolds,* 195 Mich App 182.
SENTENCING GUIDELINES.
6. A trial court's express reliance on the sentencing guidelines in imposing a sentence within the range recommended by the guidelines satisfies the requirement that the court articulate its reasons for imposing the sentence; the requirement may be satisfied where the articulation is provided by the context of remarks preceding the imposition of sentence, e.g., where remarks by both the prosecutor and defense counsel reflect an

SENTENCES—Cont'd
unambiguous understanding that the guidelines would be the basis of the sentence. *People v Lawson,* 195 Mich App 76.
7. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record; departure from the sentencing guidelines is permitted where there are special characteristics of the offense or the offender, and the court specifically explains the characteristics; a sentence within the guidelines range conceivably may violate the principle of proportionality. *People v Stone,* 195 Mich App 600.

SENTENCING GUIDELINES—*See*
CRIMINAL LAW 15
SENTENCES 3, 6, 7

SERVICE—*See*
PRETRIAL PROCEDURE 4

SETTLEMENT OR COMPROMISE OF CHARGE—*See*
TORTS 4

SEX-DIFFERENTIAL GROOMING REQUIREMENTS—*See*
CIVIL RIGHTS 1

SEXUAL DISCRIMINATION—*See*
CIVIL RIGHTS 1-3

SINGLE CAUSE OF ACTION—*See*
COSTS 1

SOCIAL SERVICES.
CHILDREN BORN OUT OF WEDLOCK.
1. Each applicant for or recipient of aid to families with dependent children, as a condition of eligibility, must cooperate in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed; cooperation includes providing information, or attesting to the lack of information, under penalty of perjury; a mother who honestly asserts, under oath, that she has no further information regarding the child's father than that already provided cannot be sanctioned for noncooperation solely on the basis of adverse blood test results; a blood test alone cannot be deemed conclusive with regard to the issue of the mother's good faith (42 USC 602[a][26][B][i]; 45 CFR 232.12[a][1],[2], and [b][3]). *Black v DSS,* 195 Mich App 27.

SPLITTING CAUSE OF ACTION—*See*
ACTIONS 1

STATE JURISDICTION—*See*
INDIANS 1

STATEMENT OF REASONS—*See*
TRIAL 1

STATISTICAL ANALYSIS—*See*
CRIMINAL LAW 5

STATUTES.
JUDICIAL CONSTRUCTION.
1. The rule that when statutory language is clear and unambiguous, no further interpretation is required does not apply where, under a literal reading of the statute, a result that is absurd, unjust, and clearly inconsistent with the Legislature's intent would occur. *American Comm Ins v Ins Comm'r,* 195 Mich App 351.

STOCK OPTIONS—*See*
DIVORCE 8, 9

STOP-LOSS COVERAGE—*See*
INSURANCE 13

SUBROGATION—*See*
INSURANCE 10

SUBSEQUENT SEXUAL ACTS—*See*
RAPE 1

SUMMARY DISPOSITION—*See*
GOVERNMENTAL IMMUNITY 1
MOTIONS AND ORDERS 1
NEGLIGENCE 1
PRODUCTS LIABILITY 2

TAXATION.
INDUSTRIAL FACILITY TAX.
1. An industrial facilities exemption certificate may not be issued for a replacement facility in an industrial development district; a replacement facility is that which is intended to replace or restore obsolete industrial property on contiguous or the same land, or on vacant noncontiguous land located within the same plant rehabilitation district as the obsolete property (MCL 207.552[3]; MSA 7.800[2][3]). *Orion Twp v State Tax Comm,* 195 Mich App 13.
LOTTERIES.
2. 1988 PA 516 did not violate the title-object clause of the Michigan Constitution in repealing the Lottery Act provision that had allowed the exemption of state lottery prizes from state and local taxes (MCL 432.34; MSA 18.969[34], Const 1963, art 4, § 24). *Mooahesh v Treasury Dep't,* 195 Mich App 551.

TIMELINESS—*See*
PRETRIAL PROCEDURE 4

TIMELY APPEALS—*See*
APPEAL 1

TITLE—*See*
ELECTIONS 2

TITLE-OBJECT CLAUSE—*See*
TAXATION 2

TITLES—*See*
AUTOMOBILES 1

TORTS.

EMOTIONAL DISTRESS.

1. Recovery for emotional distress caused by observing the negligently inflicted injury of a third person may be had only if the plaintiff is an immediate member of the victim's family. *Nugent v Bauermeister,* 195 Mich App 158.

FALSE ARREST.

2. A plea of guilty of a criminal offense that is taken under advisement and ultimately not accepted by a court, leading to dismissal of the charge, does not constitute conclusive evidence of probable cause for the arrest and the prosecution and is not grounds for dismissal of an action for false arrest or malicious prosecution. *Blase v Appicelli,* 195 Mich App 174.

FEDERAL TORT CLAIMS ACT.

3. The Federal Tort Claims Act provides the sole substantive remedy for injury or loss of property, or personal injury or death, resulting from the operation by an employee of the federal government of any motor vehicle while acting within the scope of office or employment; federal courts are the only forums available for such actions; state courts do not have jurisdiction to entertain claims under the act (28 USC 1346[b], 2679[b]). *Smith v Swarthout,* 195 Mich App 486.

MALICIOUS PROSECUTION.

4. An action for malicious prosecution is not barred by the settlement or compromise of a prosecution where the settlement or compromise was brought about by duress or coercion. *Blase v Appicelli,* 195 Mich App 174.

TRACKING-DOG EVIDENCE—*See*
CRIMINAL LAW 7

TRANSFER OF FUNCTION—*See*
CONSTITUTIONAL LAW 7

TRESPASSERS—*See*
NEGLIGENCE 4

TRIAL.

PRETRIAL PROCEDURE.

1. A trial court is not required to state its reasons for approving or denying a defendant's request to waive the right to a trial by jury and to be tried before the court without a jury; the court

TRIAL—Cont'd
or the prosecutor may refuse the request for any reason or for no reason at all (MCL 763.3[1]; MSA 28.856[1]). *People v Jones,* 195 Mich App 65.

UNAMBIGUOUS CONTRACTS—*See*
INSURANCE 4

UNDERLYING FELONIES—*See*
CONSTITUTIONAL LAW 2

UNNAMED PERSONS—*See*
WILLS 1

VEHICLE CODE—*See*
AUTOMOBILES 1

VENUE.
CRIMINAL LAW.
1. The existence of pretrial publicity, standing alone, does not necessitate a change of venue; to be entitled to a change of venue, the defendant must show either a pattern of strong antipathy in the community and publicity so extensive and inflammatory that jurors could not remain impartial when exposed to it or that the jury was actually prejudiced or that the atmosphere surrounding the trial would create a probability of prejudice. *People v Passeno,* 195 Mich App 91.

LEGAL MALPRACTICE ACTIONS.
2. Venue for a legal malpractice action, if it is based on an allegation that the attorney's conduct prevented the client from bringing an action for which the attorney was retained or consulted, properly lies where the cause of action for the lost claim arose, or where all or part of the cause of action for legal malpractice arose. *Coleman v Gurwin,* 195 Mich App 8.

VESTED RIGHTS—*See*
CONSTITUTIONAL LAW 3

VOIR DIRE—*See*
CRIMINAL LAW 10

WAIVER—*See*
DIVORCE 5

WAIVER OF RIGHT TO JURY TRIAL—*See*
TRIAL 1

WAIVER OF RIGHT TO RAISE ISSUE—*See*
ACTIONS 1

WILFUL MISCONDUCT—*See*
NEGLIGENCE 2

WILLS.

ACTIONS.

1. A person who is not named in a will has no cause of action against the attorney who drafted the will where the intent of the testator as expressed in the will is not frustrated. *Ginther v Zimmerman,* 195 Mich App 647.

WITHDRAWAL OF PLEA—*See*
CRIMINAL LAW 8

WITHHOLDING OR WITHDRAWAL OF LIFE-SUSTAINING TREATMENT—*See*
PARENT AND CHILD 2

WORDS AND PHRASES.

See, also, INSURANCE 19, 20.

RIGHT TO FARM ACT.

1. Wood pallets that are assembled on farm property from wood that has not been grown on the property are not "farm products" as defined in the Right to Farm Act (MCL 286.472; MSA 12.122[2]). *Richmond Twp v Erbes,* 195 Mich App 210.

WORKERS' COMPENSATION.

AVERAGE WEEKLY WAGE.

1. For purposes of workers' compensation, the average weekly wage of persons who have worked less than thirty-nine weeks in the employment in which they are injured is computed by dividing the total wages paid by the number of weeks worked, including those weeks in which the employee worked less than a full week; a week in which any work is performed is considered a week actually worked (MCL 418.371[3]; MSA 17.237[371][3]). *Rowell v Security Steel,* 195 Mich App 578.

DUAL CAPACITY DOCTRINE.

2. The dual capacity doctrine recognizes that an employee may maintain an action for damages against the employer where the employer as the defendant in the action has a second persona that is completely independent from and unrelated to its status as an employer; the obligation of a city to maintain a traffic signal in good working order is totally unrelated to its obligations to its employees as their employer. *Howard v White,* 195 Mich App 590.

FAVORED-WORK DOCTRINE.

3. The favored-work doctrine requires an employer to keep an offer of favored work for an injured employee open for a reasonable time; an injured employee who refuses such favored work is not entitled to wage-loss benefits following the refusal even though the employer subsequently files for bankruptcy, thereby effectively withdrawing its offer (MCL 418.301[5]; MSA 17.237[301][5]). *Derr v Murphy Freight Lines,* 195 Mich App 333.

SELF-INSURERS.

4. *Workers' Comp Bureau v Durant,* 195 Mich App 626.

WORK LOSS—*See*
INSURANCE 11

ZONING.
ESTOPPEL.
1. A party may be estopped on the basis of public policy from challenging procedural irregularities in the enactment of a township zoning ordinance where, during a lengthy time following enactment, township officials and residents acted in accordance with the ordinance and no challenges were made with regard to the validity of its enactment. *Richmond Twp v Erbes,* 195 Mich App 210.