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COURT OF APPEALS

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5A Appleman, Insurance Law & Practice, § 3549, pp 549-553 58

Bickel, *The original understanding and the segregation decision*, 69 Harv L R 1 (1955) 302

Black's Law Dictionary (2d ed) 511

Black's Law Dictionary (6th ed) 59

Black's Law Dictionary (6th ed), p 1217 554

Black's Law Dictionary (6th ed), p 1606 638

Black's Law Dictionary (Rev 4th ed) 726

1 Cameron, Michigan Real Property Law (2d ed), § 18.5, p 658 451

19 CJS, Corporations, § 785, p 161 539

44 CJS, Insurance, § 296, pp 1163-1165 385

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Conley, *The First Principle of Real Reform: The Role of Science in Constitutional Jurisprudence*, 65 NC L R 935, 942-943 (1987) 308

Cooley, Constitutional Limitations (7th ed, 1903), p 91..... 87

2 Cooley on Taxation (4th ed), § 672, p 1403 13

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2 Martin, Dean & Webster, Michigan Court Rules Practice, p 367 476

4 Martin, Dean & Webster, Michigan Court Rules Practice, pp 438-443 367

4 Martin, Dean & Webster, Michigan Court Rules Practice (2d ed), p 331 484

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Nowak & Rotunda, Constitutional Law (4th ed), § 14.14, p 719 306

Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (New York: The Free Press, 1997), p 50 745

Prosser & Keeton, Torts (5th ed), § 125, pp 931-934 179

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Scalia, A Matter of Interpretation: Federal Courts and the Law (New Jersey: Princeton University Press, 1997), p 21 123

Scalia, A Matter of Interpretation: Federal Courts and the Law (New Jersey: Princeton University Press, 1997), pp 23-25..... 406

The American Heritage Dictionary: Second College Edition, p 72..... 154

COURT OF APPEALS CASES

SANDY PINES WILDERNESS TRAILS, INC v SALEM TOWNSHIP

Docket Nos. 201785, 201786, 201889, 201890. Submitted March 3, 1998, at Lansing. Decided October 2, 1998, at 9:10 A.M.

Sandy Pines Wilderness Trails, Inc., a licensed seasonal recreational campground, petitioned the Michigan Tax Tribunal, seeking to have its real property tax assessments by Salem Township and Monterey Township reduced by eliminating the inclusion within the assessments of so-called "park models." A park model is a temporary dwelling or vehicle of less than four hundred square feet that is designed as temporary living quarters for recreational, camp, seasonal, or travel use, that is built on a single chassis, is mounted on wheels, and is drawn by another vehicle, and that, while able to be titled and registered as a trailer coach under the Michigan Vehicle Code, is unable to be licensed by the state of Michigan for over-the-road travel without a special permit. None of the park models at issue were owned by the petitioner. Pursuant to a directive of the Michigan State Tax Commission, the townships treated the park models as not coming within the mobile home exemption of subsection 2a(1) of the General Property Tax Act (GPTA), MCL 211.2a(1); MSA 7.2(1)(1), and thus making them subject to property tax assessment and taxation pursuant to subsection 2(1) of the GPTA, MCL 211.2(1); MSA 7.2(1). The petitioner argued that the park models were trailer coaches within the meaning of § 41 of 1959 PA 243, MCL 125.1041; MSA 5.278(71), that were subject to the specific monthly tax of that section and, accordingly, fell within the mobile home exemption of § 2a of the GPTA and were exempt from assessment and taxation pursuant to § 2 of the GPTA. The tax tribunal agreed with the petitioner, finding that the park models were subject to the specific tax of § 41 of 1959 PA 243 and thus were not taxable as real property under subsection 2(1) of the GPTA because they fell within the mobile home exemption of subsection 2a(1) of the GPTA. Each township appealed, and the tax commission appealed. The appeals were consolidated.

The Court of Appeals *held*:

1. Subsection 2a(1) of the GPTA provides that "a mobile home which is not covered by section 41 of Act No. 243 of the Public

Acts of 1959 . . . shall be considered real property and shall be assessed as part of the real property upon which the mobile home is located." Section 41 of 1959 PA 243 provides that a licensee shall collect and remit a specific tax of $3 a month for "each occupied trailer coach, including trailer coaches licensed under the provisions of [the Michigan Vehicle Code] . . . occupying space within the trailer coach park" and further provides that the specific tax "shall be in lieu of any property tax levied upon the trailer coach pursuant to the provisions of [the GPTA] upon or on account of the trailer while located in the trailer coach park."

2. The respondents contended that the mobile home exemption of subsection 2a(1) of the GPTA should apply only to those mobile homes covered by The Mobile Home Commission Act, 1987 PA 96, MCL 125.2301 *et seq.*; MSA 19.855(101) *et seq.*, and that the park models located on the petitioner's property would not qualify for the mobile home exemption because the petitioner's property is not a mobile home park within the meaning of that act. The respondents argued that placing such a limitation on the meaning of mobile home as used in subsection 2a(1) of the GPTA is appropriate because the Mobile Home Commission Act, 1976 PA 419, repealed and replaced all of the provisions of 1959 PA 243 except § 41 and three other sections dealing with the collection of the specific tax and the provisions of 1976 PA 419 were continued without interruption in 1987 PA 96.

3. The respondents' suggestion that the Legislature intended that the present provisions of subsection 2a(1) of the GPTA are to be governed by the provisions of The Mobile Home Commission Act, 1987 PA 96, or its predecessor, the Mobile Home Commission Act, 1976 PA 419, is not supported by the history of subsection 2a(1). Subsection 2a(1) was amended by 1978 PA 379 to provide that a mobile home not covered by 1976 PA 419 should be assessed as part of the real property on which the mobile home was located; however, that language was later amended by 1982 PA 539 to change the statutory reference from 1976 PA 419 to its present reference to § 41 of 1959 PA 243. In light of the Legislature's clear rejection of the idea that subsection 2a(1) of the GPTA should be controlled by the provisions of either 1976 PA 419 or its successor, 1987 PA 96, the argument that the specific monthly tax and the resulting exemption from real property assessment and taxation should apply only to mobile homes located in mobile home parks licensed under 1987 PA 96 must be rejected.

4. Subsection 2a(1) of the GPTA clearly exempts from taxation as real property a "mobile home" that is covered by § 41 of 1959 PA

243. The specific tax of § 41 of 1959 PA 243 is levied on the owner or occupant of an "occupied trailer coach, including trailer coaches licensed under the provisions of [the Michigan Vehicle Code], . . . occupying space within the trailer coach park." It is clear that the reference to trailer coaches licensed under the Vehicle Code was included as a term of enlargement rather than as a term of limitation. Accordingly, because the provisions of the Vehicle Code are not controlling and the terms "occupied trailer coach" and "trailer coach park" are no longer defined by statute for the purpose of § 41 of 1959 PA 243, those terms must be given the meaning that they are understood to have in common language.

5. Applying the meaning as understood in common language, the Legislature must have intended the term "occupied trailer coach" to mean an occupied moveable residence attached to and drawn by some other power source and the term "trailer coach park" to mean an area of land where trailer coaches may be assembled or stationed.

6. The Tax Tribunal did not err in holding that § 41 of 1959 PA 243 applies to parks that are licensed.

7. Because it was stipulated that the park models were movable, were drawn by other vehicles, and were used as dwellings temporarily, they were occupied trailer coaches. Further, because the stipulated facts indicate that the petitioner was a licensed campground that allows its members to keep recreational vehicles, including park models, on campsites in the park, it was a licensed trailer coach park. Accordingly, the park models were subject to the specific tax of § 41 of 1959 PA 243 and, by reason of subsection 2a(1) of the GPTA, were not subject to the general property tax under subsection 2(1) of the GPTA.

8. To the extent that the passing comment in the decision of the Tax Tribunal concerning current assessment practices constituted a finding of fact that was not supported by competent, material, and substantial evidence on the record, such a finding would not mandate reversal, because it played no role in the outcome of the case, which turned on the interpretation of statutes and the application of those statutes to the undisputed stipulated facts.

Affirmed.

1. TAXATION — GENERAL PROPERTY TAX ACT — MOBILE HOMES — THE MOBILE HOME COMMISSION ACT — LEGISLATIVE INTENT.

The Legislature did not intend the provisions of the mobile home exemption of subsection 2a(1) of the General Property Tax Act to be governed by the provisions of The Mobile Home Commission

Act (MCL 211.2a[1]; MSA 7.2[1][1]; 1987 PA 96, MCL 125.2301 *et seq.*; MSA 19.855[101] *et seq.*).

2. TAXATION — TRAILER COACHES.

A dwelling or vehicle that is of less than four hundred square feet, that is designed as temporary living quarters for recreational, camp, seasonal, or travel use, that is built on a single chassis, is mounted on wheels, and is drawn by another vehicle, and that can be titled and registered as a trailer coach under the Michigan Vehicle Code but can be licensed for over-the-road travel only with a special permit is an occupied trailer coach for the purpose of the provisions of § 41 of 1959 PA 243 (MCL 125.1041; MSA 5.278[71]).

3. TAXATION — LICENSED TRAILER COACH PARKS — LICENSED RECREATIONAL CAMPGROUNDS.

A licensed recreational campground is a licensed trailer coach park for the purpose of the provisions of § 41 of 1959 PA 243 (MCL 125.1041; MSA 5.278[71]).

4. TAXATION — GENERAL PROPERTY TAX ACT — TRAILER COACHES — LICENSED TRAILER COACH PARKS — LICENSED RECREATIONAL CAMPGROUNDS.

A dwelling or vehicle that is a trailer coach within the meaning of § 41 of 1959 PA 243, that is located within a licensed recreational campground, and that is not owned by the campgrounds is subject to the specific tax of § 41 of 1959 PA 243 and falls within the mobile home exemption of subsection 2a(1) of the General Property Tax Act (MCL 125.1041, 211.2a[1]; MSA 5.278[71], 7.2[1][1]).

Foster, Swift, Collins & Smith, P.C. (by *Steven H. Lasher* and *Mark J. Burzych*), for the petitioner.

Bauckham, Sparks, Rolfe & Thomsen, P.C. (by *John K. Lohrstorfer*), for Salem Township and Monterey Township.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Ross H. Bishop*, Assistant Attorney General, for Michigan State Tax Commission.

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

SMOLENSKI, J. In these consolidated appeals, respondents, Salem Township, Monterey Township, and Michigan State Tax Commission, appeal as of right from a judgment of the Michigan Tax Tribunal (MTT) finding that "park models" located on land owned by petitioner, Sandy Pines Wilderness Trails, Inc., should not be assessed as real property under the general property tax law. We affirm.

This case was decided on stipulated facts. They indicate that Sandy Pines is a licensed, seasonal, recreational campground. Sandy Pines owns certain real property located in respondent townships.[1] Sandy Pines is available for use only by its members, their guests, associate members, and members of Coast to Coast. Sandy Pines' members do not acquire any interest in Sandy Pines' real property other than a license to use the property. Membership in Sandy Pines allows each member to use one campsite on which the member may keep a "recreational unit," which is defined as

> a vehicle type unit primarily designed for temporary living quarters for recreational, camping, travel or seasonal use, that has its own motive power, or is mounted on, or towed by, another vehicle. The basic vehicles are: camping trailers, fifth-wheel trailers, motor homes, park models, travel trailers and truck campers.

A "park model" is defined as

> a temporary dwelling or vehicle having less than 400 square feet of living area; designed as temporary living quarters for recreational, camping, seasonal or travel use; built on a sin-

[1] The townships are located in Allegan County.

> gle chassis, mounted on wheels and drawn by another vehicle; unable to be licensed by the State of Michigan for over-the-road travel without a special permit, and able to be titled and registered as a trailer coach under the Motor Vehicle Code.

Sandy Pines does not own any of the park models located on its real property.

Section 1 of the General Property Tax Act (GPTA), MCL 211.1 *et seq.*; MSA 7.1 *et seq.*, provides "[t]hat all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." MCL 211.1; MSA 7.1. Subsection 1 of § 2 of the GPTA provides in relevant part that "[f]or the purpose of taxation, real property includes all lands within the state, all buildings and fixtures on the land and appurtenances thereto, except as expressly exempted by law . . . ." MCL 211.2(1); MSA 7.2(1). At issue in this case is subsection 1 of § 2a of the GPTA, which provides in relevant part as follows:

> For purposes of section 2, a mobile home *which is not covered by section 41 of Act No. 243 of the Public Acts of 1959, being section 125.1041 of the Michigan Compiled Laws* [hereinafter § 41 of 1959 PA 243], . . . shall be considered real property and shall be assessed as part of the real property upon which the mobile home is located. [MCL 211.2a (1); MSA 7.2(1)(1) (emphasis supplied).][2]

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[2] The remainder of § 2a of the GPTA provides as follows:

> (2) As used in this section, "mobile home" does not include a travel trailer or camping trailer which is either parked in a campground licensed by this state for not more than 180 days in any calendar year, or parked upon private property, including a designated storage area of a licensed campground, for the sole purpose of storage.

Section 41 of 1959 PA 243 provides for a $3 specific monthly tax on certain trailer coaches in lieu of any property tax imposed under the GPTA:

> *Each licensee shall collect and remit a specific tax of $3.00 per month*, or major fraction thereof, *per occupied trailer coach*, which shall be a tax upon the owners or occupants of each occupied trailer coach, *including trailer coaches licensed under the provisions of* [*the Michigan Vehicle Code* (MVC), MCL 257.1 *et seq.*; MSA 9.1801 *et seq*]. , notwithstanding any provision of [the MVC], as amended, to the contrary, *occupying space within the trailer coach park. The specific tax shall be in lieu of any property tax* levied upon the trailer coach pursuant to the provisions of [the GPTA] upon or on account of the trailer while located in the trailer coach park. The licensee of a trailer coach park shall not collect a monthly tax for any space occupied by a

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(3) As used in this section, "mobile home" does not include a truck camper which is parked in a campground licensed by this state which is a portable structure, designed and constructed to be loaded onto, or affixed to, the bed or chassis of a truck, and which is used to provide temporary living quarters for recreational camping or travel.

(4) For purposes of this section, the following definitions shall apply:

(a) A travel trailer is a vehicular portable structure mounted on wheels and of a size and weight as not to require special highway movement permits when drawn by a stock passenger automobile or when drawn with a fifth wheel hitch mounted on a motor vehicle and is primarily designed, constructed, and used to provide temporary living quarters for recreational camping or travel.

(b) A camping trailer is a vehicular portable temporary living quarters used for recreational camping or travel and of a size and weight as not to require special highway movement permits when drawn by a motor vehicle.

In this case, a park model cannot be a "travel trailer," "camping trailer," or "truck camper" because, by stipulated definition, a park model is drawn by another vehicle and requires a special permit for highway travel. Thus, there is no dispute that subsections 2 through 4 of § 2a of the GPTA do not apply in this case.

> trailer coach accompanied by an automobile when the trailer coach and automobile bear license plates issued by any state other than this state for an accumulated period not to exceed 90 days in any 12-month period, if all the occupants of the trailer coach with accompanying automobiles are tourists or vacationists. When one or more persons occupying a trailer coach bearing a foreign license are employed or are conducting any manner of business or furnishing any service for gain within this state, there shall be no exemption from the specific tax. [MCL 125.1041; MSA 5.278(71) (emphasis supplied).]

Thus, under § 2a of the GPTA, a mobile home that is an occupied trailer coach, including trailer coaches licensed under the MVC, occupying space in a trailer coach park is subject to a $3 specific monthly tax in lieu of any property tax. Conversely, a mobile home that is not such a trailer coach shall be considered real property subject to the general property tax.

In this case, respondent townships assessed Sandy Pines' real property for the tax years 1995 and 1996. Pursuant to a directive by respondent commission, respondent townships included in these real property assessments the park models located on Sandy Pines' land. Respondents' rationale for assessing the park models as real property under the GPTA was that for purposes of § 2a of the GPTA the park models were not mobile homes covered by § 41 of 1959 PA 243 and thus not subject to the $3 specific monthly tax imposed on occupied trailer coaches occupying space in trailer coach parks.

Sandy Pines appealed the inclusion of the park models in the real property assessments to the MTT. Sandy Pines contended that for purposes of § 2a of the GPTA the park models were mobile homes covered

by § 41 of 1959 PA 243 and thus subject to the $3 specific monthly tax imposed on occupied trailer coaches occupying space in trailer coach parks.

The MTT agreed with Sandy Pines. Noting that the statutory language at issue in this case was "very dubious" and "ripe for legislative clarification," the MTT turned to an analysis of the legislative policy reflected by § 2a of the GPTA and § 41 of 1959 PA 243:

> The Tribunal now analyzes the policy which is reflected from the above-cited statutes. The Tribunal recognizes that the exemption sought in this case would only be effective if located in a licensed park. Licensed parks would include mobile home parks, seasonal mobile home parks, and campgrounds, all of which pay an ad valorem tax on the fair market value for their land and improvements, which include roads, utilities, and out-buildings. Any tax or fee collected from residents of the licensed park would then be in addition to those ad valorem taxes already assessed and collected from the owner of the park. Thus, it would be logical and consistent for the legislature to have intended the exemption, i.e., the $3.00 per month fee, to apply to both mobile homes and park models, i.e. trailer coaches, as long as they are located in a licensed park subject to ad valorem tax for the land and improvements thereto.

Sandy Pines being a licensed campground, the MTT ruled that the park models were "exempt from taxation under MCL 211.2a; MSA 7.2(1) for the tax years 1995 and 1996."

Respondents appeal as of right this ruling.

In the absence of fraud, judicial review of a determination by the MTT is limited to determining whether the MTT made an error of law or applied a wrong legal principle. *Michigan Automotive Research Corp v*

Dep't of Treasury (After Remand), 222 Mich App 227, 231; 564 NW2d 503 (1997).

Respondents contend that the MTT incorrectly interpreted § 2a of the GPTA. Respondents contend that § 2a of the GPTA should be construed such that the mobile homes subject to the $3 specific monthly tax in lieu of the property tax are only those mobile homes covered by the provisions of The Mobile Home Commission Act (TMHCA), 1987 PA 96, MCL 125.2301 *et seq.*; MSA 19.855(101) *et seq.*, which continued without interruption the provisions of the Mobile Home Commission Act (MHCA), 1976 PA 419, MCL 125.1101 *et seq.*; MSA 19.855(1) *et seq.* Respondents' rationale for this argument is that 1959 PA 243 was repealed and replaced by the MHCA and the provision of the MHCA were continued in the TMHCA.[3] Respon-

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[3] 1959 PA 243, MCL 125.1001 *et seq.*; MSA 5.278(31) *et seq.*, was a comprehensive act enacted for the purpose of regulating trailer coach parks. The act originally defined the terms "trailer coach" and "trailer coach park" without reference to mobile homes or mobile home parks and without regard to whether the trailer coaches were used on a continual or temporary basis or recreational or nonrecreational basis. See subsections 2(a) and 2(d) of 1959 PA 243, MCL 125.1002(a) and (d); MSA 5.278(32)(a) and (d). In 1970, the act was amended, in relevant part, to define the term "trailer coach" as including a "mobile home," and to define the terms "trailer coach park" and "mobile home park" synonymously as places harboring trailer coaches on "a continual or nonrecreational basis . . . ." See subsections 2(a) and 2(c) of 1959 PA 243, MCL 125.1002(a) and (c); MSA 5.278(32)(a) and (c), as amended by 1970 PA 172.

In 1976, the Legislature enacted the MHCA. The 1976 MHCA repealed almost all of 1959 PA 243, including the definitions of "trailer coach," "trailer coach park," and "mobile home park." See 1976 PA 419, MCL 125.1146; MSA 19.855(46). The only sections of 1959 PA 243 not repealed by the 1976 MHCA were the section at issue in this case, § 41 of 1959 PA 243, and three other sections devoted to the collection of the $3 specific monthly tax imposed under § 41.

The 1976 MHCA expired on January 10, 1987. See § 47 of 1976 PA 419, MCL 125.1147; MSA 19.855(47), as amended by 1981 PA 168; see also

dents note that the TMHCA does not apply to "campgrounds,"[4] defined as places "for the establishment of temporary living quarters,"[5] but rather applies to "mobile home parks," defined as tracts of land on which three or more mobile homes "are located on a continual, nonrecreational basis."[6] Respondents contend that Sandy Pines is not a "mobile home park" under the TMHCA because the stipulated facts indicate the Sandy Pines' property is not used on "a continual, nonrecreational basis." Respondents contend that because the park models are not located in a mobile home park as that term is defined in the TMHCA, the park models therefore do not qualify for the $3 specific monthly tax.

As explained in *Rose Hill Center, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997):

> Statutory interpretation is a question of law subject to review de novo on appeal. . . . The primary goal of statutory interpretation is to ascertain and give effect to the intent of

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OAG, 1987-1988, No 6438, p 80 (May 21, 1987). For the purpose of continuing the MHCA without interruption, the Legislature enacted 1987 PA 96, MCL 125.2301 *et seq.*; MSA 18.855(101) *et seq.* (the 1987 TMHCA). See 1987 PA 96, MCL 125.2349; MSA 19.855(149). Neither the 1976 MHCA nor the 1987 TMHCA continued the use of the term "trailer coach." Rather, both the 1976 MHCA and the 1987 TMHCA have always separately defined the terms "mobile home" and "recreational vehicle." See subsections 2(g) and 2(l) of 1987 PA 96, MCL 125.2302(g) and (l); MSA 19.855(102)(g) and (l); see also subsections 2(f) and 2(k) of 1976 PA 419, MCL 125.1102(f) and (k); MSA 19.855(2)(f) and (k).

[4] See § 8 of 1987 PA 96, MCL 125.2308; MSA 19.855(108); see also § 8 of 1976 PA 419, MCL 125.1108; MSA 19.855(8).

[5] See subsection 2(a) of 1987 PA 96, MCL 125.2302(a); MSA 19.855(102)(a); see also subsection 12501(1)(a) of the Public Health Code, MCL 333.12501(1)(a); MSA 14.15(12501)(1)(a).

[6] See subsection 2(i) of 1987 PA 96, MCL 125.2302(i); MSA 19.855(102)(i); see also subsection 2(h) of 1976 PA 419, MCL 125.1102(h); MSA 19.855(2)(h).

> the Legislature in enacting a provision. . . . Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. . . . However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate.

In this case, had the Legislature intended the construction of § 2a of the GPTA sought by respondents it could have easily drafted this statute to so provide. However, for purposes of the $3 monthly tax, the specific language of § 2a of the GPTA does not refer to mobile homes "covered by [the TMHCA]," but rather plainly refers to mobile homes "covered by [§ 41 of 1959 PA 243]," which in turn refers only to occupied trailer coaches occupying space in trailer coach parks. The Legislature is presumed to have intended the meaning it plainly expressed. *Institute In Basic Life Principles, Inc v Watersmeet Twp (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996).

Moreover, fatal to respondents' argument is the fact that at one time subsection 2a(1) of the GPTA did refer to mobile homes covered by the MHCA:

> For purposes of section 2, a mobile home which is not covered by Act No. 419 of the Public Acts of 1976, being sections 125.1101 to 125.1147 of the Michigan Compiled Laws,[7] . . . shall be considered real property and shall be assessed as part of the real property upon which the mobile

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[7] 1976 PA 419 refers to the 1976 MHCA that expired on January 10, 1987, pursuant to 1981 PA 168. See note 3, *supra*.

> home is located. [Subsection 2a(1) of 1978 PA 379, MCL 211.2a(1); MSA 7.2(1)(1).]

However, the Legislature rejected this language when it amended § 2a of the GPTA to its current language in 1982. MCL 211.2a(1); MSA 7.2(1)(1), as amended by 1982 PA 539. Changes in statutory language are generally presumed to reflect a change in meaning. *Michigan Automotive*, *supra* at 232.

Thus, in light of the plain language of § 2a of the GPTA and the Legislature's previous rejection of language that would have permitted the construction of this statute sought by respondents, we reject respondents' argument that the $3 specific monthly tax should be imposed on mobile homes located only in "mobile home parks" operated in accordance with the TMHCA.

Respondents also contend that the $3 specific monthly tax constitutes an exemption to the general property tax. Respondents note that although the MTT found the statutory language at issue in this case "very dubious," it nevertheless construed this language to find that the park models were exempt from the general property tax. Respondents contend that in so doing, the MTT violated the rule of statutory construction that tax exemption statutes are to be strictly construed against the taxpayer.

Assuming the statutory language in this case constitutes a tax "exemption,"[8] we agree with respondents that tax exemptions are to be strictly construed

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[8] We note that the fundamental issue in this case is the preliminary determination whether the park models should even be considered real property for purposes of the property tax. See MCL 211.2a(1); MSA

against the taxpayer. *Perry Drug Stores, Inc v Dep't of Treasury*, 229 Mich App 453, 461; 582 NW2d 533 (1998). In *Howard v Clinton Charter Twp*, 230 Mich App 692, 696; 584 NW2d 644 (1998), this Court further explained:

> In *Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948), our Supreme Court quoted the following from 2 Cooley on Taxation (4th ed), § 672, p 1403:
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> "An intention on the part of the legislature to grant an exemption from the taxing power of the State will never be implied from language which will admit of any other reasonable construction. . . . Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it."

However, the rule requiring strict construction of exemptions does not permit a strained construction adverse to the Legislature's intent. *Rose Hill, supra* at 32-33.

In determining the Legislature's intent in this case, we begin by again considering the specific language

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7.2(1)(1); cf. *Michigan Bell Telephone Co v Dep't of Treasury*, 229 Mich App 200, 208; 581 NW2d 770 (1998).

of the statutory provisions at issue. *Id.* at 32. Here, the plain language of § 2a of the GPTA provides that mobile homes covered by § 41 of 1959 PA 243 shall not be considered real property for real property taxation purposes. A mobile home is covered by § 41 of 1959 PA 243 if it is an

> occupied trailer coach, . . . including trailer coaches licensed under the provisions of [the MVC], . . . occupying space within the trailer coach park.

The terms "occupied trailer coach" and "trailer coach park" are not defined in § 41 of 1959 PA 243, and the former definitions of these terms in 1959 PA 243 have been repealed.[9] However, we note that the trailer coaches covered by § 41 of 1959 PA 243, include trailer coaches "licensed under the provisions of [the MVC]." We thus examine what constitutes a trailer coach "licensed under the provisions of [the MVC].

The MVC defines a "trailer coach" as "every vehicle primarily designed and used as temporary living quarters for recreational, camping, or travel purposes and drawn by another vehicle." MCL 257.74; MSA 9.1874. Certainly, the park models in this case appear to fit this definition.

Under the MVC, a trailer coach is subject to registration and certificate of title requirements when it is to be moved upon a highway. See MCL 257.216; MSA 9.1916. Moreover, trailer coaches exceeding certain size or weight requirements may not be moved on a highway unless a special permit is obtained. See, gen-

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[9] See note 3, *supra.*

erally, MCL 257.716 *et seq.*; MSA 9.2416 *et seq.* Assuming that satisfaction of these requirements constitutes the licensing necessary under § 41 of 1959 PA 243, we note that the stipulated facts in this case do not indicate that the park models are titled and registered as a trailer coach under the MVC, but rather indicate only that the park models are "able to be titled and registered as a trailer coach" under the MVC. In addition, the stipulated facts indicate only that the park models cannot "be licensed by the State of Michigan for over-the-road travel without a special permit." No clue is given concerning whether the park models at issue presently have such a special permit. Thus, although it appears that the park models fit the MVC definition of trailer coach, it is not clear whether for purposes of § 41 of 1959 PA 243 the park models are trailer coaches "licensed" under the MVC.

However, we conclude that we need not decide this issue. Again, we note that § 41 of 1959 PA 243 applies to

> occupied trailer coach[es], . . . including trailer coaches licensed under the provisions of [the MVC], . . . occupying space within the trailer coach park.

"When used in the text of a statute, the word 'includes' can be used as a term of enlargement or of limitation, and the word in and of itself is not determinative of how it is intended to be used." *Frame v Nehls*, 452 Mich 171, 178-179; 550 NW2d 739 (1996). In this case, the principal class referred to in § 41 of 1959 PA 243 is trailer coaches, to which is added a subclass of trailer coaches "licensed under the provisions of [the MVC]." Accordingly, we conclude that as

used in § 41 of 1959 PA 243 the word "including" is used as a term of enlargement. See *Surowitz v Pontiac*, 374 Mich 597, 605-606; 132 NW2d 628 (1965). We conclude that the Legislature intended that the trailer coaches covered by § 41 of 1959 PA 243 may include, but are not limited to, trailer coaches "licensed under the provisions of [the MVC]."

Thus, for purposes of § 41 of 1959 PA 243, we are again left with the undefined terms "occupied trailer coach" and "trailer coach park."[10] However, simply because a phrase is undefined does not render a statute ambiguous. *Marcelle v Taubman*, 224 Mich App 215, 219; 568 NW2d 393 (1997). Rather, undefined words are given meaning as understood in common language, taking into consideration the text and subject matter relative to which they are employed. *Id.* Because the nonlegal words "occupied trailer coach" or "trailer coach park" are not defined for purposes of § 41 of 1959 PA 243, resort to a lay dictionary is appropriate. *Horace v Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998); *Marcelle, supra.*

The word "trailer" is defined in relevant part as "a large van or wagon drawn by an automobile, truck, or tractor, used esp. in hauling freight by road" or "a vehicle attached to an automobile and used as a mobile home or place of business, usu. equipped with furniture, kitchen facilities, bathroom, etc." *Random House Webster's College Dictionary* (1992), p 1364. The word "coach" is defined in relevant part as "a

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[10] In other words, we conclude that in light of our preceding analysis the Legislature did not intend to limit § 41 of 1959 PA 243 to those trailer coaches coming within the definition of "trailer coach" in the MVC.

large, horse-drawn four-wheeled carriage, usu. enclosed." *Random House Webster's College Dictionary* (1992), p 250. Although the word "coach" appears anachronistic[11] in the present context, we must not treat any word in a statute as surplusage or rendered nugatory. *Kiesel Intercounty Drain Drainage Dist v Dep't of Natural Resources*, 227 Mich App 327, 337; 575 NW2d 791 (1998). Rather, we must give meaning to every word of a statute. *Id.*

The definitions of both "trailer" and "coach" indicate that neither has its own power but rather each must be attached to and drawn by some other power source. The definition of "trailer" indicates that it may be used as a mobile home without regard to whether such use is temporary or permanent, recreational or nonrecreational, while the definition of "coach" indicates that is used for carrying people.[12] A "mobile home" is defined as a moveable residence.[13] Applying the meaning as understood in common language, we conclude that the Legislature intended the term "trailer coach" to mean a moveable residence attached to and drawn by some other power source. *Marcelle, supra.* An "occupied[14] trailer coach" would

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[11] See *Random House Webster's College Dictionary* (1992), p 40, defining "anachronistic" as belonging to an earlier time.

[12] See *Random House Webster's College Dictionary* (1992), p 201, defining "carriage" in relevant part as "a wheeled vehicle for conveying persons, as one drawn by horses and designed for comfort and elegance."

[13] See *Random House Webster's College Dictionary* (1992), pp 622, 1105-1106, defining "home" and "residence."

[14] See *Random House Webster's College Dictionary* (1992), p 904, defining "occupy" in relevant part as "to be a resident or tenant of; dwell in."

therefore be an occupied moveable residence attached to and drawn by some other power source.

The word "park" is defined in relevant part as "a public area of land, usu. in a natural state, having facilities for recreation" or "a space where vehicles, esp. automobiles, may be assembled or stationed." *Random House Webster's College Dictionary* (1992), p 948. Applying the meaning as understood in common language, we conclude that the Legislature intended the term "trailer coach park" to mean an area of land where trailer coaches may be assembled or stationed.

Finally, the MTT concluded that § 41 of 1959 PA 243 applied to parks that are licensed. Again, we note that every word in a statute must be given meaning. *Kiesel, supra.* Here, § 41 of 1959 PA 243 provides that the $3 specific monthly tax imposed on occupied trailer coaches occupying space in trailer coach parks must be collected and remitted by "[e]ach licensee . . . ." In addition, § 41 of 1959 PA 243 provides certain circumstances under which "[t]he licensee of a trailer coach park" need not collect the $3 specific monthly tax. Generally, this Court will defer to the MTT's interpretation of a statute that it is delegated to administer. *Rose Hill, supra.* Accordingly, we conclude that the MTT did not err in construing § 41 of 1959 PA 243 as applying to parks that are licensed.

In summary, we disagree with the MTT that the statutory provisions in this case are of "dubious" meaning. Rather, for purposes of § 2a of the GPTA and § 41 of 1959 PA 243, we conclude that the Legislature clearly and unambiguously intended that the mobile homes subject to the $3 specific monthly tax are

occupied moveable residences attached to and drawn by some other power source that are occupying space in licensed areas of land where such moveable residences may be assembled or stationed.

In this case, the stipulated facts indicate that the park models are moveable, drawn by other vehicles and used as dwellings, albeit temporarily. Strictly applying the plain statutory language to the stipulated facts as a matter of law, we conclude that the park models are occupied trailer coaches. *Howard*, *supra*; *Marcelle*, *supra* at 218. The stipulated facts indicate that Sandy Pines is a licensed campground that allows members one campsite on which they may keep recreational vehicles, including park models. Again, strictly applying the plain statutory language to the stipulated facts as a matter of law, we conclude that Sandy Pines is a licensed trailer coach park. *Howard*, *supra*; *Marcelle*, *supra*. Because the park models are occupied trailer coaches occupying space in a trailer coach park, they are therefore subject to the $3 specific monthly tax imposed under § 41 of 1959 PA 243 in lieu of the general property tax under § 2a of the GPTA. The MTT reached the right result in this case, albeit pursuant to different reasoning.

We further note that our construction of the statutes at issue in this case is in keeping with the policy behind § 2a of the GPTA. *Kiesel*, *supra* at 334. Specifically, respondents have supplied this Court with a legislative analysis concerning the Legislature's intent in 1978 when it amended § 2a of the GPTA to provide that the type of mobile homes subject to the $3 specific monthly tax were those mobile homes covered by the MHCA:

THE APPARENT PROBLEM:

The Mobile Home Commission Act regulates mobile homes in mobile home parks, and makes a distinction between mobile homes and such recreational vehicles as campers, tent trailers, etc.[15] The General Property Tax Act exempts from the property tax mobile homes situated in mobile home parks (although it refers to them as "trailer coaches" regulated by a repealed statute),[16] but specifies that all other mobile homes, i.e., those situated on private lots, must be considered real property and therefore assessable. Because its language is outdated and indefinite, the property tax act has caused problems for owners of licensed campgrounds. Some assessors have been adding the value of recreational vehicles (tent campers, motor homes, travel trailers) situated at campgrounds to the total value of those campgrounds, thereby causing campground owners to pay heavy property taxes. *It was the obvious intention of the legislature to permit the property tax to be levied against "permanent" habitations situated on private property,* not against campers which happen to be situated on a private campground on tax day (December 31). Further, some campgrounds rent spaces to owners of recre-

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[15] See note 3, *supra.*

[16] Before its 1978 amendment, subsection 2a(1) of the GPTA provided as follows:

> For all purposes of the preceding section, trailer coaches not under the provisions of Act No. 143 of the Public Acts of 1939, as amended, being sections 125.751 to 125.768, inclusive, of the Compiled Laws of 1948, and while located on land otherwise assessable as real property under this act, when such trailer coaches are used as habitations, and whether or not permanently affixed to the soil, shall be deemed to be real property and shall be assessed as part of the real property upon which they are located. [MCL 211.2a; MSA 7.2, before its amendment by 1978 PA 379 and 1982 PA 539. See 1970 CL 211.2a.]

1939 PA 143 as amended by 1941 PA 255, MCL 125.751 *et seq.*; MSA 5.278(1) *et seq.*, was a comprehensive act devoted to the regulation of trailer coach parks and was repealed by 1959 PA 243. See § 97 of 1959 PA 243, MCL 125.1097; MSA 5.278.(127); see also note 3, *supra.*

ational vehicles who leave them at the campsites during the week and then drive home, returning to pick them up on the weekends. This service is especially attractive to persons who want to avoid using excessive amounts of gasoline because they had to haul heavy vehicles back and forth. If the law's intention is not made clear, many campgrounds will cease offering these services, and the state will lose a great portion of its tourist business.

THE CONTENT OF THE BILL:

The bill would specify that mobile homes not regulated by the Mobile Home Commission Act are subject to the property tax. It would exempt from the tax a travel trailer or camping trailer licensed as a motor vehicle and parked at a licensed campground for no more than 180 days a year or parked on private property for storage purposes. Truck campers, defined as portable structures designed to be loaded onto or attached to the bed of a truck and used as temporary living quarters for recreation, would also be exempt. The bill would also exempt camping trailers (defined as "vehicular, portable, temporary living quarters used for recreational camping or travel") and travel trailers (portable vehicles mounted on wheels but not requiring special permits when drawn by a car or truck, including those with fifth-wheel hitches) used in temporary recreational camping and traveling.[17] [House Legislative Analysis, HB 4173, October 18, 1978 (emphasis supplied).]

We have already ruled in this opinion that in light of the 1982 amendment of § 2a of the GPTA it is now mobile homes that are not covered by § 41 of 1959 PA 243 that are subject to the property tax.[18] However, what we nevertheless find relevant in the preceding legislative analysis is that the "obvious intention" of § 2a of the GPTA is "to permit the property tax to be

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[17] See note 2, *supra*.

[18] See 1982 PA 539; see also the previous discussion in this opinion.

levied against 'permanent' habitations situated on private property . . . ." Our construction of § 2a of the GPTA and § 41 of 1959 PA 243 is thus consistent with this policy because the park models are temporary habitations situated not on private property, but in a licensed campground.

Finally, we reject respondents' argument that the MTT's decision should be reversed because the MTT made a finding of fact not supported by competent, material, and substantial evidence. Even assuming that the MTT's passing comment about actual current assessment practices with respect to seasonal living units in campgrounds[19] constituted a finding of fact unsupported by the record, the unsupported finding played no role in the outcome of this case. Rather, the issues in this case were questions of law consisting of the interpretation of statutes and the application of such statutes to undisputed facts. See *Marcelle, supra.*

Affirmed.

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[19] The MTT noted, in relevant part, that "[a]fter reviewing the file and analyzing the briefs, it appears that many, if not a vast majority of the seasonal living units located in licensed campgrounds and seasonal mobile home parks are currently paying the $3.00 per month fee, thus are considered exempt."

PEOPLE v GADOMSKI

Docket Nos. 197049, 197050. Submitted September 1, 1998, at Detroit. Decided October 2, 1998, at 9:15 A.M. Leave to appeal denied, 459 Mich ___.

Lawrence E. Gadomski was convicted of first-degree criminal sexual conduct and Anthony Gadomski was convicted of two counts of first-degree criminal sexual conduct and of felonious assault following a joint trial before a single jury in the St. Clair Circuit Court, Peter E. Deegan, J. The defendants appealed, and their appeals were consolidated.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion in denying Lawrence Gadomski's motion for a new trial on the asserted ground that the verdict was against the great weight of the evidence in light of the victim's "wildly inconsistent" trial testimony. At the time of the motion, the law provided that, with respect to a motion for a new trial based on the verdict being against the great weight of the evidence, the trial court could act as a "thirteenth juror" and independently evaluate the credibility of trial witnesses. Under current law, a trial court may grant a motion for a new trial based on the verdict being against the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. Under either test, the Court of Appeals may not attempt to resolve witness credibility questions anew. Accordingly, in this case, the Court of Appeals cannot overturn the trial court's determination regarding witness credibility.

2. The defendants were not denied their right to a unanimous jury verdict as a result of the trial court's instruction to the jury that, in order to find the defendants guilty of first-degree criminal sexual conduct, the jurors had to find that each act of sexual penetration was accompanied by one of three alternative aggravating circumstances. Where, as here, a defendant is charged with first-degree criminal sexual conduct and more than one aggravating circumstance is supported by the facts, the jury need not decide unanimously which aggravating circumstance serves as the basis for

conviction. Accordingly, in this case, the trial court did not err in not instructing the jury to reach unanimity with respect to the aggravating circumstance for each conviction of first-degree criminal sexual conduct.

3. Because the defendants were not entitled to jury instructions relative to unanimity with respect to the aggravating circumstances for the charges of first-degree criminal sexual conduct, they were not denied the effective assistance of counsel when trial counsel failed to request such an instruction.

4. The trial court did not abuse its discretion in allowing the late endorsement of a res gestae witness. The addition of this witness, two days into the trial, did not prejudice the defendants, who knew from the defendants' preliminary examination testimony and the prosecutor's opening statement at trial that the prosecution might attempt to establish that a third person, i.e., the witness, was with the defendants when they committed their offenses. The identity and involvement of the witness was not discovered until the trial started. The prosecution's duty under the res gestae witness statute, MCL 767.40a; MSA 28.980(1), is to provide notice of known witnesses and reasonable assistance to locate witnesses on request by a defendant. Here, the witness was unknown until trial started, and the defendants did not request the prosecution's assistance in locating the witness.

Affirmed.

1. CRIMINAL LAW — NEW TRIAL — WITNESS CREDIBILITY — APPEAL.

The Court of Appeals, when reviewing a trial court's ruling on a motion for a new trial on the asserted ground that the verdict was against the great weight of the evidence, may not attempt to resolve anew questions involving the credibility of trial witnesses.

2. RAPE — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — AGGRAVATING CIRCUMSTANCES — JURY UNANIMITY.

The jury in a first-degree criminal sexual conduct trial need not decide unanimously which of several aggravating circumstances supported by the facts serves as the basis for conviction of the defendant (MCL 750.520b; MSA 28.788[2]).

3. CRIMINAL LAW — WITNESSES — LATE ENDORSEMENT — APPEAL.

A trial court's decision to allow the late endorsement of a witness is reviewed for abuse of discretion; an abuse of discretion exists when the trial court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias, or when an unprejudiced person,

considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling.

4. CRIMINAL LAW — RES GESTAE WITNESSES — PROSECUTION'S OBLIGATIONS.

The res gestae witness statute requires the prosecution to notify defendants of the existence of known res gestae witnesses and to provide defendants with assistance in locating such witnesses; the statute does not require the prosecution to exercise due diligence to discover the names of witnesses (MCL 767.40a; MSA 28.980[1]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Elwood L. Brown*, Prosecuting Attorney, and *Timothy K. Morris*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Debra A. Gutierrez*), for Lawrence E. Gadomski.

Douglas R. Mullkoff, for Anthony Gadomski.

Before: TALBOT, P.J., and FITZGERALD and YOUNG, JR., JJ.

TALBOT, P.J. Defendants Lawrence Earl Gadomski and Anthony Gadomski were tried in a joint trial before a single jury. Defendant Lawrence Gadomski was convicted of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2), and found not guilty of three counts of CSC I and one count of first-degree home invasion, MCL 750.110a; MSA 28.305(a). He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to twenty to sixty years' imprisonment for his CSC I conviction. Defendant Anthony Gadomski was convicted of two counts of CSC I and one count of felonious assault, MCL 750.82; MSA 28.277, and found not guilty of three counts of CSC I and one count of first-degree home invasion. He was sentenced as an habit-

ual offender, second offense, MCL 769.10; MSA 28.1082, to concurrent terms of twenty-five to sixty years' imprisonment for each of his CSC I convictions and two to six years' imprisonment for his felonious assault conviction. Defendants appeal as of right. Their appeals were consolidated on this Court's motion. We affirm.

At trial, the victim testified that late on the evening of December 14, 1995, defendant Anthony Gadomski, an acquaintance of hers, entered her house uninvited through the bathroom window and proceeded to let his brother, defendant Lawrence Gadomski, and an unidentified third person in through the back door. After defendant Anthony Gadomski informed the victim that her incarcerated boyfriend owed him $10,000, he and his brother spent the remainder of the night forcing her to engage in various sexual acts and helping themselves to her food and drink. Once during the night, defendant Anthony Gadomski threatened the victim by holding a kitchen knife to her neck. Defendants left the victim's house on the following morning, taking some of her property with them. Defendant Anthony Gadomski testified that he was invited into the victim's house and that he and the victim engaged in consensual sex. Defendant Lawrence Gadomski did not testify.

DOCKET NO. 197049

Defendant Lawrence Gadomski[1] first argues that the trial court erred in denying his motion for a new

[1] In this section, use of "defendant," in the singular, will hereafter refer only to Lawrence Earl Gadomski. Use of "defendants" will refer to both Anthony Gadomski and Lawrence Earl Gadomski.

trial brought on the ground that the jury's verdict was against the great weight of the evidence. We disagree. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

Specifically, defendant contends that the trial court abused its discretion in denying his motion in the face of the victim's "wildly inconsistent" trial testimony. At the time of defendant's motion, the law provided that, in a motion for a new trial based on the great weight of the evidence, the trial court could act as a "thirteenth juror" and independently evaluate the credibility of the trial witnesses. See *People v Herbert*, 444 Mich 466, 476; 511 NW2d 654 (1993). The Michigan Supreme Court has subsequently rejected the "thirteenth juror" standard and explained that a trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). However, neither the former nor the current understanding of the law with respect to such motions provides that this Court may make a credibility determination on appeal. To the contrary, it is well settled that this Court may not attempt to resolve credibility questions anew. See, e.g., *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998); *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Accordingly, we cannot say that the trial court abused its discretion in denying defendant's motion for a new trial.

Next, defendant argues that he was denied his right to a unanimous jury verdict as a result of the trial court's instructions to the jury regarding the elements of CSC I. We disagree.

A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). In this case, the trial court instructed the jury that in order to find defendant guilty, it was required to find that defendant engaged in the specific act of sexual penetration alleged by the prosecution and that this act was accompanied by one of three alternative aggravating circumstances. The aggravating circumstances made available for the jury's consideration included (1) that the act occurred during the commission of a home invasion, see MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), (2) that it involved aiding and abetting and force or coercion, see MCL 750.520b (1) (d) (ii); MSA 28.788 (2) (1) (d)(ii), and (3) that it caused personal injury to the victim and involved force or coercion, see MCL 750.520b(1)(f); MSA 28.788 (2) (1) (f). The trial court also instructed the jurors, in general terms, that it was their job to decide the facts of the case and that their verdict must be unanimous.

Defendant contends that the trial court should have instructed the jury that it was required to unanimously agree on the existence of at least one of the three aggravating circumstances alleged by the prosecution. He maintains that, because no special unanimity instruction was given, the jury might have unani-

mously agreed on the general existence of an aggravating circumstance without unanimously agreeing on the existence of any one of the aggravating circumstances in particular. Defendant failed to raise the issue at trial by requesting such an instruction or by objecting to the trial court's instructions on that basis. Accordingly, our review is limited to the question whether relief is necessary to avoid manifest injustice. See *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Yarger*, 193 Mich App 532, 536-537; 485 NW2d 119 (1992).

Criminal defendants are guaranteed a unanimous jury verdict under the state constitution. See Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). Consequently, trial courts are required to give proper instructions regarding the unanimity requirement. *Id.* at 511. In some circumstances, a general unanimity instruction such as the one given in this case is not adequate to ensure a defendant's right to a unanimous jury verdict. For instance, the Michigan Supreme Court has held that when the prosecution offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. *Id.* at 530. Relying on this holding, defendant suggests that he was entitled to a special unanimity instruction in this case because the separate aggravating circumstances on which the jury was instructed involved alternative

factual situations (i.e., a home invasion, aiding and abetting, or a personal injury). We are not persuaded by defendant's argument.

Michigan criminal juries are not required to unanimously agree upon every fact supporting a guilty verdict. See, e.g., *People v Espinosa*, 142 Mich App 99, 105; 369 NW2d 265 (1985) (explaining that, in theory, a defendant could be convicted of murder by a jury in which six members were of the opinion that the defendant shot the victim acting as the principal, and the other six members were of the opinion that he aided and abetted another). More specifically, it is well settled that when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories. See *People v William Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991), cited with apparent approval in *Cooks*, *supra* at 515, n 16; see also *People v Lynn*, 223 Mich App 364, 366-367; 566 NW2d 45 (1997); *People v Asevedo*, 217 Mich App 393; 551 NW2d 478 (1996); cf. *Yarger*, *supra* at 537. That was the case here. Where there is a single sexual penetration, the various aggravating circumstances listed in MCL 750.520b; MSA 28.788(2) constitute alternative means of proving a single CSC I offense and would not support convictions of separate and distinct CSC I offenses. See *People v Willie Johnson*, 406 Mich 320, 330-331; 279 NW2d 534 (1979). Accordingly, defendant would have been properly convicted of CSC I even if some of the jurors believed that he committed the offense solely on the basis of one aggravating circumstance, while the rest

of the jurors believed that he committed the offense solely on the basis of another one of the aggravating circumstances.

In sum, we hold that when a defendant is tried on a charge of CSC I, and more than one aggravating circumstance is supported by the facts, it is not error for the trial court to instruct the jury, in the alternative, regarding each of the applicable aggravating circumstances alleged by the prosecution.[2] In this case, because the trial court's instructions were legally correct, manifest injustice will not result from our failure to grant the relief requested.

Defendant next argues that he was denied the effective assistance of counsel when his trial counsel failed to request a special unanimity instruction. We disagree. Because defendant was not entitled to such an instruction, defense counsel's failure to request the instruction did not constitute ineffective assistance of counsel. See *Torres*, *supra* at 425.

Finally, defendant argues that the trial court erred in allowing the prosecution's late endorsement of Dale Smith, a res gestae witness.[3] We disagree. A trial

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[2] The standard jury instruction for CSC I advises trial courts to follow the instruction for sexual penetration with an instruction for "one" of the nine alternative aggravating circumstances. See CJI2d 20.1(3). The implication is that trial courts should not instruct juries, in the alternative, regarding multiple aggravating circumstances. However, we note that the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court. "Their use is not required, and trial judges are encouraged to examine them carefully before using them, in order to ensure their accuracy and appropriateness to the case at hand." *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). The record suggests that the trial court did so in this case.

[3] "A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in

court's decision to allow a late endorsement of a witness is reviewed for an abuse of discretion. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. Stated differently, an abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. E.g., *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

During defendant's preliminary examination, the victim testified that a third person came to her house with defendants on the night of the crime. The victim could not identify this person. At trial, the prosecutor informed the jury during her opening statement that the victim would testify that, on the night of the crime, defendants came to her house with another person. She did not suggest that the name of the unidentified third person was known by anybody. Defendant's counsel then predicted in his opening statement that, contrary to the victim's story, the evidence would show that defendants were not accompanied by a third person.

Two days later, before the second day of trial, the prosecution moved to amend its witness list to add the "third person," Dale Smith. The prosecutor explained that, although the police initially suspected that Smith may have been the third person present on

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developing a full disclosure of the facts." *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990).

the night of the crime, his presence could not be confirmed during their investigation. The victim did not have enough contact with the third person to make an identification, and no fingerprints consistent with Smith's were found at the scene. Consequently, Smith was discounted, and the police "gave up" in their efforts to locate and question him. Police efforts to discover the identity of the third person were renewed in response to defense counsel's opening statement. This led to Smith's discovery in Florida. After Smith admitted that he was the third person involved in the incident, he was persuaded to come to Michigan to testify for the prosecution. Defense counsel argued that it was his belief that the prosecution had known all along that Smith had some involvement in the case, but that it had decided not to pursue the matter. Upon consideration of the parties' arguments, the trial court explained that it would allow the late addition of Smith's name to the witness list because his "identity and involvement" did not "come to light until into the trial itself."

On appeal, defendant contends that he was prejudiced by the late endorsement, because trial counsel, relying on the pretrial witness list, incorrectly predicted that the evidence would not support the prosecution's (and the victim's) assertion that an unidentified third person was present with defendants on the night of the crime. After Smith testified about his presence at the victim's house on the night of the incident,[4] Anthony Gadomski agreed, in his testimony,

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[4] Smith, who because of a stroke was blind in one eye and partially blind in the other and suffered from long- and short-term memory

that Smith was there. The prosecutor then emphasized this point by reminding the jury during her rebuttal argument that, contrary to defendants' initial assertions, "the People were able to bring forward that third person." Although this course of events undoubtedly hurt defendant's case in the eyes of the jury, we do not believe that his defense was unfairly prejudiced to such a degree that the trial court's decision to allow Smith to testify amounted to an abuse of discretion.

The res gestae witness statute provides as follows:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
>
> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
>
> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
>
> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.
>
> (5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including

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problems, testified that he was in the victim's house on the night of the incident, but that he never actually saw the victim or any sexual activity. For part of the night he was asleep. However, he recalled that, at one point, Anthony Gadomski threatened him with a knife and told him not to leave the house.

> investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.
>
> (6) Any party may within the discretion of the court impeach or cross-examine any witnesses as though the witness had been called by another party. [MCL 767.40a; MSA 28.980(1).]

The prosecution's duty under the statute is to provide notice of known witnesses and reasonable assistance to locate witnesses on a defendant's request. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). There is no requirement to exercise due diligence to discover the names of witnesses. *Id.* at 293. "[T]he purpose of the 'listing' requirement is merely to notify the defendant of the witness' existence and res gestae status." *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d 232 (1989).

In this case, given the victim's preliminary examination testimony, defendant could not have been surprised that the prosecution would offer some evidence of a third person's involvement. Because defendant knew that an unnamed third person was alleged to have been involved, he could have requested assistance in identifying and locating him before trial. See MCL 767.40a(5); MSA 28.980(1)(5). Instead, in an apparent gamble that the prosecution's case would be weakened by a failure to prove the existence of the alleged third person, defendant chose

not to avail himself of the prosecution's assistance. With no request from the defense to provide reasonable assistance, and no evidence suggesting that the unidentified third person was Smith, the prosecution was under no duty to continue pursuing that avenue. See *Burwick*, *supra* at 289, 293. Moreover, without knowledge of Smith's status as a res gestae witness, the prosecution was under no duty to include Smith's name on the pretrial witness list. *Id.* Finally, the necessary explanation, or "good cause," for Smith's late addition to the witness list was provided by the fact of his late discovery as a res gestae witness. Accordingly, defendant is not entitled to relief with regard to this issue.

DOCKET NO. 197050

The issues raised on appeal by defendant Anthony Gadomski are identical to issues raised by defendant Lawrence Earl Gadomski.[5] Accordingly, for the reasons stated above, defendant Anthony Gadomski is not entitled to relief.

Affirmed.

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[5] Defendant Anthony Gadomski challenges the absence of a special unanimity instruction with respect to the CSC I counts and the late endorsement of Dale Smith, but does not contend that the jury's verdict was against the great weight of the evidence.

THOMSON v STATE FARM INSURANCE COMPANY

Docket No. 200066. Submitted March 11, 1998, at Grand Rapids. Decided October 2, 1998, at 9:20 A.M.

William and Susan Thomson brought an action in the Kent Circuit Court against State Farm Insurance Company, seeking to recover under a homeowner's insurance policy the value of goods allegedly stolen from a commercial storage facility. State Farm moved for summary disposition on the ground that the Thomsons' failure to submit to examinations under oath (EUOs) required by the policy resulted in a material policy breach and barred the plaintiffs from bringing the action. The court, Robert A. Benson, J., denied the motion. The Court of Appeals soon thereafter decided a case involving a policy that contained the same EUO requirement as the Thomsons' policy, *Yeo v State Farm Ins Co*, 219 Mich App 254 (1996). Thereafter, State Farm moved for reconsideration of the denial of its motion, and the Thomsons' counsel advised State Farm that they were willing to appear for an EUO. The court then ordered the Thomsons to submit to an EUO within fourteen days from November 21, 1996, and denied State Farm's motion for reconsideration. The Court of Appeals granted State Farm leave to appeal.

The Court of Appeals *held*:

1. *Yeo* made clear that the policy provisions in question necessarily allow State Farm to require an insured to appear for at least one EUO and, if the insured fails or refuses to submit to an EUO, the insured is precluded from maintaining an action on the policy. Therefore, under *Yeo*, the plaintiffs' action must be dismissed.

2. *Yeo* left open the question whether dismissal should be with or without prejudice. However, *Yeo*'s general framework indicates that if the noncompliance is wilful, the dismissal is to be with prejudice, and if the noncompliance is not wilful, the dismissal is to be without prejudice.

3. Wilful noncompliance involves something more than merely knowingly failing to appear for an EUO. Wilful noncompliance refers to a failure or refusal to submit to an EUO or otherwise cooperate with an insurer in regard to contractual provisions allowing an

insurer to investigate a claim that is part of a deliberate effort to withhold material information or a pattern of noncooperation with the insurer.

4. The Thomsons provided recorded statements to State Farm. This is a minimal showing that they were not deliberately intending to withhold material information from State Farm. In future cases, it will not be sufficient to volunteer, or even to participate in giving, unsworn statements to the insurer. Henceforth, the burden is on the insured to demonstrate that the insured has not deliberately withheld material information, as opposed to a knowing failure to submit to an EUO.

5. Standing alone, the Thomsons' ignoring or rebuffing of State Farm's repeated efforts to arrange the EUOs would support a finding that there was a pattern of noncooperation with the insurer. However, the Thomsons' actions and nonactions were taken before the *Yeo* decision, when the extent of the obligation of an insured under the relevant policy provisions was perhaps questionable. Henceforth, the burden is on the insured to demonstrate that the insured has not engaged in a pattern of noncooperation.

6. The order of the trial court must be reversed and the matter must be remanded to the trial court for entry of an order dismissing this case without prejudice.

Reversed and remanded.

GRIFFIN, P.J., dissenting, stated that the plaintiffs' noncompliance was wilful and, therefore, that the trial court's order should be reversed and the matter should be remanded for the entry of an order dismissing the case with prejudice. *Yeo* did not change our insurance law with regard to the EUO provision at issue. *Yeo* reaffirmed the existing law that the provision is valid and a condition precedent to maintaining an action. The plaintiffs' noncompliance was committed intentionally, knowingly, purposely, and without justifiable excuse and should be viewed as wilful, therefore mandating dismissal with prejudice.

INSURANCE — ACTIONS — CONDITIONS PRECEDENT — EXAMINATIONS UNDER OATH — DISMISSAL WITHOUT PREJUDICE — DISMISSAL WITH PREJUDICE — WILFUL NONCOMPLIANCE.

Language in a homeowner's insurance policy that clearly establishes that, when requested by the insurer, an examination of the insured under oath is a condition precedent that must be satisfied before the insured has a right to bring an action against the insurer is generally valid and enforceable; an action against an insurer brought by an insured who has failed or refused to submit to an examination under oath requested by the insurer must be dismissed; dismis-

sal must be with prejudice where the noncompliance was wilful and without prejudice where the noncompliance was not wilful; wilful noncompliance is a failure or refusal to submit to an examination under oath or otherwise cooperate with an insurer in regard to contractual provisions allowing an insurer to investigate a claim that is part of a deliberate effort to withhold material information or a pattern of noncompliance with the insurer; the burden is on the insured to demonstrate that the insured has not deliberately withheld material information, as opposed to a knowing failure to submit to an examination under oath, or engaged in a pattern of noncooperation.

Garlington & Associates (by *Monica E. Garlington*), for the plaintiffs.

Beusse Holmes, P.C. (by *Elizabeth S. Holmes*), for the defendant.

Before: GRIFFIN, P.J., and HOEKSTRA and WHITBECK, JJ.

WHITBECK, J. Defendant State Farm Insurance Company appeals by leave granted the trial court's denial of its motion for summary disposition pursuant to MCR 2.116(C)(10) in this suit brought by plaintiffs William Thomson and Susan Thomson. We reverse and remand for dismissal of this case without prejudice.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

State Farm and the Thomsons were parties to a homeowner's insurance policy. In February 1996, the Thomsons submitted a claim to State Farm seeking coverage for household goods with a value of about $25,000 that were allegedly stolen from a commercial storage facility in Ohio on November 25, 1995, or thereabout. The Thomsons eventually provided recorded statements, as well as other information, to

State Farm.[1] A representative of State Farm conducted a tape-recorded interview of William Thomson at his apartment in Grandville on December 4, 1995, which resulted in a quite lengthy transcript that is included in the record. State Farm acknowledged that it took recorded statements from both of the Thomsons.[2]

The insurance policy issued by State Farm to the Thomsons included the following provisions:

> 2. Your Duties After Loss. After a loss to which this insurance may apply, you shall see that the following duties are performed:
>
> * * *
>
> d. as often as we reasonably require:
>
> * * *
>
> (3) submit to and subscribe, while not in the presence of any other insured:
>
> (a) statements; and
>
> (b) examinations under oath; and
>
> * * *
>
> 8. Suit Against Us. No action shall be brought unless there has been compliance with the policy provisions. The action must be started within one year after the date of loss or damage. [Emphases omitted.]

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[1] Evidently, State Farm referred this case to an internal "Special Investigation Unit" because of the size of the claim and the apparent lack of any sign of forced entry into the storage facility.

[2] State Farm stated in its brief in support of its motion for summary disposition that it "took the recorded statements of the plaintiffs . . . . "

State Farm made multiple requests for the Thomsons to appear for examinations under oath (EUOs).[3] In a letter dated May 14, 1996, the Thomsons' counsel stated that he thought requiring the Thomsons to participate in EUOs would be unreasonable because an adjuster had taken a statement from William Thomson in December 1995, and State Farm had not indicated what areas needed clarification.[4]

State Farm moved for summary disposition in this case on the basis of the Thomsons' failure to submit to EUOs. On September 25, 1996, the trial court issued an order denying State Farm's motion for summary disposition. On October 4, 1996, this Court decided

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[3] These requests included (1) an April 4, 1996, letter from State Farm's counsel stating that such counsel had attempted to contact the Thomsons' counsel at least six times to schedule EUOs, (2) a May 8, 1996, letter from State Farm's counsel advising that the file would be closed if the Thomsons' counsel did not contact State Farm's counsel within seven days to arrange for the EUOs, (3) following the letter of the Thomsons' counsel of May 14, 1996, a May 17, 1996, letter from State Farm's counsel again requesting EUOs and asking whether the Thomsons still refused to cooperate, (4) a June 14, 1996, letter from State Farm directly to the Thomsons requesting that they contact State Farm to arrange for the EUOs, and (5) the July 22, 1996, denial of claim on the basis of the Thomsons' failure to submit to the EUOs.

[4] The body of this letter read:

> I understand your request for an examination under oath; what I do not understand is what purpose it will serve at this point. You have already had the locks tested, and your expert has concluded that they were not picked. Your adjuster has already taken Mr. Thomson's statement which runs for approximately 26 pages. Your adjuster did not apparently believe my client, and I have little cause to believe that any examination under oath will suddenly convince your adjuster as to the veracity of my clients' claims.
>
> I do not believe that it is reasonable for my clients to submit to depositions [sic] unless there is additional information that you need. Some months ago I asked you what areas needed clarification. You never responded. I simply do not believe it is reasonable to have my clients make additional statements at this time.

Yeo v State Farm Ins Co, 219 Mich App 254; 555 NW2d 893 (1996), a case that we address at length below. Thereafter, State Farm moved for reconsideration of the trial court's denial of its motion for summary disposition. In a letter dated October 31, 1996, counsel for the Thomsons essentially advised counsel for State Farm that the Thomsons were willing to appear for an EUO.[5] In a December 6, 1996, order, the trial court (1) ordered the Thomsons to submit to an EUO within fourteen days from November 21, 1996, and (2) denied State Farm's motion for reconsideration of the trial court's denial of its motion for summary disposition. Thereafter, this Court granted State Farm's application for leave to appeal. There is no indication from the record that State Farm has ever conducted an EUO with either of the Thomsons.

II. STANDARD OF REVIEW

We review the trial court's denial of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A trial court may properly grant a motion for summary disposition under MCR 2.116(C)(10) if, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a mat-

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[5] The body of the letter stated:

> Because of the recent case of *Yeo v State Farm*, we are now willing to allow State Farm to perform an examination under oath or, in the alternative, taking a Deposition [sic] in the above-referenced case. Since we are within the one-year provision for the "EUO" I believe that it would be foolish not to proceed with the present case, and to get it resolved.
>
> If you have any questions, please do not hesitate to contact me.

ter of law. *Pinckney Community Schools*, *supra* at 525.

III. *YEO*

In *Yeo*, *supra* at 255, the plaintiff alleged that her home, insured by State Farm (which was also the defendant insurer in that case), had been burglarized on July 22, 1994. In a September 27, 1994, letter, State Farm requested an EUO of the plaintiff on October 25, 1994. *Id.* On October 5, 1994, the plaintiff provided State Farm with a detailed, taped statement, but she did not appear for the EUO on October 25, 1994. In a letter dated October 31, 1994, State Farm rescheduled the EUO for November 21, 1994. However, the plaintiff filed the lawsuit in *Yeo* on November 2, 1994. *Id.* The pertinent provisions of the insurance policy in *Yeo* regarding EUOs contained language identical to the pertinent language of the policy in this case. *Id.* at 256-257. State Farm moved for summary disposition on the basis of the failure of the plaintiff in *Yeo* to submit to a requested EUO before filing suit, "arguing that because plaintiff failed to satisfy the condition of being examined under oath, recovery under the policy was barred." *Id.* at 256. The trial court dismissed the case without prejudice and with " 'hope that the parties can proceed with the examination under oath and refile [sic] this case.' " *Id.* State Farm appealed, arguing that the case should have been dismissed with prejudice, but this Court affirmed. *Id.* at 255.

In *Yeo*, this Court made clear that the EUO requirement contained in policies like the one at issue there, and here, is generally enforceable:

> In this case, the policy language clearly establishes that, when requested, an examination under oath is a condition that must be satisfied before an insured has the right to bring an action against defendant. Such a condition "is a valid one and as a general rule enforceable, and one who without cause refuses to submit to examination should be precluded from maintaining an action on the policy." *Gordon v St Paul Fire & Marine Ins Co*, 197 Mich 226, 230; 163 NW 956 (1917). [*Yeo*, *supra* at 257.]

In our view, consistent with that of the *Yeo* panel, the policy provisions in question regarding EUOs necessarily allow State Farm to require an insured to appear for at least one EUO and, if the insured fails or refuses to submit to an EUO, the insured is precluded from maintaining an action on the policy. Here, the insureds failed or refused to submit to the EUO. Under *Yeo*, therefore, the Thomsons' action must be dismissed.

IV. WILFUL NONCOMPLIANCE

Yeo left open the question whether dismissal should be with or without prejudice:

> Defendant argues that because plaintiff wilfully violated the condition of being examined under oath, the dismissal should be with prejudice. However, we find nothing on the record to indicate that plaintiff's failure to submit to the examination on October 25, 1994, was the result of a flat refusal to submit to such an examination. Therefore, we need not address the effect of wilful noncompliance on the general rule stated here. [*Id.* at 259.]

We believe it to be clear that, within the general framework of *Yeo*, if the noncompliance is wilful, the dismissal is to be with prejudice. On the other hand,

if the noncompliance is not wilful, the implication is that the dismissal is to be without prejudice.

Yeo did not provide a definition of "wilful noncompliance." However, *Yeo's* conclusion that the facts of that case did not involve wilful noncompliance is instructive. As noted above, the plaintiff in *Yeo* provided "a detailed, taped statement" after being requested to appear for an EUO and thereafter failed to appear for a scheduled EUO. *Id.* at 255. After failing to appear for the EUO *and* after a letter in which the defendant insurer rescheduled the EUO, the plaintiff in *Yeo* filed suit. *Id.* Accordingly, it is evident that the plaintiff in *Yeo knowingly* declined to appear for an EUO before filing suit. Nevertheless, this Court in *Yeo* did not regard this as wilful noncompliance. It follows that wilful noncompliance in this context involves something more than merely knowingly failing to appear for an EUO.

Therefore, the central issue confronting us here is the one that the *Yeo* panel declined to address: the proper definition of wilful noncompliance. Because this is a case of first impression in Michigan, we look for guidance to pertinent cases from other jurisdictions.

In *Taylor v Fireman's Fund Ins Co*, 306 So 2d 638, 639 (Miss, 1974), the plaintiff brought suit against the defendant insurer for a claim related to a house that had burned. The insurance policy in that case included a provision that "[t]he insured, as often as may be reasonably required, shall . . . submit to examinations under oath by any person named by this Company . . . ." *Id.* at 639 (emphasis omitted). The transcript of the EUO reflects that the plaintiff in *Tay-*

lor, in accordance with the advice of counsel, refused to answer several questions during the EUO including questions related to his financial status at the time of the fire. *Id.* at 640-644. The Mississippi Supreme Court concluded that the trial court properly directed a verdict for the defendant insurer, stating, *id.* at 644-645:

> The insured was required to answer these questions fully and completely, to give the best information he had about these matters.
>
> In Southern Guaranty Insurance Co v Dean, 252 Miss 69, 172 So 2d 553 (1965), the insurance policy involved contained the exact same provisions for a sworn examination of the insured before trial. In *Southern*, the trial court held that the policy had not been voided by the actions of the insured. This Court, in reversing, said:
>
> "We hold that insured failed and refused to answer questions in the examination under oath on matters which were material and relevant to the insurance and the loss, and failed and refused to produce for examination written documents which were pertinent and material to the insurance and loss. Failure of insured to comply in material respects with these contractual clauses bars her recovery under the policies. . . ."
>
> * * *
>
> In Boston Insurance Co v Mars, 246 Miss 36, 148 So 2d 718 (1963), we closed our opinion with these words:
>
> "We think that the refusal of the insureds to submit to the examination under oath was a violation of the express provisions of the insurance policy, and resulted in a forfeiture of their right to recover under the policy; and that, therefore, the appellant was entitled to the requested peremptory instruction in its favor." 246 Miss at 43, 148 So 2d at 720.
>
> The circuit court was correct in peremptorily instructing the jury to find for the defendant.

Also instructive is *C-Suzanne Beauty Salon, Ltd v General Ins Co of America*, 574 F2d 106, 110-111 (CA 2, 1978), in which the Second Circuit Court of Appeals, applying New York law,[6] stated:

> Although it is true, as we noted in *Hudson Tire* [*Mart, Inc v Aetna Casualty & Surety Co*, 518 F2d 671, 674 (CA 2, 1975)], that a refusal to appear for an examination under oath constitutes a material breach of the contract of insurance, it is also true, as a general principle of New York law, that "equity will not enforce forfeitures." *Hal Roach Studios, Inc v Film Classics, Inc*, 156 F2d 596, 599 (2d Cir 1946). Thus, in construing the cooperation clause, the New York Court of Appeals has held that "a breach which will defeat a recovery cannot be based upon technical or unimportant omissions or defects in the performance by either party." *Porter v Traders' Ins Co*, 164 NY 504, 509, 58 NE 641, 642-43 (1900). *Rather, a "willful and fraudulent withholding of information" must be shown. Happy Hank Auction Co v American Eagle Fire Ins Co*, 1 NY2d 534, 539, 154 NYS2d 870, 873, 136 NE2d 842, 844 (1956). In *Happy Hank*, the Appellate Division unanimously agreed that "it is clear that plaintiff has willfully and designedly refused to answer questions and produce documents that are indisputably material to its claim," 286 AD 505, 510, 145 NYS2d 206, 211-12 (1st Dep't 1955), and it granted summary judgment and ordered dismissal of the complaint. The Court of Appeals modified this order so as to reinstate the complaint, explaining that willfulness and fraud present "the kind of question of fact that cannot, except in the most extreme of cases, be resolved through the study of affidavits." 1 NY2d at 539, 154 NYS2d at 873, 136 NE2d at 844. [Emphasis supplied.]

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[6] *C-Suzanne* involved an action removed from a New York state court to federal court on the basis of diversity of citizenship. *C-Suzanne, supra* at 109.

Marmorato v Allstate Ins Co, 226 AD2d 156; 640 NYS2d 97 (1996), is similarly instructive. There the court held:

> While it is clear that plaintiff's refusal, *upon advice of counsel*, to answer certain of the questions put to him at the examination under oath was a breach of his contractual obligation to cooperate with defendant's investigation (*see, Evans v International Ins Co*, 168 AD2d 374 [562 NYS2d 692 (1990)]), and that circumstances of the claim appear suspicious, we agree with the [lower] Court that the non-compliance was not so willful or extreme as to warrant dismissal of the action without giving plaintiff one last chance to answer the questions (*see, Yerushalmi v Hartford Acc & Indem Co*, 158 AD2d 407 [551 NYS2d 242 (1990)]). [*Id.* (emphasis supplied).]

Also, in *Averbuch v Home Ins Co*, 114 AD2d 827; 494 NYS2d 738 (1985), the plaintiff insured brought suit against the defendant insurer to recover under a fire insurance policy covering premises that were damaged by two separate fires. *Id.* at 827. The insurance policy in that case included a provision requiring the insured to "as often as we reasonably require . . . submit to examination under oath and subscribe the same." *Id.* at 828. The *Averbuch* court provided the following factual background:

> After a preliminary investigation by the defendant insurer disclosed that the fires in June 1983 were incendiary in nature, plaintiff appeared for an examination under oath conducted by the defendant on November 22, 1983. Despite being warned by defendant's attorney that a refusal to answer material and relevant questions might lead to a disclaimer under the policy by the defendant, plaintiff refused to answer several patently material questions posed by defendant's counsel, including, *inter alia*, questions relating to the condition of the premises prior to the fires and plain-

> tiff's financial status at that time. Despite two subsequent warning letters sent by defendant's counsel to plaintiff's counsel in December 1983 and January 1984, plaintiff (1) continued in his refusal to supply the answers to these material questions and (2) also failed to supply, in contrast to his promises at the examination under oath, an itemized list of expenditures alleged to have been made on the premises, along with any available documentation thereof. [*Id.*]

The defendant insurer moved for summary judgment on the basis of the plaintiff's failure to answer material questions during the EUO and failure to supply material information and documentation to the defendant. *Id.* The trial court ruled that it granted the motion unless the plaintiff supplied the defendant with certain documents. *Id.* However, the appellate court in *Averbuch* concluded that the defendant's motion for summary disposition should have been granted unconditionally. *Id.* at 829. The *Averbuch* court stated:

> The record herein demonstrates a *pattern of noncooperation with the insurer* for which no reasonable excuse was proffered. Under these circumstances, the plaintiff's willful refusal to answer material and relevant questions on his examination under oath by defendant and to supply material and relevant documentation constituted a breach of substantial conditions of the policy[.] [*Id.* (emphasis supplied).]

Informed by the above authority, we conclude that "wilful noncompliance" in the context at hand refers to a failure or refusal to submit to an EUO or otherwise cooperate with an insurer in regard to contractual provisions allowing an insurer to investigate a claim that is part of a *deliberate* effort to withhold

material information or a *pattern of noncooperation* with the insurer.[7]

In the case before us, the Thomsons voluntarily provided recorded statements to State Farm. We regard this as at least a minimal showing that the Thomsons were not deliberately intending to withhold material information from State Farm. However, we emphasize that in future cases it will not be sufficient to volunteer, or even to participate in giving, unsworn statements to the insurer. As a practical matter, we recognize that virtually the only way by which an insurer can demonstrate that an insured has deliberately withheld material information is through the process of taking an EUO. Therefore, the burden henceforth is on the *insured* to demonstrate that the insured has not deliberately withheld material information. This burden will be an extraordinarily difficult one to meet.[8]

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[7] We note that State Farm cites *Goldman v State Farm Fire General Ins Co*, 660 So 2d 300 (Fla App, 1995), in support of its position that the Thomsons' claims should be dismissed with prejudice. In *Goldman*, the court flatly stated, "[a]n insured's refusal to comply with a demand for an examination under oath is a willful and material breach of an insurance contract which precludes the insured from recovery under the policy." *Id.* at 303. This blanket statement is, at least with respect to the issue of dismissal with versus dismissal without prejudice, inconsistent with *Yeo*.

[8] We note that the clarity of controlling case law is relevant to the determination whether an insured has engaged in a pattern of noncooperation with an insurer. In this case, before the release of the *Yeo* opinion, the insureds would not submit to an EUO, but agreed to do so after their legal obligation in that regard was made clear by *Yeo*. We find it entirely appropriate to note that application of the same legal principle regarding a pattern of noncooperation will differ in any possible future cases in which an insured refuses to submit to an EUO despite the opinion in *Yeo* (and in this case). We are therefore somewhat puzzled by the dissenting opinion's assertion that we are "trying to engage in rule making for which [this Court] has no authority." *Post* at 56. We recognize that in *People v Sallee*, 63 Mich App 146, 149; 234 NW2d 180 (1975), this Court stated that this Court "has no inherent rule-making power. What limited authority it

With respect to the second prong of the test we adopt today, we recognize that State Farm made repeated efforts to arrange the EUOs and that these efforts were either ignored or rebuffed by the Thomsons' counsel. Standing alone, these actions would be sufficient to find a pattern of noncooperation with the insurer. However, we note that the actions and nonactions of the Thomsons' counsel were taken before the decision in *Yeo*, when the extent of the obligation of an insured under an insurance policy with provisions substantially similar to those at issue in this case was perhaps questionable. Once again, we emphasize that the burden henceforth is on the *insured* to demonstrate that the insured has not engaged in a pattern of noncooperation and that this will also be an extraordinarily difficult burden to meet. It will certainly not be sufficient, for example, for an insured to seek "clarification" regarding the information that will be discovered in an EUO or to simply claim that the insureds "do not believe it to be reasonable" to submit to an EUO. Following our decision in this matter, it will be the rare case indeed in which a claim by an insured that its refusal to submit to an EUO did not amount to wilful noncompliance is upheld. Insureds, and the insureds' counsel, will be ill-advised to interpret our decision as anything approaching a license to disregard clearly binding contractual obligations.

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has is by grace of the Supreme Court." However, we do not purport to adopt a rule, but, rather, to enunciate with some clarity the legal principles inherent in our holding in this case. We also do not see the pertinence of Const 1963, art 3, § 8, which provides a procedure in certain circumstances for either house of the Legislature or the Governor to request an advisory opinion from the Michigan Supreme Court regarding the constitutionality of legislation.

V. *YEO* AS BINDING PRECEDENT

We are, of course, bound to follow the holdings in *Yeo*, as a published decision of this Court issued on or after November 1, 1990, under MCR 7.215(H)(1). State Farm has not expressly asked us in its brief to issue a "conflicting opinion" under MCR 7.215(H)(2), following *Yeo* only because we are bound to do so. However, apparently as a criticism of *Yeo*, State Farm states:

> Inexplicably, however, *the Court of Appeals*, and the Trial Court, apparently had no difficulty in allowing a plaintiff to choose when the examination under oath will be taken, because "the defendant will still have the opportunity to examine the plaintiff, under oath." This cannot be termed "compliance." [Emphasis supplied.]

To prevent any doubt, we agree with the holding of *Yeo* that, as a general rule, a failure to comply with a requirement to submit to an EUO is not a complete bar to recovery, at least in the absence of wilful noncompliance. The holding in *Yeo* is far from being "inexplicable." Rather, it is eminently sensible as a particular application of the concept that the appropriate remedy for a minor breach of contract should be less extreme than the penalty for a substantial breach of contract. Again, we emphasize that in *Yeo* the insured knowingly failed to appear for an EUO. Nevertheless, the dismissal in *Yeo* was without prejudice. Clearly, then, a knowing failure to submit to an EUO, without more, does not rise to the level of wilful noncompliance. Equally clearly, however, in future cases the burden will be on the insured to show that the noncompliance was not wilful under the two-part test that we have outlined above.

We also find noteworthy the following observations in *Thompson v West Virginia Essential Property Ins Ass'n*, 186 W Va 84, 88; 411 SE2d 27 (1991) regarding a similar requirement to submit to an EUO in a fire insurance contract:

> The purpose of an oral examination under oath is to enable the insurer to obtain necessary and relevant information from the insured about the circumstances surrounding the fire loss and the value of the property destroyed. It also enables the insurer to determine rationally whether the insured is submitting a false or fraudulent claim.
>
> When this language was placed in the standard fire policy, the insurer was unable to obtain any discovery before or after a lawsuit was filed. This limitation substantially handicapped the insurer's defense against false or fraudulent fire loss suits. Today, much of this handicap has been removed because after suit is filed the insured's deposition can be taken, and he can be required to furnish relevant documents at that time.[9]

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[9] While we recognize in our holding the right of an insurer to conduct an EUO of an insured, we also recognize the limited, although certainly not inconsequential, importance of this right in light of the liberal discovery procedures available under the Michigan Rules of Evidence.

There is reference to a differing view of the importance of an EUO, expressed in *Goldman*, n 7, *supra* at 305:

> The policy does not provide that depositions may be substituted for examinations under oath as appellants suggest. Rather, depositions and examinations under oath serve vastly different purposes. First, the obligation to sit for an examination under oath is contractual rather than arising out of the rules of civil procedure. Second, an insured's counsel plays a different role during examinations under oath than during depositions. Third, examinations under oath are taken before litigation to augment the insurer's investigation of the claim while a deposition is not part of the claim investigation process. Fourth, an insured has a duty to volunteer information related to the claim during an examination under oath in accordance with the policy while he would have no such obligation in a deposition. Finally, the insurer has the right to examine [the] insured independently in sworn examinations while it would have

A number of jurisdictions treat a knowing failure to appear for an EUO as a material breach of policy language substantially the same as the policy language at issue in this case and as absolutely barring any right to recovery. See, e.g., *Watson v Nat'l Surety Corp of Chicago, Illinois*, 468 NW2d 448, 450-451 (Iowa, 1991); *Downie v State Farm Fire & Casualty Co*, 84 Wash App 577, 580-586; 929 P2d 484 (1997); *Goldman v State Farm Fire General Ins Co*, 660 So 2d 300 (Fla App, 1995). However, a number of other jurisdictions decline to require an absolute rule of complete forfeiture of an insured's right to recovery based on a knowing failure to appear for an EUO. See, e.g., *Thompson, supra; Abraham v Farmers Home Mut Ins Co*, 439 NW2d 48, 49-50 (Minn App, 1989); *Farm Bureau Town & Country Ins Co of Missouri v Crain*, 731 SW2d 866, 871 (Mo App, 1987). Here, we con-

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no parallel right to do so under the Florida Rules of Civil Procedure.

In this regard, one pertinent difference between an EUO and a deposition under the Michigan Court Rules in this case is that State Farm would be able to question William Thomson and Susan Thomson outside the other's presence at separate EUOs. In contrast, at a deposition, MCR 2.306 contemplates that all parties to the action would have a right to attend the deposition so that, as parties to this action, William Thomson and Susan Thomson could not be excluded from each other's depositions. MCR 2.306(B)(1) provides that "[a] party desiring to take the deposition of a person on oral examination must give reasonable notice in writing to every other party to the action." MCR 2.306(C)(1) provides that "[e]xamination and cross-examination of the witness [at the deposition] shall proceed as permitted at a trial under the Michigan Rules of Evidence." In order to be able to effectively conduct such cross-examination, a party would, of course, have to be allowed to be present throughout the deposition. While we do not find the Thomsons' breach of their obligation to submit to EUOs necessarily constitutes a substantial breach of contract, it was clearly at least a minor breach. As indicated above, to remedy that breach, William Thomson and Susan Thomson must individually make themselves available to State Farm for EUOs forthwith after the dismissal of this case as a precondition to the Thomsons' refiling this action.

clude that *Yeo* reached the correct result and apply it to the circumstances of this case. In so doing, we hold that if the noncompliance is wilful, the dismissal must be with prejudice; if the noncompliance is not wilful, the dismissal must be without prejudice. We further hold that henceforth, the insured must show that there was not a deliberate effort to withhold material information (as opposed to a knowing failure to submit to an EUO) or a pattern of noncooperation with the insurer.

VI. CONCLUSION

We reverse the order of the trial court and remand to the trial court for entry of an order dismissing this case without prejudice in light of the fact that *Yeo* had not been decided when the Thomsons failed to comply with State Farm's legitimate request for EUOs. We do not retain jurisdiction. No costs, neither party having prevailed in full.

Reversed and remanded.

HOEKSTRA, J., concurred.

GRIFFIN, P.J. (*dissenting*). I agree that the order of the lower court must be reversed. However, I would reverse with prejudice because the undisputed facts clearly establish that plaintiffs engaged in "wilful noncompliance" with a condition precedent to maintaining an action on the insurance contract.

It appears that the majority is trying to engage in rule making for which it has no authority. *People v Sallee*, 63 Mich App 146, 149; 234 NW2d 180 (1975). See also Const 1963, art 3, § 8. The majority hopes that "henceforth" its legal conclusions will be applied to prospective cases. Nevertheless, the rule of law

that the majority endorses, but does not apply, is mere dicta. As the Supreme Court stated in *Hett v Duffy*, 346 Mich 456, 461; 78 NW2d 284 (1956), quoting with approval *People v Case*, 220 Mich 379, 382-383; 190 NW 289 (1922):

> "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication."

The majority does not apply its rule of wilful noncompliance because "the actions and nonactions of the Thomsons' counsel were taken before the decision in *Yeo*, when the extent of the obligation of an insured under an insurance policy with provisions substantially similar to those at issue in this case was perhaps questionable." *Ante* at 52. I respectfully disagree. The provision of the insurance policy in dispute is the "plain English" version of the statutorily mandated language contained in all fire insurance contracts until January 1, 1992. 1990 PA 305; see former MCL 500.2832; MSA 24.12832. Over eighty years ago in *Gordon v St Paul Fire & Marine Ins Co*, 197 Mich 226, 230-231; 163 NW 956 (1917), the Supreme Court held that this policy provision is valid and is a condition precedent to maintaining an action on an insurance contract:

> The provision of the policy above quoted is a valid one and as a general rule enforceable, and one who without cause refuses to submit to examination should be precluded from maintaining an action on the policy. The purpose of the examination is to elicit the facts in order that

> the company may determine whether it will defend or adjust the claim. . . .
>
> . . . Under the circumstances of this case the request of the plaintiff that her attorney be present when such examination took place did not amount to a refusal to submit to an examination so as to preclude her right of recovery.

On this issue, *Yeo v State Farm Ins Co*, 219 Mich App 254; 555 NW2d 893 (1996), did not change our insurance law, but, rather, reaffirmed the existing law as set forth in *Gordon*, *supra*. See also 5A Appleman, Insurance Law & Practice, § 3549, pp 549-553; 13A Couch, Insurance, 2d (rev ed), § 49A:361, pp 759-762; anno: *Requirement under property insurance policy that insured submit to examination under oath as to loss*, 16 ALR5th 412.

Additionally, the majority has erred by mischaracterizing the facts of *Yeo*. As stated by the *Yeo* panel, plaintiff Yeo's failure to comply with the defendant's request for an examination under oath (EUO) was not a "flat refusal." *Yeo*, *supra* at 259. Rather, among other defenses, the plaintiff in *Yeo* argued in her appeal brief that the timing of the defendant's request was not reasonable under the circumstances (scheduled only twenty days after the plaintiff was interrogated by the defendant's representative for a thirty-two-page transcribed statement). Therefore, the plaintiff in *Yeo* asserted that her failure to appear for the EUO should be excused. In contrast to *Yeo*, the present case involves no proffered excuses regarding the timing or location of defendant's multiple EUO requests, but, rather, plaintiffs' "flat refusal" to comply.

In my view, an insured's "wilful noncompliance" with the EUO condition precedent constitutes a mate-

rial breach of the insurance contract thereby mandating dismissal with prejudice. In regard to the term "wilful," I would adopt the Black's Law Dictionary (6th ed) definition:

> A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

This well-articulated standard is consistent with our prior definitions of the term. See *Pavlov v Community Emergency Medical Service, Inc*, 195 Mich App 711, 716; 491 NW2d 874 (1992), and cases cited therein.

The majority has formulated a two-pronged definition for wilful noncompliance: "a deliberate effort to withhold material information . . . or a pattern of noncooperation with the insurer." *Ante*, at 55. While this definition may be helpful in other cases in which only circumstantial evidence of intent is present, in the instant case the proposed test is irrelevant in light of the direct evidence of plaintiffs' intent not to comply. There is no genuine factual dispute that plaintiffs' noncompliance regarding defendant's numerous requests for an EUO was committed "intentionally, knowingly, and purposely, [and] without justifiable excuse . . . ." Black's Law Dictionary, *supra*.[1] On this

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[1] Defendant's numerous EUO requests and warnings of the consequence of noncompliance are detailed in footnote number three of the majority opinion. In his letter of May 14, 1996, plaintiffs' counsel wrote that his clients would not submit to an EUO unless defendant could convince them that an EUO would serve a useful purpose. Consistent with this letter, plaintiffs have represented the following facts in the introduction of their appeal brief:

basis, I would hold that plaintiffs' noncompliance was wilful thereby mandating dismissal of plaintiffs' complaint with prejudice.

Finally, I note that the relief ordered by the majority appears moot. The one-year period of limitation contained in the policy ostensibly bars the refiling of this action. Further, a sworn examination at this late date would not fulfill the purposes of an EUO. See *Watson v Nat'l Surety Corp of Chicago, Illinois*, 468 NW2d 448; 16 ALR5th 1047 (Iowa, 1991).

For these reasons, I respectfully dissent. I would reverse the order of the trial court and remand for entry of an order dismissing the action with prejudice.

Despite the information Appellees had already provided, State Farm requested further examination under oath. State Farm's adjuster indicated to Appellees that State Farm did not believe their claim. Appellees believed, therefore, that submitting to further investigation with State Farm would be pointless. Consequently, appellees did not submit to examination under oath.

SCARSELLA v POLLAK

Docket No. 199008. Submitted May 12, 1998, at Detroit. Decided October 2, 1998, at 9:25 A.M. Leave to appeal sought.

Richard Scarsella brought a medical malpractice action in the Oakland Circuit Court against Norman L. Pollak, M.D., and others. The complaint was filed on September 22, 1995, approximately three weeks before the claim would be barred by the applicable two-year period of limitation. The plaintiff did not file the statutorily required affidavit of merit with the complaint or seek a statutorily allowed twenty-eight-day extension in which to file an affidavit. Dr. Pollak filed a motion for summary disposition on March 12, 1996, alleging the failure to file the affidavit. The plaintiff filed the affidavit on April 22, 1996, and, two days later, the court, Alice L. Gilbert, J., granted Dr. Pollak's motion and dismissed the case with prejudice. The court ruled that the failure to file the affidavit with the complaint rendered the complaint null and void and that, because the filing was a nullity, it did not toll the period of limitation and the claim was time-barred before the affidavit was filed. The plaintiff appealed.

The Court of Appeals *held*:

1. A civil action is commenced and the period of limitation applicable to the action is tolled when a complaint is filed. However, a medical malpractice plaintiff must file a complaint and an affidavit of merit to commence an action. For statute of limitation purposes, the mere tendering of a complaint without the affidavit is insufficient to commence a medical malpractice lawsuit.

2. Because the complaint without an affidavit of merit was insufficient to commence the action, the court correctly found that the period of limitation expired in October 1995. The complaint without an affidavit was insufficient to commence the action within the period of limitation and did not toll the period of limitation.

3. The plaintiff may not amend his complaint by appending the untimely affidavit of merit to it and have the amendment relate back making timely the newly completed complaint.

Affirmed.

LIMITATION OF ACTIONS — PLEADING — MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT — COMMENCEMENT OF ACTIONS.

A civil action generally is commenced and the period of limitation applicable to the action is tolled when the complaint is filed; to commence a medical malpractice action, however, the plaintiff must also file an affidavit of merit with the complaint, because the mere tendering of a complaint without the affidavit is insufficient to commence the medical malpractice lawsuit for purposes of tolling the period of limitation; a medical malpractice complaint that was filed without an affidavit of merit before the expiration of the period of limitation may not be amended by appending an affidavit of merit to the complaint after the period of limitation has expired and have such amendment relate back to make timely the newly filed complaint (MCR 2.101[B], 2.112[L], 2.118[D]; MCL 600.2912d[1], 600.5856; MSA 27A.2912[4][1], 27A.5856).

Dib and Fagan, P.C. (by *Albert J. Dib*), for the plaintiff.

Schwartz & Jalkanen, P.C. (by *Karl E. Hannum* and *Deborah Laura Rhodes*), for Norman L. Pollak, M.D.

Before: HOOD, P.J., and MACKENZIE and DOCTOROFF, JJ.

PER CURIAM. This is a medical malpractice action. Plaintiff appeals as of right from an order granting summary disposition in favor of defendant Dr. Norman Pollak (defendant) premised on plaintiff's failure to file an affidavit of merit with his complaint before the period of limitation had expired. We affirm.

MCL 600.2912d(1); MSA 27A.2912(4)(1), as amended by 1993 PA 78, the 1993 tort reform legislation, provides that the plaintiff in a medical malpractice action "shall file with the complaint an affidavit of merit . . . ." The substance of the affidavit, in essence, is a qualified health professional's opinion

that the plaintiff has a valid malpractice claim. MCL 600.2912d(2); MSA 27A.2912(4)(2) provides a measure of relief when an affidavit of merit cannot be filed with the plaintiff's complaint. That subsection allows, on motion for good cause shown, an additional twenty-eight days in which to file the required affidavit.

In this case, plaintiff filed his medical malpractice complaint against defendant and others on September 22, 1995, approximately two to three weeks before plaintiff's claim would be barred by the applicable two-year limitation period. MCL 600.5805(4); MSA 27A.5805(4). Plaintiff did not file an affidavit of merit with the complaint, however, and he did not move for a twenty-eight-day extension in which to file an affidavit.

On March 12, 1996, defendant filed a motion seeking summary disposition for failure to comply with MCL 600.2912d(1); MSA 27A.2912(4)(1). On April 22, 1996—two days before the trial court heard defendant's motion—plaintiff filed an affidavit of merit. The trial court, however, ruled that plaintiff's failure to file an affidavit of merit with his complaint rendered the complaint null and void. The court then reasoned that because the filing was a nullity, it did not toll the period of limitation and therefore plaintiff's claim was time-barred months before the affidavit of merit was finally furnished. The case was dismissed with prejudice.

We find no error in the trial court's analysis. Generally, a civil action is commenced and the period of limitation is tolled when a complaint is filed. See

MCR 2.101(B) and MCL 600.5856; MSA 27A.5856. However, medical malpractice plaintiffs must file more than a complaint; they "shall file with the complaint an affidavit of merit . . . ." MCL 600.2912d(1); MSA 27A.2912(4)(1). See also MCR 2.112(L). Use of the word "shall" indicates that an affidavit accompanying the complaint is mandatory and imperative. *Oakland Co v Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997). We therefore conclude that, for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit. Compare *Hadley v Ramah*, 134 Mich App 380, 384-385; 351 NW2d 305 (1984); *Stephenson v Union Guardian Trust Co*, 289 Mich 237, 241-242; 286 NW 226 (1939).

Because plaintiff's complaint without an affidavit of merit was insufficient to commence his action, the period of limitation expired in October 1995. Accordingly, the trial court correctly concluded that plaintiff's claim, as completed in April 1996, was time-barred.[1] Furthermore, because the complaint without an affidavit was insufficient to commence plaintiff's malpractice action, it did not toll the period of limitation. See *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 229; 561 NW2d 843 (1997), suggesting that, in order to toll the period of limitation, a medical mal-

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[1] We recognize that in *Vandenberg v Vandenberg*, 231 Mich App 497; 586 NW2d 570 (1998), this Court recently held that dismissal is not an appropriate remedy when a medical malpractice plaintiff fails to file an affidavit of merit. However, *Vandenberg* did not involve a statute of limitations problem and hence is factually and legally distinguishable from this case.

practice plaintiff filing a complaint without an affidavit of merit must move for the twenty-eight-day extension provided for under MCL 600.2912d(2); MSA 27A.2912(4)(2).

Plaintiff contends that he should have been allowed to amend his September 22, 1996, complaint by appending the untimely affidavit of merit. He reasons that such an amendment would relate back, see MCR 2.118(D), making timely the newly completed complaint. We reject this argument for the reason that it effectively repeals the statutory affidavit of merit requirement. Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and "amend" by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of MCL 600.2912d(1); MSA 27A.2912(4)(1), that the plaintiff "shall file with the complaint an affidavit of merit," as well as the legislative remedy of MCL 600.2912d(2); MSA 27A.2912(4)(2), allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint.

Affirmed.

MICHIGAN STATE EMPLOYEES ASSOCIATION v LIQUOR CONTROL COMMISSION NO 1

Docket Nos. 199949, 202234. Submitted July 14, 1998, at Lansing. Decided October 6, 1998, at 9:00 A.M. Leave to appeal sought.

Michigan State Employees Association petitioned the Ingham Circuit Court for an order enforcing subpoenas issued by an arbitrator in arbitration proceedings conducted pursuant to the terms of a collective bargaining agreement between the petitioner and respondent Liquor Control Commission concerning a grievance filed by the petitioner against the respondent relative to the privatization of liquor warehousing and distribution. The court, Thomas Leo Brown, J., granted the requested order. The respondent appealed, and the petitioner appealed the order to the extent that it precluded witnesses associated with the respondent from testifying about deliberations concerning the privatization. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The circuit court erred by enforcing the subpoenas issued by the arbitrator. When parties enter into an agreement to submit a matter to arbitration, the arbitrator is bound to follow the guidelines set forth within the four corners of the agreement. In this case, the parties' agreement provides that arbitration will proceed under the rules of the American Arbitration Association. One such rule states that an arbitrator authorized by law to subpoena witnesses and documents may do so. The parties' arbitration, having commenced pursuant to a collective bargaining agreement, is exempt from federal and state statutes that provide subpoena authority in arbitration proceedings. Accordingly, the arbitrator in this case lacks authority to issue subpoenas.

2. Subpoena authority is not necessary to ensure the petitioner a fair hearing under Const 1963, art 1, § 17 or a meaningful grievance procedure under Const 1963, art 11, § 5.

3. The issue raised by the petitioner regarding the scope of the subpoenas need not be addressed in light of the invalidation of the subpoenas.

Reversed and remanded for further proceedings.

ARBITRATION — CONTRACTUAL ARBITRATION — SUBPOENAS.

An arbitrator who conducts arbitration by agreement of the parties involved has authority to subpoena witnesses and documents to the extent provided under the parties' agreement.

Fraser Trebilcock Davis & Foster, P.C. (by *Brandon W. Zuk*), for Michigan State Employees Association.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Gary P. Gordon* and *John S. Mackey*, Assistant Attorneys General, for Liquor Control Commission.

Before: BANDSTRA, P.J., and GRIFFIN and YOUNG, JR., JJ.

BANDSTRA, P.J. In these consolidated appeals, respondent appeals by leave granted a trial court order enforcing arbitrator-issued subpoenas. Petitioner also appeals the order to the extent that it precludes compelling witnesses now or formerly associated with respondent to testify regarding their deliberative processes in deciding to adopt a plan to privatize liquor warehousing and distribution. We reverse the order enforcing the subpoenas and, because of that decision, need not address the question raised by petitioner regarding the scope of the subpoenas.

Petitioner initiated the underlying grievance arbitration pursuant to the parties' collective bargaining agreement. Petitioner argued that respondent's adoption of a plan to eliminate the state-operated liquor warehousing and distribution system (and consequent

elimination of state jobs) violated the Michigan Constitution's requirement that an agency may eliminate classified civil service positions only "for reasons of administrative efficiency . . . ." Const 1963, art 11, § 5. The constitution further provides that employees aggrieved by the abolition of positions shall have a right to appeal through "established grievance procedures." *Id.* The arbitration at issue here constitutes the required grievance procedure. During the arbitration process, the contested subpoenas were issued by the arbitrator and enforced in an order petitioner procured from the circuit court.

Respondent argues that the circuit court erred by enforcing subpoenas issued by an arbitrator when no authority supported his issuance of the subpoenas, a question of law we review de novo. *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 19; 575 NW2d 56 (1997). We agree with respondent. When parties enter into an agreement to submit a matter to arbitration, the arbitrator is "bound to follow the guidelines set forth in the four corners" of the contract. *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577; 552 NW2d 181 (1996). The parties' agreement here provides that arbitrations will proceed under the rules of the American Arbitration Association (AAA). The AAA rule that applies here states, in pertinent part, that "[a]n arbitrator *authorized by law* to subpoena witnesses and documents may do so . . . ." (Emphasis added.) We conclude from this clear contract language that the parties did not intend to empower an arbitrator to issue subpoenas in the absence of legal authorization.

As petitioner has conceded on appeal, because the parties' arbitration commenced pursuant to their collective bargaining agreement, it is exempt from several statutes governing other arbitrations, including the Federal Arbitration Act, 9 USC 1 *et seq.* (see *Bacashihua v United States Postal Service*, 859 F2d 402, 404-405 [CA 6, 1988]), Michigan's adoption of the Uniform Arbitration Act, MCL 600.5001 *et seq.*; MSA 27A.5001 *et seq.* (see MCL 600.5001[3]; MSA 27A.5001[3]), and the mediation of labor disputes act, MCL 423.1 *et seq.*; MSA 17.454(1) *et seq.* (see MCL 423.9d[2][a]; MSA 17.454[10.3][2][a]). Thus, while these statutes may provide subpoena authority in other arbitration proceedings, they do not provide that authority for the collective bargaining agreement arbitration at issue here.

Nonetheless, petitioner argues that "despite the absence of any express authorization" for subpoenas in these statutes, we should look to them "for guidance" and conclude that subpoena authority is necessary to "promote the goals" of constitutional provisions guaranteeing grievance procedures, Const 1963, art 11, § 5, and a fair hearing, Const 1963, art 1, § 17. We do not conclude that subpoena authority is necessary to assure petitioner a fair hearing or a meaningful grievance procedure. Petitioner is certainly not otherwise prevented from presenting its case for the arbitrator's consideration. Moreover, respondent will likely present employee witnesses during the arbitration process to defend its actions, and petitioner will have the right to cross-examine those witnesses. If respondent fails to produce available witnesses who have relevant knowledge, the arbitrator will likely

draw a negative inference against respondent with respect to what those witnesses would say.

The arbitrator's fact-finding ability might be enhanced by subpoena authority, and petitioner would no doubt use that authority in trying to establish its case. However, we cannot recognize that authority when to do so would be in contravention of the parties' clear agreement.[1] *Beattie*, *supra* at 577-578 (the parties' agreement constitutes the law of the case, and arbitrators are bound to act within the terms of the contract). The collective bargaining agreement "established" a grievance procedure as required by the constitution, and petitioner voluntarily entered into that agreement. Petitioner thus acquiesced to a grievance procedure that did not encompass subpoena authority, and it cannot now legitimately claim that the procedure is inadequate.

We reverse the order of the circuit court enforcing the subpoenas. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[1] We also note that, in general, the power to issue a subpoena must be expressly conferred by statute and, in the absence of a specific grant of authority, an official has no power to issue a subpoena. 73 CJS, Public Administrative Law & Procedure, § 82, pp 563-564.

PEOPLE v McINTIRE

Docket Nos. 194301, 194362. Submitted October 15, 1997, at Lansing. Decided October 9, 1998, at 9:00 A.M. Leave to appeal sought.

Charles R. McIntire was summoned to testify as a witness on January 26, 1983, during a one-man grand jury inquiry conducted in the Montmorency Circuit Court concerning a homicide that occurred in the county in December 1982. After McIntire asserted his right against self-incrimination, the judge granted a motion by the prosecutor and entered an order, pursuant to MCL 767.6; MSA 28.946, that granted McIntire complete immunity from any charges that would arise from the homicide. McIntire then testified. After the inquiry, the murder remained unsolved. In 1984, McIntire moved to South Carolina with his family. In 1994, Tom Fleck, who, together with McIntire, had been suspected of being involved in the homicide, implicated himself and McIntire. Complaints were filed in the Montmorency Circuit Court in August 1994, accusing McIntire of open murder and possession of a firearm during the commission of a felony, and, in a separate case, perjury committed in court, based on McIntire's grand jury testimony. Warrants were issued and McIntire was returned to Michigan in late 1994 or early 1995. A determination of McIntire's motion to dismiss the murder and felony-firearm charges was postponed while the perjury trial proceeded. Following a jury trial, McIntire was convicted of four counts of perjury and sentenced to concurrent sentences of ten to fifteen years, Joseph P. Swallow, J. The court then granted McIntire's motion to dismiss the murder and felony-firearm charges on the basis that McIntire had been granted immunity that was not voided by his perjured testimony. The prosecution appealed from that order (Docket No. 194301). McIntire appealed from his perjury convictions and sentences (Docket No. 194362). The appeals were consolidated.

The Court of Appeals *held*:

1. The immunity agreement is void, and McIntire is not entitled to claim the benefits of the grant of full transactional immunity under MCL 767.6; MSA 28.946. The reference in the statute to a witness' obligation to provide an "answer," in exchange for immunity, cannot reasonably be interpreted to mean any utterance of words

in reply, but refers to a truthful answer. The immunity need not be recognized unless every condition of the statute has been honored by the immunized witness. Where a witness does not give truthful answers during immunized testimony, the witness does not comply with the statute and does not receive immunity. McIntire did not comply with the statute when he provided materially false testimony. Thus, his testimony did not suffice to confer transactional immunity under the statute, and he can be charged and tried for murder and felony-firearm. The order dismissing those charges must be reversed and the matter must be remanded for the reinstatement of the charges.

2. Holding MCL 767.6; MSA 28.946 to grant immunity in the face of materially false testimony would thwart the purpose of the statute, which is the discovery of crime, would undermine its reasonably implied condition of truthfulness, and would render illusory a bargain struck between the prosecutor and a criminal witness regarding a matter of the highest importance to the security and tranquillity of the people. A requirement of truthful testimony is compelled by the language of the statute when viewed in its obvious context.

3. The defendant did not sustain his burden of showing that he was prejudiced by the delay in his perjury case. Even assuming that the defendant suffered some prejudice by the delay, no due process violation occurred because the prosecution satisfied its burden of establishing that the reasons for the delay were sufficient to justify the resulting prejudice.

4. The court properly found that the nonresident tolling provision of the applicable statute of limitations, MCL 767.24(1); MSA 28.964(1), tolled the running of the six-year period of limitation applicable to the perjury charges during the period that McIntire did not usually and publicly reside in Michigan after July 1984.

5. The court properly limited the cross-examination of witness Tom Fleck to exclude evidence of what occurred during the plea negotiations that preceded Fleck's acceptance of an offer to plead guilty of being an accessory after the fact to murder. McIntire's rights to confrontation and due process were not violated.

6. Even if the court erred in refusing to allow McIntire to impeach witness Arthur Baker, a former sheriff's department detective who had investigated the murder, with evidence of Baker's alleged bias or prejudice, any denial of McIntire's constitutional rights was harmless beyond a reasonable doubt because two other police officers gave testimony similar to Baker's.

7. The court did not engage in judicial misconduct.

8. The court did not err in allowing testimony by certain rebuttal witnesses and in denying McIntire the opportunity to present certain surrebuttal testimony.

9. Even if the instructions regarding perjury were imperfect, no error occurred because the instructions fairly presented the issues to be tried and sufficiently protected McIntire's rights.

10. The sentences for the perjury convictions are proportional. The court did not err in considering the evidence of McIntire's suspected involvement in the homicide as an aggravating factor in determining the sentences. The court did not make an independent finding of guilt regarding the murder and then sentence McIntire on the basis of that finding.

Reversed and remanded with regard to Docket No. 194301. Affirmed with regard to Docket No. 194362.

YOUNG, JR, P.J., dissenting in part, stated that the order dismissing the charges of murder and felony-firearm in Docket No. 194301 should be affirmed. The text of MCL 767.6; MSA 28.946 is clear and unambiguous and does not condition the grant of transactional immunity on truthful testimony. The only condition of the statute is that the witness give answers that may have tended to incriminate the witness. The majority concluded or conceded that at least some portion of McIntire's testimony may have tended to incriminate him. The Legislature did not overlook the problem that immunized witnesses might give false testimony and did not fail to indicate its intentions regarding how to deal with the problem. The Legislature has made an express choice to punish immunized individuals who give false testimony in grand jury proceedings by authorizing them to be prosecuted for perjury, MCL 767.19d; MSA 28.959(4).

1. STATUTES — JUDICIAL CONSTRUCTION.

A statute must be enforced as it is written if the statutory language is clear; if the statutory language is susceptible to more than one interpretation, a court must determine what the Legislature meant by the language; when the meaning of statutory language is questioned, a reasonable construction must be given by looking to the purpose subserved thereby, and the meaning must be derived from the statutory context within which the language is used; provisions of a statute must be construed in light of the other provisions of the statute in such a manner as to carry out the apparent purpose of the Legislature; statutory language should not be construed in an isolated or noncontextual manner, especially where such construction would render any statutory language surplusage, nugatory, absurd, or illogical.

2. CRIMINAL LAW — STATUTORY IMMUNITY.

One who claims statutory immunity from prosecution must come within the terms of the statute, including both those terms that are express in the statute and those that are necessarily implied from the purpose and context of the statute.

3. GRAND JURY — WITNESSES — IMMUNITY.

An objective of the statute regarding the granting of immunity to a witness compelled to testify before a one-man grand jury is to assist in the discovery of crime; therefore, a necessary component of the induced testimony is that it be truthful; the reference in the statute to a witness' obligation to provide an "answer" in exchange for immunity does not mean any utterance of words in reply, but refers to a truthful answer; an immunity agreement is void where the witness does not give truthful answers during immunized testimony (MCL 767.6; MSA 28.946).

4. CRIMINAL LAW — DUE PROCESS — PREARREST DELAY.

A defendant must first demonstrate prejudice in order to establish a due process violation in the context of prearrest delay; the prosecution then bears the burden of persuading the court that the reason for the delay was sufficient to justify the resulting prejudice; the court evaluating the reason for the delay may consider the explanation for the delay, whether it was deliberate, and whether undue prejudice attached to the defendant.

5. CRIMINAL LAW — DUE PROCESS — INDICTMENTS.

A prosecutor does not violate due process by refusing to seek an indictment until satisfied that guilt beyond a reasonable doubt can be established; investigative delay, as opposed to delay that is intended to gain a tactical advantage over a defendant, generally does not violate due process.

6. LIMITATION OF ACTIONS — CRIMINAL LAW — NONRESIDENTS.

MCL 767.24(1); MSA 28.964(1) plainly expresses the Legislature's intent to exclude from the six-year limitation period provided therein any period during which the party charged did not usually and publicly reside within this state; the provision does not limit the tolling of the running of the period only to instances where the nonresident suspect was not amenable to process or had absconded.

7. EVIDENCE — CRIMINAL LAW — WITNESS' MOTIVATION FOR TESTIFYING.

A defendant is entitled to have disclosed to the jury a testifying accomplice's guilty plea to a reduced charge or receipt of a grant of

immunity, but reasonable limits may be imposed on cross-examination regarding those issues.

8. CRIMINAL LAW — TRIAL — JUDICIAL MISCONDUCT — PARTIALITY.

A defendant in a criminal trial is entitled to a neutral and detached magistrate; the test is whether partiality could have influenced the jury to the detriment of the defendant's case; judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases generally do not support a challenge for partiality; expressions of impatience, dissatisfaction, annoyance, or anger that are within the bounds of what imperfect people sometimes display does not establish partiality.

9. EVIDENCE — CRIMINAL LAW — REBUTTAL EVIDENCE.

Rebuttal evidence is admissible to contradict, repel, explain, or disprove evidence produced by the other party and tending directly to weaken or impeach it; whether rebuttal is proper depends on what proofs the defendant introduced and not merely on what the defendant testified about on cross-examination; the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant; as long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief.

10. PERJURY — EVIDENCE.

Each of the elements of perjury, including the element that the defendant made a false statement, must be proved in order to obtain a conviction; that the defendant made a false statement is proved by establishing the truth of the contradiction; the prosecution must present evidence of circumstances bringing strong corroboration of the contradiction and does not satisfy its burden simply by contradicting the defendant's sworn statement.

11. SENTENCES — EVIDENCE.

A trial court may consider the evidence admitted at trial as an aggravating factor in determining an appropriate sentence; a court may not make an independent finding of guilt and then sentence the defendant on the basis of that finding.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Vicki P. Kundinger*, Prosecuting Attorney, *Donald J. McLennan*, Special Prose-

cuting Attorney, and *J. Ronald Kaplansky*, Assistant Attorney General, for the people.

State Appellate Defender (by *C. Joseph Booker*), for the defendant on appeal.

Charles R. McIntire, In Propria Persona.

Before: YOUNG, JR., P.J., and MARKMAN and SMOLENSKI, JJ.

MARKMAN, J. In Docket No. 194301 of these consolidated appeals, the prosecutor appeals as of right an order dismissing charges against defendant of open murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). We reverse and remand for reinstatement of the charges. In Docket No. 194362, defendant appeals as of right his convictions of four counts of perjury committed in court, MCL 750.422; MSA 28.664, and resulting concurrent sentences of ten to fifteen years' imprisonment. We affirm.

I

Sometime during Sunday night, December 19, 1982, or early Monday morning, December 20, 1982, Nolan Fritz died in his home in Montmorency County. Fritz' body was discovered on December 21, 1982. The cause of death was determined to be multiple gunshots to the head by a .32 caliber gun. Defendant and Tom Fleck were suspected of being involved in the shooting, with Fleck being the suspected shooter. A Montmorency County circuit court judge directed that an inquiry (also known as a one-man grand jury) be made into the shooting, MCL 767.3; MSA 28.943, and

defendant, but not Fleck, was summoned to testify as a witness. On January 26, 1983, defendant appeared before the judge and answered several preliminary questions before defendant's counsel asserted defendant's constitutional right against self-incrimination. The prosecutor moved in writing for an order granting defendant immunity and the judge entered an order to this effect.[1] MCL 767.6; MSA 28.946.

Defendant then testified that on the night of December 19, 1982, he was not with Fleck, but rather he was playing cards at the home of John Knight beginning at approximately 6:00 P.M. Defendant testified that present at Knight's home was defendant's wife, Knight, Knight's wife and children, and several neighbors. Defendant testified that he and his wife left the Knight residence after 1:00 A.M. and went home. Defendant testified that shortly thereafter he left home, went to a grocery store, bought beer, and then went to Fleck's home at approximately 2:00 A.M. Defendant testified that he and Fleck then drove to a number of locations, including stores, bars, restau-

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[1] The motion and order stated as follows:

MOTION

NOW COMES James E. McCormick, the Prosecuting Attorney of Montmorency County, Michigan, and moves this Court for an Order granting the witness, Charles McIntire, now present before the Grand Jury ordered in this session, complete immunity from any charges which would arise from the homicide of Nolan Fritz.

[Prosecutor's Signature]

ORDER

* * *

IT IS SO ORDERED.

[Circuit Court Judge's signature]

rants, and houses, finally ending up at a bar in Rogers City at 8:00 A.M.

Defendant testified that he had known Fritz for approximately ten years and that he had delivered wood to Fritz. Defendant testified that he was not at Fritz' home on either the night of December 19, 1982, or the morning of December 20, 1982. Defendant denied being given a gun by Walter Crenshaw. Defendant also denied that he had owned a .32 caliber gun "on that particular day" or that he gave a .32 caliber gun to Fleck.

After the inquiry, the shooting remained unsolved. In July 1984, defendant moved from Michigan to South Carolina with his family. In approximately 1992, a Michigan State Police officer began reviewing the case. This officer subsequently contacted Fleck, who in 1994 finally implicated himself and defendant in the shooting. In August 1994, complaints were filed accusing defendant of open murder and felony-firearm and, in a separate case, of perjury committed in court. Warrants were issued for defendant's arrest, and he was finally returned to Michigan between late 1994 and early 1995.

Defendant moved to dismiss the murder and felony-firearm charges on the ground of immunity. The prosecutor responded that the immunity order was void or voidable if defendant either perjured himself or did not provide incriminating answers during the inquiry. The trial court determined that resolution of the immunity issue was premature because the perjury issue needed to be addressed first. The court therefore ordered that defendant's perjury case be tried first.

Fleck was a primary witness against defendant at defendant's January 1996 perjury trial. Following is a summary, in relevant part, of Fleck's testimony. On December 19, 1982, defendant came over to Fleck's house between 5:00 P.M. and 7:00 P.M. The two of them visited and drank beer. Neither of them had any money, but defendant told Fleck that he, defendant, knew where they could get money to buy more beer because he had borrowed money at this place before. Defendant and Fleck left Fleck's house between 11:00 P.M. and 1:00 A.M. and defendant drove the two of them to an elderly man's house. Upon entering the house, Fleck immediately proceeded to the restroom. Fleck was in the restroom approximately two or three minutes and during this time he heard "two bangs." Upon leaving the restroom, Fleck observed defendant pointing a gun in Fleck's direction. The gun was an old, small, chrome-plated revolver. Fleck also observed the elderly man slumped in a chair, apparently dead. Defendant handed the gun to Fleck and told Fleck to shoot the elderly man, and Fleck did so. Defendant and Fleck then drove away from the elderly man's house and went to a number of locations, including stores, bars, restaurants, and houses. During this time, Fleck became aware that defendant had taken a wallet containing approximately $60 from the victim's house. They bought beer and food and burned the wallet alongside a road. Within a week or two after the shooting, Fleck observed defendant throw the gun from a bridge into a river.

In addition, Walter Crenshaw's wife testified at trial that sometime before the Fritz homicide she observed her husband either sell or give defendant a small, possibly silver-plated, rusty, old handgun. She testified

that she did not know much about guns and that she did not actually touch this particular gun, but that she recalled that this gun did not look like it had a cylinder and that it was not a revolver. Another witness testified, after his recollection was refreshed, that before the Fritz homicide, defendant displayed to him a small pistol that he described as a "thirty-two."

Defendant was convicted of four counts of perjury committed in court for testifying falsely at the judicial inquiry about (1) his whereabouts on December 19 or 20, 1982,[2] (2) his companions on December 19, 1982 "and/or" December 20, 1982,[3] (3) his ownership or

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[2] Specifically, the jury found that defendant made a false statement with respect to the following testimony at the inquiry:

Q. [*The Prosecutor*]: Mr. McIntire, after you met Mr. Fleck did you go to the home of Nolan Fritz?

A. [*Defendant*]: No.

* * *

Q. [*The Prosecutor*]: Mr. McIntire, I am going to ask you, again, one more time, and you know what the Court has warned you about. Were you at the home of Mr. Nolan Fritz on the night of the 19th or the morning of the 20th of December, 1982?

A. [*Defendant*]: No, sir. I was not.

[3] Specifically, the jury found that defendant made a false statement with respect to the following testimony at the inquiry:

Q. [*The Prosecutor*]: All right. Okay. Were you with him [Fleck] on Sunday, December the 19th, 1982?

A. [*Defendant*]: No.

Q. [*The Prosecutor*]: You were not with him?

A. [*Defendant*]: Not on Sunday the 19th.

* * *

Q. [*The Prosecutor*]: Now, I think you have already testified that you met Mr. Fleck about two o'clock on the morning of the 20th, is that correct?

A. [*Defendant*]: Yes.

transfer of a .32 caliber gun,[4] and (4) his receipt of a gun from Walter Crenshaw.[5]

Defendant thereafter renewed his motion to dismiss the charges of murder and felony-firearm on the ground of immunity. The trial court granted this motion. It found that defendant had been granted absolute transactional immunity that could not be voided by perjured testimony. Although describing this result as a "travesty," the court noted that the only "remedy" available in such a case was a charge of perjury.

II

We first turn to the prosecutor's appeal of the dismissal of the charges of murder and felony-firearm in Docket No. 194301. The issue we address here is simply whether testimony must be truthful in order to qualify for immunity from prosecution, i.e., whether a statutory requirement that one "answer" questions in a legal proceeding be construed as requiring that one answer such questions truthfully. In this case, defend-

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[4] Specifically, the jury found that defendant made a false statement with respect to the following testimony at the inquiry:

Q. [*The Prosecutor*]: Did you own a .32 caliber gun on that particular day?

A. [*Defendant*]: No.

Q. [*The Prosecutor*]: Did you give a .32 caliber gun to Mr. Fleck?

A. [*Defendant*]: No.

[5] Specifically, the jury found that defendant made a false statement with respect to the following testimony at the inquiry:

Q. [*The Prosecutor*]: Did you—I am on question six, now—were you given a gun by Walter Crenshaw?

A. [*Defendant*]: No.

Q. [*The Prosecutor*]: You never were?

A. [*Defendant*]: That's right.

ant was granted immunity for his testimony at a one-man grand jury investigation pursuant to MCL 767.6; MSA 28.946, part of the Code of Criminal Procedure. The purpose of this act, as indicated by the title of the act as first enacted in 1917 PA 196, is "to authorize proceedings for the discovery of crime, and to provide penalties for a violation of such procedure." *People v Birch*, 329 Mich 38, 45; 44 NW2d 859 (1950). MCL 767.6; MSA 28.946 provides in relevant part as follows:

> No witness shall upon such inquiry be required to answer any questions, or shall be convicted for contempt upon refusal to do so, when the answers might tend to incriminate him. A written order granting to such witness immunity from such incrimination may be entered by said judge pursuant to a written motion by the prosecuting attorney . . . , which order shall set forth verbatim the questions which such witness refused to answer. . . . *No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him.* [Emphasis added.]

The prosecutor contends that by perjuring himself at the inquiry, defendant forfeited his immunity from prosecution.[6]

A fundamental right of a witness who fears that his testimony may incriminate him in a proceeding of any kind for which an oath is legally required, MCL 750.423; MSA 28.665, is the Fifth Amendment privi-

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[6] We acknowledge that a witness is not required to actually and directly incriminate himself in order to retain his transactional immunity as long as his testimony "may have tended to incriminate" him. We assume for the purposes of this opinion, without deciding, that "from the character of the question[s]," *In re Schnitzer*, 295 Mich 736, 741; 295 NW 478 (1940), there is some "tangible and substantial probability" that at least some portion of defendant's testimony "may have tended to incriminate" him.

lege against compulsory self-incrimination. US Const, Am V. A witness may invoke this exception to the government's power to compel testimony in a criminal, civil, administrative, or legislative proceeding and choose to remain silent. *Kastigar v United States*, 406 US 441, 444-445; 92 S Ct 1653; 32 L Ed 2d 212 (1972); *People v Cheatham*, 453 Mich 1, 10, n 12; 551 NW2d 355 (1996). However, in order to facilitate the effective prosecution of crime, the practice of witness "immunity" has been developed as an accommodation between the government's power to compel testimony and the individual's right to avoid compulsory self-incrimination. *Kastigar*, *supra* at 446. "[I]n return for his surrender of his fifth amendment right to remain silent . . . , the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange." *United States v Tramunti*, 500 F2d 1334, 1342 (CA 2, 1974); *Carchidi v State*, 187 Wis 438, 441-443; 204 NW 473 (1925). Thus the procedure is essentially " 'based on the theory of *quid pro quo*.' " *State v Smith*, 12 Wash App 514, 519; 530 P2d 354 (1974) (citation omitted). The witness provides otherwise unavailable information, usually, although not necessarily, about a criminal episode, in exchange for immunity from prosecution.

In the instant case, immunity was imposed on defendant pursuant to MCL 767.6; MSA 28.946. After defendant claimed his Fifth Amendment privilege against compulsory self-incrimination, the prosecutor informed defendant and the court that the state would grant complete immunity in return for defendant's testimony. Defendant's attorney then informed the court that, according to the procedures mandated by the statute, the "grant of immunity has to be pur-

suant to written motion of the Prosecutor and the Judge has to enter an order granting the witness immunity." Thereafter, the prosecutor prepared a written motion seeking defendant's complete, or "transactional" immunity, which the trial court granted. However, the one-sentence motion was clearly designed only to minimally satisfy the requirement of the statute. There were no additional conditions or terms specified.

Indeed, the prosecutor's motion was so peremptory that the statutory prerequisites for immunity were not referenced in the motion. The prosecutor moved for a grant of immunity, for example, without even specifying that defendant was first required to *testify* in order to qualify for immunity under the statute. However, because the motion was merely a procedural precondition mandated by the statute, and conferred only those benefits inherent within the statute in accordance with any conditions implicit within the statute, the lack of detailed language in the motion concerning the terms of the immunity is of little legal consequence. Although we recognize that a prosecutor and a witness might agree to supplement the basic statutory immunity with additional provisions and conditions, *People v Reagan*, 395 Mich 306, 318; 235 NW2d 581 (1975), in this case we are not faced with that situation, but are referred back to the statute, because the circumstances indicate clearly that immunity was granted only pursuant to MCL 767.6; MSA 28.946. Thus, we must examine the statute to determine the effect of defendant's false testimony on such immunity.

Statutory interpretation is a question of law that this Court reviews de novo. *People v Thomas*, 438

Mich 448, 452; 475 NW2d 288 (1991). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent and purpose of the Legislature. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994); *People v Gilbert*, 414 Mich 191, 200; 324 NW2d 834 (1982). If statutory language is clear, it must be enforced as it is written, but if it is susceptible to more than one interpretation, we must determine what the Legislature meant by the language. *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). "When the meaning of statutory language is questioned, a reasonable construction must be given by looking to the purpose subserved thereby, and the meaning must be derived from the statutory context within which the language is used." *People v Parsons*, 142 Mich App 751, 756; 371 NW2d 440 (1985) (citations omitted). "Indeed, 'provisions of a statute must be construed in light of the other provisions of the statute, in such a manner as to carry out the apparent purpose of the Legislature.' *Workman v DAIIE*, 404 Mich 477, 507; 274 NW2d 373 (1979)." *Dagenhardt v Special Machine & Engineering, Inc*, 418 Mich 520, 529; 345 NW2d 164 (1984). This Court and the Supreme Court have refused to construe statutory language in an isolated or noncontextual manner, see *id.* at 529-530; *Ansell v Dep't of Commerce (On Remand)*, 222 Mich App 347, 357; 564 NW2d 519 (1997), especially where such construction would render "any statutory language surplusage, nugatory, absurd, or illogical," *id.* at 355. Indeed, MCL 760.2; MSA 28.842 explicitly provides that the Code of Criminal Procedure of Michigan, including MCL 767.6; MSA 28.946, is to be "liberally construed to effectuate the intents and purposes thereof."

One who claims statutory immunity from prosecution must come within the terms of the statute. *Smith, supra* at 517. This includes both those terms that are express in the statute and those that are necessarily implied from the purpose and context of the statute. In the statute at issue, there is no explicit language relating to truthful testimony in exchange for immunity; there is no express requirement that the immunized individual "answer" questions truthfully. However, contrary to the view of our dissenting colleague, this is not the end of the inquiry, in our judgment. In this case, we believe that we should not simply infer from the absence of an explicit requirement of truthful testimony, without further examination of the statute, that the Legislature intended to extend transactional immunity to witnesses who testify falsely. The consequence of providing untruthful testimony, and, therefore, of failing to comply with the inherent prerequisites of the statute, is an indispensable part of the subject matter of the instant statute. In our judgment, the Legislature could not intelligently or rationally deal with immunity and compelled testimony without considering the consequences of a suspect's failing to truthfully provide such compelled testimony. We will not simply infer an illogical meaning from statutory language where further inquiry into the context of the language may yield a more logical and reasonable result, as intended by the Legislature. *Wyandotte Savings Bank v State Banking Comm'r*, 347 Mich 33, 45; 78 NW2d 612 (1956). Words can be fully understood only when viewed in context; thus, the statutory requirement that a witness "answer" questions must be taken out of isolation to determine its meaning in this context. Consequently, here we

must consider the purpose, the text, and the context of the immunity statute to determine whether a requirement of truthfulness advances these considerations and, correspondingly, whether false testimony thwarts them.[7] As Justice COOLEY has remarked, it is "a very proper rule of construction that the whole is to be examined with a view to arriving at the true intention of each part." Cooley, Constitutional Limitations (7th ed, 1903), p 91.

We begin by noting that the statute in this case confers full "transactional" immunity, or " 'immunity from prosecutions for offenses to which compelled testimony relates.' " *People v Patterson*, 58 Mich App 727, 730; 228 NW2d 804 (1975), quoting *Kastigar*, *supra* at 443; *In re Colacasides*, 379 Mich 69, 84; 150 NW2d 1 (1967); see also *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 737, n 11; 344 NW2d 788 (1984) (LEVIN, J., with KAVANAGH and CAVANAGH, JJ., concurring); MCL 767.6; MSA 28.946. This grant of "transactional" immunity is broader than the "use" or "derivative use" immunity that was held, long after the original enactment of this statute, to be coextensive with

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[7] We note that the dissent perceives that we have "abandoned" traditional rules of statutory construction, "ignored" the plain text of the statute, created an ambiguity where none exists "in order to reach a desired result," enacted a "judicial ukase," turned traditional principles of statutory construction "inside out," acted without "authority," engaged in "rewriting" the law through "nontextual" analysis, created "new policy" from "wholecloth" and "substituted [our] own policy preferences" for those of the Legislature. Needless to say, we respectfully disagree. Although we have reached a different result than the dissent, we have no disagreement with the principles of jurisprudence set forth by the dissent. We fully agree with the dissent that "our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute." *Post* at 119. However, adopting similar interpretative premises does not ensure that two opinions will necessarily reach the same conclusion in every case, but merely that the range of acceptable choices will be limited.

the Fifth Amendment privilege, and thus constitutionally required, where a witness is compelled to testify after invoking the privilege. *Kastigar*, *supra* at 453; *People v Safiedine*, 152 Mich App 208, 213, n 2; 394 NW2d 22 (1986); *Patterson*, *supra* at 731, n 1. "Use" and "derivative use" immunity protects a witness only from the " 'use of compelled testimony and evidence derived therefrom,' " *id.* at 730, quoting *Kastigar*, *supra* at 443, but the witness may still be prosecuted for a crime in which he was involved and to which his immunized testimony relates. Therefore, the Michigan Legislature has apparently granted more extensive immunity than is constitutionally required to those who are compelled to testify pursuant to MCL 767.6; MSA 28.946.

Accordingly, while keeping in mind that full "transactional" immunity is not constitutionally required, we address the immunity statute at hand. First, given that the objective of the instant statute is to assist in the "discovery of crime," not to grant amnesty,[8] a necessary component of the induced testimony is that it be truthful, so that it may—in fact or at least potentially—assist in the discovery of crime. If the witness is allowed to give false information without consequence, i.e., without adversely affecting his "transactional" immunity, not only are law enforcement officers not assisted in their responsibilities to investigate and prosecute crime, but they may be affirmatively hindered or obstructed in this regard by the testimony, as occurred in the case at hand. Here, after

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[8] Immunity was envisioned by the Legislature as a means of reconciling a witness' constitutional rights under the Fifth Amendment with the need of the "People" to effectively investigate and prosecute criminal activities. It was not envisioned as an end in itself. See *Birch*, *supra* at 46.

defendant testified that he knew nothing about the murder of Fritz, prosecutors and the police apparently discontinued their investigation, and no one was charged in the case for over ten years.[9] Allowing a witness to testify falsely and still receive complete immunity would utterly defeat the purpose of this statute. As a result, we believe that viewing MCL 767.6; MSA 28.946 in the context of its explicit legislative purpose of assisting in the "discovery of crime" suggests strongly that an "answer" presupposes a truthful answer. Simply put, there is no reason to enact an immunity statute if it cannot compel testimony that is helpful, i.e., truthful, in discovering crime.

Second, the premise underlying immunity is that, while all witnesses are obligated to testify truthfully, those witnesses whose testimony would potentially expose them to criminal charges will be strongly inclined either to testify falsely or to not testify at all. However, once such a witness is placed in a position where he no longer has a basis for fearing criminal charges arising from his testimony, he is effectively situated in a position identical to any other witness—he is obligated to testify truthfully. This obligation extends, without exception, to all witnesses. The Fifth Amendment does not permit a witness to avoid giving testimony he would simply prefer to withhold. *Roberts v United States*, 445 US 552; 100 S Ct 1358; 63

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[9] Due process considerations bar the state from using false evidence; to construe the immunity statute in a manner that might result in the state's relying upon perjurious testimony in another proceeding would give rise to serious constitutional problems, which can, and must, be avoided if another reasonable construction of the act will negate such constitutional difficulties. *People v Bandy*, 35 Mich App 53; 192 NW2d 115 (1971); *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986).

L Ed 2d 622 (1980). And, in asserting the privilege against self-incrimination, the focus is on the consequences that a *truthful* answer might disclose. *Zicarelli v New Jersey State Comm of Investigation*, 406 US 472; 92 S Ct 1670; 32 L Ed 2d 234 (1972). Absent the presumption that witnesses will testify truthfully, the foundational pillar of our criminal justice system is necessarily undermined. This idea is so basic, in our judgment, that the very understanding of providing an "answer" to a question posed at a legal proceeding must presume a truthful answer. Indeed, one of the prerequisites of providing testimony, immunized or otherwise, is taking an oath or affirmation to tell the truth; defendant, in fact, was under oath when he testified falsely regarding material facts of his involvement in the murder. Certainly the Legislature was aware of the age-old requirement that witnesses take an oath to testify truthfully, and it presumably expected that witnesses seeking to avail themselves of the statute would be required to comply with this oath. In view of its altogether reasonable expectations in this regard, we do not believe that the Legislature would have allowed a witness to wholly avoid prosecution for a crime by dint of committing another crime, perjury.

Third, the practice of immunity is " 'based on the theory of *quid pro quo*.' " *Smith*, *supra* at 519 (citation omitted). The state exchanges immunity from prosecution for testimony that will help to identify and possibly bring before the bar of justice others involved in criminal activity. Immunity can be granted only where a witness, fearing that his statements will incriminate him in criminal activity, invokes his Fifth Amendment right not to testify. Therefore, in seeking

an order granting transactional immunity, a prosecutor must exercise a difficult option, forgoing prosecution of a suspected criminal in order to obtain otherwise unavailable information about a crime and the other criminals involved therein. Forgoing prosecution for one crime or criminal may be justified where the information obtained assists in solving and prosecuting another, usually more serious, crime that might otherwise evade sanction. However, where the testimony is false, the state is deprived of that which it was entitled to receive in exchange for its grant of immunity. If the state were to be held to this "deal," the witness would gain amnesty from prosecution while the state would sacrifice not only its ability to prosecute the witness for his part in the crime, but also its power to compel the witness' testimony and learn more about a criminal episode. This would enforce a bargain, an altogether illusory bargain, in which one party, the prosecutor, in exchange for something of great value—the nonprosecution of a criminal wrongdoer—receives nothing of benefits in return. We do not believe that the Legislature intended to warrant such an expensive sacrifice on the part of "the People" without demanding receipt of something of roughly equivalent value in exchange. Nor do we believe that the Legislature intended to confer such an unintended windfall upon a lawbreaker who, besides committing the crime for which immunity was proffered, perpetrated perjury to conceal the full extent of his wrongdoing.

On the basis of these three factors, we conclude that the immunity agreement is void and that defendant is not entitled to claim the benefits of the grant of full "transactional" immunity under MCL 767.6; MSA

28.946. Holding the state to the grant of immunity in the face of materially false testimony would thwart the purpose of the immunity statute, undermine its reasonably implied condition of truthfulness, and render illusory a bargain struck between the prosecutor and a criminal witness regarding a matter of the highest importance to the security and tranquillity of "the People." In our judgment, therefore, a requirement of truthful testimony is compelled by the language of this statute when viewed in its obvious context.[10] Contrary to the suggestions of the dissent, we are not engaged here in resolving an "ambiguity" in statutory language. Instead, we have sought to give reasonable meaning to the statutory requirement that a witness "answer" questions before a grand jury in exchange for immunity. On the basis of our analysis,

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[10] We do not agree with the dissent that the Legislature's enactment of MCL 767.19d; MSA 28.959(4), concerning the availability of perjury as a remedy against one who testifies falsely at a grand jury proceeding, implies that no other remedies are available under MCL 767.6; MSA 28.946. Indeed, we do not believe that treating an immunity agreement as void where a witness has failed to "answer" questions truthfully can properly be characterized as a "remedy" at all; rather, the terms of the agreement have simply not been satisfied by both parties. The clear purpose of MCL 767.19d; MSA 28.959(4) is to make clear that a grand jury proceeding in Michigan is the type of proceeding to which the perjury remedy is applicable. There is no reason why the Legislature should have been expected, in enacting MCL 767.6; MSA 28.946, to have further provided that, "oh, by the way, if you the witness do not comply with the terms of this law, you should be forewarned that you will not receive its benefits." It is wholly understandable why the Legislature would view it as unnecessary to explicitly set forth the consequences of a party's failing to live up to its obligations under a statute—consequences which are implicit in the statute itself—namely here the denial of a breaching party's ability to enforce a quid pro quo. In our judgment, it is implicit under every law of the state, as well as under every contract and deed entered into within its boundaries, that to avail oneself of the benefits of a deal, one must first comply with its conditions. That the dissent may disagree with us regarding what these conditions are does not enable it to correctly conclude that a negative implication arises from the Legislature's failure to expressly specify such an obvious legal proposition.

we conclude that reference to a witness' obligation to provide an "answer," in exchange for immunity, cannot reasonably be interpreted to mean any utterance of words in reply, but that it refers to a truthful answer. Especially since the Legislature has chosen to confer "transactional" immunity by this statute, which is far broader than what is required by the constitution, such immunity need not be recognized unless every condition of the statute has been honored by the immunized witness. Where the witness does not comply with the statute, which we construe as demanding truthful "answers" during immunized testimony, he does not receive immunity. See *Smith, supra* at 516-518; *People v Norwood*, 312 Mich 266, 274; 20 NW2d 185 (1945). Defendant did not comply with the statute when he provided materially false testimony. Thus, such testimony did not suffice to confer "transactional" immunity under the statute and defendant can be charged and tried for murder and felony-firearm as a result of the death of Nolan Fritz.

III

We now turn to defendant's appeal of his perjury convictions in Docket No. 194362 and the arguments raised in his counsel's brief. Defendant first argues that he was denied due process by the eleven-year, seven-month delay between the date that he committed his perjury offenses (January 26, 1983) and the date that the perjury complaint and warrant were filed (August 1994). We review this constitutional issue de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997); see also *People v White*, 208 Mich App 126, 134-135; 527 NW2d 134 (1994).

In *People v Bisard*, 114 Mich App 784, 791; 319 NW2d 670 (1982), this Court held that in order to establish a due process violation in the context of prearrest delay a defendant must first demonstrate prejudice. The prosecutor then bears the burden of persuading the court that the reason for the delay was sufficient to justify whatever prejudice results. *Id.* In evaluating the reason for the delay, the court may consider the explanation for the delay, whether the delay was deliberate, and whether undue prejudice attached to the defendant. *Id.* at 786, 791.

On appeal, defendant contends that application of *Bisard* to this case requires reversal of his convictions.[11] Specifically, defendant contends that the delay in his perjury case caused the loss of a number of

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[11] We note that in denying defendant's motion to dismiss on the ground of prearrest delay, the trial court applied the test enunciated in *Bisard* and concluded that, even assuming some prejudice, the delay in defendant's perjury case was justified. We further note that the test enunciated in *Bisard* has been applied often by this Court in cases considering the issue of preindictment or prearrest delay. See *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989); *People v Loyer*, 169 Mich App 105, 119; 425 NW2d 714 (1988).

However, unlike *Bisard*, a majority of the federal circuit courts of appeal, including the United States Court of Appeals, Sixth Circuit, place the burden on the defendant to show not only prejudice that is actual *and substantial*, but also to show intentional delay by the government to gain an unfair tactical advantage. *Jones v Angelone*, 94 F3d 900, 905 (CA 4, 1996); *United States v Brown*, 959 F2d 63, 66 (CA 6, 1992). In *White*, *supra* at 134, this Court, relying on *Brown* but without discussing *Bisard*, noted that in determining whether dismissal is warranted by a preindictment or prearrest delay, "a defendant must show substantial prejudice to his right to a fair trial and intent by the prosecution to gain a tactical advantage." Applying this test to a prearraignment delay, this Court found no due process violation. *White*, *supra*.

This Court must follow a rule of law established in a prior published decision of this Court issued on or after November 1, 1990. MCR 7.215(H)(1). However, because we find no due process violation even under the less stringent standard enunciated in *Bisard*, we decline to decide whether *White*, decided as it was in the context of prearraignment delay, establishes a rule of law that we are required to follow in this case

witnesses and physical evidence pertaining to the murder. However, defendant does not claim the loss of material witnesses or exculpatory evidence. Rather, defendant claims that the lost evidence might have been used to impeach Fleck's testimony. Certainly Fleck's testimony connecting defendant to the murder was crucial in this case because it provided much of the contradiction and corroboration necessary to convict defendant of perjury.[12] However, that any of the alleged lost evidence might have impeached Fleck is, at best, speculative. Moreover, defendant had substantial evidence with which to impeach Fleck at trial.[13] Cf. *People v Reddish*, 181 Mich App 625, 627-628; 450 NW2d 16 (1989). Thus, we conclude that defendant has not sustained his burden of showing that he was prejudiced by the delay.

However, assuming some prejudice under *Bisard*, we turn to a consideration of defendant's argument that the delay in this case was not justified. Defendant contends that the delay was not justified because probable cause existed in 1983 to charge him with at least three of the four perjury counts of which he was ultimately convicted. Specifically, with respect to count three (defendant's denial that he owned a .32 caliber gun or gave a .32 caliber gun to Fleck) and count four (defendant's denial that Walter Crenshaw gave him a gun), defendant contends that probable cause existed immediately after the judicial inquiry because Crenshaw testified that he had given defendant a .32 caliber gun. However, proof of perjury

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and, if not, whether this Court should nevertheless utilize the federal majority approach in prearrest- or preindictment-delay cases.

[12] See discussion later in opinion.

[13] See discussion later in opinion.

requires more than simply proof of the contradiction.[14] A prosecutor does not violate due process when he refuses to seek an indictment until he is satisfied that he will be able to establish guilt beyond a reasonable doubt. *United States v Brown*, 959 F2d 63, 66 (CA 6, 1992). In this case, the prosecutor who questioned defendant during the judicial inquiry may certainly have had his doubts about the veracity of defendant's testimony during the judicial inquiry, but may not have been satisfied that he could establish defendant's guilt of perjury beyond a reasonable doubt at that time.

With respect to count two (defendant's denial that he was with Fleck on December 19, 1982), defendant also contends that probable cause could have been easily established if the police had not simply failed to pursue this case. However, testimony given during the evidentiary hearing regarding this issue below indicates that shortly after the homicide the police came to believe that they were no longer free to interview either defendant or Fleck, both of whom allegedly requested to consult with counsel. Moreover, other witnesses have maintained from the beginning of this case that defendant was playing cards at the Knight residence throughout the night of December 19, 1982. The investigation came to a standstill not because the police unjustifiably failed to pursue this case, but because the police had no other good leads to follow.

Defendant also implies that the various prosecutors who have been in charge of this case over the years have acted in bad faith. However, our review of the

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[14] See discussion later in opinion.

record reveals no such bad faith. Rather, our review reveals that whether defendant could be successfully prosecuted for perjury depended in large part on whether it could be established that defendant was connected to the Fritz homicide. The homicide investigation came to a standstill not because of any lack of police or prosecutorial diligence, but because defendant and Fleck were not admitting their involvement in the homicide and the police were simply unable to gather enough other evidence to charge either of them. Generally, investigative delay, as opposed to delay that is intended to gain a tactical advantage over a defendant, does not violate due process. *Id.* Thus, even assuming that defendant suffered some prejudice by the delay in this case, we find no due process violation because the prosecution satisfied its burden under *Bisard* of establishing that the reasons for the delay were sufficient to justify the resulting prejudice.

Next, defendant raises an issue with respect to the nonresident tolling provision of the applicable statute of limitations. This statute provides in relevant part as follows:

> [A]ll . . . indictments [other than for certain crimes not at issue here] shall be found and filed within 6 years after the commission of the offense. *However, any period during which the party charged did not usually and publicly reside within this state shall not be considered part of the time within which the respective indictments shall be found and filed.* [MCL 767.24(1); MSA 28.964(1) (emphasis supplied).][15]

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[15] The term "indictment" is to be treated as also referring to charges made by the filing of an information. *People v Russo*, 439 Mich 584, 588, n 1; 487 NW2d 698 (1992); see also MCL 767.2; MSA 28.942.

Defendant does not contend that, at any time after July 1984, he "usually and publicly" resided in Michigan. Rather, defendant has always acknowledged that in July 1984 he moved to and began residing in South Carolina. However, defendant contends that despite his Michigan nonresidency, the nonresident tolling provision should nevertheless be interpreted as not tolling the six-year period of limitation in this case because defendant did not leave Michigan in order to avoid prosecution, he lived openly in South Carolina, he was easy to locate by Michigan authorities, and his absence from Michigan did not impede the prosecutor from going forward with this case.

The trial court denied defendant's motion to dismiss on this ground below, finding that the nonresident tolling provision was plain and unambiguous and, as applied to the undisputed facts of this case, tolled the running of the six-year period of limitation. We find no apparent error in this regard. The Legislature is presumed to have intended the meaning it plainly expressed. *People v Gould*, 225 Mich App 79, 83; 570 NW2d 140 (1997). Here, the specific language of the statute plainly expresses the Legislature's intent to exclude from the six-year limitation period certain periods defined as "any period during which the party charged did not usually and publicly reside within this state . . . ." There is no question that defendant did not usually and publicly reside in Michigan after July 1984.

However, defendant contends that a departure from the nonresident tolling provision is justified under the facts of this case because a literal construction produces a result inconsistent with the purposes behind the statute, which is to prevent the inaccurate testi-

mony and unfairness that may result from stale evidence and dull memories. *People v McCausey*, 65 Mich 72, 73; 31 NW 770 (1887); *People v Budnick*, 197 Mich App 21, 24; 494 NW2d 778 (1992); *People v Allen*, 192 Mich App 592, 602; 481 NW2d 800 (1992). In response, we simply note that statutes of limitation are a matter of legislative grace and subject to legislative control. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992). Despite any general policy against unduly postponing criminal prosecutions that is embodied in MCL 767.24; MSA 28.964, the Legislature saw fit to include a specific provision whereby the limitation period is tolled during "any period during which the party charged did not usually and publicly reside within this state . . . ." Thus, we find that application of the plain language of the nonresident tolling provision to the facts of this case does not produce an inconsistent result, but rather produces the result intended by the Legislature.

Alternatively, defendant notes that the courts in *Danuel v State*, 262 Ga 349, 352; 418 SE2d 45 (1992), and *Heitman v State*, 627 NE2d 1307, 1311 (Ind App, 1994), held that nonresident tolling provisions analogous to Michigan's provision tolled a criminal period of limitation only when the nonresident suspect was not amenable to process or had absconded. Defendant urges that we should similarly construe Michigan's nonresident tolling provision in light of the facts that he did not abscond from Michigan and was amenable to process. However, *Danuel* and *Heitman* appear to represent the minority view. See *Danuel*, *supra* at 357 (Bell, P.J., concurring). Most courts that have considered statutory tolling provisions analogous to Michigan's provision have held that mere

absence, regardless of intent to evade justice or conceal one's whereabouts, is enough to toll the criminal period of limitation.[16] See *State v Ansell*, 36 Wash App 492, 493-496; 675 P2d 614 (1984); see also *State v Whitman*, 160 Wis 2d 260, 264-267; 466 NW2d 193 (Wis App, 1991); *State v Stillings*, 238 Mont 478, 482-484; 778 P2d 406, 408-410 (1989). In so holding, the courts have reasoned that the statutory language is too clear to permit a different construction. *Whitman*, *supra* at 266; *Ansell*, *supra* at 493-496. Thus, in *Ansell*, the court held that the criminal period of limitation was tolled even though the nonresident defendant had lived openly in another state and was available for prosecution at all times. And, in *Stillings*, *supra* at 484, the court held that the criminal period of limitation was tolled even though state officials knew that the defendant was incarcerated out of state and the state could have forced the defendant's return at any point. Thus, we are not persuaded by defendant's reliance on *Danuel* and *Heitman*. We conclude that the trial court did not err in refusing to dismiss this case on this ground.

Next, defendant raises an issue with respect to witness Fleck. To put the issue in context, we note that at trial Fleck testified during both direct examination and cross-examination that, as a result of a plea agreement with respect to his involvement in the Fritz homicide, he had already pleaded guilty of being an accessory after the fact to murder. Fleck testified that he had not yet spent any time in jail because he had been permitted to post a $10,000 personal prop-

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[16] In Michigan it is not simply mere absence, but such absence as destroys residency. *McCausey*, *supra*. In this case, there is no question that defendant did not reside in Michigan after July 1984.

erty bond using his home as collateral, as opposed to a cash bond, and that sentencing with regard to his plea had been deferred until after he testified at defendant's trial. Fleck acknowledged that the plea agreement contained his statements implicating defendant in the Fritz homicide and provided that, if he did not give truthful testimony consistent with these statements, then the accessory plea would be dismissed and the prosecutor could proceed with whatever charges were deemed appropriate, including first-degree murder.

The trial court precluded defendant from exploring, with either Fleck or other witnesses, the plea negotiations preceding Fleck's actual plea agreement, including a possible plea of guilty to a charge of manslaughter. In reaching this decision, the court reasoned that evidence of what had occurred during the plea negotiations would not prove anything that the actual plea agreement did not already prove. The court also noted that the terms of the actual plea agreement had been made abundantly clear to the jury and that the benefits of this agreement to Fleck were obvious and apparent, including the maximum benefit Fleck received in exchange for his testimony, i.e., not being subject to a possible charge of first-degree murder. The trial court decided to exclude the evidence of Fleck's plea negotiations under MRE 403 on the ground that this evidence would be cumulative, confusing, misleading, and duplicative.

Defendant now contends that the trial court's refusal to allow him to impeach Fleck with evidence that Fleck had rejected a proposal that he plead guilty to a charge of manslaughter denied defendant his right to present a defense and his right to confronta-

tion. We note that defendant fails to cite any portion of the record establishing that Fleck actually rejected such a proposal. Rather, our review of the record reveals, at most, that the prosecutor initially wanted Fleck to plead guilty to a charge of manslaughter and that Fleck's counsel discussed this proposal with Fleck.

A defendant has a constitutional right to present a defense and confront his accusers. *People v Posby*, 227 Mich App 219, 226; 574 NW2d 398 (1997); *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). A primary interest secured by the right of confrontation is the right of cross-examination. *Adamski, supra.* The credibility of a witness is an issue that is of the utmost importance in every case and defendants are guaranteed a reasonable opportunity to test the truth of a witness' testimony. *Adamski, supra*; *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). Evidence of a witness' motivation for testifying is highly relevant to the witness' credibility. *Mumford, supra.* Thus, a defendant is always entitled to have a testifying accomplice's receipt of a grant of immunity or guilty plea to a reduced charge disclosed to the jury. *Id.* However, trial courts have the discretion to impose reasonable limits on cross-examination on the basis of concerns about harassment, prejudice, confusion of the issues, or interrogation that is repetitive or only marginally relevant. *Adamski, supra.*

In this case, one of defendant's primary defenses was that Fleck was untruthful. In support of this theory, substantial evidence tending to impeach Fleck's credibility was adduced at trial. Specifically, the disclosure of the details of Fleck's plea agreement raised

an inference that Fleck had a significant motive to testify as he did or face a charge of first-degree murder. Fleck also admitted to defense counsel that he had lied during his cross-examination at the preliminary hearing in this case. Finally, Fleck, as well as other witnesses, testified that between 1982 and 1994, Fleck had given varying and inconsistent accounts of his involvement in the Fritz homicide to the police. On this record, we cannot say that defendant was denied his right to present his defense that Fleck was untruthful.

Moreover, defendant was permitted great latitude in confronting Fleck, including cross-examining Fleck regarding the details of the plea agreement. Where the inference was clearly raised that Fleck benefited greatly from his plea agreement because he was subject to a charge of first-degree murder but permitted to plead guilty of being an accessory after the fact, we conclude that additional evidence that a possible plea of guilty to a charge of manslaughter was also considered during plea negotiations was of only marginal value. The trial court reasonably limited Fleck's cross-examination and defendant was not denied his right to confrontation thereby. For similar reasons, we also reject defendant's claim that his due process rights were violated when the prosecutor failed to disclose to the jury that Fleck had allegedly rejected a proposal that he plead guilty to a charge of manslaughter. *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976).

Next, defendant raises an issue with respect to witness Arthur Baker. At trial, Baker, a former detective with the Montmorency County Sheriff's Department who investigated the Fritz homicide, testified that

when he interviewed defendant shortly after the homicide, defendant never indicated that he had been with Fleck. Defendant contends that this testimony was extremely damaging because he later admitted that he was with Fleck on December 20, 1982. Defendant contends that he therefore should have been allowed to cross-examine Baker with evidence of Baker's bias or prejudice against defendant. Defendant contends that the trial court's refusal to allow him to impeach Baker denied him his constitutional rights to confrontation and to present a defense. However, assuming, without deciding, that the trial court erred in refusing to allow defendant to impeach Baker with evidence of Baker's alleged bias or prejudice, we conclude that any denial of defendant's constitutional rights was harmless beyond a reasonable doubt because two other police officers also testified that, when they interviewed defendant shortly after the Fritz homicide, defendant also did not indicate to them that he was with Fleck on December 20, 1982. *People v Belanger*, 454 Mich 571, 576; 563 NW2d 665 (1997).

Next, defendant cites approximately twelve instances in which the trial court allegedly demonstrated its partiality by criticizing or disparaging defense counsel. Defendant contends that he was denied a fair trial by this judicial misconduct. A defendant in a criminal trial is entitled to a neutral and detached magistrate. *People v Conyers*, 194 Mich App 395, 398; 487 NW2d 787 (1992). The test is whether partiality could have influenced the jury to the detriment of the defendant's case. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Judicial remarks during the course of a trial that are

critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not generally support a challenge for partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497, n 30; 548 NW2d 210 (1996). Moreover, partiality is not established by expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display. *Id.*

This case was hard-fought and hotly contested by both sides. Several times after defense counsel had raised an issue and argued his position, the trial court would request, often repeatedly, that counsel make a motion or otherwise ask for some sort of specific relief or action by the court. However, despite these requests, defense counsel would often continue to argue his position. At other times, the court would rule regarding an issue and counsel would continue to argue, often reiterating a prior position. Later in the proceedings, defense counsel would again raise the same issue, requiring the court to make the ruling again. There is no doubt that at times the court became frustrated with defense counsel's behavior in these respects. However, in our judgment, the court was also extremely patient with defense counsel and gave defense counsel great latitude in presenting defendant's case. Our review of the record reveals that the trial court's challenged remarks were, at most, simply expressions of impatience, dissatisfaction, annoyance, and anger that are fully within the "bounds of what imperfect men and women sometimes display." Moreover, the trial court gave at least two curative instructions with respect to some of these remarks. We conclude that the trial court's conduct was not partial and could not have influenced

the jury to the detriment of defendant's case. Accordingly, the trial court did not engage in judicial misconduct and defendant, therefore, was not denied a fair trial on this ground.

IV

Next, we consider those issues raised in the supplemental brief filed by defendant pro se. Defendant first argues that the trial court erred in allowing the prosecutor to present several rebuttal witnesses while denying defendant the opportunity to present certain surrebuttal testimony. Specifically, defendant takes issue with rebuttal testimony that he claims erroneously raised the damaging inference that he made an admission concerning the homicide. In order to place this issue into context, we note that defendant was the last defense witness to testify. During defendant's direct examination, defendant testified that while he was in Michigan on August 15, 1994, he went to see Fleck. Defendant testified that he had been informed by the police that Fleck had indicated that he, Fleck, had been at the murder scene "and all this stuff happened." Defendant testified that he did not know what Fleck was talking about and he went to see Fleck to talk to him and find out "what he was saying." Defendant testified that he did not talk to Fleck for any length of time because he was forced to leave Fleck's property when Fleck's son aimed a shotgun at him and shot at his vehicle.

After defendant's direct examination but before his cross-examination, the prosecutor informed the court that over the weekend the police had learned about and then interviewed a witness with critical new information about defendant's case. This witness was

Joyce McIntire, who was married to defendant's brother, Gary McIntire, and who was also the great-granddaughter of Nolan Fritz. As relevant to the present issue on appeal, Joyce McIntire had information indicating that in August 1994, defendant had made a certain statement to her. The prosecutor indicated that she was going to call Joyce McIntire for rebuttal. Defendant's objections to any rebuttal testimony by McIntire concerning defendant's alleged statement were overruled by the trial court.[17]

The prosecutor commenced her cross-examination of defendant, during which defendant testified that after leaving Fleck's house on August 15, 1994, he went to Gary and Joyce McIntire's house. The prosecutor elicited defendant's denial that, during a conversation concerning both the incident at Fleck's house and the Fritz homicide, Joyce McIntire had asked him why did he not talk to the police about what he knew about the homicide. The prosecutor also elicited defendant's denial that he had replied that he did not talk to the police because the incident involved a friend.

Joyce McIntire subsequently testified in rebuttal that on August 15, 1994, after defendant had been to Fleck's house, she had a conversation with defendant concerning the Fritz homicide during which she asked defendant why he did not tell the police what, if anything, he knew about the death. McIntire testified that defendant responded that, even if he knew

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[17] After defendant's direct examination but before his cross-examination, the prosecutor gave the defense a copy of Joyce McIntire's interview with the police. Defendant was also permitted to interview McIntire before his cross-examination.

anything, he was not going to say anything because he did not want to get any friends in trouble.

Defendant argues, as he did below, that McIntire's testimony concerning defendant's statement violates the rules stated in *People v Losey*, 413 Mich 346, 351-352; 320 NW2d 49 (1982), and *People v Bennett*, 393 Mich 445, 449; 224 NW2d 840 (1975), that the prosecutor may not use rebuttal testimony to introduce substantive evidence that belonged in the prosecutor's case in chief and that the prosecutor may not elicit a denial during cross-examination for the purpose of injecting a new issue into the case.

We first note, however, that in *Losey*, *supra* at 351, n 3, the Supreme Court recognized

> that there may be occasional cases in which evidence that might have been admissible in the prosecutor's case in chief could be admitted in rebuttal. The prosecutor may not become aware of the evidence until after having rested.

Additionally, the Supreme Court recognized, *id.* at 352, n 5, that

> [t]here will, of course, be cases in which rebuttal evidence may properly be used to contradict testimony elicited on cross-examination where the cross-examination merely drew out the details of matters raised by defense witnesses.

Moreover, in *People v Figgures*, 451 Mich 390, 398-399; 547 NW2d 673 (1996) (citations omitted), the Supreme Court explained as follows:

> Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion. . . .
>
> Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party

> and tending directly to weaken or impeach the same." The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination.
>
> Contrary to the dissent's insinuation, the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief.

The *Figgures* Court further distinguished cross-examination that injects a new issue into the case from cross-examination that responds to an issue raised by the defendant. *Id.* at 401.

In this case, defendant himself, during his direct examination, testified about going to Fleck's house on August 15, 1994. Defendant's testimony about this incident injected the inferences that defendant had no knowledge about either the homicide itself or Fleck's involvement in the homicide. The prosecutor's cross-examination of defendant concerning his alleged statement to McIntire addressed the issue of defendant's knowledge about the homicide and the involvement of other persons in the homicide. Thus, the prosecutor's cross-examination of defendant merely drew out details of matters raised by defendant himself and did not inject a new issue into the case. *Id.* Rather, the inferences from this testimony during cross-examination directly contradicted the inferences injected by defendant.

Further, the information possessed by Joyce McIntire came to the attention of the police only during

trial when Joyce McIntire's mother, who was Nolan Fritz' granddaughter, heard media reports of testimony by defense witnesses that raised questions in the mother's mind. The mother first contacted Joyce McIntire and then contacted the police, who in turn contacted Joyce McIntire. Thus, there is no question here that the prosecutor did not become aware of the substance of McIntire's testimony until the prosecutor had rested her case. *Losey*, *supra* at 351, n 3. In summary, we conclude that the trial court did not clearly abuse its discretion in allowing the prosecutor to cross-examine defendant with respect to his statement and in admitting McIntire's testimony concerning defendant's statement. *Figgures*, *supra* at 398.

Next, defendant takes issue with rebuttal testimony involving defendant's wife. Defendant's proofs had indicated that he and his wife spent the evening of December 19, 1982, at the Knight residence playing cards with the Knights and the Gays, who were neighbors of the Knights. Defendant and his wife left the Knight residence after midnight and the Gays left the Knight residence approximately forty-five minutes to an hour before defendant and his wife. After arriving home, defendant's wife went to the bedroom and read a book while defendant left to go to Fleck's house. Defendant and his wife next saw each other on December 20, 1982, at approximately 5:30 P.M. or 6:00 P.M. when defendant and Fleck arrived at defendant's house. Defendant's wife then left to take their son to a school program. After defendant's wife arrived back home at approximately 8:30 P.M., she and defendant drove Fleck home. Defendant and his wife first heard about Fritz' being killed at approximately 6:00 P.M. on the December 22, 1982, evening news. Finally, defend-

ant's proofs indicated that defendant and his wife then went to the home of defendant's brother, Gary McIntire.

When Joyce McIntire was discovered as a witness, the prosecutor learned that she had information not only about defendant's statement, but also about three visits made by defendant's wife to Joyce McIntire's house. The circumstances surrounding these visits tended to raise the following inferences: (1) that defendant's wife went to Joyce McIntire's house on the night of December 19, 1982, looking for defendant, (2) that defendant's wife went back to Joyce McIntire's the next night, December 20, 1982, and essentially told Joyce McIntire to forget that she had been looking for defendant the previous night, and (3) that defendant and his wife went to Joyce McIntire's house on December 21, 1982, the day Fritz' body was discovered and before the news of the homicide was generally known, and informed Joyce McIntire that Fritz had been killed.

After defendant rested his case, the prosecutor recalled defendant's wife, who had already testified as a defense witness. The trial court granted the prosecutor's request to treat defendant's wife as a hostile witness and to utilize leading questions in her examination. The prosecutor elicited from defendant's wife a denial that, after arriving home from the Knight residence, she went to Gary and Joyce McIntire's home looking for defendant. She also denied that she went to the home the next day and told Joyce McIntire to tell anyone who asked that defendant was with her the previous night. Further, she testified that on a Wednesday she and defendant heard on the television that Fritz had been murdered and that she and

defendant then went to the McIntires' home to so inform them.

Defendant again relies on *Losey* to argue that, in putting defendant's wife back on the stand, the prosecutor was not rebutting any evidence produced by the defense, but rather was improperly reopening the prosecution's case and injecting a new issue through the use of cross-examination. Defendant also relies on *Losey* to argue that Joyce McIntire's testimony concerning the three visits to her home by defendant's wife was improper rebuttal evidence because it constituted substantive evidence that should have been offered in the prosecutor's case in chief. Again, we simply note that the prosecutor was not aware of the evidence possessed by Joyce McIntire until the prosecutor had rested her case. *Losey*, *supra* at 351, n 3. Moreover, the test for rebuttal evidence is not whether it could have been offered in the prosecutor's case in chief, but rather whether it was responsive to an issue raised by the defendant. *Figgures*, *supra* at 399. In this case, Joyce McIntire's testimony concerning the activities of defendant or his wife in visiting McIntire's residence contradicted the defense theories that defendant was at the Knight residence the entire evening of December 19, 1982, and that defendant had no knowledge of the homicide. *Id.* Thus, Joyce McIntire's testimony concerning these visits was altogether proper rebuttal testimony.

The prosecutor clearly wanted to question Joyce McIntire concerning statements defendant's wife made to Joyce McIntire during the visits to McIntire's house. However, if the statements were offered during McIntire's testimony for the truth of the matter, a hearsay objection would have been in order. MRE

801(c); MRE 802. Alternatively, if the statements were offered during McIntire's testimony to impeach defendant's wife by proof of prior inconsistent statements, an objection regarding the lack of foundation would have been potentially in order. MRE 613(b); *People v Barnett*, 165 Mich App 311, 315; 418 NW2d 445 (1987). Knowing this, the prosecutor sought to put defendant's wife back on the stand for the purpose of laying a foundation for impeachment purposes. In granting the prosecutor's request to do so, the trial court, in effect, permitted the prosecutor to reopen her cross-examination of defendant's wife. The reopening of proofs rests within the sound discretion of the trial court. *People v Keeth*, 193 Mich App 555, 560; 484 NW2d 761 (1992). Here, the trial court specifically limited the prosecutor's renewed cross-examination of defendant's wife to establishing a foundation for impeachment purposes. The renewed cross-examination did not inject new issues into the case but rather constituted further cross-examination regarding matters raised by the defense, i.e., defendant's whereabouts at the time of the homicide and defendant's knowledge of the homicide. *Figgures*, *supra* at 401. Defendant was subsequently able to effectively impeach Joyce McIntire's testimony during surrebuttal. And, the jury was properly cautioned that it could not use evidence of the prior inconsistent statements of a witness as substantive evidence, but rather could only use such evidence in assisting it in determining whether the witness was truthful. Because we find no undue advantage to the prosecutor or prejudice to defendant, we conclude that the trial court did not abuse its discretion in permitting

the prosecutor to reopen her cross-examination of defendant's wife.

Next, defendant takes issue with the rebuttal testimony of Duane Gay. Gay testified during rebuttal that he and his wife played cards with defendant at the John and Phylis Knight residence on the night of December 19, 1982. Gay testified that he and defendant were drinking and that during the card game defendant twice asked Gay whether Gay thought Gay could "kick [defendant's] ass?" and whether Gay wanted to "go outside and try it?" Gay testified that he finished the card game and that he and his wife then left the Knight residence because he felt uncomfortable. Defendant contends on appeal that this testimony did not constitute proper rebuttal because the prosecutor improperly injected the issue of the time that the Gays left the Knight residence during the cross-examination of defense witness Mark Knight, the son of John and Phylis Knight. Defendant also contends that the issue of defendant's combative attitude should have been introduced during the prosecutor's case in chief. We disagree. As indicated previously, defendant's own proofs indicated that he was at the Knight residence during the entire evening of December 19, 1982, and that he did not leave the Knight residence until after midnight. Defendant's own proofs also linked the time that he left the Knight residence to the time that the Gays left the Knight residence, i.e., approximately forty-five minutes to an hour earlier than defendant. Gay's testimony that he and his wife left the Knight residence within an hour of darkness, with the resulting inference that defendant also left the Knight residence much earlier than previously indicated by defendant's

proofs, tended to contradict or disprove the evidence offered by defendant concerning the time that defendant left the Knight residence. *Id.* at 399. Accordingly, we find that the admission of Gay's rebuttal testimony did not constitute a clear abuse of discretion. *Id.* at 398.

Finally, defendant argues that the trial court erred in refusing to allow the testimony of two surrebuttal witnesses for the purpose of contradicting, and thereby impeaching, the credibility of Joyce McIntire's testimony. We disagree. Rebuttal evidence must relate to a substantive rather than a collateral matter. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). In this case, defendant was able to present surrebuttal witnesses that not only directly contradicted Joyce McIntire's testimony, but also impeached her credibility with evidence of bias or prejudice. In excluding certain other proposed surrebuttal testimony, the trial court found that the proposed testimony concerned collateral matters. We find no clear abuse of discretion with regard to this issue. *Figgures*, *supra*.

Next, defendant argues that the trial court erred in refusing to give defendant's requested instruction that the prosecutor must present "strong corroboration" to establish that defendant's allegedly perjured testimony was false. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *Id.* A trial court may give additional instructions concerning an area

that was not covered in the standard jury instructions as long as these additional instructions accurately state the law and are applicable, concise, understandable, conversational, unslanted, and nonargumentative. *People v Lynn*, 229 Mich App 116, 121; 580 NW2d 472 (1998). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Perez-DeLeon*, *supra*.

In order to convict a defendant of perjury, the prosecutor must prove each of the elements of the crime beyond a reasonable doubt, including the element that the defendant made a false statement. *People v Cash*, 388 Mich 153, 162; 200 NW2d 83 (1972); *People v Kozyra*, 219 Mich App 422, 428-429; 556 NW2d 512 (1996); *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996). That the defendant made a false statement is proved by establishing the truth of the contradiction. *Cash*, *supra*. The prosecution cannot satisfy its burden simply by contradicting the defendant's sworn statement. *Kozyra*, *supra* at 429. "Rather, the prosecution must present 'evidence of circumstances bringing strong corroboration of the contradiction.' " *Id.* (quoting *Cash*, *supra*).

In this case, the trial court gave instruction CJI2d 14.1 (perjury committed in courts), which simply instructs the jury that it must find that "while under that oath the defendant made a false statement." However, the trial court refused defendant's request that CJI2d 14.1 be supplemented with a "strong corroboration" instruction in accordance with *Cash*. Certainly, such an instruction would have been an accurate statement of the law and could have been given. *Lynn*, *supra*. However, the instructions, as given,

included each of the elements of the charge of perjury. In addition, the jury was properly instructed with regard to circumstantial evidence and the burden of proof. Moreover, defendant raises no challenge to the sufficiency of the evidence of his convictions and our review reveals that the prosecutor presented evidence of circumstances bringing strong corroboration of the contradictions at issue in this case. Accordingly, even if the instructions regarding perjury were imperfect, we find no error because the instructions as given fairly presented the issues to be tried and sufficiently protected the defendant's rights.

Next, defendant argues that certain inadmissible opinion testimony by the police was erroneously admitted at trial. However, defendant failed to properly object to the admission of this testimony below. "It is well established that objections to admissibility not properly raised at trial cannot be later asserted on appeal." *People v Kilbourn*, 454 Mich 677, 685; 563 NW2d 669 (1997).

Finally, defendant argues that his ten-year minimum sentences are disproportionate. In this regard, defendant notes that his criminal history consists of no prior felony convictions and only several old misdemeanor convictions, yet the instant sentences constitute the most severe sentences permitted under the law.[18] The key test of proportionality is whether the sentence reflects the seriousness of the matter. *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997). In imposing the maximum sentences permitted by law in this case, the trial court was clearly influenced by

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[18] There are no sentencing guidelines for the crime of perjury. *Honeyman, supra* at 697.

the testimony admitted at trial concerning defendant's suspected involvement in the Fritz homicide. We find no error in this regard. A trial court may not make an independent finding of guilt and then sentence a defendant on the basis of that finding. *Gould, supra* at 89. However, a trial court may consider the evidence admitted at trial as an aggravating factor in determining an appropriate sentence. *Id.* In light of the obvious aggravating factors presented by this case, we conclude that defendant's ten-year minimum sentences are proportional to the offenses and the offender. *Lemons, supra.*

In summary, in Docket No. 194301, we reverse the dismissal of the charges of murder and felony-firearm and remand for reinstatement of these charges. In Docket No. 194362, we affirm defendant's convictions of and sentences for perjury.

SMOLENSKI, J., concurred.

YOUNG, JR., P.J. (*concurring in part and dissenting in part*). I concur fully with the majority's affirmance of defendant's convictions of perjury committed in court, MCL 750.422; MSA 28.664, in Docket No. 194362. However, I must respectfully dissent from my colleagues' conclusion in Docket No. 194301 that defendant may be tried for first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Because I do not believe that the statute regarding the granting of immunity to a witness compelled to testify before a one-man grand jury, MCL 767.6; MSA 28.946, conditions its grant of transactional immunity on "truthful" testimony, I

would affirm the trial court's order dismissing the charges of first-degree murder and felony-firearm.

I. APPLICATION OF TRADITIONAL PRINCIPLES OF STATUTORY CONSTRUCTION

Because our judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979). A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995); *Lake Angelus v Oakland Co Road Comm*, 194 Mich App 220, 224; 486 NW2d 64 (1992). Finally, in construing a statute, we must give the words used by the Legislature their common, ordinary meaning. MCL 8.3a; MSA 2.212(1).

These traditional principles of statutory construction thus force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated,

intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences. See *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939) ("Courts cannot substitute their opinions for that of the legislative body on questions of policy."). Unfortunately, the majority has abandoned these traditional rules of construction, ignored the plain text of the statute before us, and substituted its own policy preferences for those of our Legislature by finding an unexpressed legislative intent that a witness who lies in a one-man grand jury proceeding forfeits statutory immunity granted under MCL 767.6; MSA 28.946. While I do not question the sincerity of my colleagues' effort, I view the majority opinion as a herculean, yet ultimately unsuccessful, attempt to create an ambiguity where none exists in order to reach a desired result, albeit one with which I might wholeheartedly agree were I a legislator authorized to enact policy.

The immunity statute, MCL 767.6; MSA 28.946, provides, in relevant part:

> No witness shall upon such inquiry be required to answer any questions, or shall be convicted for contempt upon refusal to do so, when the answers might tend to incriminate him. A written order granting to such witness immunity from such incrimination may be entered by said judge pursuant to a written motion by the prosecuting attorney . . . , which order shall set forth verbatim the questions which such witness refused to answer. . . . *No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him.* [Emphasis added.]

The text of the statute is clear and unambiguous. It simply does not condition transactional immunity on

truthful testimony.[1] As I read the immunity statute, there is but one condition that the Legislature has imposed on a grant of transactional immunity: that the witness give answers that "may have tended to incriminate him." *Id.* The above-emphasized language of the statute would seem to admit of no contrary intent. It is hard for me to conceive of language the Legislature could have otherwise employed that would more emphatically have proclaimed that, once an immunized witness has provided answers tending to incriminate, no prosecution for offenses touching upon crimes associated with such answers may be had. Indeed, the "tended to incriminate" standard appears to present a rather low threshold that need be met in order to invoke the immunity protections of the statute. See, e.g., *People v Joseph*, 384 Mich 24, 29; 179 NW2d 383 (1970) (holding that the privilege against self-incrimination extends not only to answers that would in themselves support a conviction, but also to answers that would furnish a link in the chain of evidence needed to prosecute the defendant).

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[1] The majority acknowledges that it was permissible for the prosecutor, as a condition for granting immunity, to add additional terms beyond that imposed by the statute. *Ante* at 84. Unfortunately, the prosecutor failed in this case to require truthful testimony as one such condition of the grant of immunity given.

It is this omission on the part of the prosecution that my colleagues seek to repair by rewriting the immunity statute. Indeed, despite the fact that the majority purports to be interpreting the immunity statute, the essential thrust of its analysis suggests that the majority believes that it is actually constructing a contractual undertaking. Therefore, the majority writes: "On the basis of these three factors, we conclude that the *immunity agreement* is void . . . ." *Ante* at 91 (emphasis added); see also *ante* at 92, n 10. We would do better by respecting the limitations of the statute and admonishing the prosecutors of this state to impose truthtelling as a condition of any agreement to grant immunity under the statute.

The majority, having concluded or conceded that "at least some portion of defendant's testimony 'may have tended to incriminate' him," *ante* at 82, n 6, should have, under the plain language of the statute and application of traditional rules of statutory construction, affirmed the trial court's dismissal of the murder and felony-firearm charges. Instead, the majority today enacts by judicial ukase a new statute requiring truthful testimony as a condition precedent to a grant of transactional immunity. The majority acknowledges that "there is no express requirement that the immunized individual 'answer' questions truthfully." *Ante* at 86.

II. SINS OF AN UN*HOLY TRINITY*: THE SO-CALLED "ABSURD RESULT" RULE OF CONSTRUCTION[2]

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[2] Reference is made here to the infamous case, *Church of the Holy Trinity v United States*, 143 US 457; 12 S Ct 511; 36 L Ed 226 (1892), that is sometimes recognized as a foundational stone of the "absurd result" rule of statutory construction. See *Salas v Clements*, 399 Mich 103, 109; 247 NW2d 889 (1976).

In *Holy Trinity*, the United States Supreme Court was required to determine whether the Holy Trinity Church, which contracted with a resident of England to be its pastor, had therefore violated a federal statute making it unlawful (and punishable by a fine) for any person to " 'in any way assist or encourage the importation or migration of any alien . . . into the United States . . . to perform labor or service of any kind in the United States . . . .' " *Id.* at 458. Although the Court conceded that the act of the church was "within the letter of [the statute]," and thus proscribed, the Court nonetheless concluded: "we cannot think Congress intended to denounce with penalties a transaction like that in the present case." *Id.* at 458-459. The Court explained: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Id.* at 459.

In Michigan, this same so-called rule of statutory construction has been stated as follows: "[D]eparture from the literal construction of a statute is justified when such construction would produce an *absurd and unjust result* and would be clearly inconsistent with the purposes and policies of the act in question." *Salas*, n 2, *supra* at 109 (emphasis added).

I agree with Justice Scalia's description of such attempts to divine unexpressed and nontextual legislative intent as "nothing but an invitation to

Significantly, the majority never, with respect to the *text* of the statute, identifies the terms or phrases it finds to be ambiguous.[3] Rather, in order to justify its action in looking beyond the text to determine legislative intent, the majority embarks on an "absurd result" analysis in which the majority focuses not on what the Legislature *said* through the text of the statute, but what the majority believes the Legislature

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judicial lawmaking." Scalia, A Matter of Interpretation: Federal Courts and the Law (New Jersey: Princeton University Press, 1997), p 21. This nontextual approach to statutory construction has unfortunately led my colleagues away from the task of determining the *Legislature's* expressed intent.

[3] My colleagues vehemently deny my charge that they have abandoned traditional rules of construction, but assert that, by using the same tools, they have simply reached a different set of conclusions. *Ante* at 87, n 7. The majority argues that when the meaning of a statute has been "questioned," construction must be determined by examining the purpose of the statute and the "statutory context" with which the language is used. *Ante* at 85. My critique of the majority's approach to statutory construction is a challenge of the majority's initial premise: when the language of a statute is internally consistent and not ambiguous, from whence arises the right of the Court to "question" its meaning?

I agree that, when one part of a statute points to one conclusion, while another part points elsewhere, the "contextual" approach of the majority is applicable in order to reconcile the two apparently divergent parts. See *Michigan Bell Telephone Co v Dep't of Treasury*, 229 Mich App 200, 212-217; 581 NW2d 770 (1998). However, the majority has never identified why the text of the immunity statute is internally inconsistent or ambiguous, thereby giving rise to the need for interpretation. In sum, I find entirely unpersuasive my colleagues' effort to "*re*define" the commonplace and unambiguous statutory term "answer."

Second, I specifically repudiate the majority's notion that the "context" of the immunity statute suggests a basis for ignoring the plain language of the statute. As I argue later, the majority's resort to nontextual policy bases for discerning the Legislature's intent to forfeit immunity when false testimony is given in a one-man grand jury proceeding is belied by the fact that the Legislature enacted a separate section of the criminal procedure code specifically to punish such behavior as perjury. Thus, to the extent that this Court is authorized to look beyond the text of the immunity statute—a premise that I dispute—the perjury statute supplies a nearly irrefutable clue that the Legislature intended perjury, not immunity forfeiture, as the penalty for giving false testimony.

must really have meant despite the language it used. The essence of the majority's position is that it concludes that the Legislature could not have intended a perjury charge to be the sole consequence for testifying falsely before a one-man grand jury. Therefore, in order to avoid what it believes would be an "illogical" result, the majority expends a great deal of interpretative justification to "infer" a legislative intent that the immunity granted by MCL 767.6; MSA 28.946 not apply when a witness gives "materially false testimony." *Ante* at 91.

The majority asserts that the "Legislature could not intelligently or rationally deal with immunity and compelled testimony without considering the consequences of a suspect's failing to truthfully provide such compelled testimony." *Ante* at 86. On the basis of that premise, the majority purports to scrutinize "the purpose, the text, and the context of the immunity statute" in search of "a more logical and reasonable result . . . ."[4] *Ante* at 86. However, the logical force of the majority's argument is entirely eviscer-

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[4] I cannot agree with my colleagues that, because the Legislature chose a remedy that the majority finds in this case to be inadequate, the Legislature failed to recognize that the goal of the immunity statute is to obtain "helpful," hence "truthful," testimony. For the purposes of my analysis, I need not disagree with the majority that the goal of the immunity statute at issue here is to compel truthful testimony. The difference in our approach and respective conclusions is not a disagreement on the goal of the statute, but on whether the Legislature has foreclosed this Court's right to establish a *penalty* other than that which the Legislature has chosen.

Thus, while the majority makes compelling arguments that support a rational, but different, policy choice regarding an appropriate penalty for perjury committed by a witness given immunity under the statute, the object of judicial statutory construction is not to determine whether there are valid *alternative* policy choices that the Legislature may or should have chosen, but to determine from the text of the statute the policy choice the Legislature *actually* made.

ated by the fact that the Legislature *did* deal with the prospect of false testimony given in a one-man grand jury proceeding. It did so by enacting a separate section of the criminal procedure code expressly prohibiting perjury in *any* grand jury proceeding. See MCL 767.19d; MSA 28.959(4).[5]

From the explicit terms of these statutes, two indisputable things are established: (1) that the Legislature did not overlook the "problem" posed by the majority, but was fully aware of the fact that some immunized individuals might give false testimony in grand jury proceedings, hence its enactment of the grand jury perjury statute, and (2) that the Legislature did not fail to indicate its intentions concerning how it wished to deal with false testimony in this context, but instead selected a specific remedy to deal with this problem. From these two facts I am forced to conclude that I need "infer" nothing about the intent that the Legislature made so plain in enacting these two statutes. The Legislature made an express choice to punish otherwise-immunized false swearers by authorizing their prosecution for perjury. This is the policy choice that I believe this Court is obligated to respect and enforce. By contrast, my colleagues in the majority have turned traditional statutory construction principles inside out in order to achieve a different desired result. The majority is able to invoke

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[5] MCL 767.19d; MSA 28.959(4) provides:

> A person who wilfully swears falsely under oath in regard to any matter or thing upon which he is being examined is subject to the penalties of perjury as prescribed by law.

I also note that perjury committed in any court proceeding has been prohibited by separate statute since as early as 1846. See MCL 750.422; MSA 28.664.

its "implied remedy" of withdrawing defendant's immunity in this case *only* by ignoring both the language of the immunity statute itself *and* the separate statute prohibiting perjury in grand jury proceedings. The majority has the power to do so; it does not have the authority.

It is clear that the majority believes that a perjury prosecution should not be the only consequence when a witness who is given statutory immunity testifies falsely before a one-man grand jury. However, under the clear and unambiguous language of the immunity statute, especially when considered in light of the separate prohibition against perjury in all grand jury proceedings, our Legislature has concluded otherwise and expressly said so. Whether the Legislature's choice to limit the range of penalties for lying in grand jury proceedings to prosecutions for perjury serves as a sufficient deterrent to perjury in this context is simply not this Court's concern. " '[I]t is not required that we should be sure as to the precise reasons for [a particular statutory] judgment or that we should certainly know them or be convinced of the wisdom of the legislation.' " *Cady*, *supra* at 509 (citation omitted); see also *Melia v Employment Security Comm*, 346 Mich 544, 561; 78 NW2d 273 (1956). To paraphrase the apt observation Justice RILEY made in another context, in our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution. Instead, the correction must be left to the people and the tools of democracy: the "ballot box, initiative, referendum, or consti-

tutional amendment." *Dedes v Asch*, 446 Mich 99, 123-124; 521 NW2d 488 (1994) (RILEY, J., dissenting).

III. CONCLUSION

It cannot be gainsaid that if the Legislature intended that immunity be forfeited completely upon the giving of false testimony, it could easily have said so.[6] However, the Legislature did not, and I believe that the majority mistakenly reads that condition into the statute to further policy concerns that the majority, but apparently not the Legislature, prefers. Because I am unable to reconcile the majority's analysis with traditional rules of statutory construction and what I believe is a proper reading of MCL 767.6; MSA 28.946, I respectfully dissent from its conclusion that defendant may be tried for murder and felony-firearm. I would, therefore, affirm the trial court's order in Docket No. 194301.

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[6] Considering the fact that, in many cases (such as this one), the punishment for the underlying crime that is the subject of the grand jury testimony will be far greater than that for perjury, I find it particularly troubling to infer without some legislative guidance a provision that would, as a consequence of lying under oath, completely remove a witness' immunity from prosecution.

Having in effect created such a provision from wholecloth, the majority fails to suggest how to determine in a given case whether a witness' false testimony is sufficiently false to warrant a finding that immunity has been forfeited. These are, however, mere "practical problems" that our Court is wont to pass off as issues to be addressed on another day. I merely note for the record that it is the majority's insistence upon creating a new policy not found in the statute that has caused the breach in the damworks.

PEOPLE v ADAMS

PEOPLE v DESAI

Docket Nos. 202665, 202666. Submitted June 17, 1998, at Detroit. Decided October 9, 1998, at 9:05 A.M. Leave to appeal sought.

Following separate preliminary examinations, Stephan C. Adams and Jashubai K. Desai were bound over to, and their cases were consolidated for trial in, the Detroit Recorder's Court on charges of first-degree murder, conspiracy to commit first-degree murder, and solicitation of first-degree murder. On the basis of stipulated facts indicating that certain witnesses are dead or unavailable and that certain physical evidence is lost or missing, the defendants each moved for dismissal of the charges, claiming that prearrest delay of twelve years was prejudicial to their right to a fair trial. The court, Karen Fort Hood, J., granted the motions. The prosecution appealed.

The Court of Appeals *held*:

1. The trial court abused its discretion in granting the defendants' motions to dismiss. A claim of prejudicial prearrest delay is evaluated under a two-part test. First, the defendant must demonstrate actual and substantial prejudice to the right to a fair trial. Second, if actual and substantial prejudice is shown, the prosecution must persuade the trial court that the reason for the delay is sufficient to justify whatever prejudice resulted. Prejudice must not be merely speculative and must meaningfully impair the defendant's ability to defend against the charge. The death of a witness, by itself, is insufficient to establish actual and substantial prejudice. In this case, the defendants have not demonstrated the requisite actual and substantial prejudice to shift the burden of persuasion to the prosecution to show the reasonableness of the delay. The defendants have made no showing that any of the unavailable witnesses would have provided exculpatory testimony or relevant information beneficial to their defense. The defendants have not substantiated the potentially exculpatory aspects of the missing physical evidence.

2. Even if actual and substantial prejudice were assumed, the trial court clearly erred in finding that the prosecution's proffered

reasons for the delay did not justify the resultant prejudice. The trial court clearly erred in finding that the prosecution, as a tactic, deliberately waited for an anticipated change in the law allowing the admission of Adams' confession to witness Lawrence Gorski that he had killed the victim at the request of Desai not only in the case against Adams, but also in the case against Desai. The record indicates that the delay in prosecution was prompted by investigative concerns rather than tactical concerns.

Reversed and remanded for further proceedings.

CRIMINAL LAW — PREARREST DELAY — RIGHT TO FAIR TRIAL — MOTION FOR DISMISSAL.

A defendant's claim that prearrest delay prejudiced the defendant's right to a fair trial such that a motion to dismiss the charge should be granted is evaluated under a two-part test: first, the defendant must demonstrate actual and substantial prejudice to the right to a fair trial and, second, if actual and substantial prejudice is shown, the prosecution must persuade the trial court that the reason for the delay is sufficient to justify whatever prejudice resulted; prejudice must not be merely speculative and must meaningfully impair the defendant's ability to defend against the charge; delay caused by the need for further investigation justifies resultant prejudice, while delay for tactical advantage over the defendant does not.

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 *Roberta L. Wolfe-Bryant*, Assistant Prosecuting Attorney, for the people.

James L. Feinberg (*Stuart G. Friedman*, of Counsel), for Stephen C. Adams.

Williams, Williams, Ruby & Plunkett, P.C. (by *Thomas G. Plunkett*) and *Stringari, Fritz, Kreger, Ahearn & Crandall, P.C.* (by *Martin E. Crandall*), for Jashubai K. Desai.

Before: GRIFFIN, P.J., and GRIBBS and TALBOT, JJ.

GRIFFIN, P.J. In these consolidated appeals, the people appeal as of right an order of the Recorder's Court granting defendants' motions to dismiss charges of first-degree murder, MCL 750.316; MSA 28.548, conspiracy to commit first-degree murder, MCL 750.157a; MSA 28.354(1), and solicitation of first-degree murder, MCL 750.157b; MSA 28.354(2). We reverse and remand.

I

Defendants were charged in 1995 with the November 3, 1983, strangulation murder of Anna Marie Turetzky in Woodhaven, Michigan. Turetzky, defendant Desai's business partner in the operation of a medical clinic, was found dead in her automobile parked behind a local motel. Desai had allegedly solicited defendant Adams to commit the murder. Following separate preliminary examinations, defendants were bound over and their cases consolidated for trial. Pertinent to this appeal, both defendants moved to dismiss the charges on the basis of prearrest delay, arguing that the prosecution's twelve-year delay in filing charges caused a loss of evidence prejudicial to defendants' right to a fair trial. In support of their motions, defendants relied on a stipulation of facts regarding unavailable witnesses and lost evidence.

According to the stipulation, the following witnesses are now deceased or otherwise unavailable: Philip Hatcher, an insurance agent who arranged life insurance policies making Desai and Turetzky beneficiaries upon the death of the other; Jintendra Surti, bookkeeper for Desai and Turetzky, who was the custodian of the clinic's banking records; Thomas

McCrary, who negotiated a clinic check for $2,018 to Adams, characterized by the prosecution as the "pay-off" for the homicide; Woodhaven Police Sgt. James Johnson, the preliminary investigator of the murder; Peter Slywka, Turetzky's father, who made reward offers for the discovery of the perpetrator; Dr. Ruth Higgins, a psychiatrist who was familiar with McCrary's psychiatric problems; Dr. Gregory Kaufman, who performed the autopsy on Turetzky; and Frank Raines, an associate of key witness Lawrence Gorski.

Certain physical evidence was also stipulated by the parties to be missing: tape recordings of conversations between various individuals, including defendants and an individual named Rick Lobdell, which were turned over to the police;[1] an "Anarchist's Cookbook"[2] once possessed by Adams; the contents of Adams' wallet, duffel bag, and automobile, taken from his possession following an alleged extortion attempt and beating in 1984; and, finally, a piece of tissue paper allegedly found by Turetzky family members in the victim's automobile after her murder and after a search of the car by the police.[3]

Both defendants filed motions to dismiss in the trial court, arguing that all of the missing witnesses and physical evidence were potentially exculpatory

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[1] These tapes were made in the approximate time frame of January through April 1984, allegedly in an attempt to exact a confession from Adams and extort money from Desai.

[2] This book purportedly contained underlined passages regarding strangulation techniques.

[3] According to the preliminary examination testimony of the victim's children, the initials "S A" (defendant Adams' initials) were written on this piece of tissue paper, which was turned over to the police.

and that the twelve-year delay in filing charges prejudiced their rights to a fair trial. Following an evidentiary hearing, the trial court ruled that defendants were irreparably prejudiced and unable to present a defense given the loss of testimonial and physical evidence. The trial court further found that the prosecution intentionally delayed the investigation in order to gain a tactical advantage over defendants by waiting for an anticipated change in the law that would permit the admission of Adams' inculpatory hearsay statement against Desai. The trial court granted defendants' motions to dismiss, concluding that the prosecution's reasons for delay did not justify the undue prejudice to defendants.

II

On appeal, the prosecution argues that the trial court erred in dismissing the charges against defendants. This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v McCartney*, 72 Mich App 580, 589; 250 NW2d 135 (1976). Upon review, we agree with the prosecution that, under the present circumstances, the trial court abused its discretion in granting defendants' motions to dismiss.

In *People v Bisard*, 114 Mich App 784; 319 NW2d 670 (1982), this Court reevaluated the tripartite test of prejudicial delay originally set forth in *People v Hernandez*, 15 Mich App 141; 170 NW2d 851 (1968),[4]

[4] Pursuant to the *Hernandez* test, once a defendant demonstrated that some prejudice had occurred as a result of the delay, it was incumbent on the prosecution to show (1) an explanation for the delay, (2) that the delay was not deliberate, and (3) that no undue prejudice attached to the defendant. *Hernandez*, *supra* at 147. If the prosecution failed to establish

in light of post-*Hernandez* developments in due process jurisprudence. The *Bisard* Court, *supra* at 788, noted:

> Two United States Supreme Court cases decided after 1968 have addressed the problem of preindictment or prearrest delay. In *United States v Marion*, 404 US 307; 92 S Ct 455; 30 L Ed 2d 468 (1971), the Court recognized that the Due Process Clause afforded only "limited" protection to those persons who have not been arrested but observed that such persons' primary protection was in the applicable statutes of limitation. The Court explained this decision further in *United States v Lovasco*, 431 US 783; 97 S Ct 2044; 52 L Ed 2d 752 (1977), when it established a two-part test to be used in the due process inquiry. First, the Court observed that "proof of prejudice is generally a necessary but not sufficient element of a due process claim." 431 US 783, 790. Second, the Court held that, in addition to the consideration of prejudice, a court was to explore the reason for the delay.[5]

Adopting this two-part test, the *Bisard* Court rejected an interpretation of *Lovasco* that would place

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any of the three prongs of the test, a due process violation was established.

[5] The *Lovasco* Court, *supra* at 790-791, reasoned:

> It requires no extended argument to establish that prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed, it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself," *United States v Ewell*, *supra* [383 US 116, 120; 86 S Ct 773; 15 L Ed 2d 627 (1966)].

an "extremely heavy burden" on a defendant by requiring that the defendant prove both actual prejudice and unexplainable delay. *Id.* at 789. Instead, the Court construed *Lovasco* in the following manner:

> [W]e hold that, once a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted. This approach places the burden of coming forward with evidence of prejudice on the defendant, who is most likely to have facts regarding prejudice at his disposal. The burden of persuasion rests with the state, which is most likely to have access to facts concerning the reasons for delay and which bears the responsibility for determining when an investigation should end. [*Id.* at 791.]

See also *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989); *People v Loyer*, 169 Mich App 105, 118-119; 425 NW2d 714 (1988); *People v Shelson*, 150 Mich App 718, 726; 389 NW2d 159 (1986); *People v Dungey*, 147 Mich App 83, 85; 383 NW2d 128 (1985); *People v Vargo*, 139 Mich App 573, 579; 362 NW2d 840 (1984); *People v Evans*, 128 Mich App 311, 314; 340 NW2d 291 (1983).

Pursuant to the requisite two-part inquiry, a defendant must initially demonstrate "actual and substantial" prejudice to his right to a fair trial. *Bisard*, *supra* at 790; *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994);[6] *Dungey*, *supra* at 88. Accord, *Marion*, *supra* at 325; *United States v Rogers*, 118 F3d 466, 474 (CA 6, 1997); *United States v Brown*, 959 F2d 63,

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[6] Judge GRIFFIN acknowledges that the test for prearrest delay articulated and applied in the instant case is more precise than the standard that he recited in *White*, *supra* at 134-135.

66 (CA 6, 1992); *United States v Lash*, 937 F2d 1077, 1088 (CA 6, 1991). In this context, as one federal court has explained, a defendant must show not only "actual prejudice, as opposed to mere speculative prejudice . . . but also that he show that any actual prejudice was substantial—that he was meaningfully impaired of his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected." *Jones v Angelone*, 94 F3d 900, 907 (CA 4, 1996). See also *Rogers*, *supra* at 476. This Court has reiterated that proof of "actual and substantial" prejudice requires more than generalized allegations:

> A defendant shoulders the burden of coming forward with evidence of prejudice. Until he does so, the prosecution's burden—to persuade the court that the delay was justified in the face of any resulting prejudice—is not triggered. The imperfection of a witness' memory may be exposed to the trier of fact during direct or cross-examination and may be emphasized to buttress or undermine credibility. If such absence of memory by a defendant's material witness due to a lengthy prearrest delay seriously impedes or significantly hinders a defendant in presenting his case, prejudice, of course, would be shown, and the prosecution would be required to demonstrate how that prejudice was justified by the prearrest delay. In this case, however, no such impediment or hindrance was manifest. Moreover, we decline to accept defendant's assertion on appeal that "the exceptionally long delay in the present case should itself raise a strong inference of prejudice." Without specific references to instances of prejudice-generating occurrences, and without specific allegations of actual prejudice resulting therefrom, the prosecution would be at an insuperable disadvantage indeed in attempting to show how such unspecified prejudice was in fact justified. We

> will not put the cart before the horse. [*Loyer*, *supra* at 120].[7]

Although the Michigan courts have not had occasion to address the effect of the death of a material witness during an interval of prearrest delay on the continued prosecution of a case, the federal courts have consistently held, in the present context, that the death of a witness alone is insufficient to establish actual and substantial prejudice:

> The death of a potential witness during the preindictment period may demonstrate the requisite prejudice if the defendant can demonstrate that exculpatory evidence was lost and could not be obtained through other means. . . . However, a defendant does not show actual prejudice based on the death of a potential witness if he has not given an indication of what the witness's testimony would have been and whether the substance of the testimony was otherwise available.
>
> Even where a defendant specifies what a deceased witness's testimony would have been, actual prejudice is difficult to prove. [*Rogers*, *supra* at 475.]

See also *Lovasco*, *supra* at 785-786; *United States v Benshop*, 138 F3d 1229, 1232-1234 (CA 8, 1998); *United States v Beszborn*, 21 F3d 62, 66 (CA 5, 1994); *United States v Valona*, 834 F2d 1334, 1338 (CA 7, 1987); *Stoner v Graddick*, 751 F2d 1535, 1544 (CA 11,

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[7] Delays spanning many years have been held by courts in other jurisdictions not to be presumptively prejudicial. See, e.g., *United States v Pardue*, 134 F3d 1316 (CA 7, 1998) (ten-year delay); *McDougal*, *supra* (nine-year delay); *United States v Mmahat*, 106 F3d 89 (CA 5, 1997) (nine-year delay); *Jones*, *supra* (ten-year delay); *United States v Crouch*, 84 F3d 1497 (CA 5, 1996) (seven-year delay); *Wilson v McCaughtry*, 994 F2d 1228 (CA 7, 1993) (sixteen-year delay); *Stoner*, *supra* (nineteen-year delay).

1985); *United States v Corbin*, 734 F2d 643, 648 (CA 11, 1984).

In the instant case, we conclude that defendants have not demonstrated the requisite actual and substantial prejudice necessary to satisfy the first prong of the *Bisard* test to thereby shift the burden of persuasion to the prosecution to show the reasonableness of the delay. Defendants have made no showing that any of these witnesses would have provided relevant information beneficial to their defense. Although defendants contend in general terms that they have been deprived of the opportunity to cross-examine the unavailable witnesses, defendants have neither specified the substance of that cross-examination testimony nor offered anything more than mere speculation concerning the exculpatory nature of such testimony. Indeed, if any party has been detrimentally affected by the unavailability of these witnesses, it is the prosecution, not defendants. The unavailable individuals were prosecution witnesses who, it is reasonable to surmise, would have provided information valuable to the prosecution. Consequently, the prosecution must move forward without the benefit of this testimonial evidence.[8]

Defendants have likewise failed to show actual and substantial prejudice by reason of the missing physical evidence. Defendants contend that the loss of the physical evidence has denied them the opportunity to

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[8] The issue of undue prearrest delay does not entail consideration of the strength of the prosecution's case, but rather prejudice to the defense. In this regard, we note that defendants filed motions to quash in the trial court. In light of its order dismissing the cases on the basis of prejudicial prearrest delay, the trial court did not address the merits of defendants' motions to quash.

conduct testing, such as fingerprint analysis, to determine whether the evidence may have been exculpatory. However, this argument, too, rests upon speculation. Defendants have not substantiated the potentially exculpatory aspects of this physical evidence, for instance, by delving into the substance of the missing tape-recorded conversations or explaining how the loss of the tissue paper and Anarchist's Cookbook, incriminatory in nature, prejudiced their defense.[9] In fact, testimony adduced during the evidentiary hearing held below indicated that the missing evidence was the prosecution's loss and defendants' gain, given that the *prosecution's* case rested in large part on this lost evidence. Defendants' vague claims of prejudice therefore fall short of the requisite proof.[10] We conclude the trial court abused its

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[9] Defendants' reliance on *People v Dungey*, 147 Mich App 83; 383 NW2d 128 (1985), is misplaced. In *Dungey*, the defendant was not charged with criminal sexual assault until seven months after the alleged assault occurred. Immediately after the offense, the victim underwent a physical examination, which provided secretion evidence. During the intervening delay, the evidence lost its identifying properties, thus preventing the defendant from conducting tests on the evidence. The *Dungey* Court, *supra* at 88, ruled:

> The secretion typing tests could not prove that defendant was guilty of the act, but offered the possibility of excluding him from the class of suspects. The prosecutorial delay and neglect made it impossible to obtain the potentially exculpatory evidence, and therefore the prejudice to defendant is clear.

The defendant in *Dungey* amply demonstrated that the physical properties of the missing evidence could have potentially excluded him as a suspect. The missing evidence in the instant case is potentially inculpatory, and defendants have not otherwise specified how these items may have exculpated them or meaningfully impaired the defense by their loss.

[10] Moreover, this Court has held, albeit in a different but nonetheless pertinent context, that a loss of physical evidence that occurs before a defense request for its production does not require reversal absent the intentional suppression of evidence or a showing of bad faith. *People v*

discretion in granting defendants' motions to dismiss on the basis of prejudicial prearrest delay. *McCartney, supra.* Defendants' claims of prejudice are too indefinite and speculative to satisfy the threshold requirement of *Bisard, supra,* that "actual and substantial" prejudice be shown before the burden of persuasion shifts to the prosecution to justify the delay. Defendants have not carried their burden.

III

Next, even if we were to assume the existence of actual and substantial prejudice to defendants, we nonetheless conclude that the trial court clearly erred in finding that the prosecution's proffered reasons for the delay did not justify the resultant prejudice.

In the present case, an important piece of evidence for the prosecution is the alleged statement made by Adams to witness Lawrence Gorski, in which Adams confessed to killing Turetzky at the request of Desai. Before the Michigan Supreme Court's decision in *People v Poole,* 444 Mich 151; 506 NW2d 505 (1993), this alleged statement could be introduced into evidence only against Adams. However, the *Poole* decision may now provide authority for the use of Adams' statement against Desai as well. The *Poole* Court held, pursuant to MRE 804(b)(3), that a declarant's inculpation of an accomplice, made in the context of a narra-

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Johnson, 197 Mich App 362, 365; 494 NW2d 873 (1992); *People v Albert,* 89 Mich App 350, 352-353; 280 NW2d 523 (1979). Defendants have not shown from the testimony generated during the evidentiary hearing that the police or the prosecution acted in bad faith or intentionally suppressed or destroyed the missing evidence. On the contrary, one of the original investigating officers, Sergeant James Osborn, expressly disavowed any intentional destruction of evidence.

tive of events at the declarant's initiative without prompting or inquiry, and clearly against penal interest, is admissible as substantive evidence at trial. The trial court in the instant case found that the prosecution deliberately waited for this anticipated change in the law before filing criminal charges against the defendants:

> [T]he prosecutor's office contends that the delay in prosecution of this case was due to the ongoing investigation. This is a legitimate reason for a delay. . . .
>
> However, a change in the law occurred permitting them to use Adams' alleged statement against Desai as well as himself. The tactical advantage of trying both defendants together came as a result of waiting for the *Poole* decision, rather than the discovery of new evidence from an investigation. Thus, this Court finds that the prosecutor intended to wait for an anticipated change in the law, that was tactically advantageous to them in the prosecution of this case, under the guise of conducting an ongoing investigation.

We respectfully disagree and hold that this finding is clearly erroneous.

In *Lovasco*, *supra* at 795-796, the United States Supreme Court opined that an investigative, as opposed to tactical, delay does not violate the Due Process Clause of the Fifth Amendment:

> In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely "to gain tactical advantage over the accused," *United States v Marion*, 404 US at 324 [92 S Ct 465; 30 L Ed 2d 468 (1971)] precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt

> beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of "orderly expedition" to that of "mere speed," *Smith v United States*, 360 US 1, 10; 79 S Ct 991, 997; 3 L Ed 2d 1041 (1959). This the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

See also *Bisard*, *supra* at 790-791; *White*, *supra* at 134; *Brown*, *supra* at 66.

Our review of the record reveals that several factors were involved in the decision not to prosecute sooner. The testimony of then-assistant prosecutor Nancy Alberts, when read in context, is particularly telling in this regard. She testified that the *Poole* hearsay problem was but one factor in the decision not to prosecute.[11]

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[11] *Q. (Defense Counsel)* You earlier testified I think, and correct me if I'm wrong, that you made a decision not to prosecute at a particular time based upon the state of the law at that time regarding this penal interest exception to the hearsay rule?

A. (Alberts) That was as to Dr. Desai, yes.

Q. Okay.

A. There were other considerations. That was one of them.

Q. What were the other considerations?

A. The quality of the evidence we had.

Q. All right. Is it fair to say that you weren't satisfied that there was a prosecutable case without that statement of Gorski?

A. That was one factor—

Q. Do you recall—

A. —as against Dr. Desai.

Q. Okay. Do you recall other factors?

A. There [was] a problem with—that the case was a circumstantial one, as I remember it, although I don't remember all of the evidence, but I remember that being one problem. And another one was the—the quality of the evidence against Mr. Adams, the quality of Mr. Gorski's testimony as—and I think that's about it. It was not

the—at that point it certainly was not—not as strong a case as I thought we could deal with.

Q. Okay. Was caseload a factor, your caseload?

A. No.

Q. Okay. In terms of Gorski, did you ever interview him yourself?

A. No.

Q. Do you recall one of the problems with Gorski being the fact that after he was interviewed, he was requested to take a polygraph and he didn't show up for the polygraph?

A. Yes.

* * *

Q. Okay. Your decision to not prosecute based upon the state of the law regarding the penal interest exception to the hearsay rule was made before or after you received those [grand jury] transcripts?

* * *

A. My decision to not prosecute was based on a number of factors. That decision was made after Mr. Gorski did not take the polygraph and I don't think we did anything else after that, so if that would help you with your time frame, I believe that everything was concluded after that point.

* * *

Q. Did you at some point in time make a strategic decision or a tactical decision to not prosecute this case at a particular point in time until the law changed or became more favorable with regard to the admissibility of this conversation that had problems relating to the penal exception to the hearsay rule?

A. No.

Q. Did you ever consider that the longer that you delay in bringing or prosecuting this case, that it was going to have a detrimental effect on the ability to reconstruct facts through witnesses because memories would have been faded or evidence would have become lost?

* * *

A. As to this particular case, I mean what I—I want to be careful here because always it's a detriment that a case is old. At the time I got the case, that was going through my mind because I got the case a number of years after the murder had occurred. But in

terms of whether or not I delayed, I had no intention of delaying it. To me it was a decision of whether or not I'm going to prosecute or not prosecute.

* * *

Q. As you look back on this case now, was it the ability or the wherewithal of Gorski to pass a polygraph on what he said that was pivotal in your decision whether to prosecute this case?

A. As to whether or not to prosecute the case against Steve Adams, it was very important. I don't know, I can't speculate today as to whether or not he had passed, would I have decided to prosecute, I can't tell you that, but it definitely was very important.

Q. Was there some reason that you wanted to prosecute the doctor and Mr. Adams at the same time as opposed to one before the other?

A. Well, it's always advantageous to prosecute two defendants at once but I guess that's the only—only reason, but I didn't see any way that I could do it.

Q. Is that to say that it gives you some sort—it's advantageous, it's some sort of a strategic advantage to do it that way?

A. Sure, if you have the evidence.

Q. Why is that?

A. Well, you only have to—you only have to do the case once, basically that's it I guess, and I would think a fact finder would understand more what you're getting at if you have two people.

Q. In other words, it's easier to present the jury with all of the persons that you think are involved in the same courtroom?

A. Sure.

Q. Was delaying a factor to collect evidence to give you an opportunity to bring the case against both of them together?

A. Well, you're assuming a question that I had a goal of delaying and it definitely was not—delay was definitely not—not a thing that I saw going in my favor at all. Delay usually goes against the prosecution, and I was never in favor of delay. And I don't remember anyone ever coming through my mind or ever being communicated to me that it should be delayed. We're trying to work as quickly as possible.

On cross-examination, Alberts reiterated that investigative concerns motivated her decision not to prosecute:

Q. (The Prosecutor) If you could have, in your professional judgment, charged this case in 1988, would you?

A. Absolutely.

Q. Why didn't you?

Alberts' testimony clearly underscores that investigative rather than tactical concerns governed the prosecution's course of action.[12] The investigation took many twists and turns during the years following Turetzky's murder. As noted above, key witnesses died and evidence became unavailable. In 1984, a federal grand jury convened to investigate an unrelated matter involving defendant Desai, and more evidence was allegedly garnered pertaining to this investigation. Adams and the key witness, Gorski, disappeared and were eventually located outside Michigan. Gorski failed to appear for a polygraph examination, and

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A. I didn't think I could get past a preliminary examination.

Q. Did it concern you that on the one hand you had information, however accurate it was, that Mr. Adams had passed a polygraph?

A. Yes.

Q. Did that influence your decision on whether to proceed at all?

A. Yes.

Q. Why?

A. Because he may have been telling the truth. Frankly, from my looking at the other evidence, I really doubted the results of the polygraph, but that is powerful evidence and assuming that it was—that it was correct, I found it to be pretty strong evidence for the defense.

Q. And did—

A. A big hurdle.

Q. Were you concerned about perhaps charging an innocent man?

A. Of course.

Q. And did that weigh on your decision?

A. Sure.

Q. To your knowledge, in the time you were in the unit, was there ever a grand jury impaneled to deal with a specific case?

A. I don't think so.

Q. Did you delay this prosecution to hurt the defense?

A. I didn't delay the prosecution at all. I denied the prosecution.

[12] David Hesburn and James Osborn, two of the police officers involved in the investigation during the twelve-year period, also testified during the evidentiary hearing that the investigation was never delayed to gain a tactical advantage.

Adams, who did take a polygraph, appeared to have "passed" the examination. Finally, in 1994, a one-man grand jury was appointed to investigate unsolved murders in the city of Detroit, including the murder in this case. Both defendants were subpoenaed to appear before the grand juror and, on the basis of the cumulative evidence gathered from this investigation and the intervening years of investigation, defendants were finally charged with crimes arising out of the death of Turetzky. On the record, we find no deliberate tactical delay by the prosecution and hold that the trial court clearly erred in its finding to the contrary.[13]

For these reasons, we reverse the decision of the trial court and remand these cases for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[13] We further reject the underlying premise advanced by defendants and accepted by the trial court that the Wayne County Prosecutor is capable of predicting Supreme Court decisions years in advance of their issuance. Such clairvoyance would be most extraordinary.

ARCO INDUSTRIES CORPORATION v AMERICAN MOTORISTS INSURANCE COMPANY (ON SECOND REMAND)

Docket No. 210651. Submitted April 3, 1998, at Lansing. Decided October 9, 1998, at 9:10 A.M. Leave to appeal sought.

Arco Industries Corporation and others brought an action in the Kalamazoo Circuit Court against American Motorists Insurance Company (AMICO) and other insurers who had issued comprehensive general liability policies to Arco for various periods during the preceding twenty years, seeking a declaration of AMICO's duty to defend and indemnify Arco for costs incurred in defending an underlying action brought by the Department of Natural Resources against Arco to remedy chemical contamination at Arco's manufacturing plant. Following a bench trial, the court, William G. Schma, J., ordered AMICO to indemnify Arco, finding that Arco had not expected or intended to harm the environment. However, the court refused to order AMICO to pay certain costs and fees incurred by Arco in defending itself in the underlying action. AMICO appealed, and the plaintiffs cross appealed. The Court of Appeals, MICHAEL J. KELLY, P.J., and MACKENZIE and BRENNAN, JJ., reversed, holding that AMICO did not have a duty to defend because Arco should have expected or did intend harm to the environment. 198 Mich App 347 (1993). The plaintiffs appealed. The Supreme Court held that the Court of Appeals failed to apply the correct legal standard in determining whether Arco expected or intended contamination of the environment, reversed in part, and remanded the matter to the Court of Appeals for consideration of the issues relating to the duty to defend that had been raised by Arco in its cross appeal. 448 Mich 395 (1995). On remand, the Court of Appeals, MICHAEL J. KELLY, P.J., and MACKENZIE and CORRIGAN, JJ., reversed, again holding that AMICO did not have a duty to defend, this time on the basis that the AMICO policy provided coverage only where an accident resulting in bodily injury or property damage occurred during the policy period and the contamination in question was not discovered until almost eleven years after the expiration of the last policy issued by AMICO to Arco. 215 Mich App 623 (1996). The plaintiffs appealed. The Supreme Court reversed, holding that the language

in the standard comprehensive general liability policy that provides coverage for property damage that occurs during the policy period dictates application of an injury-in-fact trigger of coverage rather than the manifestation-of-injury trigger of coverage adopted by the Court of Appeals. 456 Mich 331 (1998). The Supreme Court, in lieu of granting rehearing, amended its judgment order "to provide that the cause is remanded to the Court of Appeals for consideration of the issues raised in that Court but not addressed in its opinion." 456 Mich 1230 (1998).

On second remand the Court of Appeals *held:*

1. The contention of AMICO that the discharge of the chemical contamination into the environment was not sudden and accidental so as to evoke the provision in some of its policies that excluded pollution coverage unless the discharge of contaminants was sudden and accidental is without merit. The Supreme Court in the first of its two opinions in this matter clearly held that the evidence supported the trial court's finding that the release of contamination was accidental. Although the Supreme Court did not separately consider whether the incidents it considered contained the temporal element of suddenness, those incidents all contained the temporal element of being unexpected, compelling the conclusion that Supreme Court would deem those incidents to be sudden. Accordingly, the trial court did not err in finding the "sudden and accidental" exception to the pollution exclusion was applicable.

2. The trial court did not err in holding that coverage under the policies issued by AMICO was not barred by the "owned property" exclusion, which provided that the policies did not apply to property damage to property that was owned, occupied, rented, or used by the insured or in the care, custody, or control of the insured. The expenses relating to remediation of the contaminated soil on Arco's property arose out of the need to halt the spread of contamination to the groundwater, which is not the exclusive property of Arco. The public interest in the well-being of the environment and natural resources of the state is enough to defeat such an exclusion for damages to the insured's own property. Further, such an exclusion does not bar coverage where remediation of an insured's soil is necessary to prevent the migration of contaminants.

3. The trial court allocated the liability among the various insurers who had issued comprehensive general liability policies to Arco during the relevant period on the basis of the so-called "coverage provided" method of allocation, AMICO's allocation being the ratio of the total of the limits of coverage of the AMICO policies to the total of the limits of coverage of all the policies that were in effect over

the period that the damage occurred. Because the Supreme Court determined that AMICO's coverage under the policies it issued was triggered by the injury in fact rather than the manifestation of the injury, the proper method of apportionment among the various insurers is the "time-on-the-risk" method of allocation, which makes each insurer responsible for that portion of the underlying injury that occurred during the period that its policy or policies were in effect and holds an insurer liable for that percentage of the total covered damages that its periods of coverage bears to the total period during which the damages occurred. Because the application of the "time-on-the-risk" method of allocation reduces the percentage of the damages that must be born by AMICO, the matter must be remanded to the trial court for recalculation of AMICO's liability.

4. Because the parties agree that AMICO has no liability for remediation of that part of Arco's facility known as Area II, and because it is not clear from the record whether the trial court included the costs of the remediation of that area in its calculations of AMICO's liability, on remand the trial court should consider the effect of the parties' stipulation that AMICO had no duty to indemnify Arco with respect to Area II.

5. Because the notice letter sent by the Department of Natural Resources in November 1985 informed Arco that it had been identified as the party responsible for groundwater contamination and that it, as a responsible party, was required to determine the extent of contamination and to initiate remedial action, that letter was the functional equivalent of the initiation of a lawsuit, and the receipt of the letter triggered AMICO's duty to defend Arco. Accordingly, the trial court erred in holding that AMICO was not liable for the defense costs incurred by Arco between the date of the receipt of the notice letter and the filing of the complaint in the underlying judicial proceeding.

6. The question whether Arco should have been allowed to recover attorney fees for AMICO's bad-faith breach of its duty to defend was waived by Arco when this case was last before the Court of Appeals and is beyond the present remand order.

7. The trial court did not abuse its discretion in awarding attorney fees on the basis of the fee schedule of the law firm that had been retained by one of the insurers to represent Arco but whose representation had been rejected by Arco rather than the higher fee schedule of the law firm that had been retained directly by Arco. Because the insurer stood ready to provide Arco with a competent defense, and Arco failed to present any substantial or reasonable

reason for rejecting the insurer's tender of representation, Arco is not entitled to recoup attorney fees on the basis of the higher fee schedule of the law firm that it had independently retained.

8. The trial court erred in refusing on the basis that the liability of AMICO under its policies was in reasonable dispute to award Arco interest pursuant to MCL 500.2006(4); MSA 24.12006(4). Where an action to recover unpaid benefits is brought by an insured and is based solely on the insurance contract, the insurer is subject to interest at the rate of twelve percent from sixty days after satisfactory proof of loss pursuant to MCL 500.2006(4); MSA 24.12006(4) even if the claim is reasonably in dispute. On remand, the trial court must modify the award to include interest pursuant to MCL 500.2006(4); MSA 24.12006(4).

9. Arco's claim that the trial court erred in refusing to award it prejudgment interest from the date of the filing of its complaint against AMICO is without merit. Prejudgment interest with respect to insurance claims that arise after the filing of a complaint run from the date the insurer denied the claim of loss rather than the date of the filing of the complaint.

Affirmed in part, reversed in part, and remanded.

1. INSURANCE — EXCLUSIONS — PROPERTY OWNED BY THE INSURED — CONTAMINATION OF GROUNDWATER.

A provision in an insurance policy excluding coverage for damage to property owned by or within the care, custody, or control of an insured does not exclude coverage for damages arising out of the contamination of the groundwater underlying the insured's property and does not prevent the recovery of the costs of the remediation of conditions on an insured property that may lead to contamination of the groundwater.

2. INSURANCE — LIABILITY INSURANCE — MULTIPLE INSURERS — ENVIRONMENTAL POLLUTION — ALLOCATION OF LIABILITY.

The proper method of allocation of liability for costs related to the remediation of environmental pollution among multiple insurers who issued successive comprehensive general liability policies during the period that the events that resulted in the pollution occurred is the "time-on-the-risk" method of allocation, which makes each insurer responsible for that portion of the underlying injury that occurred during the period that its policy or policies were in effect and holds an insurer liable for that percentage of the total covered damages that its periods of coverage bears to the total period during which the damages occurred.

3. INSURANCE — PREJUDGMENT INTEREST — INSURANCE BENEFITS.

Prejudgment interest on an award of money damages in an action by an insured to recover insurance benefits that were wrongfully denied by the insurer is, with respect to a claim of benefits that was denied by the insurer after the filing of the complaint, awarded from the date the claim was denied rather than from the date of the filing of the complaint (MCL 600.6013; MSA 27A.6013).

Honigman Miller Schwartz & Cohn (by *Jay E. Brant*, *Philip A. Grashoff, Jr.*, and *Mark A. Goldsmith*) and *Butter Durham & Willoughby* (by *Sidney D. Durham*), for the plaintiffs.

Miller, Canfield, Paddock & Stone (by *Kevin J. Moody*) and *Drinker Biddle & Reath, LLP* (by *T. Andrew Culbert* and *Paul H. Saint-Antoine*), for the appellee and cross-appellant.

ON SECOND REMAND

Before: CORRIGAN, C.J., and KELLY and MACKENZIE, JJ.

MACKENZIE, J. This declaratory judgment action arises from the refusal of defendant American Motorists Insurance Company (AMICO) to defend and indemnify plaintiffs (collectively referred to as Arco) for costs incurred in an action brought by the Department of Natural Resources (DNR) for remediation of contamination at the automotive parts manufacturing plant of Arco Industries Corporation. Following a bench trial, the trial court entered an order requiring AMICO to indemnify Arco for 68.63 percent of all indemnifiable losses up to the aggregate limits of AMICO's coverage of $3.5 million. This is the third time the case has been before this Court. See *Arco Industries Corp v American Motorists Ins Co*, 198 Mich App 347; 497 NW2d 190 (1993), reversed 448 Mich

395; 531 NW2d 168 (1995) *(Arco I)*, and *Arco Industries Corp v American Motorists Ins Co (On Remand)*, 215 Mich App 633; 546 NW2d 709 (1996), reversed 456 Mich 305; 572 NW2d 617 (1998) *(Arco II)*. The case is before this Court pursuant to a second remand from the Supreme Court "for consideration of the issues raised in [the] Court [of Appeals] but not addressed in its opinion." *Arco Industries Corp v American Motorists Ins Co*, 456 Mich 1230 (1998). We now affirm in part, reverse in part, and remand.

I

The pertinent facts were set forth by the Supreme Court in *Arco I*:

> Plaintiff Arco Industries Corporation is a small automotive parts manufacturer that has operated a manufacturing plant in Schoolcraft, Michigan, since 1967. As part of the manufacturing process, the automotive parts are dipped into liquid plastisol or vinyl. Volatile organic compounds (VOCs) such as perchloroethylene, trichloroethylene, 1-2 dichloroethylene and vinyl chloride, were used to clean the parts during the manufacturing process and to remove plastisol from the plant floors. The plant floor was designed with a trench drain system that drained waste from the plant floor into an unlined seepage lagoon located in the back of the plant. As a result, VOCs contaminated the seepage lagoon and ground water.
>
> In November, 1985, the Department of Natural Resources notified Arco that the seepage lagoon was contaminated with VOCs, and records indicate that Arco was the source of the contamination. After Arco's failure to resolve the problem, the DNR [in October, 1987] filed suit against Arco in federal court in an attempt to compel Arco to remedy the VOC contamination and collect claimed response costs. Subsequently, [in October, 1989] the State of Michigan and Arco

> entered into a consent decree whereby Arco agreed to pay the state $450,000 in response costs together with attorney fees. Arco also agreed to develop and implement a multimillion dollar ground water and soil remediation program. [448 Mich 399-400.]

In February 1987—after Arco received the DNR notice letter, but before the DNR brought its federal suit—Arco filed this declaratory judgment action to compel AMICO, and six other insurers that had issued comprehensive general liability policies to Arco since 1967, to defend and indemnify Arco in any potential DNR action.[1] AMICO had issued annual comprehensive general liability policies to Arco covering the years 1968 through 1974. In each of the policies, AMICO agreed to "pay all sums which the insured shall become legally obligated to pay as damages because of (a) bodily injury or (b) property damage to which this insurance applies, caused by an occurrence," and an "occurrence" was defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The policies also included an "owned property" exclusion and, in addition, three of the policies contained a pollution exclusion.

Arco I, *supra*, involved AMICO's claim that there was no "occurrence" that would require it to indemnify Arco for its remediation costs. In that case, the Supreme Court determined that several discharges at the Arco plant were accidents, 448 Mich 406-407, and that Arco and its employees did not intend or expect

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[1] The other six insurers settled with Arco before trial.

the resultant environmental contamination. 448 Mich 418. The Court therefore concluded that the release of VOCs constituted a covered occurrence under AMICO's policies.

Arco II, supra, addressed AMICO's claim that, even if Arco's release of VOCs was an "occurrence," coverage was not triggered until the VOC-contaminated groundwater was discovered in 1985—well after the last of AMICO policies was no longer in effect. The *Arco II* Court held that because the policies define an "occurrence" as an accident that results in property damage "during the policy period," the policies dictate an injury-in-fact approach to the question of when coverage was triggered. 456 Mich 319-320. Under that approach, coverage is triggered when exposure to the pollutants results in actual property damage. *Id.*, p 313. The Court was apparently satisfied that Arco's discharge of solvents resulted in property damage from 1968 to 1974; it "affirm[ed] the trial court's findings that there had been coverage triggering occurrences in each of the defendant's policy periods." *Id.*, p 330.

We now turn to the parties' remaining claims.

II

Three of the seven AMICO policies contain a pollution exclusion that excludes from coverage claims arising out of the discharge of contaminants, unless the discharge is "sudden and accidental." In its appeal, AMICO contends that the discharges at the Arco plant were neither sudden nor accidental, so that Arco's claims were not covered. The Supreme Court's

opinion in *Arco I, supra*, leads us to conclude otherwise.

In *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197; 476 NW2d 392 (1991), the Supreme Court addressed the meaning of "sudden and accidental" in a pollution exclusion clause. The Court stated:

> We conclude that when considered in its plain and easily understood sense, "sudden" is defined with a "temporal element that joins together conceptually the immediate and the unexpected." [*United States Fidelity & Guaranty Co v*] *Star Fire Coals*, [*Inc*, 856 F2d 31, 34 (CA 6, 1988)]. The common, everyday understanding of the term "sudden" is " 'happening, coming, made or done quickly, without warning or unexpectedly; abrupt.' " *FL Aerospace* [*v Aetna Casualty & Surety Co*, 897 F2d 214, 219 (CA 6, 1990)]. "Accidental" means "[o]ccurring unexpectedly and unintentionally; by chance." *The American Heritage Dictionary: Second College Edition*, p 72. [*Id.* pp 207-208.]

When determining whether a discharge is "sudden and accidental," the focus is on the initial entry of the pollutants into the environment, and not the subsequent migration of the pollutants after their release. *Protective Nat'l Ins Co of Omaha v Woodhaven*, 438 Mich 154, 161-162; 476 NW2d 374 (1991). See also *Polkow v Citizens Ins Co of America*, 438 Mich 174, 179; 476 NW2d 382 (1991).

In *Arco I, supra*, the Supreme Court stated that "[t]he trial court found that there were definitely unintentional, accidental releases of VOCs [at the Arco plant], and we hold that this was fully supported by the evidence." 448 Mich 405. The Court then presented a list of incidents during the policy periods illustrating the accidental character of the releases,

including (1) several unintentional spills of mop buckets holding four to five gallons of solvents, most of which went into the drain system and seepage pond, (2) drums of solvents being punctured by forklifts or hunters' guns and leaking into the ground, and (3) numerous spills of drums of solvents while being transported within the plant or transferred into a holding tank, resulting in several gallons of solvents going into the drain. 448 Mich 406. The Court declared that "[t]hese incidences indicate that the spills were unintentional and constituted accidents. There is ample evidence establishing that they were an undesigned contingency, not anticipated, and not naturally to be expected." 448 Mich 406-407. Thus, the Supreme Court has expressly determined that Arco's release of the solvents into the environment was unexpected and accidental.

Although the Supreme Court did not separately consider whether the listed incidents contained the temporal element of suddenness, an examination of the incidents relied on by the Court in affirming the trial court's findings reveals that each of these incidents contains a temporal element as well as being unexpected: a bucket spilling, a drum tipping, drums being shot or punctured by a forklift are all events that are "made or done quickly, without warning or unexpectedly; abrupt." *Upjohn*, *supra*, p 207. This compels the conclusion that the Supreme Court would likewise deem that the incidents were sufficiently unexpected to be considered "sudden."

In light of *Arco I*, we must conclude that the trial court did not err in determining that the incidents were within the "sudden and accidental" exception to

the pollution exclusion, so that the exclusion did not preclude coverage.

III

AMICO also contends that the trial court erred in determining that the "owned property" exclusion did not bar coverage for the cost of remediating the soil and seepage pond on Arco's property. That exclusion states that the policies do not apply to property damage to "(1) property owned or occupied by or rented to the insured, (2) property used by the insured, or (3) property in the care, custody or control of the insured or as to which the insured is for any purpose exerting physical control." AMICO essentially concedes that the "owned property" exclusion does not apply to the groundwater beneath the Arco facility, but asserts that the exclusion precludes coverage for the expenses relating to remediation of the contaminated soil on Arco's property. The trial court ruled that the exclusion did not bar coverage because the failure to clean up the soil and seepage pond at the site would further contaminate the groundwater. We agree with the trial court.

In *United States Aviex Co v Travelers Ins Co*, 125 Mich App 579, 590-592; 336 NW2d 838 (1983), this Court held that an "owned property" exclusion will not bar coverage where an insured's on-site contamination has spread to groundwater percolating beneath the insured's property. The reasoning behind the holding was that the groundwater was not the exclusive property of the landowner. *Id.* This reasoning was expanded in *Upjohn Co v New Hampshire Ins Co*, 178 Mich App 706, 719-720; 444 NW2d 813 (1989),

reversed on other grounds 438 Mich 197; 476 NW2d 392 (1991). There, the subsoil at an Upjohn facility was contaminated as the result of a leaking underground storage tank and the contaminants were slowly making their way into the groundwater. This Court observed that "the improper release of toxic wastes may cause property damage not only to the actual owner of the land, but also to the government because of its independent interest, behind the titles of its citizens, in all the air and earth (i.e., its natural resources) within its domain." *Id.*, p 720. Finally, in *Polkow v Citizens Ins Co of America*, 180 Mich App 651, 659; 447 NW2d 853 (1989), reversed on other grounds 438 Mich 174; 476 NW2d 382 (1991), this Court again held that an "owned property" exclusion would not bar coverage associated with groundwater contamination. Significantly, the panel also stated that the public interest in the purity of not only groundwater, but the environment and the state's natural resources as a whole, is significant enough to defeat an "owned property" exclusion:

> [W]e conclude that the alleged contamination in this case [contaminated soil on the insured's property causing contaminated groundwater] falls outside of the policy exclusion for damage to the insured's own property for reasons broader in scope [than the reasoning of *Aviex, supra*]. We hold that these allegations are essentially for injury to the public interest in the well-being of the environment and natural resources of this state. This public interest is apparent in the tenor of the statutory framework for environmental protection which, as we have already alluded, vests the DNR and the Attorney General with substantial powers to preserve and protect the environment. This public interest was noted in *Aviex, supra*, p 589, where the Court stated that the statutory provision of MCL 323.10; MSA 3.529(1) [now

> MCL 324.3115(2); MSA 13A.3115(2)] authorizing suit by the Attorney General for civil damages to natural resources "clearly indicates the state's interest in its natural resources." That this public interest is enough to defeat an exclusion for damage to the insured's own property was acknowledged in [*Fireman's Fund Ins Cos v*] *Ex-Cell-O Corp*, [662 F Supp 71], 75 [(ED Mich, 1987)] and *Upjohn* [*supra*, p 720]. [*Id.*, pp 659-660.]

Thus, in environmental contamination clean-up cases, this Court has long recognized an independent public interest in the state's natural resources that supersedes any "owned property" exclusion. *Anderson Development Co v Travelers Indemnity Co*, 49 F3d 1128, 1134 (CA 6, 1995). This view is consistent with the case law from other jurisdictions. See, e.g., *Intel Corp v Hartford Accident & Indemnity Co*, 952 F2d 1551, 1565-1566 (CA 9, 1991); *Pepper's Steel & Alloys, Inc v United States Fidelity & Guaranty Co*, 668 F Supp 1541, 1550 (SD Fla, 1987). See also anno: *Liability insurance coverage for violations of antipollution laws*, 87 ALR4th 444.

Even in the absence of an overriding public interest in the state's natural resources, the case law of the majority of other jurisdictions holds that on-site soil clean-up is not barred by an "owned property" exclusion where there is a threat that the contaminants in the insured's soil would migrate to the groundwater or to the property of others. See, e.g., *South Carolina Ins Co v Coody*, 813 F Supp 1570, 1578-1579 (MD Ga, 1993); *Chemical Leaman Tank Lines, Inc v Aetna Casualty & Surety Co*, 788 F Supp 846, 852-853 (D NJ, 1992); *Boyce Thompson Institute for Plant Research, Inc v Ins Co of North America*, 751 F Supp 1137, 1141 (SD NY, 1990); *New Castle Co v Continen-*

tal Casualty Co, 725 F Supp 800, 816-817 (D Del, 1989), aff'd in part and rev'd in part on other grounds sub nom *New Castle Co v Hartford Accident & Indemnity Co*, 933 F2d 1162 (CA 3, 1991). See also cases cited in 87 ALR4th 444, § 28, pp 539-549.

Here, the trial court found that there was a substantial threat that the contaminants in the soil and seepage pond on Arco's premises would migrate into the groundwater absent remediation of the soil. This finding is supported by the record. Thus, under either the theory that the "owned property" exclusion does not bar coverage on public policy grounds, *Polkow*, *supra*, or the theory that the exclusion does not bar coverage where remediation of the insured's soil is necessary to prevent the migration of contaminants, the "owned property" exclusion did not bar coverage in this case.

IV

AMICO's final claim is that the trial court erred in its allocation of Arco's insurers' responsibility for Arco's indemnifiable losses. Allocation of responsibility for coverage among insurers becomes relevant once it is determined under which policies coverage has been triggered. See comment: *Apportioning coverage responsibility of consecutive insurers when the actual occurrence of injury cannot be ascertained: Who has to contribute in a settlement?*, 49 Mercer L R 1151, 1157 (1998). In this case, given the six other insurers' settlements with Arco and the Supreme Court's decision in *Arco II*, it appears that coverage was triggered—that is, that there was an injury-in-fact as defined in *Arco II*—under each successive compre-

hensive general liability policy in effect during the twenty years between the time Arco began operating the facility and the cessation of wastewater discharges into its seepage lagoon in 1987.

According to the trial court's opinion in this case, the allocation of a 68.63 percent share of indemnifiable losses to AMICO represents "the ratio of [AMICO's] limits to the limits available under all the policies which were effective over the period of time which the damage occurred." This allocation was apparently based on an "other insurance" provision contained in the seven AMICO policies.

A

Courts and commentators have discussed five possible methods for allocating liability among successive insurance policies in cases involving property damage or injuries occurring over the course of several years. See, generally, comment: *Allocating progressive injury liability among successive insurance policies*, 64 U Chi L R 257 (1997), cited in *Arco II*, *supra*, 456 Mich 312, 314. These methods are generally referred to as the "joint and several liability" or "all sums" method, the "stacking coverage" method, the "coverage provided" method, the "other insurance" method, and the "time-on-the-risk" method. *Id.*

Under the "all sums" method of allocation, each triggered insurer is liable for the insured's entire loss, even though the injury giving rise to liability may have begun before, and continued after, the insurer's policy period. One insurer pays the entire loss and then may seek contribution from other triggered insurers under the common-law doctrine of contribu-

tion or pursuant to each policy's "other insurance" clause. See, e.g., *Keene Corp v Ins Co of North America*, 215 US App DC 156; 667 F2d 1034 (1981).

Under the "stacking coverage" method of allocation, the coverage limits of all triggered policies are aggregated and the insured is allowed to exhaust the coverage limits of all the policies up to the level of its loss—again, regardless of whether the underlying injury was sustained before or after the policies' coverage period. 64 U Chi L R 257, 273-274. This method also appears to permit a selected insurer to sue other triggered insurers for contribution if the injury does not exhaust the coverage limits of all triggered policies. *Id.* See, e.g., *Cole v Celotex Corp*, 599 So 2d 1058 (La, 1992).

Under the "coverage provided" method of allocation, liability is determined by multiplying the number of years an insurer provided coverage by the limits of that insurer's policies, and then assigning liability corresponding to the ratio of the total coverage provided by that insurer to the total coverage provided by all the triggered policies. 64 U Chi L R 257, 274-275. See, e.g., *Owens-Illinois, Inc v United Ins Co*, 138 NJ 437; 650 A2d 974 (1994). The fourth method of allocation, the "other insurance" clause approach, appears to be a refinement of the "all sums" method in which allocation is based on principles of joint and several liability. See 64 U Chi L R 257, 278-279.

The final method of allocation is the "time-on-the-risk" approach. This method allocates liability among triggered policies using the periods covered by each insurer without considering the coverage limits of the triggered policies. 64 U Chi L R 257, 280. See, e.g., *Ins*

Co of North America v Forty-Eight Insulations, Inc, 633 F2d 1212 (CA 6, 1980). Under this method, insurers are responsible for the portion of the underlying injury that occurred during their policy period; the effect is to prorate coverage for continuous damage across each period that the damage occurred.

B

We are of the opinion that the "time-on-the-risk" method of apportionment should be used in cases such as this one, involving continuous property damage and successive policies of liability coverage. We reach this conclusion primarily on the basis of the Supreme Court's decision in *Arco II*, *supra*, where the Court applied the "injury-in-fact" trigger of coverage. The *Arco II* Court made it clear that, under the language of the AMICO policies, coverage was available to Arco when actual property damage occurred "during the policy period." The logical corollary is that AMICO must provide coverage for damage sustained "during the policy period," but not for the years outside the policy period. As stated in *Northern States Power Co v Fidelity & Casualty Co of New York*, 523 NW2d 657, 662 (Minn, 1994):

> [T]he choice of trigger theory is related to the method a court will choose to allocate damages between insurers. . . . A "pro rata by limits" [or "all sums"] allocation is inconsistent with the actual injury [or "injury-in-fact"] trigger theory.
>
> The essence of the actual injury trigger is that each insurer is held liable for only those damages which occurred during its policy period; no insurer is held liable for damages outside its policy period. Where policy periods do not overlap, therefore, the insurers are consecutively, not concurrently liable. A "pro rata by limits" allocation

> method effectively makes those insurers with higher limits liable for damages incurred outside their policy periods and is therefore inconsistent with the actual trigger theory.

Arco II instructs that the policy language in this case states unequivocally that the policies apply to damage and injury that take place "during the policy period." Consequently, we must reject any method of allocation that would require AMICO to provide coverage on a joint and several or "all sums" basis, since that method would require AMICO to indemnify Arco for damage occurring outside the policy period.

Our decision is strengthened by the history of comprehensive general liability policies as a whole. The seminal case adopting the "injury-in-fact" trigger of coverage, *American Home Products Corp v Liberty Mut Ins Co*, 565 F Supp 1485, 1500-1503 (SD NY, 1983), aff'd as modified 748 F2d 760 (CA 2, 1984), provides an extensive discussion regarding the intention of the drafters of the standard comprehensive general liability (CGL) policy, including the following:

> [T]he evidence establishes that the CGL draftsmen, as well as the parties, contemplated coverage only for injuries shown in fact to have occurred during periods of coverage.
>
> * * *
>
> . . . For example, Richard Elliott, then Secretary of the National Bureau of Casualty Underwriters, in presenting what he described as "the underwriting intent" of the CGL's revisers, explained that "the definition of occurrence serves to identify the time of loss for the purpose of applying coverage—the injury must take place during the policy period." He recognized that long exposure could involve "cumulative injuries," in which "more than one policy afford[s] coverage," and "each policy will afford coverage to the bodily

> injury or property damage which occurs during the policy period." . . . [Another commentator stated:] "Injury or damage must occur during the policy period to be covered."

Thus, it appears that the intent of the drafters of the policies at issue here, whose language we are required to uphold, was to provide coverage for the policy period only, and not for damages arising before or after the policy period. Again, this intent precludes imposition of an "all sums" or joint and several liability approach. "While the insurers agreed to indemnify [the insured] for 'all sums,' it had to be for sums incurred during the policy period." *Outboard Marine Corp v Liberty Mut Ins Co*, 283 Ill App 3d 630, 642; 670 NE2d 740 (1996).

Finally, we note the commentators' preference for the "time-on-the-risk" method of allocating responsibility among successive insurers. As stated in 64 U Chi L R 257, 281-283:

> The time-on-the-risk method should be adopted by courts because its inherent simplicity promotes predictability, reduces incentives to litigate, and ultimately reduces premium rates.
>
> Courts can easily administer the time-on-the-risk method. Once a court determines the scope of the progressive injury, that is, the total damage . . . it can readily allocate the damages among the triggered policies. The court divides the total damages by the number of triggered years and simply allocates to each year the result. If, for example, a certain policy spans three years out of a total of ten triggered years, then thirty percent of the damages will be allocated to that policy.
>
> Unlike the *Owens-Illinois* method, the effects of deductibles, excess insurance, and self-insurance are easy to calculate by pretending that the policy's share of damages was

> the damage that actually occurred during that policy period. . . .
>
> The time-on-the-risk method has intuitive, commonsense appeal . . . .
>
> The simplicity of the time-on-the-risk method removes many of the incentives to litigate the allocation of damages. Since the parties will know in advance how the court will allocate liability, there is much less of the uncertainty that encourages wasteful litigation. . . . While there will still be many issues to litigate, such as which policies are triggered and total damages, reducing the amount of allocation litigation should substantially decrease the costs of insurance.
>
> In addition to decreasing the amount of litigation, this method provides a way for insurance companies to estimate more accurately total expected liability; as a result premiums should decline. . . . Because this method, unlike the *Owens-Illinois* method, does not rely on a case-by-case determination of how much coverage was purchased, it also obviates the concern about inconsistent application.

See also 49 Mercer L R 1151, 1159-1166.

C

Because we conclude that each insurer in this case is responsible for coverage "during [its] policy period," and is not jointly and severally responsible for providing coverage for all policy periods, we cannot agree with the trial court's reliance on the "other insurance" clauses of the AMICO policies in apportioning AMICO's share of liability. "Other insurance" clauses do not provide a solution to the allocation problem here because they were not meant to allocate liability among successive insurers. 64 U Chi L R 257, 278. Rather, they relate to the effect of concurrent coverages of a single occurrence. *Continental Casualty Co v Medical Protective Co*, 859 SW2d 789, 791 (Mo App,

1993). They are individual contractual agreements between the insured and the insurer, designed to prevent the insured from recovering multiple times for an injury that occurs at one point in time. 64 U Chi L R 257, 279. Because this case involves consecutive policies covering different policy periods, we conclude that the "other insurance" clauses have no application.

D

Applying the "time-on-the-risk" method of allocating the insurers' liability in this case, we reverse the judgment of the trial court holding AMICO responsible for 68.63 percent of Arco's indemnifiable losses. As previously noted, the coverages of the various insurers were triggered over a twenty-year period, from 1967 to 1987. AMICO was Arco's liability insurer for seven of those years, from 1968 to 1974. Under the time-on-the-risk method of allocation, therefore, AMICO was responsible for 7/20ths, or thirty-five percent, of Arco's losses. Accordingly, we remand for a recalculation of AMICO's liability applying the time-on-the-risk method.

E

Finally, the parties are in agreement that AMICO has no indemnity obligation with regard to the costs of remediating Area II of Arco's facility. The record is not clear with regard to whether the trial court included the costs of remediating Area II in its calculations, nor is it clear what effect exclusion of the remediation costs attributable to Area II would have on the judgment. On remand, therefore, the trial court should consider the effect of the parties' stipulation that

AMICO had no duty to indemnify Arco with regard to Area II.

V

In its cross appeal, Arco argues that the trial court erred in determining that Arco was not entitled to defense costs incurred between the time it received the November 1985 notice letter from the DNR and the filing of the complaint in the underlying federal court action in October 1987. We agree.

In *Arco I, supra*, 448 Mich 417, n 15, the Supreme Court noted its expectation that this Court would find guidance on this issue in *Michigan Millers Mut Ins Co v Bronson Plating Co*, 445 Mich 558, 572-575; 519 NW2d 864 (1994). In *Bronson Plating*, the Supreme Court held that a PRP (potentially responsible party) letter from the Environmental Protection Agency to an insured was the functional equivalent of the initiation of a lawsuit, giving rise to the insurer's duty to defend. More recently, in *South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 660-668; 572 NW2d 686 (1997), this Court held that notice letters to an insured from the DNR were analogous to a PRP letter and constituted the initiation of a suit that gave rise to an insurer's duty to defend. In both cases, the Courts looked primarily to the contents of the letters and the authority of the agencies that prepared the letters. The Courts then concluded that because the letters carried immediate and severe implications and were prepared by agencies with substantial regulatory authority, they were the functional equivalent of a lawsuit for purposes of triggering the insurers' duty to defend. See *Bronson*

Plating, *supra*, pp 573-574; *South Macomb*, *supra*, pp 667-668.

The notice letter from the DNR involved in this case informed Arco that it had been identified as the party responsible for groundwater contamination and notified Arco that, as a responsible party, it was required to determine the extent of contamination and to initiate remedial action. The letter further "requested" the submission of "plan of intent to investigate the extent of groundwater contamination for which you are responsible" to the DNR by a specific date. Although the letter was not as strongly worded as the letters in *Bronson Plating* and *South Macomb*, the clear implication of the letter was that Arco was causing unlawful pollution and the DNR intended to take enforcement action to remedy the situation. Further, as indicated in *South Macomb*, *supra*, p 667, the DNR had the power to take substantial action against Arco. In short, the letter was not a " 'garden variety' demand letter[], which expose[s] one only to a potential threat of litigation." *Id.*, p 668. Rather, consistent with the reasoning of *South Macomb* and *Bronson Plating*, *supra*, the notice letter from the DNR in this case constituted a "suit" for purposes of triggering AMICO's duty to defend. Accordingly, we reverse the trial court's ruling that Arco was not entitled to defense costs incurred before the federal suit was filed. On remand, the trial court shall determine the amount of those costs.

VI

Arco next contends that it should have been allowed to recover attorney fees for AMICO's bad-faith

breach of its duty to defend. However, Arco waived this issue when the case was last before this Court; it is therefore beyond the scope of the present remand order. In any event, the claim is without merit. See *Burnside v State Farm Fire & Casualty Co*, 208 Mich App 422; 528 NW2d 749 (1995); *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167-168; 561 NW2d 445 (1997).

VII

Arco next argues that the trial court abused its discretion by limiting its award of attorney fees to a particular rate schedule. Some additional factual background is necessary to consider this claim.

The DNR sent its notice letter to Arco in November 1985. In May 1986, another of Arco's insurers retained the firm of Plunkett & Cooney to defend Arco. Arco rejected the tendered defense, apparently because it had already retained the firm of Honigman Miller Schwartz & Cohn.

The trial court's award of attorney fees was based on the rates Plunkett & Cooney would have charged the other insurance company, although Arco's representation was actually provided by the Honigman firm at a higher rate. In denying Arco's motion to increase the award to match the Honigman firm's rates, the court noted that Plunkett & Cooney is a "recognized and respected law firm" with an environmental law section and concluded that Arco had no reasonable basis for rejecting the tendered defense.

On appeal, Arco contends that Plunkett & Cooney's rates should not have been used to calculate its reasonable attorney fees because the firm could not have

represented Arco because of a conflict of interest. This argument is without merit for two reasons. First, by Arco's own admission, the alleged "conflict" did not arise until June 1987, a year after Arco rejected the tender of representation by Plunkett & Cooney. Second, had Arco accepted the tender, Plunkett & Cooney quite possibly could have avoided the conflict by declining to represent the party that resulted in the conflict of interest. Moreover, even if an unavoidable conflict existed, Arco's insurers might have retained other counsel at rates similar to those of Plunkett & Cooney.

Arco has failed to present any substantial or reasonable reason for rejecting the other insurer's tender of representation. Because Arco's insurer stood ready to provide it with a competent defense at a quoted fee scale, Arco was not entitled to recoup attorney fees at a higher rate. Under these circumstances, we find no abuse of discretion in the trial court's calculation of attorney fees at the rate quoted by Plunkett & Cooney.

VIII

Arco also claims that the trial court erred in determining that Arco could not collect twelve percent penalty interest pursuant to MCL 500.2006; MSA 24.12006 because coverage was reasonably in dispute. We must conclude that Arco is correct.

MCL 500.2006; MSA 24.12006 provides in relevant part:

> (1) A person [including an insurer; see MCL 500.114; MSA 24.1114] must pay on a timely basis to its insured . . . the benefits provided under the terms of the policy . . . .

* * *

(4) When benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. Where the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum *if the liability of the insurer for the claim is not reasonably in dispute* . . . . The interest shall be paid in addition to and at the time of payment of the loss . . . . Interest paid pursuant to this section shall be offset by any award of interest that is payable by the insurer pursuant to the award. [Emphasis added.]

In *Yaldo v North Pointe Ins Co*, 457 Mich 341, 348-349; 578 NW2d 274 (1998), the Supreme Court recently addressed the question whether the twelve percent interest allowed under MCL 500.2006(4); MSA 24.12006(4) is available to an insured only when the claim for coverage is not reasonably in dispute. The Court concluded that, "[w]ith respect to collection of twelve percent interest, reasonable dispute is applicable only when the claimant is a third-party tort claimant." *Yaldo*, *supra*, p 349. Thus, "[w]here the action is based solely on contract, the insurance company can be penalized with twelve percent interest, even if the claim is reasonably in dispute." *Id.*, p 348, n 4.

Under *Yaldo*, AMICO could be assessed penalty interest pursuant to MCL 500.2006(4); MSA 24.12006(4) even though Arco's claim for coverage was reasona-

bly in dispute. Accordingly, on remand the trial court shall modify Arco's award to include that interest.

IX

Finally, Arco contends that the trial court erred in ruling that Arco should not receive prejudgment interest under MCL 600.6013; MSA 27A.6013 from the date it filed its complaint for declaratory judgment against AMICO. This claim is without merit. As Arco acknowledges, this Court has held that, in actions to collect benefits of insurance contracts, it is error to award prejudgment interest pursuant to MCL 600.6013; MSA 27A.6013 from the date of the complaint with respect to claims that arise after the complaint is filed. *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 624-625; 550 NW2d 580 (1996). Rather, prejudgment interest with respect to claims that arise after the filing of the complaint is properly awarded from the postcomplaint date on which the insurer refused to pay and the delay in receiving money began. *Id.* See also *McKelvie v Automobile Club Ins Ass'n*, 203 Mich App 331, 339-340; 512 NW2d 74 (1994). Here, Arco filed its complaint for declaratory relief against AMICO more than 2-1/2 years before the entry of the 1989 federal consent decree making Arco liable for response costs and remediation program funding. Under *Beach*, therefore, Arco was entitled to prejudgment interest dating back only to the date on which AMICO refused coverage for that loss; it was not entitled to prejudgment interest dating back to the filing of the complaint against AMICO in 1987.

X

To summarize, we affirm the trial court's determination that the pollution and "owned property" exclusions contained in AMICO's policies did not bar coverage; AMICO was required to indemnify Arco for a share of Arco's losses resulting from its discharge of solvents from 1967 to 1987. However, we conclude that the trial court erred in allocating AMICO's share of responsibility for indemnification in relation to the six other insurers that covered Arco during that twenty-year period; the court should have allocated responsibility based on a "time-on-the-risk" approach. We therefore remand for recalculation of AMICO's indemnification obligation.

With regard to AMICO's duty to defend in the underlying federal action brought by the DNR, we find no abuse of discretion in the trial court's award of attorney fees. We also find no error in the court's refusal to allow prejudgment interest for the period between the filing of the complaint in this case and the entry of the consent judgment in the federal case. However, we reverse the trial court's determination that Arco was not entitled to defense costs incurred before suit was filed in the federal court. Additionally, we reverse the court's determination that Arco was barred from receiving twelve percent penalty interest under MCL 500.2006; MSA 24.12006; the fact that Arco's claim was reasonably in dispute was irrelevant. Consequently, those items should be calculated and added to the judgment on remand.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

BURCHETT v RX OPTICAL

Docket No. 196681. Submitted January 13, 1998, at Grand Rapids. Decided October 9, 1998, at 9:15 A.M. Leave to appeal denied 459 Mich ___.

Lisa and John Burchett and their minor son, Jacob Burchett, by his next friend, Lisa Burchett, brought an action in the Kalamazoo Circuit Court against Rx Optical, Lisa Burchett's former employer. The plaintiffs alleged that the defendant terminated Lisa Burchett's employment after she went on disability for a medical condition related to her pregnancy with Jacob Burchett and after she complained to the Michigan Department of Labor that the defendant was docking her pay for mistakes made on the job. The plaintiffs alleged that the termination violated the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, the Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, and the Family and Medical Leave Act (FMLA), 29 USC 2601 *et seq.* John Burchett claimed loss of consortium, and Jacob Burchett claimed that the defendant's actions caused Lisa Burchett to suffer stress while pregnant, resulting in the premature birth and injury of Jacob Burchett. The defendant moved for summary disposition. The court, Philip D. Schaefer, J., denied the motion with respect to Lisa and John Burchett, but granted the motion with respect to Jacob Burchett. The parties settled the claims of Lisa and John Burchett. Jacob Burchett, by his next friend, appealed the order summarily dismissing his claims under the CRA, the HCRA, and the WPA.

The Court of Appeals *held*:

1. Jacob Burchett cannot maintain a cause of action under the CRA for damages for injuries allegedly sustained as a result of the alleged violation of Lisa Burchett's civil rights. The language of subsection 801(1) and § 202 of the CRA indicate legislative intent that only the person whose civil rights were violated in a given case may bring an action under the CRA.

2. Jacob Burchett cannot maintain a cause of action under the HCRA for damages for injuries allegedly sustained as a result of the alleged violation of Lisa Burchett's rights under the HCRA. The purposes and goals of the HCRA are the same as those of the CRA, and

language in the HCRA similarly indicate legislative intent that only the person whose rights under the HCRA were violated in a given case may bring an action under the HCRA.

3. Jacob Burchett cannot maintain a cause of action under the WPA for damages for injuries allegedly sustained as a result of alleged retaliatory actions taken against Lisa Burchett. Although the WPA has purposes and goals that are distinct from those of the CRA and the HCRA, all three acts are given like treatment. Jacob Burchett cannot maintain an action under the WPA for the same reasons that he cannot maintain an action under the CRA and the HCRA.

Affirmed.

NEFF, P.J., concurring in part and dissenting in part, stated that Jacob Burchett cannot maintain an action under the WPA, but should be allowed to proceed under the CRA and the HCRA. Regardless of whether Jacob Burchett's action under the CRA and the HCRA is derivative or independent of his mother's action under the CRA and the HCRA, nothing in the CRA and the HCRA precludes Jacob Burchett's claim.

1. CIVIL RIGHTS — CIVIL RIGHTS ACT — HANDICAPPERS' CIVIL RIGHTS ACT — INFANTS.

An action under the Civil Rights Act or the Handicappers' Civil Rights Act may be brought and maintained only by those whose rights under either act are violated; an infant who claims injury only from discriminatory conduct directed at its mother while pregnant with the infant cannot maintain an action under either act (MCL 37.1101 *et seq.*, 37.2101 *et seq.*; MSA 3.550[101] *et seq.*, 3.548[101] *et seq.*).

2. MASTER AND SERVANT — WHISTLEBLOWERS' PROTECTION ACT — INFANTS.

An action under the Whistleblowers' Protection Act may be brought and maintained only by those employees who report violations or suspected violations of law by their employers; an infant who claims injury only from retaliatory conduct directed at its mother while pregnant with the infant cannot maintain an action under the act (MCL 15.361 *et seq.*; MSA 17.428[1] *et seq.*).

Durant, Piper & Sorei (by *William F. Piper*), for the plaintiff.

Mary E. Delehanty, for the defendant.

Before: NEFF, P.J., and SAWYER and MURPHY, JJ.

MURPHY, J. Plaintiff appeals as of right from the order granting in part and denying in part defendant's motion for summary disposition. We affirm.

This case arises out of Lisa Burchett's termination of employment as an optician with defendant. However, this appeal only addresses the claims involving plaintiff's son, Jacob. Lisa began working at Rx Optical in 1992. In December 1994, she became pregnant and informed her supervisor. On January 1, 1995, Lisa received a paycheck from which defendant had deducted money pursuant to its policy that its opticians would be responsible for mistakes made on accounts. On January 4, 1995, plaintiff contacted the Michigan Department of Labor to report defendant's policy of requiring opticians to reimburse defendant for mistakes that they made on certain accounts. Upon discovering that defendant's policy was illegal, Lisa informed both the owner and the president of Rx Optical. That same day, Lisa experienced vaginal bleeding and her doctor instructed her to go home. The next day, she was placed on a two-week disability leave; however, before the end of this two-week period she was terminated from her job for allegedly having a bad attitude.

On March 16, 1995, Lisa and John Burchett, her husband, filed an action alleging that Lisa's termination violated the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, the Michigan Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, and the Family and Medical Leave Act (FMLA), 29 USC 2601 *et seq.* John Burchett alleged that because of Lisa's termination, he suffered loss of

consortium. Following the premature birth of their son, Jacob, the Burchetts amended their complaint to add Jacob as a party, alleging that defendant's actions caused Lisa to suffer stress, which resulted in Jacob's premature birth and associated injuries.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Although plaintiff may very well have had considerable problems establishing that defendant's alleged violations of the statutes proximately caused the alleged injuries to Jacob, the trial court did not reach the issue of proof. Rather, the trial court granted the motion with respect to the claims involving Jacob under MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). The trial court denied defendant's motion for summary disposition with respect to John and Lisa Burchett's claims; however, the parties settled those claims after the trial court's order. Plaintiff appeals from the trial court's dismissal of Jacob's claims.

We review de novo a trial court's decision to grant a motion for summary disposition. *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 486; 532 NW2d 183 (1995). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim and only permits consideration of the pleadings. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A trial court should grant a motion for summary disposition under MCR 2.116(C)(8) only where a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

Plaintiff argues that Jacob should be allowed to maintain a cause of action under the CRA, the HCRA, and the WPA. Plaintiff does not challenge the trial court's decision with respect to the FMLA. The fundamental purpose of statutory construction is to discover and give effect to the intent of the Legislature. *Ansell v Dep't of Commerce (On Remand)*, 222 Mich App 347, 355; 564 NW2d 519 (1997). Once discovered, the Legislature's intent must prevail, any existing rule of construction to the contrary notwithstanding. *Id.* Where reasonable minds may differ about the meaning of the statute, we look to the objective of the statute and the harm it is designed to remedy and apply a reasonable construction that best accomplishes the Legislature's purpose. *Id.*

Although we appreciate the remedial nature of these acts and recognize that appellate courts have consistently construed these acts liberally, see *Chmielewski v Xermac, Inc*, 457 Mich 593; 580 NW2d 817 (1998) (the HCRA); *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 398; 572 NW2d 210 (1998) (the WPA); *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 15; 506 NW2d 231 (1993) (the CRA), we are not prepared to say that the Legislature, by its adoption of these acts, intended to create a cause of action for physical injuries to an infant, allegedly resulting from a stress-induced premature birth caused by unlawful employment discrimination directed at the infant's mother.

We first address whether Jacob can maintain a cause of action under the CRA. In *Eide v Kelsey-Hayes Co*, 431 Mich 26; 427 NW2d 488 (1988), our Supreme Court addressed a distinctly different question. In that case, the Court addressed whether a derivative cause

of action for loss of consortium is precluded by the CRA. *Id.*, 28. According to the majority in *Eide*, "a claim for loss of consortium is simply one for loss of society and companionship," which needs no independent statutory authority for it to be brought. *Id.*, 29-30. What is necessary is that the impaired spouse has sustained some legally cognizable harm or injury—in *Eide*, injuries from sexual harassment in violation of the CRA—resulting in a loss of society and companionship to the unimpaired spouse. *Id.*, 29. Because "courts have consistently treated loss of consortium not as an item of damages, but as an independent cause of action," Justice BOYLE, writing for the majority, framed the issue before the Court as "not whether a cause of action [for loss of consortium] is *available* under the Civil Rights Act, but whether there is anything in the act which would *preclude* this independent cause of action." *Id.*, 29-30 (emphasis added). Stated differently, a loss of consortium claim is not a claim under the CRA at all, but a claim at common law. *Id.*, 33-34, citing Prosser & Keeton, Torts (5th ed), § 125, pp 931-934. Our Supreme Court concluded that neither the plain language of the CRA nor conventional rules of statutory construction support the argument that the Legislature intended to preclude a cause of action for loss of consortium. *Id.*, 31, 34.

In our view, the question before this Court is entirely different. Unlike the loss of consortium claim, the claim presented here is not an independent cause of action rooted in the common law. While it is true that Michigan common law recognizes a claim of *negligence* on behalf of a fetus for prenatal injury if (1) the fetus is later born alive, or (2) the fetus was viable at the time of injury, *Jarvis v Providence Hosp*,

178 Mich App 586, 591; 444 NW2d 236 (1989), the cause of action presented in this case is not a negligence claim. Rather, the claim made by Lisa Burchett, as next friend of her son Jacob, can only be perceived as a civil rights claim brought directly under the CRA. In other words, we are asked to decide not whether there is anything in the CRA that would preclude an infant's independent cause of action for physical injuries, resulting from a premature birth that was allegedly caused by employment discrimination against the infant's pregnant mother, but whether the infant can maintain such a cause of action directly under the CRA. We believe that the CRA cannot be so broadly construed as to authorize such a claim.

Statutory analysis necessarily begins with the language of the statute in question. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). The civil enforcement provision of the CRA provides:

> A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both. [MCL 37.2801(1); MSA 3.548(801)(1).]

Although remedial statutes are to be liberally construed to suppress the evil and advance the remedy, *Eide, supra*, 34, we are not convinced that the Legislature intended to allow an infant to pursue a cause of action for injuries that the infant has incurred as a result of a civil rights violation inflicted upon the infant's mother, irrespective of whether the infant has alleged that prenatal or postnatal injuries were incurred as a result of the civil rights violation.

Enacted by the Michigan Legislature in 1976 to supplant the Fair Employment Practices Act, the CRA prohibits discrimination based on sex, race, national origin, religion, height, weight, or marital status in employment, housing, use of public accommodations, public service, and educational facilities. With respect to discrimination in employment, the CRA provides:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system. [MCL 37.2202; MSA 3.548(202).]

In our view, when this portion of the CRA is read with the civil enforcement provision of the act, we are compelled to conclude that the Legislature intended to authorize only the person whose civil rights were violated to bring a cause of action under the CRA. Because plaintiff does not claim that defendant violated Jacob's civil rights but, rather, alleges that Jacob suffered damages as a result of the violation of the civil rights of Jacob's mother, we conclude

that Jacob cannot maintain a cause of action *directly* under the CRA.

Plaintiff next argues that Jacob should be allowed to maintain a cause of action under the HCRA. However, the HCRA has the same purposes and goals as the CRA, and this Court has held that claims under the HCRA should be treated similarly to those under the CRA. *Milnikel v Mercy-Memorial Medical Center, Inc*, 183 Mich App 221, 223-224; 454 NW2d 132 (1989). Further, the civil enforcement provision of the HCRA is identical to that of the CRA. See MCL 37.1606(1); MSA 3.550(606)(1). Therefore, for the reasons set forth above, we likewise decline to interpret the HCRA as authorizing Jacob's claim.

Plaintiff also argues that Jacob should be allowed to maintain a cause of action under the WPA. Although the WPA and the civil rights acts do not share identical purposes and goals—the WPA is designed to protect the public by protecting employees who report violations or suspected violations of the law to a public body, *Dolan v Continental Airlines*, 454 Mich 373, 378; 563 NW2d 23 (1997)—case law nonetheless supports the conclusion that the WPA, the CRA, and the HCRA deserve like treatment. See *Stewart v Fairlane Community Mental Health Centre (On Remand)*, 225 Mich App 410, 421; 571 NW2d 542 (1997); *Anzaldua v Band*, 216 Mich App 561, 580-581; 550 NW2d 544 (1996). Further, the civil enforcement provision of the WPA is substantively the same as those of both the CRA and the HCRA. See MCL 15.362; MSA 17.428(2). Accordingly, for the reasons discussed above, we are also satisfied that the Legislature, by its adoption of the WPA, did not intend to establish a cause of action for a person other than the person against whom a

violation of the WPA was directed. Because the alleged violation of the WPA in this case was directed at Jacob's mother and not Jacob, we conclude that Jacob cannot maintain a cause of action against defendant under the statutory scheme established in the WPA.

In sum, a court's decision regarding whether a statute creates a private right of action must be consistent with legislative intent while furthering the Legislature's purpose in enacting the statute. See *Gardner v Wood*, 429 Mich 290, 301; 414 NW2d 706 (1987). We conclude that the Legislature, by its adoption of the CRA, the HCRA, and the WPA did not intend to create the private right of action brought in this case by Lisa Burchett, as next friend of her son Jacob. Further, because these areas of law have been so extensively addressed by the Legislature, we are not prepared to recognize a new derivative cause of action in the area of civil rights or the WPA for prenatal injuries allegedly inflicted on the child of the person whose rights were violated. Such recognition is best left to the Legislature, if it is so inclined.

Accordingly, the trial court did not err in granting defendant's motion for summary disposition with respect to Jacob's claims.

Affirmed.

SAWYER, J., concurred.

NEFF, P.J., (*concurring in part and dissenting in part*). I concur with the majority that the trial court properly granted defendant's motion for summary disposition with respect to plaintiff's attempt to seek redress on Jacob's behalf under the Whistleblowers'

Protection Act, MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.* However, I would hold that plaintiff is entitled to proceed under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and the Michigan Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, and write separately to address the issue of derivative liability, which, because of the unique relationship between an unborn child and its mother, and the particular allegations set forth in plaintiff's complaint, is critical to the resolution of this case.

Although the concept of derivative liability is not always clearly articulated, it generally refers to a claim in which the plaintiff seeks damages for a wrong done to the plaintiff that is proximately caused by a wrong done to another. Generally, the inquiry whether a claim is "derivative" focuses not on how the injury occurred but on whether the claimed damages are based on the plaintiff's own injury, or that of another.

A common example of derivative liability is that of loss of consortium, which cannot exist without a prior injury to a spouse. See *Berryman v Kmart Corp*, 193 Mich App 88, 94; 483 NW2d 642 (1992). The alleged damages are separate and distinct from any damages to the physically injured spouse, yet they are dependent both legally and causally on the latter. Our Supreme Court has recognized that a claim for loss of consortium is derivative "but only in the sense that it does not arise at all unless the other, impaired spouse has sustained some legally cognizable harm or injury," and treats such a claim not as an item of damages, but as a separate cause of action.

Eide v Kelsey-Hayes Co, 431 Mich 26, 29; 427 NW2d 488 (1988).

The facts alleged in the present case do not fit neatly into a recognized category. Unlike a loss of consortium claim, plaintiff's complaint on Jacob's behalf does not seek compensation for damages suffered by or on account of an injury to plaintiff. Neither is Jacob a mere assignee of plaintiff's cause of action. Rather, plaintiff in her representative capacity seeks to recover for various injuries allegedly sustained by Jacob as a result of statutory violations involved in the termination of plaintiff's employment. Plaintiff alleges that defendant's violation of the CRA and HCRA resulted in injuries and damages to both plaintiff and Jacob and gave rise to two separate and distinct claims. Viewed in this light, Jacob's independent claim is not truly derivative because it is based on his own separate and distinct injuries, not those of plaintiff.

However, Jacob's claim is not entirely independent. This is not a situation where, for example, an unborn child is injured by a violent blow to the mother's abdomen, or where a mother and her unborn child are both injured simultaneously by breathing toxic fumes. See, e.g., *Hitachi Chemical Electro-Products Inc v Gurley*, 219 Ga App 675; 466 SE2d 867 (1995); *Ransburg Industries v Brown*, 659 NE2d 1081 (Ind App, 1995). In these examples, the injury to the unborn child is direct. In contrast, the claimed injury to Jacob allegedly flowed, both temporally and causally, from the alleged injuries to plaintiff caused by defendant's alleged statutory violations. That is, defendant caused no direct physical harm to Jacob in utero; rather, defendant's alleged statutory violations

caused plaintiff to suffer stress which, in turn, allegedly caused Jacob's premature birth and resultant injuries. Jacob's injuries allegedly would not have existed absent plaintiff's status as defendant's employee; therefore, plaintiff's action on Jacob's behalf "derives" from her own injury. Accordingly, Jacob's claim is independent insofar as it seeks redress for his own injuries, but is also derivative because it depends on plaintiff's status as defendant's employee and defendant's alleged violation of the CRA and the HCRA.

Regardless of the term used to describe it, whether a cause of action exists under these circumstances rests on the issue of duty. See *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 426; 550 NW2d 243 (1996) (as a general rule, "where a statute imposes upon a person a specific duty for the protection or benefit of others, neglect or refusal to perform the duty creates a liability for any injury or detriment caused by such neglect or refusal, if the injury or hurt is of the kind which the statute was intended to prevent"). If plaintiff's claim on Jacob's behalf were purely derivative, then the alleged violation of defendant's statutory duties to plaintiff would support the claim on Jacob's behalf without regard to whether defendant owed any duty to Jacob. On the other hand, if the claim on Jacob's behalf were entirely independent, then defendant must be shown to have a duty to Jacob as well as to plaintiff, his mother. As previously stated, the unique facts presented here do not fit precisely into either category.

In *Eide, supra*, the Supreme Court held that nothing in the CRA precludes a derivative cause of action for loss of consortium. *Id.* at 30. The Court stated that

the comprehensive scheme of the CRA must be liberally construed "to suppress the evil and advance the remedy." *Id.* at 34. The Court further noted that the opening clause of the civil enforcement provision of the CRA, "[a] person alleging a violation of this act . . . . ," should be read to include claims by nonemployees such as those for loss of consortium. MCL 37.2801(1); MSA 3.548(801)(1); *Eide*, *supra* at 34-35. I believe a similar result is required here. Using the analysis set forth by the Supreme Court in *Eide*, I find nothing in the CRA that would preclude this claim—which is in a sense both derivative and independent—from proceeding.

I would likewise find that summary disposition was erroneously granted regarding plaintiff's claim on Jacob's behalf under the HCRA. See *Milnikel v Mercy-Memorial Medical Center, Inc*, 183 Mich App 221, 223-224; 454 NW2d 132 (1989) (holding that, in the absence of any indication of legislative intent to the contrary, a claim of loss of consortium is not precluded by the HCRA).

I recognize that plaintiff may have significant problems establishing that defendant's alleged violations of the CRA and the HCRA proximately caused any of Jacob's injuries. Nonetheless, on the basis of the allegations contained in plaintiff's complaint, I conclude that plaintiff should be permitted to proceed under these two statutes. Accordingly, I would reverse the trial court's grant of summary disposition regarding counts II and III of plaintiff's complaint.

HUGGETT v DEPARTMENT OF NATURAL RESOURCES

Docket No. 195548. Submitted May 5, 1998, at Lansing. Decided October 16, 1998, at 9:00 A.M. Leave to appeal sought.

Wallace A. Huggett and Huggett Sod Farm, the owners of a wetland subject to a reversionary interest of the state of Michigan should the land be used for a purpose other than peat farming, brought an action in the Cheboygan Circuit Court against the Department of Natural Resources after the department denied their application for a permit under the wetland protection act (WPA), MCL 324.30301 *et seq.*; MSA 13A.30301 *et seq.*, that would allow the plaintiffs to start a cranberry farm on the wetland. The plaintiffs sought a declaration that, pursuant to the farming exemption from the permit requirement of the WPA, MCL 324.30305(2)(e); MSA 13A.30305(2)(e), no permit was required for the proposed activity. The plaintiffs also sought a declaration that the state's interest in the wetland, which arose as a condition annexed to the state's conveyance of the wetland to the plaintiffs' predecessor in interest, was nominal and unenforceable. The court, Robert C. Livo, J., granted the requested declaratory judgment. The department appealed, and the plaintiffs cross appealed to claim that the state's interest in the wetland is unenforceable because it violates the rule against perpetuities.

The Court of Appeals *held*:

1. The trial court properly refused to require the plaintiffs to exhaust administrative remedies in the department. The issue whether the proposed activity is exempt from the permit requirements of the WPA is a legal question that does not call for extensive findings of fact or technical expertise. Requiring the exhaustion of administrative remedies in this case would be nothing more than a formal step on the way to the courthouse.

2. The farming exemption from the wetland permit requirement applies only to wetlands already in agricultural use and does not apply to the plaintiffs' wetland, which was not already in agricultural use. The WPA was intended to enable the state to assume the authority to administer the federal Clean Water Act. The WPA must be enforced in accordance with, and be just as or more stringent than, the Clean Water Act. The similarly worded federal farming

exemption statute, 33 USC 1344(f), applies only to ongoing, established farming operations; activities that convert an area into farmland or bring an area into farming use are not exempted. Additionally, language in the WPA itself indicates that references to "farming" are restricted to already existing farming operations.

3. Because in a prior mortgage foreclosure action Huggett stipulated that the state's interest in the wetland was superior to the plaintiffs' interest, res judicata bars relitigation of the issue whether the state's interest is nominal and unenforceable. In any event, the state's interest is not nominal. Adjoining landowners may place conditions on adjoining lands they transfer to protect their interest in preventing noxious business from being conducted thereon, or in having it improved in a certain manner. In this case, the state's interest in placing a condition on the use of the wetland it conveyed is not nominal because the state continues to own land adjoining the wetland.

4. Res judicata bars consideration of the issue whether the state's interest is unenforceable as being violative of the rule against perpetuities. In any event, rights of entry are generally not subject to the common-law rule against perpetuities. Michigan's statutory limitation placed on rights of entry is inapplicable because the plaintiffs' terminable interest was initially created in a conveyance from the state.

Affirmed in part and reversed in part.

WHITE, P.J., concurring in part and dissenting in part, stated that res judicata does not bar consideration of the issue whether the state's reversionary interest is enforceable. The prior proceeding was a foreclosure action in which Huggett's stipulation served as acknowledgment that the state's interest would survive the foreclosure proceeding and that the state's interest is superior to that of Huggett as mortgagee, but did not serve as acknowledgment that the state's interest was superior to that of Huggett as fee owner.

1. ADMINISTRATIVE LAW — JUDICIAL REVIEW —EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Exhaustion of administrative remedies is not an inflexible condition precedent to judicial consideration and may not be required where the question presented is one of law and does not call for extensive findings of fact or technical expertise.

2. ENVIRONMENT — WETLAND PROTECTION ACT — PERMITS — FARMING EXEMPTION.

The farming exemption from the permit requirements of the wetland protection act applies only to wetlands already in agricultural use and therefore does not apply to wetlands for which a not yet existing agricultural use is proposed (MCL 324.30305[2][e]; MSA 13A.30305[2][e]).

3. ACTIONS — RES JUDICATA.

Res judicata bars relitigation of claims actually litigated and those claims arising out of the same transaction that could have been litigated; the test for determining whether two claims are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the claim.

D. Haywood & Associates, P.C. (by *David J. Haywood* and *Mark A. Cooley*), for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *A. Michael Leffler* and *Stephen F. Schuesler*, Assistant Attorneys General, for the defendant.

Before: WHITE, P.J., and SAAD and MARKEY, JJ.

MARKEY, J. Defendant appeals as of right a declaratory judgment in favor of plaintiffs. We affirm in part and reverse in part.

In 1982, the state of Michigan, through defendant, deeded the wetland at issue to Michigan National Bank (MNB) in exchange for a parcel of land owned by MNB. The deed from the state to MNB included a condition that the land be used for peat farming and that if the condition were violated, the state had the right to reenter and retake the land. Plaintiffs later became owners of the wetland after MNB assigned its mortgage interest in the land to plaintiffs, and plaintiffs foreclosed the mortgage. Plaintiffs seek to construct a 200-acre, $6 million cranberry farm. The construction will consist of, among other things, building dikes,

digging ditches, and constructing a reservoir. The proposal also calls for some excavating and filling in of the wetland. Plaintiffs sought, but were denied, a wetland permit from defendant to begin the project, so they initiated the instant declaratory judgment action claiming, inter alia, that the proposed activity was exempt from the permit requirement of the wetland protection act (WPA), MCL 324.30301 *et seq.*; MSA 13A.30301 *et seq.*, and that the state's interest in the wetland was void because the condition placed in the deed is of nominal value to the state. The trial court agreed.

I

First, defendant claims that the trial court should have denied plaintiffs' claims because of plaintiffs' failure to exhaust the available administrative remedies. We disagree.

Plaintiffs applied for a permit to construct the cranberry farm. Defendant denied the application. Plaintiffs initiated contested case proceedings to challenge the denial of the permit, but before the conclusion of the contested case proceedings, plaintiffs filed the instant action in the circuit court.[1] Michigan courts have long recognized the importance of the doctrine of exhaustion of administrative remedies. *Int'l Business Machines Corp v Dep't of Treasury*, 75 Mich App 604, 608; 255 NW2d 702 (1977). Exhaustion of administrative remedies is not an inflexible condition precedent to judicial consideration, however, and will not

[1] The contested case proceedings have been held in abeyance pending the resolution of this case.

be required if review of the agency's final decision would provide an inadequate remedy. *Id.*

In *Int'l Business Machines Corp*, this Court allowed the plaintiff to seek relief in the circuit court even though the available administrative remedies had not been exhausted because the plaintiff did not challenge the propriety of the agency action taken (declaration of tax liability). Instead, the plaintiff argued that the agency had no authority to take any action in the first place. Because the plaintiff sought to avoid submitting the dispute to the agency procedures, the "very harm that plaintiff seeks to avoid would inevitably occur if plaintiff were required to exhaust administrative remedies before access to judicial review." *Id.* at 610. This Court also considered whether the agency's statutory authority to act was clearly framed for the circuit court, whether extensive findings of fact were unnecessary, and whether a resolution of the issue did not demand special technical expertise. *Id.*; see also *Universal Am-Can Ltd v Attorney General*, 197 Mich App 34, 38-39; 494 NW2d 787 (1992) (holding that where the plaintiff claimed that the agency lacked statutory authority to regulate the plaintiff's activity, "both judicial economy and the interests of justice supported the plaintiff's actions in filing a complaint in the circuit court for declaratory relief").

In the case at bar, we believe that plaintiffs' claim in the circuit court was proper even though they had not exhausted the available administrative remedies. In the circuit court, plaintiffs did not challenge the propriety of defendant's denial of the permit but sought a declaration that defendant had no statutory

authority to require a permit in the first place. Plaintiffs' argument is that the Legislature exempted the proposed activity from defendant's regulation. While copious testimony was admitted at trial, the issue was clearly framed for the court as one of law (statutory interpretation) that did not call for extensive findings of fact or technical expertise. Under these circumstances, requiring exhaustion of the available administrative remedies would have been "nothing more than a formal step on the way to the courthouse." *Michigan Supervisors Union OPEIU Local 512 v Dep't of Civil Service*, 209 Mich App 573, 577; 531 NW2d 790 (1995). The trial court therefore did not err in failing to require plaintiffs to exhaust administrative remedies.

II

Next, defendant claims that the trial court improperly ruled that plaintiffs' proposed activities were exempt from the permit requirements of the WPA. With regard to this issue we agree with defendant.

MCL 324.30304; MSA 13A.30304 prohibits placing fill material in a wetland, dredging or removing soil from a wetland, draining surface water from a wetland, and constructing, operating, or maintaining any use in a wetland without a permit; however, MCL 324.30305; MSA 13A.30305 exempts certain uses from the permit requirement. The exemption at issue here is MCL 324.30305(2)(e); MSA 13A.30305(2)(e) (referred to as the "farming exemption"):

> Farming, horticulture, silviculture, lumbering, and ranching activities, including plowing, irrigation, irrigation ditching, seeding, cultivating, minor drainage, harvesting for the

> production of food, fiber, and forest products, or upland soil and water conservation practices. Wetland altered under this subsection shall not be used for a purpose other than a purpose described in this subsection without a permit from the department.

The trial court opined that this farming exemption "is not limited in scope to existing farming operations nor limited by the size of the project but includes all activities necessary to commence and to continue farming in a commercially viable manner and to bring land into agricultural production." We disagree.

The fundamental purpose of statutory construction is to assist the court in discovering and giving effect to the intent of the Legislature. *Ansell v Dep't of Commerce (On Remand)*, 222 Mich App 347, 355; 564 NW2d 519 (1997). Statutory exceptions operate to restrict the general applicability of legislative language and are strictly construed. See *People v Brooks*, 184 Mich App 793, 797; 459 NW2d 313 (1990), citing *Grand Rapids Motor Coach Co v Public Service Comm*, 323 Mich 624; 36 NW2d 299 (1949).

According to Senate Bill Analysis, SB 3, January 17, 1980, and House Legislative Analysis, HB 4049, February 6, 1979, the WPA was intended to enable the state to assume authority to administer the federal Clean Water Act to Michigan's wetlands.[2] In order for

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[2] We acknowledge that while a Senate bill analysis is not an official statement of legislative intent, it is a helpful tool in statutory interpretation. See *People v Link*, 225 Mich App 211, 217; 570 NW2d 297 (1997). The fact that Michigan became the first state to receive authority to enforce and administer the federal Clean Water Act lends support to the assertion in the Senate bill analysis. See 2 Haynes & Smary, Michigan Environmental Law Deskbook, Land Use Controls and State Lands, § 12.3 (1992 & Supp 1997).

Michigan to assume administration of the Clean Water Act, Michigan's analogous statute, the WPA, must be enforced in accordance with, and be just as or more stringent than, its federal counterpart. See 40 CFR 233.1(d). The analogous, similarly worded federal farming exemption statute, 33 USC 1344(f),[3] applies only to ongoing, established farming operations; activities that convert an area into farmland or bring an area into farming use are not exempted. See 40 CFR 232.3(c)(1); *Avoyelles Sportsmen's League v Alexander*, 473 F Supp 525 (WD La, 1979). Therefore, because the intent behind the WPA was to confer authority over the Clean Water Act, and because in order to assume such authority the WPA must be consistent with, and at least as stringent as, its federal counterpart, the WPA farming exemption must apply only to established uses and not to activities necessary to create new farmland.

The conclusion that the farming exemption was intended to apply to land in established use for agriculture, and was not intended to refer to new farming activities, is also supported by the language of the statutory exemption itself. The farming exemption lists "minor drainage" as an example of a permissible farming activity. According to the definition section of the WPA, MCL 324.30301(b); MSA 13A.30301(b), "minor drainage" refers to activities on "land in established use for agriculture." Further, it appears that the

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[3] 33 USC 1344(f)(1)(A) provides that discharge of dredged or fill material from "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" is not prohibited by the act.

other examples of permissible farming activities listed in the farming exemption are "activities that would only occur on a continuing basis as part of an ongoing farming or forestry operation." See *Alexander*, *supra* at 535 (interpreting the analogous federal statute in the Clean Water Act, 33 USC 1344[f]).

Also, Michigan courts recognize the principle of statutory construction that express mention in a statute of one thing implies the exclusion of other similar things. *Jennings v Southwood*, 446 Mich 125, 142; 521 NW2d 230 (1994). The exemption statute, MCL 324.30305; MSA 13A.30305, in the WPA specifically exempts some farm-related construction. Subsection 2(g) allows construction of farm ponds, and subsection 2(i) allows construction of farm roads. No other farm-related construction is specifically allowed. As a result, we are of the opinion that it would be improper to infer that other farm-related construction activities are implied or that the word "farming" implicitly includes construction activities not explicitly enumerated in the exemption statute. In conclusion, the legislative intent behind the WPA, as well as the language of the exemption statute, require us to interpret the farming exemption as applying only to currently existing farmland.[4] Because plaintiffs' land

[4] In addition, on the basis of the agreement between the state and the federal government, defendant has been interpreting the WPA in accordance with the Clean Water Act. While an agency's interpretations of statutes it administers are not binding on courts, longstanding interpretations are entitled to great weight unless clearly wrong. See *In re Storm*, 204 Mich App 323, 327; 514 NW2d 538 (1994). Therefore, we give some deference to defendant's interpretation.

was not already in agricultural use, the exemption does not apply.[5]

III

Next, defendant claims that the issue whether the state of Michigan's interest in the land is nominal and unenforceable was barred by res judicata because there was a stipulation in a prior proceeding that the state had an interest in the land superior to plaintiffs. We agree.

Before the instant action, plaintiff Huggett sued the state and a mortgagee seeking to foreclose on the interest of the mortgagee and also asking that the court "enter its order determining the rights of any of [sic] defendants Robert Bolline and State of Michigan and the United States Treasury, if any." Subsequently, the parties stipulated that the state had an interest superior to any other party at bar. This stipulation was recited in the trial court's final order, where the trial court ruled, in part, that plaintiffs' rights were subject to the state's interests.

Res judicata bars relitigation of claims actually litigated and those claims arising out of the same transaction that could have been litigated. *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). The test for determining whether two claims are identical for res judicata purposes is whether the same facts or evidence are essential to

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[5] Whether plaintiffs' proposed farm should be allowed is a separate issue and is not before this Court. We were simply asked to determine whether plaintiffs must seek a permit, and we answered that question in the affirmative. We offer no opinion with respect to the propriety of plaintiffs' proposed use of a wetland.

the maintenance of the two claims. *Jones v State Farm Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993).

Plaintiff Huggett's complaint in the prior proceedings sought the court's determination of the state's rights in the land. Plaintiff Huggett then stipulated the superiority of the state's interest. In the case at bar, plaintiffs sought to litigate the validity of the condition placed in the deed; however, plaintiff Huggett did not limit the prior proceeding to foreclosure. He specifically asked for a determination of the state's rights in the land. Because the rights of the state are essentially dependent on the validity of the condition in the deed, the same facts or evidence were essential to the maintenance of both claims, and the validity of the condition could have been litigated in the prior proceeding. It is inequitable to allow plaintiff Huggett to clearly set out a quiet-title claim against the state in a prior proceeding, concede the issue, and then subsequently argue that he did not have the ability to challenge the state's interest in the first place. Consequently, we find that in the instant action plaintiffs should have been precluded from challenging the state's interest in the property.

Moreover, even if the doctrine of res judicata did not apply, the condition placed on the land at issue is not nominal, and the state's interest in the land is enforceable. MCL 554.46; MSA 26.46 provides:

> When any conditions annexed to a grant or conveyance of lands are merely nominal and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no

> case operate as a forfeiture of the lands conveyed subject thereto.

In *Barrie v Smith*, 47 Mich 130, 135; 10 NW 168 (1881), our Supreme Court stated:

> The fair construction of this statute is that conditions in a conveyance which evince no intention of actual or substantial benefit to the grantor are merely nominal. Where the observance of the condition is an existing substantial benefit, or its breach works an actual substantial injury to the grantor it cannot be considered as nominal . . . .

Barrie also states that adjoining landowners may place conditions on adjoining lands they transfer to protect their interest in preventing "noxious business from being carried on thereon, or in having it improved in a certain manner." *Id.* at 134. We interpret *Barrie* as holding that adjoining landowners have a special interest in enforcing use conditions placed upon adjoining land they transfer, and that these conditions are not nominal. Because the land at issue adjoins state land, and the state put the condition on land adjoining land it owns, the state has a special interest in enforcing the condition, and the condition is not nominal.

IV

On cross appeal, plaintiffs claim that the state's interest in the land is unenforceable because it violates the rule against perpetuities. As previously discussed, plaintiffs are precluded from challenging the validity of the state's interest in the land at issue. Moreover, even if plaintiffs were not precluded from raising this issue, the claim must fail. Generally speaking, rights of entry are not subject to the com-

mon-law rule against perpetuities, see 61 Am Jur 2d, Perpetuities and Restraints on Alienation, § 47, pp 58-59; 1 Restatement Property (Donative Transfers), 2d, § 1.4 comment c, p 49, and because plaintiffs' terminable interest was initially created in a conveyance from the state, Michigan's statutory limitation placed on rights of entry is inapplicable, MCL 554.61; MSA 26.49(11).

Affirmed in part and reversed in part.

SAAD, J., concurred.

WHITE, P.J. (*concurring in part and dissenting in part*). While it is clearly consistent with the public policy of this state, as expressed in subsection 30302(1)(c) of the wetlands protection act, MCL 324.30302(1)(c); MSA 13A.30302(1)(c), to permit and facilitate operation of a commercial cranberry-growing facility in a wetland area, I agree that the farming exception to the permit requirement, MCL 324.30305(2)(e); MSA 13A.30305(2)(e), when construed in the context of the entire act, does not evince a legislative intent to except from the permit requirement "all activities necessary to commence . . . farming in a commercially viable manner and to bring land into agricultural production," without regard to the scope or nature of those activities. I agree that plaintiffs' proposed alterations in preparation for farming were subject to the permit requirement.

I do not agree that plaintiffs' challenge to the state's reversionary interest in the property is barred by res judicata. The prior proceeding was a foreclosure action. The state was included as a party because of its reversionary interest in the property. Huggett stipulated the superiority of the state's interest. In so stipulating, Huggett acknowledged that the state's interest would survive the foreclosure proceeding and that his

interest in the property was subject to the state's reversionary rights under the deed from the state to Michigan National Bank. Acknowledging the superiority of the reversionary rights in the deed (whatever their scope and interpretation) over Huggett's interest as the mortgagee, and after foreclosure, fee owner, is not tantamount to acknowledging that the reversionary rights themselves are valid and not subject to challenge on the basis of mistake[1] or because based on nominal conditions. In sum, the stipulation in the prior action was a concession that the state's reversionary interest would survive the foreclosure action as superior to Huggett's rights; it was not a concession that the interest is valid and enforceable.

I agree, however, that the state's reversionary interest is not based on conditions that are "merely nominal" "evinc[ing] no intention of actual and substantial benefit to" the state, and that the interest is not unenforceable as violative of the rule against perpetuities.

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[1] This was one of the claims asserted below.

SAGINAW COUNTY v JOHN SEXTON CORPORATION OF MICHIGAN

SAGINAW COUNTY v PEOPLE'S GARBAGE DISPOSAL, INC

Docket Nos. 199519, 199520. Submitted July 1, 1998, at Lansing. Decided October 16, 1998, at 9:05 A.M. Leave to appeal sought.

Saginaw County brought actions in the Saginaw Circuit Court against landfill operators John Sexton Corporation of Michigan and People's Garbage Disposal, Inc., seeking payment by the defendants to the Saginaw County Treasurer of surcharges collected by the defendants from trash depositors at fifty cents a cubic yard of solid waste as provided under the county's solid waste ordinance. The defendants counterclaimed that the ordinance was invalid and unenforceable because it was preempted by state waste disposal statutes and regulations and that the surcharge constituted a tax that was invalid because it was not submitted to voter approval as required under the Headlee Amendment, Const 1963, art 9, § 31. The actions were consolidated, and the court, William A. Crane, J., on a joint motion by the defendants for summary disposition, partially granted the motion, ruling that state statutes had preempted most of the ordinance, but that the surcharge provision was severable from the ordinance and was valid and enforceable. The defendants appealed separately, and their appeals were consolidated.

The Court of Appeals *held*:

1. The ordinance, in requiring the defendants to perform fee collection duties, does not improperly delegate governmental authority to private parties. The ordinance merely imposes a ministerial duty on landfill owners and operators to collect fees payable by those who deposit waste in landfills. The ordinance does not provide landfill operators with any discretion in setting the surcharge amount or in deciding from whom the surcharge is collected. The defendants' claim that the duty of tax or fee collection may be imposed only on a private party who itself has an obligation to pay the tax or fee is without merit. The defendants failed to cite authority supportive of this claim. A landfill operator's duty to collect the surcharge pursuant to the ordinance is analogous to the duty imposed by the Uniform City Utility Users Tax Ordinance, MCL 141.1161 *et seq.*; MSA 5.3188(261) *et seq.*, on utility service providers to collect a tax imposed on utility users.

2. The surcharge represents a valid regulatory fee, not a tax, and enactment of the surcharge did not violate the Headlee Amendment. A fee generally is exchanged for a service rendered or a benefit conferred, and some reasonable relationship must exist between the amount of the fee and the value of the service or benefit. A regulatory fee will be deemed to be an illegal tax when the revenue generated by the regulation exceeds the cost of the regulation. In this case, the surcharge is reasonably related to the costs involved in implementing the county's solid waste disposal plan.

3. The surcharge provision of the ordinance is not preempted by the solid waste management act, MCL 324.11501 *et seq.*; MSA 13A.11501 *et seq.* Preemption occurs when a municipal ordinance directly conflicts with a statute or statutory scheme or when, even if the ordinance and the statute do not directly conflict, the state statutory scheme occupies an entire field of regulation. In this case, the surcharge provision does not conflict with the solid waste management act or with regulations promulgated thereunder, and the act does not occupy the field of landfill regulation because it expressly prohibits only those local regulations that attempt to regulate landfill location and development.

4. MCL 46.11; MSA 5.331—which empowers a county board of commissioners to pass ordinances that relate to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a township, city, or village within the limits of the county—grants Saginaw County authority to adopt the surcharge requirement. The surcharge requirement is consistent with the county's solid waste management plan and does not affect landfill location or development and therefore is not a local regulation that is prohibited by subsection 11538(8) of the solid waste management act, MCL 324.11538(8); MSA 13A.11538(8). Subsection 115201(1), MCL 324.115201(1); MSA 13A.11520(1), contemplates the imposition of the surcharge.

5. The imposition of the surcharge on only those who deposit solid waste at Type II landfills does not violate equal protection guarantees under the federal and state constitutions. A rational basis exists for imposing the surcharge on those who increase the county's solid waste management burden and for imposing the surcharge only for solid waste deposited in Type II landfills, which, unlike Type III landfills, accept a variety of solid waste from the general public.

6. The penalty provisions of the ordinance are invalid because they exceed those that the Legislature has authorized counties to impose, MCL 46.10b(1); MSA 5.330(2)(1). However, the invalid pen-

alty provisions have no effect on the enforceability of the surcharge requirement.

Affirmed.

1. COUNTIES — TAX OR FEE COLLECTION — PRIVATE ENTITIES — DELEGATION OF POWERS.

A county does not improperly delegate legislative authority to private entities in requiring them to collect a tax or fee as required under an ordinance where the ordinance merely imposes a ministerial duty of collection and does not provide the private entities with discretion to decide how much to collect and from whom.

2. CONSTITUTIONAL LAW — HEADLEE AMENDMENT — REGULATORY FEES — TAXES.

The amount of a regulatory fee must be reasonably related to the value of the service or benefit conferred, and a regulatory fee will be deemed to be a tax for which voter approval is required by the Headlee Amendment where the revenue generated by the regulation exceeds the cost of the regulation (Const 1963, art 9, § 31).

3. ENVIRONMENT — SOLID WASTE MANAGEMENT ACT — PREEMPTION OF LOCAL LANDFILL REGULATION.

The solid waste management act preempts only those local regulations that attempt to regulate landfill location and development (MCL 324.11538; MSA 13A.11538).

4. COUNTIES — ORDINANCES.

A county board of commissioners is statutorily empowered to pass ordinances that relate to county affairs and do not contravene the general law of the state or interfere with the local affairs of a township, city, or village within the limits of the county; such authority is liberally construed to include powers fairly implied and not prohibited by the state constitution (Const 1963, art 7, § 34; MCL 46.11[m]; MSA 5.331[m]).

5. CONSTITUTIONAL LAW — EQUAL PROTECTION — RATIONAL BASIS.

The rational basis test is employed by courts when considering an equal protection claim raised by one who is not a member of a protected class or does not allege a violation of a fundamental right (US Const, Am XIV; Const 1963, art 1, § 2).

Jensen, Gilbert, Smith & Borello, P.C. (by *Peter C. Jensen*), for the plaintiff.

Thomas M. Fallucca, for the defendants.

Before: MURPHY, P.J., and GRIBBS and GAGE, JJ.

GAGE, J. Defendants appeal as of right the trial court's partial denial of their motion for summary disposition. We affirm.

This case involves a dispute regarding the enforceability of § 280 of the Saginaw County Solid Waste Ordinance. In 1984, plaintiff's solid waste management plan, by which it accepted responsibility for countywide planning and management of solid waste disposal, was approved by the Department of Natural Resources (DNR). In 1993, the DNR approved plaintiff's update to the plan. Paragraph eight of the update provided that plaintiff's board of commissioners would pursue and explore all feasible means of financing countywide solid waste management, including tax levies, state and federal grants, bond issues, and licensing fees. Pursuant to the update, the board of commissioners also intended to establish an enforcement agency to carry out the provisions of the plan. The board envisioned enforcement agency funding from "surcharges, tipping fees and/or other appropriate means of financing."

In November 1990, Saginaw County voters approved a millage increase for the purpose of establishing and operating plaintiff's recycling and other waste management programs. However, in 1993 plaintiff elected not to collect this millage because of plaintiff's concern that it would exceed its millage cap. Also in 1993, the Governor withdrew all state funding of county health departments.

In August 1993, plaintiff's board of commissioners adopted a solid waste ordinance, § 280 of which imposed a fifty-cent surcharge on every cubic yard of solid waste disposed of in county landfills. Subsection 280.2 mandated that all surcharge payments be paid

quarterly to the county treasurer, but failed to identify the intended payor. Defendants admitted that they had collected the surcharge from those dumping waste in their landfills, but did not remit any of the collected money to the county treasurer. Plaintiff initially filed separate complaints in January and February 1994 against defendant landfill operators alleging their nonpayment of the disposal surcharge. Defendants counterclaimed that the ordinance was invalid and unenforceable because it was preempted by state waste disposal statutes and regulations, and that the surcharge constituted an illegal tax and was unconstitutionally vague. A September 1994 amendment of subsection 280.2 stated explicitly that landfill owners and operators were to collect the surcharge and remit quarterly surcharge payments to the county treasurer.

In May 1995, defendants moved for summary disposition. The trial court agreed that state statutes had preempted most of the ordinance, and concluded that the surcharge provision as originally enacted was unconstitutionally vague. Because plaintiff had brought its claims pursuant to this vague preamendment § 280, the trial court dismissed plaintiff's complaint. However, the trial court found that the September 1994 amendment of § 280 cured its vagueness problem and that the surcharge was severable and would remain in effect.

I

First, defendants contend that the trial court erred in upholding the validity of postamendment § 280. They argue that this section improperly delegates governmental authority to private parties by requiring

that defendants perform tax collection duties. We disagree.

Defendants cite two Michigan cases addressing delegations of legislative authority. *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1; 367 NW2d 1 (1985); *Penn School Dist No 7 v Lewis Cass Intermediate School Dist Bd of Ed*, 14 Mich App 109; 165 NW2d 464 (1968). The Supreme Court in *Blue Cross & Blue Shield*, *supra* at 51, explained that "[c]hallenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power." Legislative delegations of power are reviewed in terms of the adequacy of the standards provided to guide the exercise of the power whether the Legislature has delegated power to an administrative agency, the judiciary, or a private group or person. *Dukesherer Farms, Inc v Director of the Dep't of Agriculture*, 405 Mich 1, 25, n 4; 273 NW2d 877 (1979). The Supreme Court concluded in *Blue Cross & Blue Shield*, *supra*, at 52-55, that the Legislature had impermissibly conferred standardless discretion on the Insurance Commissioner to review risk factors proposed by a statutorily created actuary panel. In *Penn School Dist*, *supra* at 121-124, this Court recognized that legislative authority generally may not be delegated to private persons or associations, but concluded that the committees authorized to determine school district boundaries did not qualify as private entities because they had been created by statute, and also that these committees possessed sufficient statutory guidance regarding the exercise of their powers.

However, the instant case does not involve a delegation of legislative authority similar to those involved in the cases cited by defendants. The ordinance at issue merely imposes a ministerial duty on landfill owners and operators to collect fees payable by those who deposit waste in the landfills. Plaintiff's ordinance does not provide landfill operators with any discretion in setting the landfill disposal surcharge amounts or in deciding from whom it will collect the surcharge. Under the ordinance, defendants must simply collect fifty cents a cubic foot of waste deposited in their landfills and remit its collections quarterly to the county treasurer. The solid waste management act, MCL 324.11501 *et seq.*; MSA 13A.11501 *et seq.*, also imposes on landfill owners and operators a nearly identical quarterly surcharge collection requirement of municipality-imposed impact fees. MCL 324.11532(4); MSA 13A.11532(4). We conclude that both plaintiff and the Legislature may constitutionally impose these ministerial functions on private landfill owners and operators. See *Whatcom Co v Taxpayers of the Whatcom Co Solid Waste Disposal Dist*, 66 Wash App 284, 293-294; 831 P2d 1140 (1992) (upholding ordinance's delegation of collection of garbage disposal excise tax, a ministerial function, to private garbage collectors). Therefore, because the instant ordinance does not vest defendants with the authority to exercise any legislative discretion, defendants' reliance on the *Blue Cross & Blue Shield, supra*, and *Penn School Dist, supra*, cases involving delegations of legislative authority is misplaced.

Defendants also failed to cite authority to support their argument that it is illegal for a governmental entity to impose a fee or tax collection requirement

on any private entity unless the private entity itself has an obligation to pay the tax or fee. The Uniform City Utility Users Tax Ordinance (Utility Tax Ordinance), MCL 141.1161 *et seq.*; MSA 5.3188(261) *et seq.*, contradicts defendants' argument. While § 3 of the Utility Tax Ordinance imposes a tax on utility users, § 4 imposes on the utility service providers the ministerial task of billing utility customers for the tax. The utility service providers' billing duty is analogous to the landfill operators' duty to collect surcharges from landfill depositors. Therefore, defendants' argument that the duty of tax or fee collection may be validly imposed only on a private party who itself has an obligation to pay the charge is without merit.

II

Second, defendants argue that the landfill surcharge constitutes an illegal tax that violates the Headlee Amendment. Section 31 of the Headlee Amendment prohibits local governments

> from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. [Const 1963, art 9, § 31.]

Plaintiff did not submit the landfill surcharge issue to the electorate. Therefore, should the surcharge provision impose a tax, it is illegal and unenforceable.

Whether the instant landfill surcharge represents a valid user fee or unconstitutional tax is a question of law that we review de novo. *Gorney v Madison Heights*, 211 Mich App 265, 267; 535 NW2d 263

(1995). Although no bright-line test exists for distinguishing one from the other, a fee generally is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. *Bolt v Lansing*, 221 Mich App 79, 86; 561 NW2d 423 (1997), lv gtd 456 Mich 946 (1998); *Northgate Towers Associates v Royal Oak Charter Twp*, 214 Mich App 501, 503; 543 NW2d 351 (1995), modified on other grounds 453 Mich 962 (1996). A regulatory fee will be construed as an illegal tax when the revenue generated by the regulation exceeds the cost of the regulation. *Rouge Parkway Associates v City of Wayne*, 423 Mich 411, 419; 377 NW2d 748 (1985). The Supreme Court examined the regulatory fee/tax distinction in *Merrelli v St Clair Shores*, 355 Mich 575; 96 NW2d 144 (1959).

> To be contrasted with the revenue derived from municipal taxation are those moneys accruing from the issuance of licenses or permits coming under the police power of the community. These are regulatory measures involving the public health, morals, or welfare. . . .
>
> * * *
>
> . . . One involves an exercise of the municipal power of taxation. Its purpose is to raise money. The other is an exercise of the police power of the community. Its purpose is the protection of the public health, safety, and welfare. True, certain moneys may be obtained in connection therewith, but such moneys are incidental to the accomplishment of the primary purpose of guarding the public. The differences between the 2 were well expressed in *Vernor v Secretary of State*, 179 Mich 157, 167-170 [146 NW 338 (1914)], involving the validity of an automobile licensing fee:

> "To be sustained, the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies. [Citations omitted.]
>
> "Anything in excess of an amount which will defray such necessary expense cannot be imposed under the police power, because it then becomes a revenue measure. [Citations omitted.]
>
> * * *
>
> "In determining whether a fee required for a license is excessive or not, the absence or amount of regulatory provisions and the nature of the subject of regulation should be considered, and, if the amount is wholly out of proportion to the expense involved, it will be declared a tax." [*Merrelli*, *supra* at 582-584.]

The instant landfill surcharge qualifies as a regulatory fee because it is reasonably related to the costs involved in managing the county's disposal of solid waste. Our review of the county's estimated budgetary figures for 1994 indicates that the revenue generated by the landfill surcharge of § 280 does not exceed the costs of implementing the county's solid waste plan. The budget reflects that in 1994 the surcharge generated nearly $400,000. For the same year, the operational costs of the solid waste plan's health department, recycling department, and solid waste (administrative) department totaled over $450,000. According to the county's solid waste management director, these operational costs included county solid waste employee salaries, benefits, and travel expenses, promotion of the county's recycling program, and ordinance enforcement and implemen-

tation activities such as monitoring who utilizes each landfill, recording the landfill activity of each hauler, ensuring that no improper waste enters the landfills, and aerial capacity estimates of landfill space. Thus, the revenues derived from the surcharge fall below these costs of implementing the county's solid waste disposal plan.

Defendants insist that the revenues derived from the landfill surcharge should not be measured against the costs of implementing the county's solid waste disposal plan in its entirety, but against only the health department's budgetary figures. The health department, whose responsibility it is to conduct landfill inspections and to enforce landfill ordinances and statutes, estimated its share of budgetary expenses to amount to less than $120,000. Defendants thus reason that because the landfill surcharge revenues greatly exceed actual landfill inspection and enforcement costs, the surcharge represents a general revenue-raising tax. We disagree.

In *Bowers v Muskegon*, 305 Mich 676; 9 NW2d 889 (1943), the Supreme Court addressed the issue whether revenue from newly installed parking meters constituted a fee or a tax. Muskegon's parking meter ordinance provided that the city would apply parking meter revenues to parking meter regulation and enforcement and to "other traffic control devices and regulations." *Id.* at 681. The plaintiffs alleged that the parking meter fees could exceed by $18,000 the amount of parking meter acquisition, maintenance, and policing costs, and other incidental enforcement expenses, and that they therefore constituted a tax. *Id.* at 682. However, the Supreme Court did not believe "that receiving revenue for 'other traffic con-

trol devices and regulations' . . . [was] so remote from the parking problem that to contemplate proceeds for such purposes from the parking meters is to create an intent as a matter of law to raise 'revenue under the guise of a police regulation.' " *Id.* at 682-683. The Court therefore concluded that the parking meter costs properly constituted fees. *Id.* at 685.

Similarly, we do not believe that any aspect of plaintiff's solid waste program is so remote from its waste disposal problems in landfills that to contemplate proceeds for its recycling program, solid waste administrative costs, and other solid waste purposes from the landfill surcharge revenues is to create an intent as a matter of law to raise revenue under the guise of a police regulation. Plaintiff's other solid waste efforts are intimately connected with its landfill regulations. For example, to the extent that plaintiff successfully promotes its recycling program, these efforts directly affect the amount of waste flowing into county landfills. We agree with the trial court's astute observations regarding this interrelationship:

> The Court further finds that said [landfill surcharge] fee is reasonably related to the cost of implementing the County's solid waste plan, and is proportionate and not in excess of the cost of the regulation. Contrary to defendants' assertion, this Court finds nothing inconsistent with imposing the costs of the recycling program upon those who use the landfills. As was pointed out at oral argument, part of providing solid waste service is preserving landfill space for county generated waste. Recycling is a necessary part of that program so as to ensure that landfills are not quickly filled up, requiring expansion or the opening of new facilities and all the attendant problems that follow. The Court accordingly concludes that the instant surcharge is not a tax as defendants' [sic] suggest but a regulatory fee.

We likewise conclude that the landfill surcharge represents a valid regulatory fee, not a tax, and that therefore enactment of the surcharge did not violate the Headlee Amendment.

III

Third, defendants also suggest that the solid waste management act (hereinafter the act) entirely preempts plaintiff's 1993 solid waste ordinance. Specifically, defendants challenge the trial court's conclusion that the act does not preempt amended § 280 of plaintiff's solid waste ordinance. A preemption determination involves legal questions of statutory interpretation, which we review de novo. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

Preemption occurs when a municipal ordinance directly conflicts with a statute or statutory scheme or when, even if the ordinance and the statute do not directly conflict, the state statutory scheme occupies an entire field of regulation. *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977). The *Llewellyn* Court provided the following guidelines to consider in determining whether an ordinance was preempted:

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.
>
> Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. While the pervasiveness of the state regulatory scheme is not generally suffi-

> cient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.
>
> . . . [W]here the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld. [*Id.* at 323-325 (citations omitted).]

The surcharge provision of § 280 does not conflict with the act or with any of the regulations promulgated thereunder. Therefore, § 280 is valid only if the act does not occupy the field of landfill regulation.

We do not believe that the act occupies the field to the extent that it preempts plaintiff's surcharge requirement. First, the act does not expressly provide that the state has exclusive authority to regulate solid waste disposal. To the contrary, § 11538 of the act, MCL 324.11538; MSA 13A.11538, contemplates local regulation of solid waste disposal. Subsection 11538(8) specifically addresses local landfill measures, explaining that any such ordinance that "prohibits or regulates the location or development of a solid waste disposal area, and which is not part of or not consistent with the approved solid waste management plan for the county, shall be considered in conflict with this part and shall not be enforceable." Thus, the act explicitly prohibits only those local regulations that attempt to regulate landfill location and development. Second, relevant legislative history regarding the predecessor of the current act (MCL 299.401 *et seq.*; MSA 13.29[1] *et seq.*) reveals that the House favored dual state and local control of solid

waste management, although it is impossible to discern the intent of the Senate. *Southeastern Oakland Co Incinerator Authority v Avon Twp*, 144 Mich App 39, 43-44, & 44, n 1; 372 NW2d 678 (1985). The repeal of the prior act and its reenactment as the current act occurred as part of the Legislature's attempt to reorganize all statutes relating to the environment and natural resources, and did not represent a change in legislative policy regarding solid waste. Senate Fiscal Agency Bill Analysis, SB 257, July 19, 1994. Third, as panels of this Court have previously recognized, the state's regulatory scheme of solid waste disposal is pervasive. *Southeastern Oakland Co Incinerator*, *supra* at 44. While this factor is evidence of preemption, pervasiveness is not generally sufficient by itself to infer preemption. *Llewellyn*, *supra* at 324. Fourth, while the nature of solid waste disposal may demand exclusive state regulation regarding location, development, and operation of solid waste disposal areas, see MCL 324.11538(8); MSA 13A.11538(8); *Southeastern Oakland Co Incinerator*, *supra* at 45-46, the instant surcharge provision does not affect these concerns. The surcharge provision is designed to offset the regulatory costs incurred by plaintiff in monitoring and enforcing its solid waste management plan. Different landfill locations and features are not identical, and regulatory costs related to solid waste disposal may vary from county to county. Therefore, for each county to effectively offset its costs would require regulation adapted to its particular local conditions. Because of the need for localized regulation in this area and because local regulations imposing varied surcharges on garbage disposal would not otherwise interfere with the state's uniform scheme regulating

landfill location, development, and operation, we believe the instant surcharge is a permissible local regulation that is compatible with the Legislature's statutory scheme. *Llewellyn*, *supra* at 324-325. Thus, although the state has regulated extensively in the area of solid waste disposal, we conclude that the state's regulatory scheme does not preempt the instant surcharge. The instant surcharge is consistent with plaintiff's existing solid waste management plan and does not attempt to regulate landfill location or development; it is therefore valid under subsection 11538(8).

Defendants contend that this Court's opinions in *Fort Gratiot Charter Twp v Kettlewell*, 150 Mich App 648; 389 NW2d 468 (1986), *Weber v Twp of Orion Bldg Inspector*, 149 Mich App 660; 386 NW2d 635 (1986), and *Southeastern Oakland Co Incinerator*, *supra*, mandate that we find the instant surcharge preempted. All of these cases held that township ordinances regulating landfill operations were preempted by the act. *Fort Gratiot*, *supra* at 655; *Weber*, *supra* at 663; *Southeastern Oakland Co Incinerator*, *supra* at 46. We distinguish these cases on the basis that none of them specifically addressed a local surcharge on landfill disposal. The instant surcharge represents the primary source of plaintiff's revenue for enforcement of its solid waste plan. The surcharge is imposed on those who haul garbage to landfills, is to be collected by landfill operators like defendants, and is to be forwarded to the county. The surcharge does not affect landfill operations. To the extent that we can discern the subject matter of the local solid waste ordinances addressed in the cases cited by defendants, they all

affected landfill development or operation.[1] Therefore, defendants' reliance on these prior opinions is misplaced.

The trial court properly severed the surcharge provision from the preempted provisions of the ordinance. The trial court found most of the other provisions of the ordinance, which addressed various landfill operational requirements, invalid. However, § 422 of the ordinance contained a severability provision, reflecting plaintiff's desire that all valid provisions remain in effect in the event some provisions were stricken. The surcharge provision remains enforceable independently of the invalid portions of the ordinance, and we believe the surcharge provision remains reasonable in view of the ordinance as originally drafted. MCL 8.5; MSA 2.216; *Citizens for Logical Alternatives & Responsible Environment v Clare Co Bd of Comm'rs*, 211 Mich App 494, 498; 536 NW2d 286 (1995).

The trial court did not address defendants' subargument that the state should properly provide the funding for the county's solid waste management plan because plaintiff had its health department certified as an environmental quality enforcement agency. Nor did the trial court discuss defendants' contention that

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[1] Exhibit five to defendants' lower court brief in reply to plaintiff's response to defendants' motion for summary disposition is a copy of the Avon Township landfill ordinance that this Court deemed preempted in *Southeastern Oakland Co Incinerator Authority*, *supra*. The Avon Township ordinance purported to regulate landfill permit and bond requirements, landfill performance standards and other operational regulations, landfill soil excavation, and landfill restoration, all areas in which the act and regulations promulgated thereunder currently regulate. The *Weber* Court also addressed "certain local ordinances preventing [plaintiffs] from operating a sanitary landfill." *Weber*, *supra* at 662. *Fort Gratiot*, *supra*, contains no description of the township ordinances there at issue.

MCL 324.11532(1); MSA 13A.11532(1), which authorizes municipalities to impose "an impact fee of not more than 10 cents per cubic yard on solid waste that is disposed of in a landfill," does not authorize counties to impose such a fee. However, regarding defendants' state-funding argument, MCL 324.11547(2); MSA 13A.11547(2) does not forbid the receipt of funds from other sources for the purpose of funding a county's solid waste management plan. Although § 11547 could conceivably provide a basis for an action by a city or county against the state in the event that the state failed to provide the funding described therein, it does not establish a private cause of action by individuals against a city or county that tries to make up a deficiency when the state fails to provide the described funding. Furthermore, regarding defendants' second subargument, although subsection 11532(1) of the act fails to mention counties while authorizing municipalities to impose a landfill impact fee, § 11532 merely constitutes a limitation on the amount of fees that a municipality may impose on landfill disposal. While § 11532 neglects to mention counties, subsection 11520(1), MCL 324.11520(1); MSA 13A.11520(1), contemplates that "[f]ees collected by a health officer [of a certified city, county, or district department of health—see subsection 11504(1)] under this part" may be used to implement a solid waste management plan.[2] We infer from the fact that

[2] Subsection 11520(1) refers to fees collected "under this part." Several sections of the act establish fees. For example, § 11509, MCL 324.11509; MSA 13A.11509, delineates various construction permit application fees, § 11512, MCL 324.11512; MSA 13A.11512, contains a list of landfill operating license application fees, and § 11525a, MCL 324.11525a; MSA 13A.11525a, imposes on landfill owners and operators a solid waste program administration fee. However, none of these fees are receivable by a

the act contains no explicit limitation on county-imposed landfill disposal fees and the fact that the act contemplates that counties will collect fees under the act, that counties may impose such fees.

IV

Fourth, defendants argue that the surcharge is invalid because plaintiff possessed no authority to impose it. As a political subdivision of the state, plaintiff county possesses only those powers delegated to it by constitution or statute. *Mudge v Macomb Co*, 210 Mich App 436, 442; 534 NW2d 539 (1995), rev'd in part on other grounds 458 Mich 87; 580 NW2d 845 (1998). We conclude that plaintiff possessed statutorily granted authority to promulgate the instant surcharge ordinance.

MCL 46.11; MSA 5.331 invests a county board of commissioners with a list of powers, including the power to,

> [b]y majority vote of the members of the county board of commissioners elected and serving, *pass ordinances that relate to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a*

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city or county health officer. Subsection 11509(7) mandates that the department of environmental quality (the department) deposit the construction permit application fees in the state's solid waste management fund (created pursuant to § 11550, MCL 324.11550; MSA 13A.11550), subsection 11512(11), MCL 324.11512(11); MSA 13A.11512(11), also orders the department to deposit the operating license application fees into the solid waste management fund, and subsection 11525a(5) directs that solid waste administration fees also be deposited in the solid waste management fund. The only other fees explicitly discussed within the act are municipal impact fees in § 11532, MCL 324.11532; MSA 13A.11532. Because none of the fees specifically authorized by the act represent fees that a county could collect as fees "under this part," we conclude that § 11520 must contemplate that counties may impose various solid waste fees of their own, such as the instant surcharge.

> *township, city, or village* within the limits of the county, and . . . provide suitable sanctions for the violation of those ordinances. [MCL 46.11(m); MSA 5.331(m) (emphasis added).]

The county's statutorily granted authority should be liberally construed in plaintiff's favor and includes those powers "fairly implied and not prohibited by th[e] constitution." Const 1963, art 7, § 34. We again review de novo this issue of statutory interpretation. *Oakland Co Bd of Co Rd Comm'rs*, *supra*.

Construing MCL 46.11(m); MSA 5.331(m) liberally, we conclude that plaintiff possessed authority to enact the landfill surcharge. The surcharge was intended to fund the enforcement of the county's solid waste management plan, and therefore, it related to county affairs. Defendants do not allege that the surcharge in any way interfered with the local affairs of a city, township, or village. Therefore, we conclude that MCL 46.11(m); MSA 5.331(m) constituted at least one basis for plaintiff's passage of the surcharge ordinance.

Furthermore, we believe plaintiff possessed authority to pass the surcharge ordinance under the solid waste management act. As we previously mentioned, subsection 11538(8) of the act, MCL 324.11538(8); MSA 13A.11538(8), declares that, after approval of a countywide solid waste management plan by the Department of Environmental Quality, only a county ordinance that affects landfill location or development and is not part of or is inconsistent with the county's approved plan is prohibited. Because the surcharge does not fall into the category of ordinances explicitly prohibited by subsection 11538(8), it is valid. The surcharge also comports with the most

recent, state-approved update to plaintiff's solid waste management plan. The update requires that the county board of commissioners establish an enforcement agency to carry out the plan and provides for enforcement agency funding "by surcharges, tipping fees and/or other appropriate means of financing."

Finally, subsection 11520(1) provides that "[f]ees collected by a health officer [defined within § 11504 of the act, MCL 324.11504; MSA 13A.11504, as a certified city or county health department's administrative officer] under this part shall be deposited with the city or county treasurer, who shall keep the deposits in a special fund designated for use in implementing this part." Plaintiff's health department is a certified health department that may collect fees to implement its solid waste management plan. As we discussed above, we believe that subsection 11520(1) contemplates that such certified cities and counties may impose solid waste disposal fees.

V

Fifth, defendants claim that amended § 280 violates the Equal Protection Clauses of the United States and Michigan Constitutions, US Const, Am XIV; Const 1963, art 1, § 2. Defendants argue that the ordinance creates a classification of persons who utilize landfills and improperly imposes the costs of the county's solid waste program on them, when the program benefits all the county's residents. Defendants also contend that the surcharge is not applied equally because only Type II landfill users must pay the fee. We review these constitutional issues de novo. *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 263; 583 NW2d 512 (1998).

Where the proponent of an equal protection argument is not a member of a protected class, or does not allege violation of a fundamental right, we review the equal protection claim using a rational basis test. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 349; 578 NW2d 274 (1998). Under the rational basis test, we will uphold the challenged statute or ordinance if it furthers a legitimate governmental interest and if the classification is rationally related to achieving the interest. *Id.*

Defendants' equal protection arguments lack merit. The county imposed the surcharge to fund the enforcement of its solid waste management plan, a legitimate, state-approved interest. Regarding defendants' argument that the surcharge improperly applies only to landfill users, it was certainly reasonable for the county to impose the surcharge on only those people who deposited their waste in county landfills, thus increasing the county's solid waste management burden. Regarding defendants' argument that the surcharge improperly applies only to Type II and not to Type III landfills, these two types of landfills are labeled and classified differently because each type is authorized to collect different types of wastes. Type II landfills potentially receive "household waste, municipal solid waste incinerator ash" and "commercial waste, nonhazardous sludge, conditionally exempt small quantity generator waste, and industrial waste," 1993 AACS, R 299.4104(d). Type III landfills include construction and demolition waste landfills or industrial waste landfills, but are not hazardous waste landfills. 1993 AACS, R 299.4105(a)(ii). The mere fact that these different types of landfills receive different types of waste would constitute a rational basis for

imposing a fee on disposal in one type and not in the other. Although the record is unclear what specific rationale led plaintiff to impose disposal fees on waste entering only Type II landfills, testimony indicated that all Type III landfills in Saginaw County are privately owned facilities, in which their owners dispose of their own industrial wastes. Perhaps these privately owned Type III landfills also generate less waste volume than the Type II landfills open to the general public. In any event, the Legislature has also seen fit to distinguish between Type II and Type III landfills, imposing larger construction permit application fees for Type II landfills (see MCL 324.11509[2], [3]; MSA 13A11509[2], [3]), and requiring larger operating license application fees for all Type II landfills receiving more than five hundred tons of waste a day rather than the flat operating license application fee paid by Type III landfills (see MCL 324.11512[7]-[9]; MSA 13A.11512[7]-[9]). Therefore, we conclude that the fact that the two types of landfills contain different types of waste constitutes a rational basis for imposing a fee on disposal in one type while imposing no fee for disposal in the other.

VI

Lastly, defendants contend that plaintiff's ordinance contains penalty provisions for its violation beyond those that the Legislature has authorized a county to impose and therefore these penalty provisions are preempted. We note that although defendants failed to preserve this argument by raising it before the trial court, we may address it for the first time on appeal because it involves only a question of law. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).

We agree with defendants that the penalty provisions of the ordinance are invalid and unenforceable. MCL 46.10b(1); MSA 5.330(2)(1) limits the penalties imposed on one who violates an ordinance to "a fine of not more than $500.00 or imprisonment for not more than 90 days, or both." Subsection 333.1, apparently mislabeled within the ordinance as subsection 332.1, provides for civil penalties of from $1000 to $3000, and subsection 334.1 authorizes fines of up to $10,000 a day for "major violations" of the ordinance. These ordinance penalties clearly exceed those authorized by the Legislature and are therefore preempted and unenforceable.[3] *Llewellyn*, *supra* at 322. However, the mere fact that the ordinance authorizes the imposition of a greater penalty than does the statute does not invalidate the ordinance. *Kalita v Detroit*, 57 Mich App 696, 705; 226 NW2d 699 (1975). Therefore, the surcharge provision remains enforceable.

Affirmed.

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[3] We reject plaintiff's contention that the penalty provisions of the ordinance are consistent with MCL 324.11546; MSA 13A.11546 and therefore are valid. Subsection 11546(2) authorizes fines of up to $10,000 a day for violation of "any provision of this part or rules promulgated under this part" or for failure "to comply with any permit, license, or final order issued pursuant to this part." Plaintiff's ordinance constitutes neither a rule promulgated under this part, nor a permit, license, or final order issued pursuant to the act. Therefore, § 46 cannot be construed to permit plaintiff's ordinance to impose penalties beyond those authorized by MCL 46.10b(1); MSA 5.330(2)(1).

AMTOWER v WILLIAM C RONEY & CO (ON REMAND)

Docket No. 211717. Submitted May 19, 1998, at Lansing. Decided October 16, 1998, at 9:10 A.M.

Franklin Amtower and others who had invested in securities following the advice of William C. Roney & Co., a limited partnership, brought an action in the Wayne Circuit Court against Roney, alleging that Roney had misrepresented pertinent facts regarding the investments. Roney moved for summary disposition, seeking dismissal of the action or an order to compel arbitration of the dispute on the basis of customer agreements executed by the plaintiffs providing that any claims against Roney arising from the investments must be submitted to binding arbitration within one year after the cause of action accrued. Roney argued that the cause of action accrued in October 1990. The plaintiffs argued that it accrued in May 1991 and that the arbitration agreement was invalid. The court, Michael J. Callahan, J., concluded that the arbitration agreement was valid and that the cause of action accrued in October 1990. The court entered an order dismissing the action. The plaintiffs appealed. The Court of Appeals, in an unpublished opinion per curiam, issued February 11, 1997 (Docket No. 165777), affirmed the determination that the claims are arbitrable and reversed and remanded for arbitration, holding that procedural issues, such as the timeliness of an otherwise arbitrable claim, must be determined by the arbitrator, not the court. The defendant sought leave to appeal to the Supreme Court, which, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for the limited purpose of considering whether the Federal Arbitration Act (FAA), 9 USC 1 *et seq.*, requires that a court, instead of arbitrators, decide the issue of the timeliness of the plaintiffs' claims. 457 Mich 864 (1998).

On remand, the Court of Appeals *held*:

1. The FAA applies because this dispute arises out of contracts involving interstate commerce.

2. Because the parties broadly agreed to arbitrate the merits of any controversy arising between them, federal law requires that an arbitrator, rather than the trial court, must decide the procedural issue whether the plaintiffs' claims were timely. Michigan and fed-

eral law provides that arbitrators, rather than courts, should decide the application of such potential defenses to arbitration as contractual limitation periods, statutes of limitation, and the doctrine of laches.

3. Because parties may provide in an arbitration agreement that certain issues are to be determined by a court, the determination whether the issue of timeliness must be decided by an arbitrator or a court is a question of contract interpretation. Any ambiguity concerning whether a specific issue falls within the scope of arbitration must be resolved in favor of submitting the question to the arbitrator for resolution. When the contract provides for the arbitration of some issues, it is likely that the parties gave at least some thought to the scope of arbitration. Therefore, the law insists upon clarity before concluding that the parties did not want to arbitrate a related matter.

4. The broadly worded arbitration clauses, covering any controversy arising between the parties, indicate that the arbitrator must decide the timeliness issue. The contractual language does not unmistakably remove the timeliness issue from the purview of the arbitrator. The matter must be reversed and remanded to the trial court with instructions to grant the defendant's motion to compel arbitration.

Reversed and remanded.

1. ARBITRATION — FEDERAL ARBITRATION ACT.

The Federal Arbitration Act applies to disputes that arise out of contracts involving interstate commerce; the Supremacy Clause of the United States Constitution requires state courts to enforce the substantive provisions of the Federal Arbitration Act (US Const, art VI, cl 2; 9 USC 1 *et seq.*).

2. ARBITRATION — PROCEDURAL QUESTIONS — LIMITATION OF ACTIONS.

Under federal law, procedural questions, such as the timeliness of a claim, that grow out of a dispute and bear on its final disposition should be left to the arbitrator once it is determined that the parties are obligated to submit the subject matter of a dispute to arbitration; Michigan's strong policy favoring arbitration is in accord with federal precedent; federal and Michigan law also provides that arbitrators, rather than courts, should decide the application of such potential defenses to arbitration as contractual limitation periods, statutes of limitation, and the doctrine of laches.

3. ARBITRATION — CONTRACTS — SCOPE OF AGREEMENT TO ARBITRATE.

The parties to an arbitration agreement may provide in the agreement that certain issues are to be determined by a court instead of an

arbitrator; courts should ordinarily apply basic state-law principles that govern the formation of contracts in determining whether the parties agreed to arbitrate a certain matter; any ambiguity concerning whether a specific issue falls within the scope of arbitration, such as whether a claim is timely, must be resolved in favor of submitting the question to the arbitrator for resolution; because the parties to a contract that provides for the arbitration of some issues likely gave some thought to the scope of arbitration, the law insists upon clarity before concluding that the parties did not want to arbitrate a related matter.

Fieger, Fieger & Schwartz (by *Geoffrey N. Fieger* and *Rebecca S. Eaton*), for the plaintiffs.

Honigman Miller Schwartz and Cohn (by *Raymond W. Henney* and *Steven M. Ribiat*), for the defendant.

ON REMAND

Before: CORRIGAN, C.J., and HOLBROOK, JR., and YOUNG, JR., JJ.

YOUNG, JR., J. This case involves claims arising out of infelicitous securities investments in which defendant advised plaintiffs to participate. As a part of these investment transactions, plaintiffs executed customer agreements providing that any claims against defendant arising from the investments must be submitted to binding arbitration within one year of the accrual of the cause of action.

Plaintiffs sued and defendant moved to dismiss plaintiffs' claims on the basis that plaintiffs had agreed to arbitrate any such disputes and that, under the arbitration provisions, plaintiffs' claims were barred by the contractual limitation period. The trial court concluded that plaintiffs' claims were barred by the contractual limitation period and dismissed plain-

tiffs' action. The plaintiffs appealed. Relying on Michigan precedent, *Bennett v Shearson Lehman-American Express, Inc*, 168 Mich App 80, 83; 423 NW2d 911 (1987), we affirmed the determination that the plaintiffs' claims are arbitrable and reversed and remanded for arbitration, holding that procedural issues, such as the timeliness of an otherwise arbitrable claim, must be determined by the arbitrator, not the court. *Amtower v William C Roney & Co*, unpublished opinion per curiam of the Court of Appeals, issued February 11, 1997 (Docket No. 165777).

This case has now returned to us[1] on remand from the Supreme Court for the limited purpose of considering "whether the Federal Arbitration Act [FAA], 9 USC 1 *et seq.*, requires that a court instead of arbitrators decide the issue of the timeliness of plaintiffs' claims." 457 Mich 864 (1998). We hold that it does not, and we again conclude that the timeliness of plaintiffs' claims is a question to be decided by the arbitrator rather than the trial court. Accordingly, we reverse and remand this matter for further proceedings.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

For completeness, we repeat the facts of this case as set forth in our prior unpublished opinion:

> Following the advice of defendant, an investment adviser, plaintiffs invested in a limited partnership known as the Certified Historic Income Properties VII Limited Partnership (CHIPS VII). Twelve of the plaintiffs, Franklin Amtower, Richard Bumb, Richard Cummings, Thomas DeAgostino,

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[1] Upon remand, Judge HOLBROOK, JR., was substituted for (now) Justice CLIFFORD W. TAYLOR.

David Farber, Jeffrey Farber, Carl Freeman, Patricia Hutchinson, Gary Lambert, Paul Tatseos, Barry Miller and John Christ, executed customer agreements with defendant. These agreements provided that any claims against defendant arising out of the CHIPS VII transaction would be submitted to binding arbitration within one year of the accrual of the cause of action.

Plaintiffs brought this action pursuant to the Michigan Consumer Protection Act, MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.* Plaintiffs alleged that defendant misrepresented pertinent facts regarding the integrity of the CHIPS VII investment.[2] Defendant moved for summary disposition against Amtower, Bumb, Cummings, DeAgostino, David and Jeffrey Farber, Freeman, Hutchinson, Lambert, Tatseos, Miller and Christ, arguing for outright dismissal or, alternatively, for an order to compel arbitration. Defendant argued that the arbitration agreement precluded these plaintiffs from obtaining relief from the courts. Defendant also argued that the action had been brought more than one year from the time the cause of action accrued. Defendant argued that the cause of action accrued in October, 1990, when plaintiffs were notified that the CHIPS VII investments were failing. Plaintiffs argued in response that the arbitration agreement was invalid because they had not made a knowledgeable waiver of rights. Plaintiffs also argued that the cause of action did not accrue until May 8, 1991, when they learned that the CHIPS VII general partner had misappropriated funds.

The trial court concluded that the arbitration agreement was valid and that the cause of action accrued in October, 1990. The trial court granted defendant's summary disposition motion. The trial court later denied plaintiff[s'] motion for relief from order and for reconsideration pursuant to MCR 2.612.

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[2] Plaintiffs also alleged claims of breach of fiduciary duty, breach of contract, and negligence.

On appeal, plaintiffs abandoned any claim that the arbitration agreements were invalid and argued only that the trial court erred in determining that their cause of action accrued in October 1990. Defendant argued that the court correctly made this determination. Although not an issue raised by the parties, we held in our prior opinion that the arbitrator, not the trial court, should decide whether plaintiffs' claims were barred by the contractual one-year limitation period:

> Although the existence of a contract to arbitrate and its enforceability is a judicial question that cannot be decided by an arbitrator, *City of Huntington Woods v Ajax Paving [Industries, Inc (After Remand)]*, 196 Mich App 71, 74; 492 NW2d 463 (1992), procedural matters arising out of an arbitrable dispute are for the arbitrator, and not the court, to determine. *Bennett v Shearson Lehman-American Express, Inc*, 168 Mich App 80, 83; 423 NW2d 911 (1987). As such, the timeliness of bringing of an arbitration proceeding is a procedural issue to be determined by the arbitrator rather than the courts. *Id.*; see also *Nielsen v Barnett*, 440 Mich 1, 10; 485 NW2d 666 (1992). Therefore, the trial court erred in making a determination regarding when plaintiffs' cause of action accrued.

On the basis of defendant's argument in seeking leave to appeal to the Supreme Court, that the FAA preempted state law and that federal law required the court rather than an arbitrator to determine the question of timeliness, the Supreme Court, in lieu of granting leave to appeal, remanded the matter for further consideration.[3]

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[3] Although defendant mentioned the FAA and cited various federal cases in arguing before this Court that the trial court properly calculated the accrual date of plaintiffs' claims, defendant did not, until it filed briefs in

II. ANALYSIS

Now that it has made its legal position more clear, we agree with defendant that the FAA applies to this dispute, which dispute unquestionably arises out of contracts involving interstate commerce. *Allied-Bruce Terminix Cos, Inc v Dobson*, 513 US 265; 115 S Ct 834; 130 L Ed 2d 753 (1995). State courts are bound, under the Supremacy Clause, US Const, art VI, cl 2, to enforce the FAA's substantive provisions. *Ultracashmere House, Ltd v Meyer*, 664 F2d 1176, 1180 (CA 11, 1981). However, as more fully explained below, because the parties broadly agreed to arbitrate the merits of any controversy arising between them, we conclude that federal law requires that an

A. GENERAL FEDERAL RULE—TIMELINESS ISSUES AS QUESTIONS OF "PROCEDURAL ARBITRABILITY"

In *John Wiley & Sons, Inc v Livingston*, 376 US 543, 557-558; 84 S Ct 909; 11 L Ed 2d 898 (1964), the Supreme Court held that "[o]nce it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." Since that decision, an overwhelming majority of fed-

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the Supreme Court, assert that the matter was actually governed by the FAA. We therefore addressed the arbitration question relying on Michigan precedent. See *Bennett*, *supra* at 83.

In any event, we note that *Bennett*, although a Michigan case, is entirely founded on federal law. *Bennett* can be traced directly back to our Supreme Court's decision in *Brown v Holton Public Schools*, 397 Mich 71, 73-74; 243 NW2d 255 (1976), which, in turn, relied on a series of federal cases. Thus, as a practical matter, whether the issue at hand (who, as between arbitrator or court, should determine a timeliness question) is addressed under Michigan or federal law, the legal rule and result is the same.

eral appellate circuits (including the Sixth Circuit Court of Appeals) considering the issue have determined that timeliness of a claim is a procedural matter and, therefore, within the arbitrator's jurisdiction.[4] Michigan, which has developed its own strong policy favoring arbitration on the basis of federal precedent,[5] is in accord. Michigan law also provides that arbitrators, rather than courts, should decide the application of such potential defenses to arbitration as contractual limitation periods, statutes of limitation, and the doctrine of laches. See, e.g., *Brown v Holton Public Schools*, 397 Mich 71, 73-74; 243 NW2d 255 (1976); *Iron Co v Sundberg, Carolson & Associates, Inc*, 222 Mich App 120, 126; 564 NW2d 78 (1997); *Bennett, supra* at 83.

B. PARTIES' INTENT TO RESERVE TIMELINESS ISSUES FOR THE COURT

Notwithstanding the general federal rule, it is equally clear that the parties to an arbitration agreement can provide that certain issues be determined

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[4] See, e.g., *Glass v Kidder Peabody & Co, Inc*, 114 F3d 446, 455 (CA 4, 1997); *United Rubber, Cork, Linoleum, & Plastic Workers of America, AFL-CIO, CLU, Local 164 v Pirelli Armstrong Tire Corp*, 104 F3d 181, 184 (CA 8, 1997); *Local 285, Service Employees Int'l Union, AFL-CIO v Nonotuck Resource Associates, Inc*, 64 F3d 735, 739 (CA 1, 1995); *Denhardt v Trailways, Inc*, 767 F2d 687, 689-690 (CA 10, 1995); *Nursing Home & Hosp Union No 434 AFL-CIO-LDIU v Sky Vue Terrace, Inc*, 759 F2d 1094, 1097 (CA 3, 1985); *Commerce Park at DFW Freeport v Mardian Constr Co*, 729 F2d 334, 339, n 5 (CA 5, 1984); *Belke v Merrill Lynch, Pierce, Fenner & Smith*, 693 F2d 1023, 1027-1028 (CA 11, 1982); *O'Neel v Nat'l Ass'n of Securities Dealers, Inc*, 667 F2d 804, 807 (CA 9, 1982); *Conticommodity Services Inc v Philipp & Lion*, 613 F2d 1222, 1227 (CA 2, 1980); *Chambers v Beaunit Corp*, 404 F2d 128, 131 (CA 6, 1968).

[5] See *Detroit v A W Kutsche & Co*, 309 Mich 700, 703; 16 NW2d 128 (1944). In Michigan, arbitration clauses are to be liberally construed with any doubts to be resolved in favor of arbitration. *Chippewa Valley Schools v Hill*, 62 Mich App 116, 120; 233 NW2d 208 (1975).

by the court if they so specify in their contract. " '[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he had not agreed so to submit.' " *AT & T Technologies, Inc v Communications Workers of America*, 475 US 643, 648; 106 S Ct 1415; 89 L Ed 2d 648 (1986) (citations omitted). Thus, "the basic objective in this area is . . . to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms,' and according to the intentions of the parties." *First Options of Chicago, Inc v Kaplan*, 514 US 938, 947; 115 S Ct 1920; 131 L Ed 2d 985 (1995) (citations omitted).

Consequently, the determination whether the issue of timeliness must be decided by the arbitrator or a court inexorably becomes a question of contract interpretation. When deciding whether the parties agreed to arbitrate a certain matter, courts should ordinarily apply basic state-law principles that govern the formation of contracts. *Id.* at 944. " 'The cardinal rule in the interpretation of contracts is *to ascertain the intention of the parties*.' " *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 209; 220 NW2d 664 (1974), quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924) (emphasis in *Goodwin*). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991).

However, consistent with the strong federal policy promoting arbitration, any ambiguity concerning whether a specific issue falls within the scope of arbitration, such as whether a claim is timely, must be resolved in favor of submitting the question to the

arbitrator for resolution. See *AT & T Technologies*, *supra* at 650. In other words, there is a presumption of arbitrability " 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' " *Id.*, quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582-583; 80 S Ct 1347; 4 L Ed 2d 1409 (1960).[6] In *First Options*, *supra* at 945, the Court explained that when the parties have a contract that provides for arbitration of some issues, "the parties likely gave at least some thought to the scope of arbitration." Therefore, the law "insist[s] upon clarity before concluding that the parties did not want to arbitrate a related matter." *Id.*

With these principles in mind, we turn to the arbitration provisions at issue in this case. Most of the customer agreements contain the following language related to arbitration:

> Any and all controversies which may arise between us . . . concerning, arising out of, or relating to, your business, my account(s), transactions with you for me, any other transactions, this agreement or the construction, performance or breach of this or any other agreement between us . . . shall be submitted to, and settled and determined by, binding arbitration . . . . Arbitration must be commenced within one year after the cause of such action accrued by service upon the other of a written demand for arbitration

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[6] Although the general principles to be applied in construing arbitration agreements originated in the labor context, we note that the United States Supreme Court has since applied them in a commercial arbitration case. See *First Options*, *supra*; see also *PaineWebber Inc v Elahi*, 87 F3d 589, 594, n 6 (CA 1, 1996) (recognizing that principles derived from labor arbitration cases may be applied in a commercial setting).

> or a written notice of intention to arbitrate, naming therein the arbitration tribunal.

Some of the agreements used slightly different language, but with the same import:

> It is agreed that any controversy between us arising out of . . . this agreement shall be submitted to arbitration . . . . Arbitration must be commenced within one year after the cause of action accrued by service upon the other of a written demand for arbitration or a written notice of intention to arbitrate, naming therein the arbitration tribunal.

Particularly when considered in light of the federal presumption in favor of arbitrability, we believe that these broadly worded arbitration clauses, covering as they do *any* controversy arising between the parties, indicate that the arbitrator must decide the timeliness issue. This conclusion makes sense when one considers that the timeliness issue itself requires a determination of often-disputed, as here, fact questions regarding when "the cause of action accrued." Federal precedent makes it clear that, ordinarily, this is a question that the arbitrator is in a better position to decide. In *John Wiley & Sons*, *supra* at 556-557, the Court explained:

> Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it. . . .
>
> Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration.

We also believe, as a general rule, that submitting procedural matters, such as timeliness, to the arbitrator is consistent with the United States Supreme Court's admonition that in deciding whether the parties have agreed to submit a particular grievance to arbitration, "a court is not to rule on the potential merits of the underlying claims." *AT &T Technologies, supra* at 649.

C. EXCEPTIONS TO THE GENERAL RULE—*RONEY & CO v KASSAB* AND *SMITH BARNEY, INC v SARVER*

In opposition to the general federal rule favoring the determination of timeliness issues by an arbitrator, defendant cites two recent decisions from the Sixth Circuit Court of Appeals, *Roney & Co v Kassab*, 981 F2d 894 (CA 6, 1992), and *Smith Barney, Inc v Sarver*, 108 F3d 92 (CA 6, 1997), for the proposition that the court must determine whether a plaintiff's claims are barred by a contractual limitation period in the absence of clear and unmistakable evidence that the parties intended the question to be for the arbitrator. However, these cases are clearly distinguishable, involving contract language much different than that at issue here. *Roney & Co*, *supra* at 898, involved Rule 603 of the New York Stock Exchange, while *Smith Barney*, *supra* at 94, n 2, involved the identically worded §15 of the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc. Both provisions state that after six years from the events giving rise to the dispute have elapsed, the dispute "shall [not] be eligible for submission to arbitration . . . ."

In light of this "eligible for submission" language, it has been recognized that Rule 603 and §15 are unlike ordinary procedural limitation periods because they

indicate "that the parties intended to bar from arbitration disputes raised more than six years after the events giving rise to them." *PaineWebber Inc v Hartmann*, 921 F2d 507, 513 (CA 3, 1990); see also *Cogswell v Merrill Lynch, Pierce, Fenner & Smith Inc*, 78 F3d 474, 476 (CA 10, 1996). Furthermore, even given the unique character of the time-bar language of Rule 603 and § 15 at issue in *Roney & Co* and *Smith Barney*, we note that currently there is an even split among the federal appellate circuits regarding the question whether such language abrogates the general rule that timeliness is a procedural matter that must be submitted to the arbitrator.[7]

We conclude that the analysis contained in *Roney & Co* and *Smith Barney* is limited to the unique language of Rule 603 and § 15 and represents a specific exception to the general federal rule that timeliness issues must be submitted to an arbitrator.[8] Conse-

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[7] By way of illustration, the Third, Sixth, Seventh, Tenth, and Eleventh Circuit Courts of Appeal have held that the application of the § 15 time-bar provision is for the court to decide. See, e.g., *Smith Barney*, *supra*; *Cogswell*, *supra* at 478-481; *Merrill Lynch, Pierce, Fenner & Smith, Inc v Cohen*, 62 F3d 381, 383-384 (CA 11, 1995); *Smith Barney Inc v Schell*, 53 F3d 807, 809 (CA 7, 1995); *PaineWebber Inc v Hofmann*, 984 F2d 1372, 1378 (CA 3, 1993). On the other hand, the First, Second, Fifth, Eighth, and Ninth Circuit Courts of Appeal have held that the application of §15 is reserved for the arbitrator. See, e.g., *PaineWebber Inc v Elahi*, 87 F3d 589, 599 (CA 1, 1996); *PaineWebber Inc v Bybyk*, 81 F3d 1193, 1196-1199 (CA 2, 1996); *Smith Barney Shearson, Inc v Boone*, 47 F3d 750, 753-754 (CA 5, 1995); *FSC Securities Corp v Freel*, 14 F3d 1310, 1312-1313 (CA 8, 1994); *O'Neel v Nat'l Ass'n of Securities Dealers, Inc*, 667 F2d 804, 807 (CA 9, 1982). As stated in the text, the language of Rule 603 is identical.

[8] This exception to the general rule is nevertheless consistent with the basic presumption of arbitrability, *AT & T Technologies*, *supra* at 650, and the principle that a court must enforce only the contractual arbitration agreement the parties have struck. *First Options*, *supra* at 947. As recognized in *General Drivers, Warehousemen & Helpers, Local Union 89 v Moog Louisville Warehouse*, 852 F2d 871 (CA 6, 1988), procedural matters (such as the timeliness of a claim) are presumptively resolved by an

quently, the decisions in *Roney & Co* and *Smith Barney* provide no guidance in our determination how the arbitration agreements in this case should be construed. We further conclude that the contractual language at issue in this case does not unmistakably remove the issue of the timeliness of a claim from the purview of the arbitrator and is thus not equivalent to the language that the Sixth Circuit Court of Appeals found in *Roney & Co* and *Smith Barney* to preclude submission of the issue to an arbitrator.

III. CONCLUSION

Because the parties have included a broadly worded arbitration provision encompassing the core claim, we conclude that the timeliness of plaintiffs' claims is for the arbitrator to decide as a procedural matter. Accordingly, we reverse and remand this matter to the trial court with instructions to grant defendant's alternative motion to compel arbitration. We do not retain jurisdiction.

Reversed and remanded.

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arbitrator *unless* the parties have specified otherwise in the arbitration agreement. See *id.* at 875.

In *General Drivers*, the parties' arbitration agreement provided that untimely grievances " 'shall not thereafter be arbitrable.' " *Id.* at 873. The Sixth Circuit Court of Appeals found that this language constituted "positive assurance" that the parties intended that the timeliness issue was for the court to decide as a condition precedent to arbitration. *Id.* at 874. As stated in the text, the language of the parties' arbitration agreements in this case contains no similar language of "positive assurance" that they intended to remove the question of timeliness of a claim from the arbitrator's consideration.

CREMONTE v MICHIGAN STATE POLICE

Docket Nos. 195669, 195670. Submitted September 8, 1998, at Lansing. Decided October 20, 1998, at 9:00 A.M. Leave to appeal sought.

Thomas A. Cremonte brought actions in the Livingston Circuit Court and the Court of Claims against the Michigan State Police, his employer, alleging in the circuit court complaint that the defendant, in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, denied him promotion on the basis of his age or in retaliation for his opposition to policies of the defendant that discriminated against employees on the basis of age, race, and gender, and alleging in the Court of Claims complaint, for the same alleged conduct by the defendant, a violation of "public policy embodied in the Michigan and United States Constitutions" and a violation of equal protection under the state constitution. The parties stipulated to a joint trial, with the circuit court action tried before a jury. After five days of trial, the court, Daniel A. Burress, J., granted a motion by the plaintiff to amend the circuit court complaint to add claims of racial and gender discrimination. The jury found the defendant liable with regard to all claims and awarded the plaintiff damages. In the Court of Claims action, the court found the defendant liable for racial and gender, but not age, discrimination and awarded the plaintiff damages. The defendant appealed the jury verdict in the circuit court action and the award of damages in the Court of Claims action. The appeals were consolidated.

The Court of Appeals *held*:

1. The defendant did not raise at trial, and therefore failed to preserve for appellate review, its claim that the plaintiff did not show that he opposed a violation of the Civil Rights Act, as required under MCL 37.2701(a); MSA 3.548(701)(a).

2. The trial court abused its discretion by allowing the plaintiff to amend his circuit court complaint midtrial. Pleadings may be amended to conform to evidence introduced at trial only where issues not raised by the pleadings are tried by express or implied consent of the parties, MCR 2.118(C)(1), or, if evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, where the party seeking amendment satisfies the

court that the amendment and the admission of evidence will not prejudice the objecting party in its action or defense, MCR 2.118(C)(2). Here, the defendant did not consent to amendment of the complaint and the plaintiff did not show that the defendant would not be prejudiced by amendment.

3. The trial court erred in awarding damages for a violation of the state constitution. While the propriety of an inferred damage remedy arising directly from violations of the state constitution has been recognized in *Smith v Dep't of Public Health*, 428 Mich 540 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989), the availability in this case of a remedy under the Civil Rights Act obviates any need for an inferred damage remedy.

Circuit court jury verdict reversed and circuit court case remanded for new trial; Court of Claims award of damages reversed.

1. PLEADINGS — MIDTRIAL AMENDMENT OF PLEADINGS — COURT RULES.

A party whose evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings is not allowed to amend its pleadings to conform the pleadings to the evidence unless the party satisfies the trial court that the amendment and the admission of the evidence will not prejudice the objecting party in its action or defense (MCR 2.118[C][2]).

2. CIVIL RIGHTS — CIVIL RIGHTS ACT — EMPLOYMENT DISCRIMINATION — DAMAGES — MICHIGAN CONSTITUTION.

A damage remedy for violations of the state constitution may be inferred from the constitution in certain cases; no inferred remedy applies to claims of employment discrimination based on age, race, or gender or to claims of retaliation for opposing discriminatory employment practices or policies in view of remedies available under the Civil Rights Act (Const 1963, art 1, § 2; MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*).

Malley & Fett, P.C. (by *James K. Fett* and *Marla A. Linderman*), for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Richard P. Gartner*, Assistant Attorney General, for the defendant.

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

O'CONNELL, J. This is an employment discrimination and retaliation case. In Docket No. 195669, defendant appeals a jury verdict in favor of plaintiff. We reverse and remand. In Docket No. 195670, defendant appeals the trial court's damage award in the Court of Claims action. We reverse.

The facts relevant to this appeal are fairly straightforward. Plaintiff is a white male and has been a Michigan State Police Trooper since 1977. Although he has been eligible for promotion for a number of years, he has not been promoted. In the years preceding this suit, plaintiff derided his superiors for hiring and promoting employees pursuant to an affirmative action program.[1] He also wrote a memo questioning

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[1] Several of plaintiff's writings were introduced at trial. These writings included statements regarding affirmative action. One statement came from plaintiff's evaluation of a State Police instructor:

> Once again our department is using officers with far too little experience to teach programs which relate to patrols. I respect only those that I know in my own mind are qualified to teach those areas. Those promoted under the auspices of "affirmative action" are not worthy of respect, or my attention. Having been a 21 yr resident of Detroit I did not appreciate [the instructor] ridiculing the Detroit Police tactics of the 60's. When I was a kid I could walk the streets of Detroit and was safe. S.T.R.E.S.S. and the "Big Four," both of which [the instructor] attacked were responsible for the safe streets. Its [sic] very evident that Coleman Young and "Affirmative Action" have turned the streets into a "War Zone."

Another statement came from a memo plaintiff wrote to the Director of the Michigan State Police:

> We have seen many changes in the 80's. Experience, maturity, leadership, and capability are no longer used as a consideration for promotion. Mediocrity and affirmative action are the standard. Those that deserve the least reap the most. Gone are the days of promoting the most qualified person for that position. Affirmative action has given us a new breed of manager, one who thinks that people skills is a training program for the unemployed, and a leader is something which is put on the end of a fishing pole.

his superiors' use of seniority as a factor in promotion decisions, arguing that low seniority troopers were being promoted more often than high seniority troopers. During this time, defendant was hiring and promoting pursuant to an affirmative action program. Defendant was also participating in a system of "augmented certification," that, in certain circumstances, gave favorable treatment to women and minorities.[2]

Plaintiff originally filed a complaint in the Livingston Circuit Court alleging that the Michigan State Police failed to promote him on the basis of his age or in retaliation for his opposition to Michigan State Police policies that discriminated against certain employees on the basis of their age, race, and gender. Plaintiff also filed a Court of Claims complaint alleging a violation of "the public policy embodied in the Michigan and United States Constitutions" and a violation of equal protection under the Michigan Constitution. The parties stipulated joinder of the two actions, with the circuit court action to be decided by a jury and the Court of Claims action to be decided by the circuit judge. During the trial, plaintiff amended his circuit court complaint to add claims of race and gender discrimination. At trial, plaintiff argued that he has not been promoted because he opposed violations of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and because of his age, race, and gender. Defendant argued that plaintiff was not promoted because he did not have the qualities of a leader. Using a special-verdict form,

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[2] The whole process of augmented certification is somewhat complex. While this issue occupied a great deal of time at trial, it is not relevant to this appeal, and we will not attempt to describe it here.

the jury found defendant liable on all claims and awarded plaintiff $850,000 in damages. In the Court of Claims action, the trial court found defendant not liable on plaintiff's public policy and age claims, but found defendant liable for race and gender discrimination in violation of the Michigan Constitution, and awarded plaintiff $850,000.[3] The trial court then added costs and interest to both awards, and attorney fees to the circuit court award.

DOCKET NO. 195669

On appeal, defendant first argues that plaintiff failed to prove a prima facie case of retaliation. Defendant contends that plaintiff did not show that he opposed a violation of the Civil Rights Act, as required under MCL 37.2701(a); MSA 3.548(701)(a). While it appears that this argument has merit,[4] defendant failed to raise it below.[5] Thus, this issue is

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[3] The trial court and the parties apparently agreed that plaintiff was not entitled to collect both awards. This was obviously correct, because collection of both awards would have given plaintiff a double recovery.

[4] The Civil Rights Act protects those who seek redress for civil rights violations. Pursuant to the act, an employer may not "[r]etaliate or discriminate against a person because the person has opposed a violation of this act." MCL 37.2701(a); MSA 3.548(701)(a). In reviewing the record, we found no evidence that plaintiff "opposed a violation" of the Civil Rights Act. Plaintiff's writings to his superiors did not raise the specter of a discrimination complaint, nor did they contain any hint of any illegality on the part of defendant. Indeed, the writings can, at best, be interpreted as plaintiff's expression of disagreement with defendant's employment practices. We do not believe that the protections of the Civil Rights Act extend to such statements. Compare *McLemore v Detroit Receiving Hosp*, 196 Mich App 391, 396; 493 NW2d 441 (1992). See also *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1311-1314 (CA 6, 1989).

[5] Defendant should have raised this issue in its motion for a directed verdict. At the very least, defendant should have filed a motion for judgment notwithstanding the verdict or a motion for a new trial.

unpreserved, and we will not review it. *Napier v Jacobs*, 429 Mich 222, 237-238; 414 NW2d 862 (1987).

Defendant next argues that the trial court abused its discretion in allowing plaintiff to amend his complaint midtrial. We agree.

MCR 2.118(C) provides for the amendment of pleadings to conform to the evidence introduced at trial:

> (1) When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.
>
> (2) If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence.

Our Supreme Court has addressed the difference between amendments before trial and amendments during trial:

> MCR 2.118(C)(2) establishes strict requirements for amending a pleading during trial. Unless the party requesting amendment "satisfies the court that . . . amendment . . . would not prejudice the objecting party," amendment "shall not be allowed." This rule contrasts sharply with the free amendment allowed before trial. [*Dacon v Transue*, 441 Mich 315, 333; 490 NW2d 369 (1992).]

Here, the trial court allowed plaintiff to amend his complaint on the basis of a motion brought after five days of trial. In granting the motion, the trial court placed a great deal of emphasis on the fact that the parties both referenced race and gender claims in their opening statements. According to the trial court, plaintiff's counsel "opened the door" to race and gender claims in his opening argument, and defendant failed to object. The trial court also focused on defense counsel's statements at the beginning of the third day of trial. At that time, defense counsel essentially stated that he had always perceived the case as a reverse discrimination case, but, after reviewing the pleadings, he realized that plaintiff was claiming only age discrimination and retaliation. The trial court felt that defense counsel's statements were crucial: "It appears to me from my recollection now that there was a defining moment in this case, and I can't remember what day that was, where [defense counsel] came in and said, I had a chance to really look at this case. And I was trying something different than what [plaintiff alleged in his complaint]." The trial court apparently concluded that defense counsel was prepared to defend against claims of race and gender discrimination.

After discussing the amendment during the sixth day of trial, a Wednesday, the trial court put the matter off and finished the day's testimony. There was no action on the case on Thursday, and on Friday morning the parties came in to further argue the motion to amend. Plaintiff's attorney essentially argued that, on the basis of defense counsel's statements on the third day of trial, defendant was not "in a position to argue that they were actually prejudiced." Defense counsel

responded: "[W]hen I prepared for that opening statement I had corrected my erroneous belief and no longer thought it was [a race and gender case]." The trial court continued its focus on the opening statements, asking defense counsel: "Do you agree that it was laid out in the opening statements it was clearly laid out in that fashion to the jury?"

After listening to both attorneys, the trial court questioned defense counsel: "Mr. Gartner, if I were to grant the motion, tell me how you would be prejudiced and what you would need to cure that prejudice." After additional arguments, the trial court granted the motion:

> Rule 2.118 (C)(1) [and] (2) take a liberal approach towards conforming the pleadings to the proofs, and they include safety valves of prejudice. In this case, it's clear to me that the issue [sic] of retaliation, age, gender, sex, race was [sic] clearly laid on the table, and in the Plaintiff's opening statement not objected to by the Defendant; and, in fact, responded to by the Defendant in their [sic] opening statement.
>
> The case was really being tried on those issues until what I call the moments of enlightenment came on this record, at least which would be February 2nd, 1996 after we had gone through a number of witnesses when the matter was brought up by [defense counsel].
>
> I am satisfied that substantial justice can be achieved and complete relief as it relates to this case can be submitted to the jury. I'm going to allow the amendment as indicated.

The trial court went on to describe the remedial measures it would allow defendant to use to "shore up the defense." The court also noted that the trial was being delayed for one week anyway, because of the judge's and jurors' schedules, which would give the defense time to prepare.

The trial court applied the wrong analysis and standard in granting plaintiff's motion. In focusing on the opening statements, the trial court was apparently trying to apply MCR 2.118(C)(1). In other words, the trial court was trying to decide whether defendant had impliedly consented to the additional claims. This was improper, because defense counsel made it clear on the third day of trial that he was not consenting to the trial of race and gender issues. In fact, defense counsel vigorously opposed the introduction of evidence on those issues. When plaintiff brought his motion to amend two days later, any "implied consent" had long since been revoked. Thus, MCR 2.118(C)(1) was inapplicable.

The trial court's statement that MCR 2.118(C)(2) "takes a liberal approach" toward amendments was clearly incorrect as a matter of law. As noted above, our Supreme Court has made it clear that MCR 2.118(C)(2) establishes strict requirements that must be met by the party requesting amendment. *Dacon*, *supra* at 333. Otherwise, the amendment "shall not be allowed." *Id.* The trial court compounded its error by asking defendant to establish the nature and extent of any prejudice, when the court rule clearly places that burden entirely on the party requesting amendment, in this case, plaintiff.

After a thorough review of the record, it is clear that plaintiff did not meet the requirements of MCR 2.118(C)(2), and we conclude that the trial court abused its discretion in granting plaintiff's motion to amend. Plaintiff argues on appeal that defendant could not have been surprised by the amendment and that defendant was not prejudiced by it. First, we note that this argument is not especially convincing

coming from the party who had the ability to avoid this issue by simply amending before trial. Second, it is clear that the addition of race and gender claims changed the nature of the case. The added claims placed new factual questions at issue[6] and changed the import of evidence that had already been admitted.[7] Under these circumstances, plaintiff could not have shown an absence of prejudice to defendant. As our Supreme Court has recognized, " 'litigation may proceed to a point where the opposing party cannot reasonably be expected to defend against the amendment; this is an especially pertinent factor on the eve of, during, or after trial.' " *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997) (quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 663; 213 NW2d 134 [1973]). In this case, litigation had proceeded well past the point where defendant could reasonably have been expected to defend against plaintiff's

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[6] For example, before the amendment, plaintiff only had to show that he had a "good faith belief" that defendant was violating the Civil Rights Act. In addition, plaintiff did not have to show that defendant was discriminating against him on the basis of his race or gender; he could show that he opposed discrimination against others. After the amendment, plaintiff had to show that defendant was actually discriminating against him on the basis of his race or gender. In addition, the change in factual issues also changed the available defenses. Because defendant was acting pursuant to an affirmative action policy, there is at least a possibility that it is immune from liability on plaintiff's race and gender claims. See MCL 37.2210; MSA 3.548(210); *Victorson v Dep't of Treasury*, 439 Mich 131, 137-146; 482 NW2d 685 (1992). See also *Kulek v Mount Clemens*, 164 Mich App 51, 64-65; 416 NW2d 321 (1987).

[7] For instance, the trial court admitted a statement suggesting that a State Police supervisor had to hire "a black and a woman" for certain positions. At the time the evidence was introduced, it was admitted to show only that plaintiff believed that defendant was discriminating on the basis of race and gender. After the amendment, however, this evidence became directly relevant for its truth.

amendment. Therefore, we reverse the jury verdict in Docket No. 195669 and remand for a new trial.[8]

DOCKET NO. 195670

Defendant argues that the trial court erred in awarding plaintiff monetary damages for a constitutional violation. We agree.

In a splintered opinion, our Supreme Court has addressed the question whether a plaintiff may sue the state for damages for a violation of the Michigan Constitution. *Smith v Dep't of Public Health*, 428 Mich 540; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). After a thorough review of United States Supreme Court decisions on point, two justices declined to find such a remedy. *Id.* at 612-632 (Justice BRICKLEY, joined by Chief Justice RILEY). However, four other justices "would recognize the propriety of an inferred damage remedy arising directly from violations of the Michigan Constitution in certain cases." *Id.* at 647 (Justice BOYLE, joined by Justice CAVANAGH), 658 (Justice ARCHER, joined by Justice LEVIN). While the Court did not precisely identify which cases would justify an inferred damage remedy, Justice BOYLE offered some guidance:

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[8] We believe that a new trial on plaintiff's age and retaliation claims is required. Once the motion to amend was erroneously granted, defendant was forced to dedicate time and resources during the remainder of the trial to combat the new claims. This obviously forced defense counsel to shift their focus away from the elements of a prima facie case of age discrimination or retaliation, which, as noted in footnote 3, were apparently lacking, and focus instead on the new claims of race and gender discrimination. Under these circumstances, affirming any part of the jury's verdict would be inequitable, because affirmance would allow plaintiff to benefit indirectly from the belated, improper amendment of plaintiff's complaint.

> We would recognize the propriety of an inferred damage remedy arising directly from violations of the Michigan Constitution in certain cases. As the *Bivens* [*v Six Unknown Federal Narcotics Agents*, 403 US 388, 407; 91 S Ct 1999; 29 L Ed 2d 619 (1971)] Court recognized, there are circumstances in which a constitutional right can only be vindicated by a damage remedy and where the right itself calls out for such a remedy. On the other hand, there are circumstances in which a damage remedy would not be appropriate. The absence of any other remedy would, as in *Bivens*, heighten the urgency of the question. Justice Harlan, concurring in *Bivens*, states that "[t]he question then, is, as I see it, whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." 403 US 407. In answering this question in the positive, Justice Harlan commented, "[f]or people in Bivens' shoes, it is damages or nothing." *Id.*, p 410. Where a statute provides a remedy, the stark picture of a constitutional provision violated without remedy is not presented. [*Id.* at 647.]

Justice BOYLE went on to look at other factors that might weigh for or against an inferred damage remedy. One of those factors calls for a court "to consider the text, history, and previous interpretations of the specific provision for guidance on the propriety of a judicially inferred damage remedy. The provision itself may commit creation of a remedy to the Legislature rather than the courts." *Id.* at 650-651.

Art 1, § 2 of the Michigan Constitution of 1963 states:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

The last line of the section certainly weighs against an inferred damage remedy.[9] Indeed, that sentence alone could be viewed as dispositive of this issue. See *Smith*, *supra* at 632 (opinion of BRICKLEY, J.). In addition, the availability of a remedy under the Civil Rights Act obviates any need for an inferred damage remedy in age, race, or gender discrimination cases, or in retaliation cases. Here, plaintiff could, and did, file a Civil Rights Act action against defendant. Thus, we have no trouble concluding that this was not an appropriate case in which to infer a damage remedy. For this reason, we must reverse the trial court's damage award in Docket No. 195670.

Docket No. 195669: Reversed and remanded for a new trial. We do not retain jurisdiction.

Docket No. 195670: The trial court's damage award is reversed.

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[9] Plaintiff cites *Johnson v Wayne Co*, 213 Mich App 143; 540 NW2d 66 (1995), for the proposition that this Court has already recognized the existence of such a remedy. However, the panel in *Johnson* did not directly address this issue.

In re PAROLE OF ROBERTS

In re PAROLE OF LEE

Docket Nos. 199741, 204516. Submitted October 6, 1998, at Grand Rapids. Decided October 20, 1998, at 9:05 A.M. Leave to appeal sought.

James M. Roberts, an inmate in the custody of the Department of Corrections, filed an application in the Newaygo Circuit Court for leave to appeal decisions by the Parole Board to deny him parole and to issue a two-year continuance until his next parole eligibility interview. The court, Terrence R. Thomas, J., granted the department's motion to dismiss the application. The Court of Appeals entered an order on February 6, 1996 (Docket No. 188656), denying Roberts' delayed application for leave to appeal. The Supreme Court, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for consideration as on leave granted limited to whether in light of MCL 791.235(7); MSA 28.2305(7), the respondent can direct a continuance of Roberts' consideration for parole beyond twelve months. *Roberts v Dep't of Corrections*, 453 Mich 963 (1996).

Robert Lee, Jr., an inmate in the custody of the Department of Corrections, filed a petition for review in the Wayne Circuit Court after he was denied parole and given a two-year continuance until his next parole eligibility interview. The petition sought review of the department's decisions to issue the two-year continuance and to forgo issuance of a declaratory ruling regarding the legality of the decision to issue the two-year continuance. The court, Brian K. Zahra, J., entered a judgment and order in favor of the department. The Court of Appeals entered an order on July 22, 1996 (Docket No. 194049), denying the petitioner's delayed application for leave to appeal. The Supreme Court, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for consideration as on leave granted and, on its own motion, ordered that the appeals by Lee and Roberts be consolidated in the Court of Appeals. *Lee v Dep't of Corrections*, 454 Mich 910 (1997). The appeals of Roberts (Docket No. 199741) and Lee (Docket No. 204515) were consolidated by the Court of Appeals.

The Court of Appeals *held*:

1. There is no statutory impediment to the Parole Board's determination that Roberts' and Lee's eligibility for parole would not be reconsidered for two years. That part of the order in Docket No. 199741 must be affirmed. The order in Docket No. 204516 must be affirmed.

2. The rule promulgated by the Department of Corrections providing that a new hearing date shall be no more than twelve months from the pass-over date, 1979 AC, R 791.7710, was superseded and implicitly rescinded when the department promulgated 1988 AACS, R 791.7710, which provides that the next parole consideration date is to be determined by the Parole Board. Therefore, under the most current rule, the scheduling of subsequent parole hearings is discretionary.

3. The Parole Board is statutorily required to provide a prisoner denied parole a written explanation of the reason for denial. The board's statement of the reasons for the denial of parole for Roberts was not sufficient to satisfy the statutory requirement and does not allow meaningful appellate review of the board's decision. The part of the order in Docket No. 199741 dismissing the petition to review the decision to deny Roberts parole must be vacated and the matter must be remanded to the Parole Board for an explanation of its decision.

Affirmed in part and vacated and remanded in part in Docket No. 199741. Affirmed in Docket No. 204516.

1. PAROLE — PAROLE BOARD — RECONSIDERATION OF DENIAL OF PAROLE.

The Parole Board, after denying a prisoner parole, may order a continuance of more than twelve months before the prisoner is reconsidered for parole; no statute requires parole consideration at twelve-month intervals or limits the board's discretion to determine when it will reconsider a prisoner's eligibility for parole.

2. PAROLE — PAROLE BOARD — RECONSIDERATION OF DENIAL OF PAROLE.

A Department of Corrections rule providing that when a prisoner is denied parole the next parole hearing date for that prisoner shall be no more than twelve months thereafter, 1979 AC, R 791.7710, was superseded and implicitly rescinded by 1988 AACS, R 791.7710, which provides that the next parole consideration date is to be determined by the Parole Board; the scheduling of subsequent parole hearings is discretionary under the 1988 rule.

3. PAROLE — PAROLE BOARD — WRITTEN EXPLANATION FOR DENIALS OF PAROLE.

The Parole Board must provide a prisoner denied parole a written explanation of the reason for denial; the explanation must contain sufficient detail to allow meaningful appellate review of the board's

decision; the board's decision regarding parole is reviewed for an abuse of discretion (MCR 7.104[D][5][b]; MCL 791.234[7], 791.235[12]; MSA 28.2304[7], 28.2305[12]).

National Lawyers Guild (by *Neal Bush*), for James M. Roberts.

Robert Lee, Jr., in propria persona.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Charles C. Schettler, Jr.*, Assistant Attorney General, for the Department of Corrections.

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

FITZGERALD, J. In Docket No. 199741, James Morris Roberts, a prisoner in the custody of respondent Department of Corrections, appeals by leave granted a circuit court order granting respondent's motion to dismiss his application for leave to appeal the Parole Board's decisions to deny him parole and to issue a two-year continuance until his next parole eligibility interview.

In Docket No. 204516, petitioner Robert Lee, Jr., a prisoner in the custody of respondent Department of Corrections, appeals by leave granted a circuit court order affirming respondent's decisions to issue Lee a two-year continuance until his next parole eligibility interview after denying him parole and to forgo issuance of a declaratory ruling regarding the legality of respondent's decision to issue the two-year continuance. The appeals were consolidated.

The pivotal question presented is whether the Parole Board, after denying a prisoner parole, has authority to order a continuance of more than twelve

months. A continuance is the period before an inmate will next be considered for parole. Roberts and Lee (petitioners) contend that MCL 791.235(7); MSA 28.2305(7) mandates that the time between Parole Board interviews may not exceed twelve months.

Subsection 35(7) provides, in pertinent part:

> At least 90 days before the expiration of the prisoner's minimum sentence, or the expiration of a 12-month continuance, a parole eligibility report shall be prepared by appropriate institutional staff.

Subsection 35(7) pertains exclusively to the preparation of parole eligibility reports. Neither subsection 35(7) nor any other statute clearly requires parole consideration at twelve-month intervals. Additionally, subsection 35(7) does not limit the Parole Board's discretion to determine when it will reconsider a prisoner's eligibility for parole. Therefore, there exists no statutory impediment to the Parole Board's determination that petitioners' eligibility for parole would not be reconsidered for two years.

Petitioners also rely on 1979 AC, R 791.7710(2)(c), which states that if a parole release is denied, the Parole Board shall furnish the prisoner written notice "setting a new hearing date, to be no more than 12 months from the minimum eligibility date or previous pass-over date." Petitioners assert that this rule entitles prisoners to a parole release interview annually. However, the 1979 version of the rule was superseded by 1988 AACS, R 791.7710, which provides in subrule 710(2) that "[i]f a prisoner is denied parole at his or her minimum parole eligibility date, written notice shall be provided to the prisoner of his or her next parole consideration date, as determined by the

parole board." Petitioners argue that MCL 24.207(k); MSA 3.560(107)(k) makes 1988 AACS, R 791.7710 inapplicable and requires application of 1979 AC, R 791.7710. MCL 24.207(k); MSA 3.560(107)(k) provides, in relevant part, that the following is excluded from the definition of an administrative rule:

> Unless another statute requires a rule to be promulgated under this act, a rule or policy that only concerns the inmates of a state correctional facility and does not directly affect other members of the public, except that a rule that only concerns inmates which was promulgated before December 4, 1986, shall be considered a rule and shall remain in effect until rescinded but shall not be amended.

Petitioners contend that because 1979 AC, R 791.7710 was promulgated before December 4, 1986, it could not be amended, making the 1988 change nugatory. We reject this argument. First, nothing indicates that 1988 AACS, R 791.7710 amended, rather than superseded, 1979 AC, R 791.7710. MCL 791.206; MSA 28.2276 provides the Department of Corrections with the authority to promulgate rules controlling the manner in which paroles are considered. Under this authority, 1988 AACS, R 791.7710 was promulgated, giving it the force and effect of law. Replacing the earlier rule with the new version implicitly rescinded the earlier one. Thus, under the most current rule, the scheduling of subsequent parole hearings is discretionary.

Petitioner Roberts argues that his case must be remanded to the Parole Board for a detailed explanation of the reasons for parole denial. Under the circumstances of this case, we agree.

The Parole Board's decision regarding parole is reviewed for an abuse of discretion. MCR 7.104(D)(5)(b); MCL 791.234(7); MSA 28.2304(7). In denying Roberts parole, the Parole Board perfunctorily cited the following reasons: "nature of crime, insufficient progress, poor prognosis." The board denied parole in spite of the fact that Roberts had a parole guidelines score of 14, which indicates a "high probability of parole." See *In re Parole of Franciosi*, 231 Mich App 607; 586 NW2d 542 (1998).

MCL 791.235(12); MSA 28.2305(12) requires the Parole Board to provide a prisoner denied parole a written explanation of the reason for denial. Here, the Parole Board's cursory statement of the reasons for denial of parole is not sufficient to satisfy the written explanation requirement and does not allow meaningful appellate review of the Parole Board's decision, particularly in light of Roberts' high probability of parole. *In re Parole of Scholtz*, 231 Mich App 104; 585 NW2d 352 (1998). Consequently, it is impossible to determine whether the decision to deny Roberts parole constituted an abuse of the Parole Board's discretion. We therefore vacate the part of the trial court's order dismissing the petition to review the decision to deny Roberts parole and remand this case to the Parole Board for an explanation of its decision to deny Roberts parole.

The order in Docket No. 199741 is affirmed in part and vacated in part and the matter is remanded to the Parole Board. The order in Docket No. 204516 is affirmed. We do not retain jurisdiction.

MOROSINI v CITIZENS INSURANCE COMPANY OF AMERICA (ON REMAND)

Docket No. 186760. Submitted August 7, 1998, at Lansing. Decided October 20, 1998, at 9:10 A.M. Leave to appeal sought.

Kenneth Morosini brought an action in the 37th District Court against Citizens Insurance Company of America, seeking first-party, no-fault benefits for injuries sustained when he was assaulted by the driver of an automobile that had struck the plaintiff's automobile. The assault occurred when the plaintiff got out of his automobile to examine damage to his vehicle. After trial, the court, Thomas E. Kennedy, J., entered a judgment for the plaintiff. The Macomb Circuit Court, George C. Steeh, J., affirmed on appeal. The Court of Appeals, HOLBROOK, JR., P.J., and FITZGERALD and SMOLENSKI, JJ., affirmed, holding that injuries arising from assaults are compensable under the no-fault act when the assault arises out of a normal activity associated with the use of a vehicle as a motor vehicle, and that there was a sufficient causal nexus between the injuries sustained by the plaintiff in the assault and the use of a motor vehicle as a motor vehicle because the injuries were sustained in the course of fulfilling statutory obligations as a motor vehicle operator involved in an accident to inspect for damage and exchange information with any other motorist involved in the accident. 224 Mich App 70 (1997). The Supreme Court, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for reconsideration in light of *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214 (1998). 458 Mich 866 (1998).

On remand, the Court of Appeals *held*:

Pursuant to *McKenzie*, whether an injury arises out of the use of a motor vehicle as a motor vehicle under MCL 500.3105(1); MSA 24.13105(1) turns on whether the injury is closely related to the transportational function of motor vehicles. In this case, the plaintiff's injuries arose out of the use of a motor vehicle as a motor vehicle because the fulfillment of statutory obligations regarding motor vehicle accidents is closely related to the transportational function of motor vehicles.

Affirmed.

INSURANCE — NO-FAULT — ACCIDENTAL BODILY INJURY — ASSAULTS.

Whether an injury arises out of the use of a motor vehicle as a motor vehicle so as to be compensable pursuant to the no-fault act turns on whether the injury is closely related to the transportational function of motor vehicles; injury sustained by a motorist when assaulted while inspecting damage to the motorist's vehicle following an accident and exchanging information with another motorist involved in the accident is injury that is closely related to the transportational function of motor vehicles and thus is compensable under the no-fault act (MCL 257.618, 257.619, 500.3105[1]; MSA 9.2318, 9.2319, 24.13105[1]).

Gregory T. Zalecki, for the plaintiff.

Schellhase, Rekiel & Mitcham (by *David C. Johnston*) (*Gross, Nemeth & Silverman, P.L.C.*, by *Steven G. Silverman*, of Counsel), for the defendant.

ON REMAND

Before: HOLBROOK, JR., and FITZGERALD and SMOLENSKI, JJ.

PER CURIAM. This case is before us on remand from the Supreme Court for reconsideration in light of *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998). 458 Mich 866 (1998). In *McKenzie*, the Court held that whether an injury arises out of the use of a motor vehicle as a motor vehicle under MCL 500.3105(1); MSA 24.13105(1) turns on whether the injury is closely related to the transportational function of motor vehicles. Because the plaintiff in *McKenzie* was using a camper/trailer attached to his pickup truck as a sleeping accommodation at the time of his injury, the Court concluded that the use was too far removed from the transportational function to constitute use of the camper/trailer as a motor vehicle at the time of the injury.

The facts of the present case are succinctly set forth in *Morosini v Citizens Ins Co of America*, 224 Mich App 70; 568 NW2d 346 (1997). Plaintiff's vehicle was struck from the rear by another motorist. The plaintiff got out of his vehicle and was in the process of examining the damage to his vehicle when he was assaulted by the driver of the other vehicle. We held that while assaults are not ordinarily part of the "normal risk" of driving, injuries arising from assaults are compensable under the no-fault act only when the assault arises out of a "normal activity associated with the use of a vehicle as a motor vehicle." Thus, we concluded that there was a sufficient causal nexus between the injuries sustained by plaintiff in the assault and the use of the motor vehicle as a motor vehicle because plaintiff's injuries were sustained in the course of fulfilling his statutory obligations as an operator of a motor vehicle involved in an accident to inspect for damage and exchange information with any other driver involved in the accident. MCL 257.618, 257.619; MSA 9.2318, 9.2319. This holding is consistent with the approach that focuses on transportational function because the fulfillment of statutory obligations with regard to motor vehicle accidents is closely related to the transportational function of motor vehicles.

Affirmed.

PEOPLE v LESTER

Docket No. 199269. Submitted May 13, 1998, at Grand Rapids. Decided October 23, 1998, at 9:00 A.M.

David J. Lester was convicted by a jury in the Kalamazoo Circuit Court, John F. Foley, J., of delivery of over 650 grams of cocaine and of conspiracy to deliver between 225 grams and 650 grams of cocaine. The Court of Appeals, MURPHY, P.J., and HOLBROOK, JR., and MAHER, JJ., affirmed in an unpublished opinion per curiam, issued October 5, 1990 (Docket No. 112954). The Supreme Court denied the defendant's application for leave to appeal. 440 Mich 910 (1992). The defendant filed a motion in the trial court for relief from judgment, arguing in part that newly discovered evidence indicated that the prosecution withheld evidence from the defendant and allowed a prosecution witness to perjure herself when the witness was cross-examined about the scope of the plea bargain under which she testified, her involvement in insurance fraud, her use of marijuana, and her involvement in other misconduct. The court denied the motion. The defendant filed a delayed application for leave to appeal in the Court of Appeals, and leave to appeal was granted.

The Court of Appeals *held*:

1. The trial court did not clearly err in finding that the prosecution witness had not testified falsely when she stated that her plea bargain only called for the prosecution to charge her with delivery of between 225 grams and 650 grams of cocaine instead of delivery of over 650 grams of cocaine. The record does not support the defendant's claim that the prosecution additionally agreed not to charge the defendant with multiple counts of insurance fraud.

2. The trial court did not err in ruling that the claimed newly discovered evidence was inadmissible under MRE 608(b). This rule provides that specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in MRE 609, may not be proved by extrinsic evidence.

3. A prosecutor is obligated by the Due Process Clause of the Fourteenth Amendment to correct perjured testimony relating to a

witness' credibility. In this case, the record does not support the defendant's claim that the prosecution witness at issue committed perjury when she testified about marijuana use. The matter must be remanded for a determination whether the prosecution knew or can be deemed to have known that the witness lied when she denied involvement in insurance fraud. If the trial court on remand finds that the prosecution was aware that the witness lied when she denied participation in insurance fraud, a new trial will be required only if such false testimony could in any reasonable likelihood have affected the judgment of the jury.

4. A criminal defendant has a due process right of access to evidence in the possession of the prosecution that might lead the jury to entertain a reasonable doubt about the defendant's guilt. This right of access extends to evidence that would materially affect the credibility of a prosecution witness. The prosecution's failure to provide a defendant with access to evidence impeaching a prosecution witness will require a new trial if the undisclosed evidence is material. Undisclosed evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. In this case, the matter must be remanded for a determination whether the prosecution withheld from the defendant evidence regarding the credibility of prosecution witnesses and, if so, whether the evidence was material.

Affirmed in part and remanded.

1. CRIMINAL LAW — NEW TRIAL — NEWLY DISCOVERED EVIDENCE — APPEAL.

The Court of Appeals reviews for abuse of discretion a trial court's grant or denial of a defendant's motion for a new trial based on newly discovered evidence.

2. CRIMINAL LAW — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

A motion for a new trial based on newly discovered evidence may be granted upon a showing that the evidence itself, not merely its materiality, is newly discovered, that the evidence is not merely cumulative, that the evidence is such as to render a different result probable on retrial, and that the defendant could not with reasonable diligence have produced it at trial.

3. CONSTITUTIONAL LAW — DUE PROCESS - CRIMINAL PROSECUTIONS — FALSE TESTIMONY BY PROSECUTION WITNESSES — NEW TRIAL.

A prosecutor has an obligation under the Due Process Clause of the Fourteenth Amendment to report to a defendant and to a trial court perjury by a prosecution witness in proceedings against the

defendant, including perjured testimony relating to the witness' credibility; a prosecutor's failure to correct perjured testimony by a prosecution witness at a jury trial will require a new trial if the false testimony could in any reasonable likelihood have affected the judgment of the jury (US Const, Am XIV).

4. CONSTITUTIONAL LAW — DUE PROCESS — CRIMINAL PROSECUTIONS — DISCOVERY BY DEFENDANTS.

A criminal defendant has a due process right of access to evidence in the possession of the prosecution that might lead a jury to entertain a reasonable doubt about the defendant's guilt; this right of access extends to evidence that would materially affect the credibility of a prosecution witness.

5. CONSTITUTIONAL LAW — DUE PROCESS — CRIMINAL PROSECUTIONS — DISCOVERY BY DEFENDANTS.

A criminal defendant who claims a due process right of access to evidence in the possession of the prosecution must prove that the state possessed evidence favorable to the defendant, that the defendant did not possess the evidence and could not have obtained it with any reasonable diligence, that the prosecution suppressed the favorable evidence, and that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

6. CONSTITUTIONAL LAW — DUE PROCESS — CRIMINAL PROSECUTIONS — DISCOVERY BY DEFENDANTS — IMPEACHMENT EVIDENCE — NEW TRIAL.

The failure of a prosecutor to provide a defendant with access to evidence that would impeach a prosecution witness, which access is required under the constitutional guarantee of due process, will warrant a new trial if the undisclosed evidence is material; such undisclosed evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *James J. Gregart*, Prosecuting Attorney, and *Frank J. Machnik*, Assistant Prosecuting Attorney, for the plaintiff.

Carla J. Johnson, for the defendant.

Before: FITZGERALD, P.J., and HOLBROOK, JR., and CAVANAGH, JJ.

CAVANAGH, J. Defendant appeals by leave granted his jury trial convictions of one count of delivery of over 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and one count of conspiracy to deliver between 225 grams and 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). The trial court imposed the mandatory life sentence for the delivery conviction[1] and twenty to thirty years' imprisonment for the conspiracy conviction. We affirm in part and remand for further proceedings.

Defendant's convictions arose out of the sale of approximately 666 grams of cocaine by Brenda Houston to undercover police officer Patrick Codere of the Southwest Enforcement Team on April 30, 1987. At defendant's trial, Houston testified as part of a plea agreement under which she would avoid the mandatory life sentence for delivery of the cocaine. Houston testified that defendant had supplied her with the drugs and that she had "a business relationship" with defendant whereby any profits made were to be split equally between them. Another witness, Credell Carpenter, also testifying with the benefit of a plea agreement, stated that he saw defendant the day before the delivery with a large quantity of cocaine. After Houston's arrest, defendant told Carpenter that he had given her a large amount of cocaine to sell.

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[1] The Legislature has recently enacted 1998 PA 314, which provides that a prisoner sentenced for a violation of MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i) before October 1, 1992, who has served twenty years of his sentence, may be released on parole by the Parole Board.

A jury convicted defendant of one count of delivery of over 650 grams of cocaine and one count of conspiracy to deliver between 225 grams and 650 grams of cocaine on December 18, 1987. This Court affirmed defendant's convictions and sentences,[2] and defendant's application for leave to appeal in the Supreme Court was denied.[3]

In his first postappeal motion for relief from judgment under subchapter 6.500 of the Michigan Court Rules, defendant alleged misconduct by the police and the prosecutor in using or failing to correct false testimony by Houston regarding the consideration she received in exchange for her testimony against defendant and other matters affecting her credibility as a witness. Specifically, defendant challenged Houston's testimony that she had no sentence agreement with the prosecution other than a reduction of the delivery charges against her from delivery of over 650 grams to delivery of between 225 and 650 grams. Defendant presented evidence that the final agreement for Houston's guilty plea, tendered several weeks after defendant's trial, also provided her with immunity from prosecution for various acts of insurance fraud. Defendant also challenged the failure of the prosecuting attorney or police officials to correct Houston's denial, on cross-examination, of any participation in staging a false burglary at her home for which she received insurance money. Previously, Houston had admitted to Detective Donald Smith of the Kalamazoo Police Department that she and her

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[2] *People v Lester*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 1990 (Docket No. 112954).

[3] 440 Mich 910 (1992).

then-boyfriend, Gary Roberts, had been involved in the phony burglary.[4] Her admissions were set forth in a police report that had been available to the prosecutor, but had not been provided to defense counsel, although defense counsel had received a tape recording of most of Houston's inculpatory statements to the police. Defendant also argued that the jury's verdicts on the two counts were inconsistent, given the different amounts of cocaine involved.

The trial court ordered an evidentiary hearing regarding defendant's motion, and the hearing took place on June 8, 1993. Testimony was received from the prosecuting attorney who tried defendant's case, Mark Courtade, and Houston's attorney, Earl Dalzell. Courtade testified that the only agreement his office had with Houston at the time of the trial was that she would be charged with the lesser offense of possession with intent to deliver over 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), rather than delivery of over 650 grams of cocaine, which carries a mandatory life sentence. Furthermore, Courtade stated that he had no knowledge of Houston's involvement with any insur-

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[4] At defendant's trial, Houston testified that she had collected insurance money after the burglary occurred at her house, then found out months later that Roberts had faked the burglary. Houston further testified that, two years before trial, Carpenter had secreted her luggage away upon her return from a trip to New York and induced her to report it as stolen, resulting in her receiving a $600 or $700 insurance settlement. Houston explained that she had not initially known that Carpenter had taken the luggage. In addition, defense counsel elicited from Houston that she had collected an insurance settlement after she had reported being raped in a motel. From the insurance proceeds, Houston paid Carpenter approximately $19,000. Houston stated that the rape really happened and implied that she paid Carpenter so that he could achieve some kind of extralegal remedy for her.

ance frauds until she was cross-examined at trial, and immunity from prosecution for her involvement with such frauds was not offered as part of her plea agreement until after defendant's trial.[5] Dalzell's testimony essentially corroborated Courtade's testimony in this regard.[6] Defendant also submitted excerpts from the transcript of the trial of Thaddeus Earl Dunning, which occurred shortly before defendant's own trial, in which the prosecution elicited testimony from Carpenter regarding Houston's involvement in a number of insurance frauds.

In an opinion and order entered December 22, 1993, the trial court rejected on the merits defendant's various arguments that he was entitled to relief. Defendant then sought leave to appeal the trial court's decision in this Court. However, before the matter was submitted to a panel of this Court for decision, defendant retained his present appellate

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[5] Courtade testified that when, after defendant's trial, Dalzell was attempting to obtain a plea agreement for Houston,

> I told him I was not going to negotiate. She had to plead guilty to the charge that we brought. She had to go to prison for twenty years and, at that point, he said well, how about throwing in the misdemeanors. I said fine.
>
> In fact, at that time, I wasn't even thinking that there was [sic] any misdemeanors, because we had no jurisdiction over the allegations of theft of luggage in Chicago; we had no jurisdiction over the allegations of fake rapes in Kent County.
>
> The only thing we had was potentially the Roberts breaking and entering, false police report, which he had apparently been charged with. So when you have a 90-day concurrent misdemeanor, my thoughts were why fight it; she's going for twenty years.

[6] Dalzell testified that he had not known of any possible fraud charges against Houston until after she testified at defendant's trial. When Houston subsequently reached a plea agreement with the prosecutor's office, Dalzell made sure that the agreement included immunity from prosecution for any frauds that had occurred in Kalamazoo County.

counsel, who subsequently filed a motion to strike the application for leave to appeal. This Court granted defendant's motion on June 16, 1994.

In February 1995, defendant filed a second motion for relief from judgment pursuant to MCR 6.500 in the trial court. Defendant cited various items of alleged "newly discovered evidence" in support of his perjured-testimony claims, as well as new grounds for relief based on the racial composition of the jury pool. Defendant offered new deposition testimony from Detective Smith and Officer Codere that he contended was relevant to the deal given to Houston in exchange for her testimony. Essentially, these witnesses testified that when Houston was arrested on drug charges, they had information that she was involved in insurance fraud, but the police officer in charge of the case, Lieutenant Charlie McCord, advised them that Houston was not to be charged in connection with her alleged frauds. Defendant also again cited the testimony from the Dunnings trial regarding Houston's involvement in fraudulent activities as "new evidence" that Houston gave false testimony at defendant's trial regarding her involvement in insurance frauds. Defendant further argued that Houston had committed perjury when she testified that she had not used marijuana during the previous year in light of the fact that marijuana was discovered when a search warrant was executed at her home in conjunction with her arrest.

In its November 17, 1995, opinion and order, the trial court denied defendant's second motion for relief from judgment. With regard to defendant's challenge to Houston's trial testimony regarding the considera-

tion she received in exchange for her testimony against defendant, the trial court again found that Houston's testimony was truthful in this regard, essentially finding the new testimony from Detective Smith and Officer Codere insufficient to rebut the testimony of prosecuting attorney Courtade at the June 8, 1993, evidentiary hearing and other evidence corroborating Houston's trial testimony. As for defendant's claims that Houston had falsely testified regarding her involvement in insurance frauds, marijuana use, and other misconduct, the trial court apparently reasoned that defendant was not prejudiced in this regard because any extrinsic evidence of Houston's involvement in such acts of misconduct would be inadmissible under MRE 608(b). Finally, the trial court rejected defendant's challenges to the racial composition of his jury pool and the effectiveness of trial counsel and his previous appellate counsel.

Defendant filed a delayed application for leave to appeal the trial court's decision. On June 12, 1997, this Court granted leave to appeal limited to the second issue raised in the application. That issue was stated by defendant as follows: "Did the court err when it held that since evidence of prior bad acts would not be admissible under MRE 608(b), the prosecutor could withhold evidence and allow their [sic] star witness to commit perjury on the stand?"

As an initial matter, we note that, in his phrasing of the issue, defendant misrepresents the trial court's holding. The trial court did *not* hold that the prosecutor could allow Houston to commit perjury on the stand or that the prosecutor could withhold evidence. Rather, the trial court found that Houston testified

truthfully about the scope of her agreement with the prosecutor at the time of defendant's trial. With regard to defendant's other allegations, the trial court did not make a specific finding regarding whether the prosecutor improperly allowed Houston to commit perjury or withheld evidence. The trial court simply concluded that any error was harmless because defendant's new evidence was related to collateral matters and, pursuant to MRE 608(b), defendant would not have been able to impeach Houston with extrinsic evidence. Therefore, keeping in mind the actual scope of the trial court's ruling, we now address defendant's allegations of error.

This Court reviews a trial court's postconviction ruling granting or denying a new trial based on newly discovered evidence for an abuse of discretion. *People v Bradshaw*, 165 Mich App 562, 566-567; 419 NW2d 33 (1988). A motion for a new trial based on newly discovered evidence may be granted upon a showing that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial. *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). We review the trial court's findings of fact for clear error. *People v Williams*, 228 Mich App 546, 557; 580 NW2d 438 (1998). Whether a prosecutor may allow a witness to commit perjury or withhold evidence that would tend to contravene its witness, where such evidence would be inadmissible under MRE 608(b), is a question of law. This Court reviews questions of law de novo.

People v Tracey, 221 Mich App 321, 323-324; 561 NW2d 133 (1997).

I

We first address defendant's claim that newly discovered evidence establishes that Houston testified falsely regarding her agreement with the prosecutor. After reviewing the record, we conclude that the trial court did not clearly err in finding that relief from fraud charges was not part of Houston's agreement with the prosecutor at the time of defendant's trial.

Contrary to defendant's argument, the trial court did not "ignore" the new testimony from Detective Smith and Officer Codere regarding their understanding that the prosecution had already decided not to charge Houston in connection with the insurance frauds investigated before defendant's trial. Rather, the trial court essentially found that this testimony was insufficient to rebut the previous testimony from Houston's attorney and prosecuting attorney Courtade himself at the June 8, 1993, evidentiary hearing. The trial court's conclusion is not clearly erroneous; the new testimony from Detective Smith and Officer Codere is largely based upon assumption, conjecture, and second-hand information, whereas the contrary evidence cited by the trial court involved first-hand knowledge.[7]

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[7] Smith's deposition contains the following passage:

Q. Okay. Now, do you know—when Lieutenant McCord said he contacted somebody in the prosecutor's office, do you know who he contacted?

A. No, I don't.

Q. And you say he had been authorized to give her [Houston] a deal. Did that mean he had been authorized to drop these charges

II

Defendant also asserts that the trial court erred in finding that his newly discovered evidence was inadmissible under MRE 608(b). We disagree. MRE 608(b) states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Defendant argues that the question of a witness' bias is never a collateral matter, and accordingly, evidence of bias cannot be excluded under MRE 608(b). As defendant notes, evidence of a witness' bias or interest in a case is highly relevant to her credibility. See *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). However, defendant fails to explain how the evidence allegedly withheld from him demonstrates bias on the part of Houston and Carpenter.

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or not press these charges, as far as the fraud stuff, as long as she cooperated on the drug stuff?

A. Right. I'm sure that that would have to be part of it, because at this time point in time [sic], she's involved in a light [sic—life] felony. So to say, Well, we're going to throw the light [sic—life] felony out but charge you with a nickel and dime larceny wouldn't make a whole lot of sense.

Codere testified that he was aware of allegations of fraud against Houston, but he was not present at any of the plea negotiations in her case.

Defendant claims bias from Houston's and Carpenter's participation in frauds that they did not admit when testifying against defendant, but, other than the failed argument that Houston testified in part to avoid fraud charges, defendant does not explain why the witnesses' participation in various frauds should cause them to be biased against him. Defendant does not assert that Carpenter understated the extent of his agreement with the prosecution. Defendant also alludes to Houston's alleged drug consumption, but he makes no effort to illustrate how evidence that Houston may have used drugs establishes that she was biased against him. Accordingly, we reject defendant's contention that the evidence was admissible to show bias on the part of the witnesses.

Defendant also argues that the trial court erred because the new evidence is relevant not to character evidence that would be inadmissible under MRE 608(b), but rather to direct contradiction of prosecution witnesses' statements. In support of this argument, defendant relies on *People v Vasher*, 449 Mich 494; 537 NW2d 168 (1995), and *Wischmeyer v Schanz*, 449 Mich 469; 536 NW2d 760 (1995). We conclude, however, that neither case supports defendant's claim.

In *Vasher*, the Supreme Court held that, under MRE 404(a)(1), the prosecution may introduce evidence to rebut a defendant's specific statement regarding a matter germane to the question of guilt or innocence. *Vasher*, *supra* at 504. Thus, *Vasher* addresses MRE 404(a)(1), which concerns evidence to rebut a defendant's assertion of good character, not MRE 608(b), which concerns evidence of specific conduct for pur-

poses of attacking a witness' general credibility. The Court reiterated in *Vasher* that a party may introduce extrinsic evidence to contradict an adversary's answers on cross-examination regarding matters germane to the trial, but generally a party may not introduce extrinsic evidence to contradict a witness regarding collateral, irrelevant, or immaterial matters. See *id.* Furthermore, *Vasher* concerned the rebuttal of the defendant's testimony on a point closely tied in with the question of guilt or innocence,[8] whereas in the instant case the controversy concerns prosecution witnesses' conduct that is unrelated to defendant and the crimes with which he was charged.

Wischmeyer, a medical malpractice action, likewise does not support defendant's contention that evidence regarding Houston's prior acts was admissible to impeach her testimony. In *Wischmeyer*, the trial court allowed the defendant to cross-examine the plaintiff's expert regarding unsuccessful surgeries that he had performed. The Supreme Court held that the

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[8] In *Vasher*, the defendant was charged with three counts of first-degree criminal sexual conduct, where the three victims were four years old or younger. The defendant introduced evidence that he had a loving, grandfatherly relationship with the victims and therefore would never harm them. The defendant denied that he had said that young girls should be initiated into sex by their own family members. On rebuttal, the prosecutor called a witness who testified that the defendant had told her that it used to be common for family members to introduce young girls to sexual intercourse. The Supreme Court noted that, as a general rule, a witness may not be contradicted regarding collateral, irrelevant, or immaterial matters. However, the Court held that the rebuttal testimony was proper because it was narrowly focused on refuting the defendant's denial that he had said that he believed that it was acceptable for family members to initiate young girls into sexual activity. The Court explained, "Because this was a matter so closely bearing on defendant's guilt or innocence, it was not error for the prosecutor to have impeached defendant." *Vasher*, *supra* at 504.

cross-examination was permissible because the surgeries were relevant to the expert's competency. Moreover, the defendant was required to settle for whatever answer the expert gave because the trial court had not allowed the expert to be impeached on any extrinsic matters. See *Wischmeyer*, *supra* at 477-478.

Applying *Wischmeyer* to the instant case, we conclude that MRE 608(b) barred the admission of the new evidence advanced by defendant. On cross-examination of Houston, defense counsel inquired into specific instances of prior bad acts, which Houston denied. Pursuant to MRE 608(b), defendant was required to accept Houston's responses without recourse to extrinsic impeachment evidence. In other words, as the trial court in *Wischmeyer* put it, defendant was "stuck with" Houston's answers. See *Wischmeyer*, *supra* at 478.

III

Defendant asserts that he is entitled to a new trial because the prosecutor allowed Houston to perjure herself. Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984). Prosecutors therefore have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath. *Id.*; *Napue v Illinois*, 360 US 264, 269-272; 79 S Ct 1173; 3 L Ed 2d 1217 (1959); see also *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935).

Michigan courts have also recognized that the prosecutor may not knowingly use false testimony to obtain a conviction, *People v Wiese*, 425 Mich 448, 455; 389 NW2d 866 (1986), and that a prosecutor has a duty to correct false evidence, *People v Woods*, 416 Mich 581, 601; 331 NW2d 707 (1982), cert den sub nom *Michigan v Alexander*, 462 US 1134; 103 S Ct 3116; 77 L Ed 2d 1370 (1983); *People v Thomas*, 49 Mich App 682, 693; 212 NW2d 728 (1973). As this Court has explained,

> [t]he prosecutor's duty to prevent lies from entering the evidence in the guise of truth stems not from any particular role in the adversary process; rather, it is derived from the prosecution's duty to represent the public interest, and to place the pursuit of truth and justice above the pursuit of conviction. [*People v Cassell*, 63 Mich App 226, 229; 234 NW2d 460 (1975).]

In *Napue, supra*, the United States Supreme Court expanded the prosecutorial duty to correct perjured testimony to include perjured testimony that related to the witness' credibility and not just the facts of the case. *Napue, supra* at 269. The Court explained, "The jury's estimation of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . ." *Id.*

The trial court determined that defendant was not prejudiced by the alleged false testimony because, pursuant to MRE 608(b), defendant could not have contradicted the testimony with extrinsic evidence. We conclude that the trial court erred. A prosecutor has a duty to correct his witness' false testimony, without regard to whether evidence to rebut the witness would be admissible for impeachment under

MRE 608(b). See *Trombetta*, *supra*; *Woods*, *supra*; *Thomas*, *supra*. We therefore consider each of defendant's allegations that the prosecutor allowed false testimony to pass uncorrected.

Defendant first claims that the prosecutor permitted Houston to perjure herself by testifying that she had not smoked marijuana for more than a year. In support of this assertion, defendant points to the fact that the police found marijuana when they executed a search warrant at her house. However, the mere presence of marijuana in Houston's residence, which she shared with her boyfriend, does not conclusively establish that Houston lied when she testified that she had abstained from marijuana for over a year. Assuming that the prosecution knew when Houston testified that marijuana had been found at her residence, that knowledge did not sufficiently establish that Houston was lying so as to trigger the prosecution's duty to correct Houston's statement.

Defendant next asserts that the prosecution allowed Houston to testify falsely about her participation in various insurance frauds.[9] Defendant relies in part on Carpenter's testimony in the Dunning case, in which Carpenter stated that he had participated in traveler's check frauds with Houston on several occasions, and he knew that she had been involved in other frauds. However, assuming that the prosecutor was or should have been aware of the discrepancy,[10]

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[9] See note 4.

[10] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), does not require prosecutors to search their unrelated files to exclude the possibility, however remote, that they contain exculpatory information. *United States v Joseph*, 996 F2d 36, 41 (CA 3, 1993), cert den 510 US 937;

defendant cites no authority for the proposition that the prosecution must disbelieve its own witness when testimony from another witness contradicts her. Cf. *United States v Lopez*, 985 F2d 520, 524 (CA 11, 1993) (stating that knowledge of the falsity of testimony is not imputed to the prosecutor when a key government witness' testimony is in conflict with another's statement).

Defendant also cites the fact that Detective Smith testified at a posttrial deposition in an unrelated case that Houston had admitted to him that she took part in an insurance fraud involving a faked breaking and entering. In its decision of December 22, 1993, the trial court appears to have concluded that defendant was not prejudiced by Houston's false testimony because defendant already had possession of a tape recording of Houston's admission of involvement in the staged burglary. However, the prosecutor's constitutional duty to report to the court whenever government witnesses lie under oath is not vitiated when defense counsel is or should be aware that the testimony is false and does nothing. The prosecutor has a duty to correct the false testimony of a state witness, which arises when the false testimony appears. *Wiese*, *supra* at 455.

In the present case, the prosecutor testified that he was unaware of Houston's participation in any insurance frauds until she was cross-examined at trial. However, Codere and McCord were apparently aware of Houston's involvement in at least one insurance fraud, and knowledge of facts that are known to the

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114 S Ct 357; 126 L Ed 2d 321 (1993); *United States v Brooks*, 296 US App DC 219, 223; 966 F2d 1500 (1992).

prosecutor's chief investigative officer must be imputed to the prosecutor. *Cassell*, *supra* at 228-229; see *Kyles v Whitley*, 514 US 419, 437; 115 S Ct 1555; 131 L Ed 2d 490 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). Accordingly, we remand this case to the trial court for a determination whether the prosecutor knew, or can be deemed to have known, that Houston committed perjury when she testified that she had not taken part in various insurance frauds. If, on remand, the trial court finds that the prosecutor was aware that Houston lied when she denied participation in insurance frauds, the prosecutor's failure to correct false testimony does not automatically require reversal.[11] A new trial is required only if the false testimony could in any reasonable likelihood have affected the judgment of the jury. *Wiese*, *supra* at 454.

IV

Defendant also contends that, despite his request for discovery, the prosecutor withheld the following information: (1) the police found marijuana in Houston's house when they executed a search warrant; (2) Houston had participated in a number of insurance frauds; (3) Houston stole drugs from the hospital where she worked; (4) Houston was to receive immu-

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[11] In the absence of the prosecutor's knowing use of perjury, a new trial is warranted only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *United States v Endicott*, 869 F2d 452, 455 (CA 9, 1989).

nity from fraud charges, and (5) Carpenter had been involved in many insurance frauds, some with Houston. Defendant asserts that the prosecutor's failure to disclose this information constitutes error requiring reversal.

A criminal defendant has a due process right of access to certain information possessed by the prosecution. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). This due process requirement of disclosure applies to evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt. *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972). Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence "may make the difference between conviction and acquittal." *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

Due process does not require the prosecutor to allow complete discovery of his files as a matter of practice. *United States v Agurs*, 427 US 97, 109; 96 S Ct 2392; 49 L Ed 2d 342 (1976). However, the prosecutor is under a duty to disclose any information that would materially affect the credibility of his witnesses. *United States v Smith*, 316 US App DC 199, 202; 77 F3d 511 (1996); *People v Murray*, 54 Mich App 723; 221 NW2d 468 (1974).

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4)

that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *United States v Meros*, 866 F2d 1304, 1308 (CA 11, 1989), cert den 493 US 932; 110 S Ct 322; 107 L Ed 2d 312 (1989).

The failure to disclose impeachment evidence does not require automatic reversal, even where, as in the present situation, the prosecution's case depends largely on the credibility of a particular witness. *Bagley, supra* at 676-677; *Giglio, supra* at 154. The court still must find the evidence material. *Id.*; *United States v Trujillo*, 136 F3d 1388, 1393 (CA 10, 1998), cert den ___ US ___; 119 S Ct 87; 142 L Ed 2d 69 (1998). Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bagley, supra* at 682; *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Bagley, supra.* Accordingly, undisclosed evidence will be deemed material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles, supra* at 435. In determining the materiality of undisclosed information, a reviewing court may consider any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. *Bagley, supra* at 683.

In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility

would have undermined a critical element of the prosecutor's case. In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. *United States v Payne*, 63 F3d 1200, 1210 (CA 2, 1995), cert den 516 US 1165; 116 S Ct 1056; 134 L Ed 2d 201 (1996).

In the present case, the prosecutor denies that any evidence was withheld from defendant. Because the trial court concluded that any error was harmless because the evidence was related to collateral matters, it did not address whether the prosecutor improperly withheld evidence. We therefore remand for a determination whether the prosecutor withheld from defendant evidence regarding the credibility of his witnesses and, if so, whether that evidence was material.

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

CREGO v COLEMAN

Docket No. 192798. Submitted April 29, 1998, at Grand Rapids. Decided October 23, 1998, at 9:05 A.M. Leave to appeal sought.

Phyllis R. Crego brought a paternity action in the Wayne Circuit Court against Kermit L. Coleman. By stipulation of the parties, the court, Marianne O. Battani, J., after determining that adequate support had been provided for the child, entered an order dismissing the complaint and directing the defendant to pay child support of $20 a week until the friend of the court made a formal recommendation and then to pay the lesser of the recommended amount or $50 a week until the child reached eighteen years of age. Upon stipulation of the parties, the court entered a second order, increasing the amount of the initial child support. The stipulation that prompted the second order included an agreement by the parties that the support order would not be subject to modification. After the friend of the court made its recommendation, the court entered a third order that directed the defendant to pay $50 a week until the child turned eighteen or until further order of the court. Neither party nor their attorneys signed the third order to approve its form or substance. The plaintiff thereafter moved for an increase in child support. The trial court denied the motion on the basis of res judicata. The plaintiff appealed. The Court of Appeals, HOLBROOK, JR., P.J., and REILLY, J., affirmed, holding that the settlements are governed by contract principles, that an illegitimate child's right to equal protection of the law did not provide a basis for a court to modify an order of support that had been entered pursuant to a stipulation of the parties that precluded modification of the level of support, that the trial court's second order and its underlying stipulation of the parties were consistent with the statutory bar of § 3 of the Paternity Act, MCL 722.713; MSA 25.493, which prevented modification of a support order unless the parties provided for such modification in the language of the settlement agreement, and that the language of the trial court's third support order that provided that the ordered support was until further order of the court did not provide a basis for the trial court to modify the level of support because that order with the added language had not been approved by the parties. Griffin, J., dissenting, stated that the defendant, by

failing to appeal the third support order, had acquiesced to the provisions of that order and that the trial court could have modified the level of support pursuant to the "further order" language of the third support order. 201 Mich App 443 (1993). Subsequently, following the decision of the Court of Appeals in *Dones v Thomas*, 210 Mich App 674 (1995), in which the statutory bar of MCL 722.713; MSA 25.943 was declared unconstitutional as a violation of the constitutional guarantees of equal protection because it authorized nonmodifiable child support awards in paternity actions even though child support awards in divorce actions were always modifiable, the plaintiff renewed her motion for modification of the order of support. The trial court concluded that it was required to follow *Dones*, even though *Dones* conflicted with the 1993 decision of the Court of Appeals in this case, provided that the parties were afforded an opportunity to resolve any issue regarding paternity with a blood test. The defendant appealed. The Court of Appeals, DOCTOROFF, P.J., and MACKENZIE and GRIFFIN, JJ., in an opinion released November 14, 1997, reversed, holding that the 1993 opinion of the Court of Appeals in this matter was controlling precedent pursuant to MCR 7.215(H), but that were it not bound by the 1993 opinion of the Court of Appeals in this matter, it would follow *Dones* and hold MCL 722.713; MSA 25.493 to be unconstitutional as a violation of the constitution's guarantees of equal protection. 226 Mich App 815 (1997). By its order of November 26, 1997, the Court of Appeals vacated the November 14 opinion and convened a special panel pursuant to MCR 7.215(H) to resolve the conflict between the position taken by the panel in the 1993 opinion of the Court of Appeals in this matter and the position taken by the panel in the 1997 opinion of the Court of Appeals in this matter. 226 Mich App 815 (1997).

After consideration by the conflict resolution panel, the Court of Appeals *held*:

1. Although orders of child support entered in conjunction with a divorce action and in conjunction with an order of filiation are, by statute, subject to modification by the court entering the order, even where there is a contrary agreement by the parties, the now-repealed § 3 of the Paternity Act permitted a mother or child to enter into an agreement with the father concerning the education and support of the child, made such an agreement binding on the mother and child when a court having jurisdiction to compel support had approved the agreement after having determined that adequate provision was reasonably secured by payment or otherwise, and barred other remedies of the mother or the child for the support and education of the child on the performance of the

approved agreement. Thus, children born outside marriage who were not the subject of a filiation order were statutorily denied the right to seek modification of support orders, a right expressly granted to other children.

2. A constitutional challenge to a statute on equal protection grounds on the basis that the statute utilizes a classification scheme based on whether a child is legitimate or illegitimate is subject to the heightened scrutiny of the substantial relationship test, under which a statutory classification will be struck down as unconstitutional unless it is substantially related to the achievement of an important governmental objective.

3. There was no substantially related state interest that would sustain the classification contained in the now-repealed § 3 of the Paternity Act, under which children born outside marriage who were not subject to a filiation order might be foreclosed from future modification of child support, regardless of their need, even though legitimate children were not similarly foreclosed from seeking modification of child support orders. Accordingly, the disparate treatment of children born outside marriage who were not subject to a filiation order caused by the provisions of the now-repealed § 3 of the Paternity Act violates the constitutional rights of equal protection of the law of those children.

Affirmed.

FITZGERALD, J., concurring, wrote separately to state that the question of retroactivity should have been addressed.

WHITBECK, J., dissenting, stated that the decision of the trial court should be reversed because the provisions of the now-repealed § 3 of the Paternity Act did not deprive children born outside marriage who were not the subject of a filiation order of their rights to equal protection of the law and, accordingly, those provisions should not be declared unconstitutional. The principles of judicial deference require that a determination whether a statutory classification based on illegitimacy results in denial of equal protection of the law should be made by applying the rational basis test rather than the heightened scrutiny test employed by the majority. If the rational basis test were to be applied, the provisions of § 3 would be found to be constitutional as applied in this case, because those provisions bore a rational relationship to a legitimate government objective. Even if the more rigorous standard of the heightened scrutiny test were used, the provisions of § 3 should have been found constitutional, because those provisions bore a substantial relationship to the governmental objective of providing support for children born outside marriage by facilitating and regulating the formation of child support agreements. The statutory scheme

adopted by the Legislature was reasonable. In any event, the decision of the majority should be given limited retroactive effect.

HOEKSTRA, P.J., dissenting, joined in those portions of the opinion of Whitbeck, J., relating to the proper test to be applied and to the constitutionality of the now-repealed § 3 of the Paternity Act, but expressed no opinion concerning the issue of retroactivity, because the record in this case is not fully developed in that regard.

1. CHILDREN BORN OUT OF WEDLOCK — CHILD SUPPORT — AGREEMENTS CONCERNING CHILD SUPPORT — MODIFICATION OF CHILD SUPPORT AWARDS.

Children born outside marriage who were not the subject of a filiation order were statutorily denied the right to seek modification of support orders entered pursuant to the provisions of the now-repealed § 3 of the Paternity Act where the underlying agreement between the mother or child and the father concerning the support and education of the child did not provide for modification of the level of support (MCL 722.713; MSA 25.493).

2. CONSTITUTIONAL LAW — EQUAL PROTECTION — ILLEGITIMACY — SUBSTANTIAL RELATIONSHIP TEST.

A constitutional challenge to a statute on equal protection grounds on the basis that the statute utilizes a classification scheme based on whether a child is legitimate or illegitimate is subject to the heightened scrutiny of the substantial relationship test, under which a statutory classification will be struck down as unconstitutional unless it is substantially related to the achievement of an important governmental objective (US Const, Am XIV; Const 1963, art 1, § 2).

3. CHILDREN BORN OUT OF WEDLOCK — EQUAL PROTECTION — MODIFICATION OF CHILD SUPPORT AWARDS.

There was no substantially related state interest that would sustain the disparate treatment of children born outside marriage who were not subject to a filiation order caused by the provisions of the now-repealed § 3 of the Paternity Act that foreclosed modification of child support orders entered pursuant to the provisions of that section; the statutory foreclosure of modification of child support orders entered pursuant to the provisions of the now-repealed § 3 of the Paternity Act with respect to children born outside marriage who were not subject to a filiation order violates the constitutional rights of equal protection of the law of those children; the provisions of the now-repealed § 3 of the Paternity Act are unconstitutional (US Const, Am XIV; Const 1963, art 1, § 2; MCL 722.713; MSA 25.493).

Robés & Kobliska, P.L.C. (by *J. Stephen Robés* and *Mathew Kobliska*), for the plaintiff.

Steven M. Jentzen, for the defendant.

Before: HOEKSTRA, P.J., and SAWYER, MCDONALD, MURPHY, NEFF, FITZGERALD, and WHITBECK, JJ.

NEFF, J. Pursuant to MCR 7.215(H), this special panel was convened to resolve the conflict between *Crego v Coleman*, 201 Mich App 443; 506 NW2d 568 (1993) (*Crego I*), and a later, vacated case involving the same parties, *Crego v Coleman*, 226 Mich App 815; 573 NW2d 291 (1997) (*Crego II*). At issue is the constitutionality of § 3 of the Paternity Act, MCL 722.713; MSA 25.493,[1] which allows the parties in a paternity action to reach a settlement barring future recovery or modification of child support. If not for the precedential effect of *Crego I*, the *Crego II* panel would have held the statute unconstitutional as violative of the equal protection guarantees of the United States and Michigan Constitutions. We agree with the analysis set forth in *Crego II*, and thus hold that MCL 722.713; MSA 25.493 is unconstitutional. Accordingly, we affirm the circuit court's order denying rehearing of an order granting plaintiff's motion for an increase in defendant's child support obligation.

I

In October 1978, plaintiff filed a paternity action alleging that defendant is the father of her daughter, who was born in August 1978. In 1980, the complaint was dismissed pursuant to a settlement agreement

[1] MCL 722.713; MSA 25.493 was repealed by 1996 PA 308, effective June 1, 1997.

reached between the parties in which defendant agreed to pay weekly child support but did not acknowledge paternity. The trial court approved the terms of the settlement, as required by MCL 722.713; MSA 25.493, and ordered defendant to pay $20 a week in child support pending receipt of the friend of the court's formal recommendation. A second order was entered on September 26, 1980, requiring defendant to pay $35 a week. This second order specified the parties' intent that the support order be "not modifiable" and that the matter "shall stand settled, discontinued and dismissed" with respect to defendant. On January 30, 1981, after receiving the friend of the court recommendation, the court entered a third and final "permanent" order, which required defendant to pay $50 a week until the child's eighteenth birthday "or until further order of the court." Unlike the two previous orders, however, this order was not signed by the parties, nor did their attorneys approve its form or substance.

In the early 1990s, plaintiff filed a motion to modify the child support order. The trial court dismissed plaintiff's motion on the basis of res judicata. A divided panel of this Court affirmed, holding that the parties' settlement agreement was binding and precluded a modification of defendant's support obligation.[2] *Crego I*, *supra* at 447. The Court also rejected plaintiff's claim that MCL 722.713; MSA 25.493 denies children born outside marriage their constitutional right of equal protection of the law. *Id.* at 446.

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[2] Judge GRIFFIN dissented, opining that the language of the trial court's final order allowed for modification. *Crego I*, *supra* at 448.

Two years later, in *Dones v Thomas*, 210 Mich App 674; 534 NW2d 221 (1995), a different panel of this Court declared MCL 722.713; MSA 25.493 unconstitutional as violative of the constitutional guarantees of equal protection because it authorizes nonmodifiable child support awards in paternity actions, while child support awards in divorce actions always remain modifiable.[3] Following the decision in *Dones*, plaintiff renewed her motion for modification of the support order. The trial court concluded that it was required to follow *Dones*, even though it conflicted with *Crego I*, as long as the parties were afforded an opportunity to resolve any issue regarding paternity with blood tests if they so desired.

Defendant appealed, arguing that *Crego I* was controlling and that MCL 722.713; MSA 25.493 does not violate the equal protection clause. The panel in *Crego II* agreed that *Crego I* was controlling, but stated that if it were not required to follow *Crego I*, it would find the statute unconstitutional.

II

Children have an inherent right to parental support. *Evink v Evink*, 214 Mich App 172, 175-176; 542 NW2d 328 (1995). For children born in wedlock, but whose parents divorce or separate, our Legislature has provided statutory procedures to modify support orders. For example, MCL 552.17(1); MSA 25.97(1) provides:

> The court may, from time to time after its issuance, on the petition of either of the parents, revise, and alter a judgment concerning the care, custody, maintenance, and sup-

[3] The Court in *Dones* did not mention the previous decision in *Crego I*.

> port of some or all of the children, as the circumstances of the parents, and the benefit of the children require.

Moreover, it is well settled that in a divorce action, the court may modify a support order even if the parties had entered into an agreement regarding support. *Johns v Johns*, 178 Mich App 101, 106; 443 NW2d 446 (1989); see also *Wiersma v Wiersma*, 241 Mich 565, 566; 217 NW 767 (1928) (" 'parents may not bargain away the children's welfare, . . . [and] the court may always do what seems reasonable and necessary to protect the children's rights' "[citations omitted]). Similarly, children born outside marriage who are the subject of a filiation order are permitted to seek modification of child support orders, despite contrary agreements between the parties. *Boyles v Brown*, 69 Mich App 480; 245 NW2d 100 (1976); MCL 722.720; MSA 25.500.

In sharp contrast, the statute at issue here, MCL 722.713; MSA 25.493, provides as follows:

> (a) An agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support and education of the child shall be binding upon the mother and the child only when the court having jurisdiction to compel support and education of the child shall have determined that adequate provision is reasonably secured by payment or otherwise and has approved the agreement or compromise.
>
> (b) The performance of the agreement or compromise, when so approved, shall bar other remedies of the mother or child for the support and education of the child.

Thus, children born outside marriage who are not the subject of a filiation order are statutorily denied the right to seek modification of support orders, a right

expressly granted to other children. Plaintiff argues that the denial of this right violates the constitutional guarantees of equal protection of the law. We agree.

III

The Equal Protection Clauses of the United States Constitution and the Michigan Constitution are coextensive, *Moore v Spangler*, 401 Mich 360, 370; 258 NW2d 34 (1977), and provide that no person shall be denied equal protection of the law. US Const, Am XIV; Const 1963, art 1, § 2. This constitutional guarantee requires that persons similarly situated be treated alike. *El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987).

A

The first step in an equal protection analysis is to determine the appropriate level of judicial scrutiny. The reviewing court will use one of three tests, depending on the type of classification and the nature of the interest at issue. Where a statute creates an inherently suspect classification, such as race, alienage, ethnicity, and national origin or affects a fundamental interest, the "strict scrutiny" test applies. *Plyler v Doe*, 457 US 202, 216-217; 102 S Ct 2382; 72 L Ed 2d 786 (1982). Under this test, the statute will be upheld only if the state "demonstrate[s] that its classification scheme has been precisely tailored to serve a compelling governmental interest." *Id.* at 217. The "rational basis" test is applied when the classification is not inherently suspect or a fundamental interest is not involved. *Id.* at 216. Under this test, the legislation is presumed to be constitutional and the party challenging the statute has the burden of proving that the

legislation is arbitrary and thus irrational. *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 668; 232 NW2d 636 (1975).

Under the third, or "substantial relationship" test, a statutory classification will be struck down as unconstitutional unless it is "*substantially* related to the achievement of the important governmental objective." *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 191; 387 NW2d 821 (1986) (emphasis in original). Without question, classifications based on illegitimacy are subject to this intermediate, or "heightened" scrutiny. *Clark v Jeter*, 486 US 456, 461; 108 S Ct 1910; 100 L Ed 2d 465 (1988); *Spada v Pauley*, 149 Mich App 196, 203; 385 NW2d 746 (1986). Therefore, we must determine whether the statute's classification, which denies children born outside marriage the right to seek modification of support on changed circumstances, is substantially related to an important state interest.[4]

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[4] Our dissenting colleague's assertion that heightened scrutiny may not be the appropriate test is based on an earnest but strained attempt to distinguish the clear holdings of *Gomez v Perez*, 409 US 535; 93 S Ct 872; 35 L Ed 2d 56 (1973), and *Frame v Nehls*, 452 Mich 171; 550 NW2d 739 (1996). In *Frame*, our Supreme Court held that a statute that made a grandparent's right to seek visitation rights dependent on whether the child's parents were involved in divorce proceedings was not subject to strict or heightened equal protection scrutiny because the statute *did not discriminate on the basis of legitimacy of the child. Id.* at 185. Only then did the Court proceed to use the "rational basis" test and find the grandparent visitation statute constitutional. *Id.* at 189. Unlike the situation presented in *Frame*, the discrimination of MCL 722.713; MSA 25.493 is clearly aimed solely at children born outside marriage whose fathers have settled a paternity suit without acknowledging paternity.

The dissent's position regarding the applicability of *Gomez* is similarly flawed. Whether MCL 722.713; MSA 25.493 contains provisions similar to the statutory scheme struck down in *Gomez* is not the issue. Rather, the case stands for the modern position that statutes that result in disparate

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The overriding purpose of the Paternity Act is to see that minor children born outside marriage are supported and cared for. *Whybra v Gustafson*, 365 Mich 396, 400; 112 NW2d 503 (1961). This Court has stated, "The announced public policy of this state is to treat children born out of wedlock as no less deserving of support than those born in wedlock." *Smith v Robbins*, 91 Mich App 284, 289; 283 NW2d 725 (1979). We agree with the panel in *Crego II* that no "substantially related" state interest exists that would sustain the classification contained in MCL 722.713; MSA 25.493.[5]

1

In upholding the constitutionality of MCL 722.713; MSA 25.493, *Crego I* relied on the father's interest in a final settlement of paternity matters. In the context of divorce proceedings, our Legislature has determined that the need to allow a modification of child support on a change of circumstances outweighs the need for settlement and finality. MCL 552.17(1); MSA 25.97(1). We see no difference between the state's interest in settlement and finality in divorce proceedings and those same interests in actions under the

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treatment of legitimate children and children born outside marriage are unconstitutional. Indeed, as the Court itself stated, "[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez*, *supra* at 538.

[5] We note our disagreement with the dissent's focus on the effect of MCL 722.713; MSA 25.493 on mothers of children born outside marriage. Although support payments are made to the mother, the right to receive support belongs solely to the child. *Evink*, *supra* at 175-176. Accordingly, the payment of support—or the denial of it—is a matter involving the equal protection rights of the child.

Paternity Act that would justify treating children born outside marriage any differently than children generally. Indeed, as noted in *Crego II*, *supra* at 821, "legitimate and illegitimate children do not differ in their potential for encountering circumstances that may increase their need for financial support."

In *Gomez v Perez*, 409 US 535; 93 S Ct 872; 35 L Ed 2d 56 (1973), the United States Supreme Court held that a state statute that granted legitimate children a judicially enforceable right of support from their natural fathers but denied the right to children born outside marriage was unconstitutional as a violation of the guarantee of equal protection. In so ruling, the Court stated:

> [A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust." [*Id.* at 538.]

With this we heartily agree. MCL 722.713; MSA 25.493 provides that, unlike legitimate children, children born outside marriage who are not subject to a filiation order may be foreclosed from future modification of child support, regardless of need. This disparate treatment of children born outside marriage cannot withstand heightened scrutiny.[6]

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[6] Other decisions of this Court have recognized that support may be modified in a paternity action when the order entered pursuant to the parties' settlement agreement itself provides for future adjustments, such as including the proviso, "until further order of the court." See *Morrison v*

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We disagree with the dissent's assertion that the circumstances present when a child is born within marriage are objectively different in substance from the situation where a child is born outside marriage because in the latter case there is no presumptive father. Children, whether born within or without marriage, are the same with regard to their rights to support.

Further, as noted by *Crego II*, the factual determination of paternity is no longer a difficult credibility contest. Scientific advances regarding DNA testing now provide for a quicker, easier, and more accurate method for establishing paternity. In fact, a statutory presumption of paternity exists if a blood or DNA test establishes a probability of paternity of ninety-nine percent or higher. MCL 722.716(5); MSA 25.496(5). With these advances, there is no longer a difference between the state's interest in finality and settlement in paternity actions and divorce actions on the basis of difficulty of proof.

IV

Children born outside marriage are no less deserving of support because of the circumstances of their birth than other children. If there is no limitation on the right of a legitimate child to seek modification of support, then there can be no such limitation on the same right for a child born outside marriage. The disparate treatment between children born outside mar-

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Richerson, 198 Mich App 202, 211; 497 NW2d 506 (1993); *Van Laar v Rozema*, 94 Mich App 619, 624; 288 NW2d 667 (1980). Unlike our dissenting colleague, we do not believe that a child's equal protection rights should hang on so narrow a thread.

riage and legitimate children contained in MCL 722.713; MSA 25.493 violates the federal and state constitutional rights of a child born outside marriage to equal protection under the law. Accordingly, we hold MCL 722.713; MSA 25.493 is unconstitutional, and we affirm the trial court's order denying defendant's motion for rehearing of the order granting plaintiff's motion for modification of the earlier support agreement.

Affirmed.

SAWYER, MCDONALD, and MURPHY, JJ., concurred.

FITZGERALD, J. (*concurring*). I agree wholeheartedly with the majority's analysis and resolution. I write separately, however, in light of my dissenting colleague's sentiment that the issue of retroactivity should be addressed by the majority. While I express no opinion regarding the retroactive effect of the decision, I believe that the issue of retroactivity should be addressed in the interests of judicial economy.

WHITBECK, J. (*dissenting*). I respectfully dissent. The majority's decision holds unconstitutional a section of the Paternity Act that was on the books for over forty years, in the process substituting its judgment for that of the 1956 Legislature relative to the appropriate *means* for carrying out an *objective* that the majority finds perfectly acceptable. There is nothing in our judicial commissions that makes us better qualified than that Legislature to make such policy decisions, particularly in a situation where the disparate treatment that the majority uses to strike down the offending section could have been, and presuma-

bly often was, obviated by the fairly simple expedient of utilizing language in child support agreements that provided for later modifiability by the parties or by other order of the cognizant court. In my view, therefore, our voyage into judicial activism in this matter is an entirely unnecessary one.

I. STATUTORY PROVISIONS

A. SECTION 3 OF THE PATERNITY ACT

Section 3 of the Paternity Act, MCL 722.713; MSA 25.493 provided[1] as follows:

> (a) An agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support and education of the child shall be binding upon the mother and the child only when the court having jurisdiction to compel support and education of the child shall have determined that adequate provision is reasonably secured by payment or otherwise and has approved the agreement or compromise.
>
> (b) The performance of the agreement or compromise, when so approved, shall bar other remedies of the mother or child for the support and education of the child.

As is readily apparent, and as a prior panel of this Court observed, subsection 3(b) of the Paternity Act prevented modification of the support order unless the parties provided for modification in the agreement, either specifically or by using language allowing modification "by other order of the court." See *Crego v Coleman*, 201 Mich App 443; 506 NW2d 568 (1993) (*Crego I*).[2] Stated differently, subsection

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[1] The Legislature repealed § 3 of the Paternity Act effective June 1, 1997.

[2] I, therefore and quite obviously, do not read *Crego I* as having held that § 3 of the Paternity Act precluded the parties from providing for mod-

3(b) of the Paternity Act created a statutory bar to other remedies, in addition to those contained in the agreement, but was silent concerning what was required to be contained in the agreement itself.[3]

B. THE DIVORCE STATUTES

The Michigan statutes relating to divorce contain at least three separate provisions relating to the modification of divorce and child support orders and decrees. See MCL 552.17(1); MSA 25.97(1), MCL 552.455(1); MSA 25.222(5)(1), MCL 552.517(1); MSA 25.176(17)(1). These provisions, both collectively and individually, explicitly allow for the modification of judgments of divorce and child support orders. Indeed as noted by the majority, in a divorce action the parties may not compromise their child's right to receive support. *Johns v Johns*, 178 Mich App 101, 106; 443 NW2d 446 (1989).

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ification of the agreement, despite the reference to the lack of authority for the circuit court to "modify the parties' agreement by entering a support order that was inconsistent with the parties' settlement of the paternity action that had previously been approved by the court." *Crego I, supra* at 447. Rather, I read this language, particularly in light of Judge GRIFFIN's dissent, to mean that a majority of the *Crego I* panel believed that the circuit court could not, sua sponte and without the agreement of the parties, insert the phrase "or until further order of the court" in a support order. I regard this reading of *Crego I* as being the law of the case with respect to the modifiability of the support order.

[3] I observe, however, that subsection 3(b) of the Paternity Act required that the circuit court approve the agreement and that subsection 3(a) required that the circuit court make a determination that "adequate provision [for the child's support and education] is reasonably secured by payment or otherwise." Clearly, therefore, the statute required that the circuit court scrutinize the agreement independently to assure, at a minimum, that provision for the child's support and welfare was (a) "adequate" and (b) "reasonably secured by payment or otherwise." Beyond these minimum standards, subsection 3(b) of the Paternity Act was silent with regard to the contents of the agreement.

The majority, however, concludes that children born outside marriage who were not the subject of a filiation order were statutorily denied the right to seek modification of support orders, a right expressly granted to other children. This is, quite literally, incorrect. Rather, subsection 3(b) of the Paternity Act denied children born outside marriage who were not the subject of a filiation order the right to seek modification of support orders *unless the parties provided for modification in the agreement, either specifically or by using language allowing modification "by other order of the court."*[4] This distinction is, I contend, an extremely significant one: rather than being denied the right of modification, children born outside marriage were, under these circumstances, granted *exactly* the same right.

II. STANDARD OF REVIEW: THE THREE LEVELS OF CONSTITUTIONAL SCRUTINY

A. INTRODUCTION: THE GENERAL PRINCIPLES OF EQUAL PROTECTION

The majority, rather too quickly in my view, reaches the conclusion that, "[w]ithout question," classifications based on illegitimacy are subject to the form of intermediate constitutional review known as " 'heightened' " scrutiny. *Ante*, p 293. The majority does, however, correctly state that the Equal Protection Clauses of the United States Constitution and the Michigan Constitution provide that no person shall be denied the equal protection of the law. See US Const, Am XIV; Const 1963, art 1, § 2. See also *Frame v*

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[4] We have judicially recognized such agreements. See *Crego I*, *supra*; *Hisaw v Hayes*, 133 Mich App 639, 643; 350 NW2d 302 (1984).

Nehls, 452 Mich 171, 183; 550 NW2d 739 (1996); *Spada v Pauley*, 149 Mich App 196, 203; 385 NW2d 746 (1986). In this regard, the Michigan and federal Equal Protection Clauses offer similar protection. *Doe v Dep't of Social Services*, 439 Mich 650, 670-671; 487 NW2d 166 (1992). This constitutional guarantee requires that persons similarly situated be treated alike. *F S Royster Guano Co v Virginia*, 253 US 412, 415; 40 S Ct 560; 64 L Ed 989 (1920); *El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987). Indeed, this Court has held that the equal protection provisions of the federal and state constitutions are coextensive. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 716; 575 NW2d 68 (1997); *People v McFall*, 224 Mich App 403, 413; 569 NW2d 828 (1997).

Conversely, however, the United States Constitution does not require things that are different in fact or opinion to be treated in law as though they were the same. *Jefferson v Hackney*, 406 US 535, 549; 92 S Ct 1724; 32 L Ed 2d 285 (1972); *Reed v Reed*, 404 US 71, 75; 92 S Ct 251; 30 L Ed 2d 225 (1971); *Tigner v Texas*, 310 US 141, 147; 60 S Ct 879; 84 L Ed 1124 (1940). Stated differently, the courts have not interpreted the United States Constitution to require " 'absolute equality.' " See *Doe*, *supra* at 661, citing *San Antonio Independent School Dist v Rodriguez*, 411 US 1, 24; 93 S Ct 1278; 36 L Ed 2d 16 (1973). [5]

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[5] Similarly, it is well established that the equal protection guarantee is not a source of substantive rights or liberties; rather, it is a measure of our constitutions' tolerance of government classification schemes. *Doe*, *supra* at 661, citing *San Antonio Independent School Dist*, *supra*, 411 US 58 [sic, p 59] (Stewart, J., concurring).

B. STRICT SCRUTINY

As the majority correctly states, when state legislation creates a classification scheme that is based upon suspect factors, such as race,[6] national origin,[7] ethnicity or alienage,[8] or that affects a fundamental interest,[9] courts apply a high standard of review, labeled "strict scrutiny." *People v Pitts*, 222 Mich App 260, 273; 564 NW2d 93 (1997). When courts review statutes under this strict standard, they uphold the statutes only "if the state demonstrates that its classification scheme has been precisely tailored to serve a compelling governmental interest." *Doe*, *supra* at 662, citing *Plyler v Doe*, 457 US 202, 216-217; 102 S Ct 2382; 72 L Ed 2d 786 (1982). Rarely have courts sustained legislation under this standard of review. *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 668; 232 NW2d 636 (1975). Justice Brennan, writing for the majority, laid out the rationale underlying the strict scrutiny analysis in *Plyler*, *supra* at 216-217, n 14:

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[6] See *American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 592-594; 560 NW2d 644 (1996). See also *Yick Wo v Hopkins*, 118 US 356; 6 S Ct 1064; 30 L Ed 220 (1886); *Strauder v West Virginia*, 100 US 303; 25 L Ed 664 (1879); Bickel, *The original understanding and the segregation decision*, 69 Harv L R 1 (1955).

[7] See *Oyama v California*, 332 US 633; 68 S Ct 269; 92 L Ed 249 (1948); *American States*, n 6, *supra* at 592-594.

[8] See *Nyquist v Mauclet*, 432 US 1, 8, n 9; 97 S Ct 2120; 53 L Ed 2d 63 (1977); *El Souri*, *supra*; *Chan v City of Troy*, 220 Mich App 376; 559 NW2d 374 (1996). While Congress has broad power to regulate immigration and the status of aliens, "[t]he States enjoy no power with respect to the classification of aliens." *Plyler v Doe*, 457 US 202, 225; 102 S Ct 2382; 72 L Ed 2d 786 (1982). Only rarely is alienage a matter "relevant to legislation by a State." *Id.*

[9] See *Harper v Virginia Bd of Elections*, 383 US 663, 672; 86 S Ct 1079; 16 L Ed 2d 169 (1966); *Neal*, *supra* at 717-718.

Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. See *McLaughlin v Florida*, 379 US 184, 192; 85 S Ct 283; 13 L Ed 2d 222 (1964); *Hirabayashi v United States*, 320 US 81, 100; 63 S Ct 1375; 87 L Ed 1774 (1943). Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist v Rodriguez*, 411 US 1, 28; 93 S Ct 1278; 36 L Ed 2d 16 (1973); *Graham v Richardson*, 403 US 365, 372; 91 S Ct 1848; 29 L Ed 2d 534 (1971); see *United States v Carolene Products Co*, 304 US 144, 152-153, n 4; 58 S Ct 778; 82 L Ed 1234 (1938). The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.[10]

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[10] There has not been unanimity on the United States Supreme Court that anything other than a "traditional" "rational basis" equal protection analysis should be used. See the dissents of Justice Harlan in *Katzenbach v Morgan*, 384 US 641, 660-661; 86 S Ct 1717; 16 L Ed 2d 828 (1966) (reflecting his view that requiring a state to show a need greater than mere rational policy to justify classifications in the area of voting rights is not "consistent with the purposes of the Equal Protection Clause, with the overwhelming weight of authority, or with well-established principles of federalism which underlie the Equal Protection Clause") and in *Shapiro v Thompson*, 394 US 618, 658-663; 89 S Ct 1322; 22 L Ed 2d 600 (1969) (reflecting his insistence on judicial restraint lest the Court become a "super-legislature"). Justice Harlan summarized his view in his concur-

The majority, again correctly in my view, declines to use the strict scrutiny test; subsection 3(b) of the Paternity Act is not based upon suspect factors, nor does it affect a fundamental interest.

C. THE "TRADITIONAL" OR "RATIONAL BASIS" TEST

The "traditional" or "rational basis" test represents the other polar extreme. Under this standard, courts will not strike down a statute if the classification scheme it creates is rationally related to a legitimate governmental purpose. Justice Stewart articulated the test in *Dandridge v Williams*, 397 US 471, 485; 90 S Ct 1153; 25 L Ed 2d 491 (1970):

> If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v Natural Carbonic Gas Co*, 220 US 61, 78; 31 S Ct 337; 55 L Ed 369 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co v City of Chicago*, 228 US 61, 69-70; 33 S Ct 441; 57 L Ed 730 (1913). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v Maryland*, 366 US 420, 426; 81 S Ct 1101; 6 L Ed 2d 393 (1961).

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rence in *Dandridge v Williams*, 397 US 471, 489; 90 S Ct 1153; 25 L Ed 2d 491 (1970), when he said:

> Except with respect to racial classifications, to which unique historical considerations apply, see *Shapiro*, at 659, I believe the constitutional provisions assuring equal protection of the laws impose a standard of rationality of classification, long applied in the decisions of this Court, that does not depend upon the nature of the classification or interest involved.

In Michigan, courts have applied the rational basis test principally to economic and social[11] legislation. See *Manistee Bank*, *supra* at 668. Under the traditional or rational basis test, a classification will stand unless it is shown to be " 'essentially arbitrary.' " *Id.*, quoting *Lindsley*, *supra*. Stated differently, one who attacks an enactment must show that it is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981). See also *In re Kasuba Estate*, 401 Mich 560, 568-569; 258 NW2d 731 (1977); *McAvoy v H B Sherman Co*, 401 Mich 419, 453-454; 258 NW2d 414 (1977). "Few statutes have been found so wanting in 'rationality' as to fail to satisfy the 'essentially arbitrary' test." *Manistee Bank*, *supra* at 668. Stated positively, the test is that courts must uphold a statutory classification where it is rationally related to a legitimate government purpose. *Doe*, *supra*, 439 Mich 662; *American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 592; 560 NW2d 644 (1996). The rational basis test " 'reflects the judiciary's awareness that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." ' " *Id.* at 597, quoting *Gronne v Abrams*, 793 F2d 74, 77 (CA 2, 1986) (further citation omitted).

D. HEIGHTENED SCRUTINY

The United States Supreme Court formally adopted "intermediate" or "heightened" scrutiny for "illegiti-

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[11] In *Dandridge*, Justice Stewart, writing for the Court, noted that many of the previous United States Supreme Court cases applying the traditional or rational basis test had dealt with business and industry but then stated that there was no basis for applying a different constitutional standard to cases involving social welfare. *Dandridge*, *supra* at 485.

macy" classifications in 1988 in *Clark v Jeter*, 486 US 456; 108 S Ct 1910; 100 L Ed 2d 465 (1988). In that case, Justice O'Connor, writing for a unanimous court, stated:

> To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because "visiting this condemnation on the head of an infant is illogical and unjust." *Weber v Aetna Casualty & Surety Co*, 406 US 164, 175; 92 S Ct 1400; 31 L Ed 2d 768 (1972). Yet, in the seminal case concerning the child's right to support, this Court acknowledged that it might be appropriate to treat illegitimate children differently in the support context because of "lurking problems with respect to proof of paternity." *Gomez v Perez*, 409 US 535, 538; 93 S Ct 872; 35 L Ed 2d 56 (1973). [*Clark v Jeter*, *supra* at 461.][12]

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[12] As Justice LEVIN noted in his dissenting opinion in *Frame*, *supra* at 207-209, it can easily be argued that at least some of the United States Supreme Court's pre-1988 decisions regarding "illegitimacy" classifications are consistent with an intermediate form of constitutional review. See, *e.g.*, *Picket v Brown*, 462 US 1, 8; 103 S Ct 2199; 76 L Ed 2d 372 (1983) ("In view of the history of treating illegitimate children less favorably than legitimate ones, we have subjected statutory classifications based on illegitimacy to a heightened level of scrutiny."). See also Nowak & Rotunda, Constitutional Law (4th ed), § 14.14, p 719:

> This standard of intermediate scrutiny, which falls between the rational relationship test and the strict scrutiny test in terms of the strictness of the judicial review of classification, was not formally adopted for illegitimacy classifications until 1988. Nevertheless, the Supreme Court's pre-1988 decisions are consistent with this form of intermediate standard of review.

But see *Glona v American Guarantee & Liability Ins Co*, 391 US 73, 75; 88 S Ct 1515; 20 L Ed 2d 441 (1968), where Justice Douglas, writing for the majority, arguably used the rational basis test in holding that a wrongful death statute that authorized actions by mothers of legitimate children but did not authorize actions by mothers of children born outside marriage denied the equal protection of the laws to the mothers in the latter class. See also the dissent by Justice Harlan, joined by Justices Black and

Gomez involved facts considerably different than those involved in this matter. *Gomez* arose in Texas where, both at common law and under the statutes of the state, the natural father had "a continuing and primary duty to support his legitimate children." *Gomez*, *supra* at 536. However, there was no counterpart duty, either at common law or under the state stat-

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Stewart, *id.* at 76, describing the decision in *Glona* and the companion case of *Levy v Louisiana*, 391 US 68; 88 S Ct 1509; 20 L Ed 2d 436 (1968), as "constitutional curiosities" in which the majority reached the answer to the question presented "by a process that can only be described as brute force." See also the acerbic dissent of Justice Rehnquist in *Trimble v Gordon*, 430 US 762, 777; 97 S Ct 1459; 52 L Ed 2d 31 (1977), in which, in words echoing the earlier concerns voiced by Justice Harlan, he questioned the entire concept of taking equal protection analysis beyond a rational basis test in cases other than those involving race or national origin:

> The Fourteenth Amendment's prohibition against "any State . . . deny[ing] to any person . . . the equal protection of the laws" is undoubtedly one of the majestic generalities of the Constitution. If, during the period of more than a century since its adoption, this Court had developed a consistent body of doctrine which could reasonably be said to expound the intent of those who drafted and adopted that Clause of the Amendment, there would be no cause for judicial complaint, however unwise or incapable of effective administration one might find those intentions. If, on the other hand, recognizing that those who drafted and adopted this language had rather imprecise notions about what it meant, the Court had evolved a body of doctrine which both was consistent and served some arguably useful purpose, there would likewise be little cause for great dissatisfaction with the existing state of the law.
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> Unfortunately, more than a century of decisions under this Clause of the Fourteenth Amendment have produced neither of these results. They have instead produced a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass "arbitrary," "illogical," or "unreasonable" laws. Except in the area of the law in which the Framers obviously meant it to apply—classifications based on race or on national origin, the first cousin of race—the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.

utes, for natural fathers to support their "illegitimate children." *Id.* at 536-537. Thus, but for the fact that the child in *Gomez* was born outside marriage, she would have been entitled to support from her natural father. *Id.* at 537. Under such circumstances, the Court held:

> We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust." [*Weber*, *supra*] at 175. We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.[13] [*Gomez*, *supra* at 538.]

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[13] Although not central to my view in this matter, I note in passing that both the panel in *Dones v Thomas*, 210 Mich App 674, 677-679; 534 NW2d 221 (1995), and the panel in *Crego v Coleman*, 226 Mich App 815, 821; 573 NW2d 291 (1997) (*Crego II*), placed considerable reliance on recent scientific innovations in the area of testing for paternity as part of their rationale for finding § 3 of the Paternity Act to be unconstitutional. I first note that subsection 6(5) of the Paternity Act, MCL 722.716(5); MSA 25.496(5), creates a presumption of paternity when the "probability of paternity" after testing by DNA profile or other methods is ninety-nine percent or higher, but that a party may always rebut that presumption. Secondly, today's scientific "fact" may become tomorrow's heresy. See Conley, *The First Principle of Real Reform: The Role of Science in Constitutional Jurisprudence*, 65 NC L R 935, 942-943 (1987):

> I want to consider what guidance cases such as these can offer for future interactions between science and the law. To my mind, the fatal flaw in these cases is the misperception of science as a well oiled machine for generating truth, a process somehow less susceptible to human passion and error than is law. When science suggests the resolution of a legal problem, a lawmaker with this view may take comfort in rising above the admittedly human and inherently fallible process of traditional lawmaking—he may believe, in Holmes' words, that he is 'approaching the first principle of real reform.' [Referring to a letter by Justice Oliver Wendell

Here, the statutory scheme is considerably different. Section 3 of the Paternity Act did not deny children born outside marriage the right of child support from their natural fathers; rather, it provided a mechanism for obtaining such support. The issue here relates to the modifiability of child support orders under subsection 3(b), an issue that the Court in *Gomez* did not come close to addressing. Thus, while perhaps "seminal" in the overall sense, the holding in *Gomez* is not particularly helpful in dealing with this issue.

Holmes mentioning *Buck v Bell*, 274 US 200; 47 S Ct 584; 71 L Ed 1000 (1927), containing Justice Holmes' notorious statement that "[t]hree generations of imbeciles are enough." *Id.* at 207. Conley's premise is that this statement was based upon a belief that there was in 1927 an "irrefutable scientific basis for upholding the compulsory sterilization of a mentally retarded woman." Conley, *supra* at 935.]

. . . The problem is that often the human frailty of science can be detected and exposed only by the trained insider. The outsider, even one as astute as Holmes, may confront a wall of superficial unanimity, and see no cause to inquire further.

So what is the law to do? In my view, it should respond with extreme care when science demands that new legal doctrine be created or established doctrine be altered radically. The more strident the demand, the more cautious it should be. Above all, judges and legislators should look skeptically at the scientific process, remembering that such terms as 'fact,' 'truth' and 'law' are, in most cases, as relative for scientists as they are for the rest of us.

* * *

. . . The findings of science sometimes have appealed to lawmakers as a simple substitute for the complex interaction among precedent, facts, and values that comprise legal decisonmaking, and as a source of certainty in an otherwise uncertain world. But the appeal of science as a first principle of real reform has been often illusory, and sometimes dangerous. If the Constitution is 'to endure for ages to come' in the face of technological challenge, real reform must continue to be inspired by the document itself and the eminently human processes it has spawned.

The situation in Michigan is similarly somewhat mixed. The Michigan Supreme Court clearly has adopted the United States Supreme Court's definition of heightened scrutiny. See *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 191; 387 NW2d 821 (1986):

> Under this level of scrutiny, there are two determinations that must be made. The first question is whether the classification serves an *important* governmental interest. The second question is whether the classification is *substantially* related to the achievement of the important governmental objective. *Craig v Boren*, 429 US 190, 197; 97 S Ct 451; 50 L Ed 2d 397 (1976), reh den 429 US 1124 (1977). [Emphasis in original.]

Waterford Twp, however, involved an allegation of gender discrimination, as did *Craig v Boren*. The most recent Michigan Supreme Court case involving an allegation of discrimination based on illegitimacy is *Frame, supra*. One of the questions presented in that case was whether § 7b, MCL 722.27b; MSA 25.312(7b), of the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.*, unconstitutionally deprived the paternal grandfather of a child born outside marriage equal protection of the law. (The Court referred to § 7b as the "grandparent visitation statute.") In *Frame*, the mother of the child filed a complaint (apparently under the Paternity Act) to determine paternity. *Frame, supra* at 175. The father admitted paternity, and the circuit court entered an order of filiation, awarding the mother custody and awarding the father regular visitation. *Id.* The child's paternal grandfather then petitioned the circuit court for grandparent visitation under the grandparent visitation statute. *Id.* The mother moved for summary

disposition (rejecting the petition), and the circuit court granted that motion. The grandfather appealed and this Court reversed. *Frame v Nehls*, 208 Mich App 412; 528 NW2d 773 (1995). This Court specifically applied heightened scrutiny to classifications based on illegitimacy:

> Classifications based on illegitimacy are subject to intermediate or "heightened" scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Clark* [*supra*, 486 US 461]; and see *Gerhardt v Estate of Moore*, 150 Wis 2d 563; 441 NW2d 734 (1989) (statutory scheme similar to Michigan's statute invalidated on equal protection grounds). [208 Mich App 415.]

The Michigan Supreme Court, however, reversed. Justice BOYLE, writing for the majority, stated that "[t]he classification created involves neither a suspect class, [sic] nor a fundamental right, *is rationally related to a legitimate government purpose*, and does not violate equal protection." *Frame*, *supra*, 452 Mich 174-175 (emphasis supplied). In responding to the grandfather's assertion (relying on *Clark*, *supra*, and *Dones v Thomas*, 210 Mich App 674; 534 NW2d 221 [1995]) that heightened scrutiny must be used, the majority found, after reviewing the statute as a whole, that "the Legislature did not create classifications using legitimacy as a factor." *Frame*, *supra*, 452 Mich 185. Citing *Califano v Boles*, 443 US 282, 296; 99 S Ct 2767; 61 L Ed 2d 541 (1979),[14] the majority held that the

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[14] *Califano v Boles*, 443 US 282; 99 S Ct 2767; 61 L Ed 2d 541 (1979), holds that a provision of the federal Social Security Act, 42 USC 402(g)(1), making "mother's insurance benefits" payable only to divorced spouses and surviving spouses of wage earners, but not to unwed mothers, is not a classification on the basis of illegitimacy because any effect on children born outside marriage is incidental and, to a large degree, speculative.

incidental effect on children born outside marriage as a class " 'is not sufficient' " to warrant heightened scrutiny analysis. *Frame, supra*, 452 Mich 189. The majority then explicitly used a rational basis test to find the grandparent visitation statute constitutional:

> The classifications created under the grandparent visitation statute are grandparents whose child is deceased or involved in a custody dispute (who may seek visitation) and grandparents whose child is alive or not involved in a custody dispute (who may not seek visitation). *Because there is no fundamental right or suspect classification involved, a rational basis test is used. Under this test, the grandparent visitation statute will be upheld as long as the classifications therein are rationally related to a legitimate governmental purpose. Doe, supra*, at 662. [*Frame, supra* at 189 (emphasis supplied).]

Thus, at least in *Frame*, the highest court in this state has declined to use heightened scrutiny in a case involving the allegation of statutory denial of equal protection based on illegitimacy. Panels of this Court have, however, not been so reluctant to apply the heightened scrutiny test. In two cases that this Court decided before the formal adoption by the United States Supreme Court of heightened scrutiny for illegitimacy classifications in *Clark, supra*, this Court relied on the reasoning of pre-*Clark* United States Supreme Court cases—in particular, *Gomez*—in reviewing statutory classifications alleged to be based

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(Although the language of 42 USC 402[g][1] as then in effect limited eligibility for "mother's insurance benefits" to females, the gender-based exclusion of males from eligibility for these benefits had been held to violate the equal protection component of the Fifth Amendment's Due Process Clause in *Weinberger v Wiesenfeld*, 420 US 636; 95 S Ct 1225; 43 L Ed 2d 514 [1975].)

on illegitimacy.[15] In addition, the *Dones* panel[16] and the panel in *Crego v Coleman*, 226 Mich App 815; 573 NW2d 291 (1997), (*Crego II*)[17] used the heightened scrutiny hallmark language of whether the challenged classification is "substantially related to permissible state interests."

On the other hand, this Court's approach has not been uniform on this point. In *Hisaw v Hayes*, 133 Mich App 639, 644-645; 350 NW2d 302 (1984), the panel, after discussing contractual considerations, addressed the equal protection aspects of the Paternity Act:

> In *Gomez* [*supra*], the Court held that a statutory scheme which required natural fathers to support their legitimate

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[15] See *Boyles v Brown*, 69 Mich App 480, 483; 245 NW2d 100 (1976) ("[m]ore recently, the United States Supreme Court, in *Gomez* [*supra*] found disparate statutory treatment between legitimate and illegitimate children to be constitutionally invalid") and *Spada*, *supra* at 203 ("Both article 1, § 2 of the Michigan Constitution and the Fourteenth Amendment to the United States Constitution provide that no person shall be denied the equal protection of the law. Classifications based on illegitimacy are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests," citing *Pickett*, *supra*, and *Gomez*, *supra* at 538.)

[16] See *Dones*, *supra* at 677:

> Classifications based upon illegitimacy violate the Equal Protection Clauses of US Const, Am XIV, and Const 1963, art 1, § 2, unless they are substantially related to permissible state interests. *Spada* [*supra* at 203.] The question then is whether the different treatment of legitimate and illegitimate children with respect to the modifiability of an award of support is substantially related to a permissible state interest. We are not persuaded that it is.

[17] See *Crego II*, *supra* at 818:

> Classifications based on illegitimacy are subjected to intermediate or "heightened scrutiny" and are unconstitutional unless "substantially related to permissible state interests." *Spada*, *supra* at 203.

> children but not their illegitimate children amounted to a denial of equal protection. However, equal protection does not require that things different in fact be treated as though they were the same. *Tigner* [*supra* at 147]. The difference between a paternity case and a case involving support for legitimate children is the necessity of proving paternity in the former case. Due process requires that a litigant be afforded a fair trial of the issues involved in the controversy and a determination of disputed questions of fact on the basis of evidence. . . . The right of an illegitimate child to equal protection of law does not justify depriving the alleged father of the right to a trial of a disputed question of paternity. We decline to follow *Boyles* [*v Brown*, 69 Mich App 480; 245 NW2d 100 (1976),] to the extent that, in a paternity settlement like that at issue here, it would permit a court to increase an alleged father's support obligation, albeit leaving him bound by his agreement to surrender his right to a judicial determination of paternity. Such a settlement cannot be modified, the only judicial remedy being recission.

And, of course, in *Crego I*, the panel declined to follow *Boyles* and followed *Hisaw*, thereby at least implicitly refusing to utilize the heightened scrutiny test.

Clearly, then, the situation with respect to the application in Michigan of heightened scrutiny to classifications alleged to be based on illegitimacy is anything but clear. I am considerably troubled by the fact that the majority has declined, without meaningful explanation,[18] to follow the example set in the most

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[18] In a footnote, the majority refers to the dissent's "earnest but strained" attempt to distinguish *Gomez* and *Frame*. *Ante* at 293, n 4. While (perhaps) being complimentary, I believe the majority misses the point of *Frame*. Certainly, the majority in *Frame* found that the Legislature did not create classifications using legitimacy as a factor. *Frame*, *supra* at 185. However, the majority's contention that "only then" did the Court in *Frame* proceed to use the rational basis test is incorrect. *Ante* at 293, n 4.

recent Michigan Supreme Court case, *Frame*, *supra*, in which classifications touching on illegitimacy were a significant issue and in which that Court explicitly applied the rational basis test. My concern is heightened by the fact that the majority pays no attention whatever to fundamental principles of judicial deference.

E. THE PRINCIPLES OF JUDICIAL DEFERENCE

There is almost universal agreement that the power of the Legislature is not without limits. See *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803): "[T]hat those limits may not be mistaken, or forgotten, the Constitution is written." And, as the Michigan Supreme Court stated in *Manistee Bank*, *supra* at 666: "[T]hat those limits not be exceeded, the courts are entrusted with the responsibility to review and

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Rather, the Court had *previously* determined to use the rational basis test, *id.* at 174-175, and made its comments about the classifications using legitimacy as a factor *in response to* the grandfather's assertion that heightened scrutiny must be used. (Certainly, the Court again later in its opinion referred to its use of the rational basis test: "Because there is no fundamental right or suspect classification involved, a rational basis test is used." *Id.* at 189. However, as the quotation itself makes clear, the Court rather clearly was of the opinion that the choice of tests under the facts presented was between strict scrutiny and rational basis.) I also note that the only parties in the case before us are the mother, plaintiff, and the acknowledged father, defendant. The child of the parties is not a party, and the increased child support payments being sought would not be paid directly to the child but rather to plaintiff. Accordingly, one hypothetical situation that we arguably need *not* deal with is whether application of § 3 of the Paternity Act to bar an action by a child born outside marriage in the child's own right for increased or back child support would violate the *child's* equal protection rights. One could therefore narrowly frame the question before us, in parallel with the Michigan Supreme Court's framing of the question in *Frame*, as whether § 3 of the Paternity Act violated the equal protection rights of the *mother* of a child born outside marriage.

the power to nullify legislative acts which are repugnant to the constitution."

Nevertheless, courts are to use this authority sparingly. "[U]nder established rules of statutory construction, statutes are presumed constitutional, and courts have a duty to construe a statute as constitutional unless unconstitutionality is clearly apparent." *Mahaffey v Attorney General*, 222 Mich App 325, 344; 564 NW2d 104 (1997). As the Michigan Supreme Court stated in *Council of Organizations & Others for Education About Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997), citing *United States v Raines*, 362 US 17, 21; 80 S Ct 519; 4 L Ed 2d 524 (1960), "When compelled to make a constitutional pronouncement, the court must do so with great circumspection and trepidation, with language carefully tailored to be no broader than that demanded by the particular facts of the case rendering such a pronouncement necessary." Further, in *General Motors Corp v Attorney General*, 294 Mich 558, 568; 293 NW2d 751 (1990), the Court stated:

> The court will not go out of its way to test the operation of a law under every conceivable set of circumstances. The court can only determine the validity of an act in the light of the facts before it. Constitutional questions are not to be dealt with in the abstract.

Indeed, the party challenging the facial constitutionality of an act " 'must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . . ' " *Council of Organizations*,

supra at 568, quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987).

Thus, this Court should presume § 3 of the Paternity Act to be constitutional unless its unconstitutionality is clearly apparent. Further, in ruling concerning this constitutional challenge, this Court should carefully tailor its language to the particular facts of this case. This Court should not go out of its way to test the operation of § 3 under every conceivable set of circumstances, nor should it deal with the constitutional question in the abstract. Rather, this Court should recognize that the fact that § 3 might operate unconstitutionally under some conceivable set of circumstances is insufficient. In my view, the majority opinion violates each of these precepts, and indeed does so without acknowledging their very existence.

For example, the majority asserts that children born outside marriage and not subject to a filiation order "*may be* foreclosed from future modification of child support, regardless of need." *Ante* at 295 (emphasis supplied). It is equally true, however, that such children born outside marriage were *not* foreclosed from future modification of child support if the parties provided for modification in the agreement, either specifically or by using language allowing modification "by other order of the court." The majority characterizes this distinction as a "narrow . . . thread." *Ante* at 295, n 6. I regard it as central. The majority uses the fact that subsection 3(b) of the Paternity Act may have operated discriminatorily in *some* circumstances as the peg upon which to hang its conclusion that it was therefore unconstitutional *in all circumstances* on equal protection grounds. It seems to me that, under well-recognized principles of

judicial deference to legislative enactments, we should take exactly the opposite approach: if subsection 3(b) of the Paternity Act operated *exactly the same as* the counterpart provisions in the divorce statutes in *some* circumstances, it was therefore constitutional on equal protection grounds. The majority's approach, in my view, allows the constitutionality of an enacted statute to hinge on the tenacity—or the lack thereof—of a party in a paternity proceeding or the skill—or the lack thereof—of that party's lawyer in negotiating a support order that provides for later modification. This, indeed, is a "narrow thread."

III. THE CONSTITUTIONALITY OF § 3 OF THE PATERNITY ACT

A. TREATMENT OF THE TWO CLASSIFICATIONS

Plaintiff's basic position here is that § 3 of the Paternity Act created an impermissible classification based on whether the mother of a child was married to the father at the time of the child's conception or birth. She thus claims that she, and others similarly situated in the same classification under § 3 of the Paternity Act, are treated differently than mothers of children within marriage who seek modification of child support under the divorce statutes, the second classification. The majority agrees. I do not.

In my view, § 3 of the Paternity Act did not *create* such an impermissible classification as it did not *require* that the mother of a child born outside marriage, such as plaintiff, be treated differently from the mother of a child born within marriage when seeking modification of child support. First, the Paternity Act did not require plaintiff to enter any paternity agreement with defendant whatsoever. Moreover, plaintiff could have insisted on the inclusion of a term in the

paternity agreement allowing for modification of support, either specifically or by reference to "other order of the court," as a precondition to entering the agreement. By its silence, subsection 3(b) of the Paternity Act did not bar such an agreement and, as I have previously noted, we have judicially recognized such agreements. Had the parties entered into such an agreement here and had the circuit court approved it, plaintiff would have been in exactly the *same* position with respect to the ability to seek modification of the amount of child support as if she and defendant had conceived their child within marriage.[19]

Although involving a different context, the equal protection issue in *McFall, supra,* is instructive. In that case, a jury convicted the defendant of assault with intent to commit criminal sexual conduct involving sexual penetration[20] and fourth-degree criminal sexual conduct.[21] The defendant argued that the trial court violated his constitutional right to equal protection when it read CJI2d 20.25,[22] which informed the jury that evidence other than the complainant's testimony was not necessary to prove a charge if that testimony proved guilt beyond a reasonable doubt. *McFall, supra* at 413. The defendant argued that this violated the right to equal protection of defendants in cases involving charges of criminal sexual conduct

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[19] If defendant had declined to enter a child support agreement with such a provision allowing for modification by the circuit court of the level of child support, then plaintiff, like the mother of a child born inside marriage, could have sought a judicial award of child support without defendant's consent.

[20] MCL 750.520g; MSA 28.788(7).

[21] MCL 750.520e(1)(a); MSA 28.788(5)(1)(a).

[22] An instruction from the "Sex Crimes" chapter of the second edition of the Michigan Criminal Jury Instructions.

"by exalting the complainants [in criminal sexual conduct cases] above other crime victims by instructing jurors that their testimony alone can justify conviction." *Id.* The *McFall* panel rejected the defendant's equal protection argument because the instruction could have been given in cases that did not involve criminal sexual conduct charges:

> Defendant's argument must fail because his premise, that CJI2d 20.25 is given only in cases involving charges of criminal sexual conduct, is without factual support. This Court is aware of no authority, nor has defendant cited any, establishing that this instruction cannot be given in cases involving other offenses. Moreover, it is well established that trial courts are not required to use the Michigan Criminal Jury Instructions, which do not have the official sanction of the Michigan Supreme Court. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).
>
> Defendant has failed to demonstrate that the circuit court treated him less favorably than it would have treated a similarly situated defendant not charged with criminal sexual conduct. Accordingly, defendant has not established that the court's use of CJI2d 20.25 violated his right to equal protection under the laws. [*McFall*, *supra* at 413-414.]

McFall differs from this case: *McFall* involved the "standard" criminal jury instructions, which the trial courts are not required to use, while this case involves a statute that had the force of the law. Nevertheless, this case is analogous to *McFall* in that § 3 of the Paternity Act did not *require* that plaintiff, as the mother of a child born outside marriage seeking modification of a child support agreement, be treated differently from the mother of a child born within marriage seeking modification of a child support agreement. In essence, the inclusion of CJI2d 20.25 only in the "Sex Crimes" chapter of the Michigan

Criminal Jury Instructions created a "default situation" in which it might have required extra effort or thought for a prosecutor to obtain a "no corroboration required" instruction in a case that did not involve a criminal sexual conduct charge. Similarly, § 3 of the Paternity Act created a "default situation" in which the mother of a child born outside marriage who entered a child support agreement could not later seek modification of the level of child support in the agreement *unless* the mother insisted that the agreement include a specific provision allowing for modification or the "other order of the court" language. Thus, § 3 of the Paternity Act did not violate plaintiff's constitutional right to equal protection, because it did not *require* that she be treated differently than the mother of a child born within marriage.

B. THE APPLICATION OF THE RATIONAL BASIS TEST

If this Court were to follow the lead of the Michigan Supreme Court in *Frame*, we could certainly conclude that, with regard to its effect on mothers of children born outside marriage, such as plaintiff, we may review § 3 of the Paternity Act under the "rational basis" test. Under this test, this Court should uphold § 3 of the Paternity Act as long it bears a rational relationship to a legitimate governmental purpose. See *Frame*, *supra*, 452 Mich 189.

In applying a rational basis review, the Court should recognize that "[t]he lines [were] drawn where they [were] because the Legislature put them there. As long as these lines survive rational basis review . . . this Court must defer to the legislative policy choices." *Id.* at 191, n 27. In short, this Court should review the constitutionality of legislation, not its wis-

dom.[23] By allowing parties to agree voluntarily to a scheme precluding modification of a child support order, § 3 of the Paternity Act could have increased the financial incentive for a putative father to acknowledge paternity. Also, by providing this option, the Legislature may reasonably have sought to facilitate settlement agreements between the mother and the putative father that would avoid the intense animosity often associated with litigation and thereby encourage the development of a satisfactory father-child relationship. While the majority emphasizes technological developments regarding the determination of paternity as a reason to hold § 3 of the Paternity Act unconstitutional, such technological developments did not eviscerate the reasonableness of § 3 of the Paternity Act in facilitating the relatively amicable settlement of paternity disputes. If the rational basis test were to be applied, I would conclude that § 3 of the Paternity Act was constitutional as applied in this case because it bore a rational relationship to a legitimate government objective.

C. THE APPLICATION OF THE HEIGHTENED SCRUTINY TEST

If, however, this Court chooses to depart from the Michigan Supreme Court's lead in *Frame* and to look

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[23] In this regard, I note that developments in technology used to provide evidence of paternity, or perhaps concerns about fairness to children born outside marriage and their mothers, may have influenced the Legislature's decision to repeal § 3 of the Paternity Act effective June 1, 1997. My view that § 3 of the Paternity Act had a rational basis certainly does not reflect any disapproval of the Legislature's decision to repeal that statute, but merely is a recognition that, within constitutional limits, the Legislature has broad power to determine matters of public policy. With the repeal of § 3 of the Paternity Act, it is clear that the default prohibition on modification of child support orders has now been prospectively removed by the Legislature.

more broadly at subsection 3(b) of the Paternity Act so as to conclude that it does, although indirectly but nevertheless in fact, affect the equal protection rights of the *child* born outside marriage, this Court then arguably is compelled to apply the heightened scrutiny test. Under this test, a statutory classification must be substantially related to an important governmental objective. Here, discerning the objective of the Paternity Act is relatively easy. Clearly, the objective of the Paternity Act is to provide a mechanism for assuring support for children born outside marriage. Indeed, this Court has stated that "[t]he purpose of the Paternity Act is to provide for the support of an illegitimate child." *Smith v Robbins*, 91 Mich App 284, 289; 283 NW2d 725 (1979). See also, *id.*, citing *Boyles*, *supra*, to the effect that "[t]he announced public policy of this state is to treat children born out of wedlock as no less deserving of support than those born in wedlock."

There is also very little question that this objective is an important one. The issue under the heightened scrutiny test, then, is whether the statutory mechanism in § 3 of the Paternity Act was "substantially related" to the important governmental objective of providing for the support of children born outside marriage. I would hold that it was.

I first note, however, as did Justice Rehnquist dissenting in *Trimble v Gordon*, 430 US 762, 783-784; 97 S Ct 1459; 52 L Ed 2d 31 (1977), that this type of review puts a court in the position of finding a legitimate, important objective that the Legislature in its wisdom adopted and then considering whether the very same Legislature was astute enough to adopt an

appropriate mechanism to achieve that objective. As Justice Rehnquist observed:

> If the great difficulties . . . [of ascertaining legislative intent] are surmounted, this Court then takes it upon itself to inquire into whether the Act in question accomplished the "purpose" which the Court first determines the legislature had in mind. It should be apparent that litigants who wish to succeed in invalidating a law under the Equal Protection Clause must have a certain schizophrenia if they are to be successful in their advocacy: They must first convince this Court that the legislature had a particular purpose in mind in enacting the law, and then convince it that the law was not at all suited to the accomplishment of that purpose.
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> But a graver defect than this in the Court's analysis is that it also requires a conscious second-guessing of legislative judgment in an area where this Court has no special expertise whatever. Even assuming that a court has properly accomplished the difficult task of identifying the "purpose" which a statute seeks to serve, it then sits in judgment to consider the so-called "fit" between that "purpose" and the statutory means adopted to achieve it. In most cases, and all but invariably if the Court insists on singling out a unitary "purpose," the "fit" will involve a greater or lesser degree of imperfection. Then the Court asks itself: How much "imperfection" between means and ends is permissible? In making this judgment it must throw into the judicial hopper the whole range of factors which were first thrown into the legislative hopper. What alternatives were reasonably available? What reasons are there for the legislature to accomplish this "purpose" in the way it did? What obstacles stood in the way of other solutions?
>
> The fundamental flaw, to me, in this approach is that there is absolutely nothing to be implied from the fact that we hold judicial commissions that would enable us to answer any one of these questions better than the legislators to whose initial decision they were committed. Without any antecedent constitutional mandate, we have created on the premises of the Equal Protection Clause a school for legislators, whereby opinions of this Court are written to

> instruct them in a better understanding of how to accomplish their ordinary legislative tasks. [*Id.*]

Here, the majority engages in exactly this process. It finds the overriding purpose of the Paternity Act to be assuring that minor children born outside marriage receive support and care. Clearly, then, the majority believes the 1956 Legislature to have been wise enough to perceive a legitimate need and concerned enough to pass legislation to address that need. However, in the next breath, the majority condemns the 1956 Legislature for being so dim as to adopt mechanisms that provided for "disparate treatment" of the very children that same Legislature sought to benefit. To use Justice Rehnquist's analogy, the majority first takes the 1956 Legislature to school and then administers a rather public judicial spanking by substituting its judgment concerning the "fit" between objectives and means. As did Justice Rehnquist, I find nothing in our judicial commissions that gives us superior qualifications to those of the 1956 Legislature to effect such a substitution.

I also note that the circumstances present when a child was born within marriage and, thus, with a presumptive biological father were objectively different in substance from the situation where a child is born outside marriage with no individual male readily apparent as the presumptive father. The majority disagrees with this assertion and states that "[c]hildren, whether born within or without marriage, are the same with regard to their rights to support." *Ante* at 296.

While this is an attractive statement rhetorically—and as a truism it is certainly beyond debate—it

misses the point. When subsection 3(b) was enacted in 1956, DNA testing was not even a gleam in a scientist's eye and identifying the putative father was not a matter of science but of largely anecdotal evidence. While in hindsight this seems quaint, the fact remains that, objectively, a substantive difference did exist between the factual circumstances surrounding the birth of a child within marriage and the birth of a child outside marriage. Standing alone, this is not a basis for upholding disparate treatment. Nevertheless we cannot avert our eyes from the circumstances that existed at the time the statute was enacted. In any event, it certainly will not do to assert a generalized equal right to child support payments as the deciding principle in this case without also showing a statutory violation of that right. Here, as I have repeatedly emphasized throughout this dissent, subsection 3(b) of the Paternity Act treated children born outside marriage *exactly the same as* children born within marriage under circumstances where the agreement allowed for modification of support, either specifically or by reference to "other order of the court."

In addition, it seems clear to me that the substantial relationship of § 3 of the Paternity Act to the objective of providing for the support of children born outside marriage was that it facilitated and regulated the formation of child support agreements. Thus, the mechanism that § 3 provided was as substantially related to the objective of the Paternity Act as the mechanisms provided in MCL 552.17(1); MSA 25.97, MCL 552.455(1); MSA 25.222(5)(1), and MCL 552.517(1); MSA 25.176(17)(1) are to the same or similar objectives of the divorce statutes. Thus, in my view, § 3 of the Paternity Act was constitutional even

when we examine it under the more rigorous standard of the heightened scrutiny test.

D. CONCLUSION

I would find that § 3 of the Paternity Act was not clearly unconstitutional in its application. I do not view the fact that, under the law of *this* case, plaintiff could not modify the agreed-upon support provision to be dispositive, for we are not required to test the operation of § 3 under *every* set of circumstances. Rather, mothers of children born outside marriage were treated exactly the *same* as mothers of children born within marriage under one set of circumstances: where the child support agreement contained a specific provision allowing the modification or the "other order of the court" language. Further, there was a substantial justification for the enactment of this mechanism for the support of a child born outside marriage, given the objective differences at the time the Legislature adopted the statute between such a situation and one in which a child was born within marriage. Overall, the Legislature's action in adopting § 3 of the Paternity Act was reasonable. In making this assertion, I do not deal with the constitutional question in the abstract, but would rather adhere to our duty to construe the statute as constitutional unless its unconstitutionality is clearly apparent.

IV. RETROACTIVITY

The majority makes no holding concerning—indeed, it makes no reference to—the issue of the ret-

roactive[24] effect of its decision. Inasmuch as the Paternity Act was enacted in 1956, I think it safe to assume that literally thousands of cases were brought under its provisions and that a fair number resulted in nonmodifiable child support agreements under § 3. The effect of the majority's decision is to allow these agreements to be reopened. Presumably, it is the majority's intent to allow *women*, including plaintiff, who are the *mothers* of children who are covered by these agreements to reopen their cases in order to obtain modification of the agreements. However, presumably, defendant and other similarly situated putative *fathers* may in response contest the issue of paternity.[25] What, then, if the putative father, using modern DNA testing methods, is now "cleared" of paternity? Will such an individual be able to obtain reimbursement of the total amount of child support he paid for a child born outside marriage from the mother of that child?[26]

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[24] The decision can have no prospective effect because the Legislature repealed § 3 of the Paternity Act effective June 1, 1997.

[25] Such a result seems inevitable in light of the fact that, presumably, a defendant father in a paternity suit gave up his right to contest paternity in return for a nonmodifiable support agreement. See *Hisaw*, *supra* at 644-645. If the defendant father now loses nonmodifiability, he certainly regains the right to contest paternity.

[26] To push the point one step further, there is nothing in the majority's decision that limits a putative *father*, absent an action by the mother to reopen the child support agreement, from independently commencing an action to reopen that agreement in an attempt to disprove his paternity. Given modern DNA testing methods and assuming a certain amount of prudence on behalf of that putative father, one would suspect that such an action would, if commenced, be successful. The same troubling questions would then arise. Would the mother then be required to make "restitution" of past child support payments? Would the child then be deprived of the benefit of future child support payments? The majority's decision leaves the answer to these questions for another day. Given the litigious nature of our society, I suspect that such a day will not be long in coming.

In this regard, I note that in some—and perhaps many—cases, the mother may have had a good-faith basis for believing that the man involved was the biological father, although she was honestly mistaken. Requiring such a woman to make "restitution" of years of child support payments could impose a tremendous hardship, literally to the point of bankruptcy. Also, putative fathers may in many cases still be making child support payments pursuant to child support agreements. If in a significant number of these cases the men involved are now able to disprove paternity and renounce those agreements, will the children born outside marriage be henceforward deprived of any "paternal" child payments whatsoever?

A practical answer to these troubling questions would be to give the decision in this matter "limited retroactive effect." We have typically used this phrase to refer to a holding that articulates a rule of law that is to be applied to (1) future cases or circumstances (a circumstance not involved here) and (2) to only certain cases or circumstances that were initiated before the opinion, i.e., to cases in which direct appellate review is still pending. See, e.g., *Jahner v Dep't of Corrections*, 197 Mich App 111, 115; 495 NW2d 168 (1992); *Seder v Peoples Community Hosp Authority*, 169 Mich App 238, 241; 425 NW2d 775 (1988). However, the majority articulates no such limiting principle in its opinion. I think it fair to predict that while the resulting litigation may not particularly endear us to the trial bench, it certainly will to the family law bar.

V. CONCLUSION

I would vacate the circuit court's order granting plaintiff's motion for an increase in defendant's agreed-upon child support payments on the basis that § 3 of the Paternity Act was constitutional. However, if I agreed with the majority's resolution of that issue, I would give today's decision limited retroactive effect.

HOEKSTRA, P.J. (*dissenting*). I join the result reached in Judge WHITBECK's dissenting opinion and its resolution of the issues addressed in parts I, II, and III. However, I express no opinion concerning the issue of retroactivity addressed in part IV because the record in this case is not fully developed in this regard and the issue was not fully briefed by the parties.

In re GAYTAN ESTATE

Docket No. 205273. Submitted September 1, 1998, at Detroit. Decided October 27, 1998, at 9:00 A.M.

R. Richard Livorine filed a petition in the Oakland County Probate Court, seeking an order requiring the estate of John A. Gaytan, deceased, to pay the petitioner's claim for legal services allegedly rendered on behalf of John Gaytan before his death. Priscilla Gaytan, personal representative of the decedent's estate, had mailed the petitioner a notice of the disallowance of his claim two days after the expiration of the statutory sixty-three-day period within which a notice of allowance or disallowance of a claim must be delivered or mailed. The petitioner asserted that, pursuant to MCL 700.717(1); MSA 27.5717(1), the respondent's failure to comply with the time limit resulted in the claim's being deemed allowed by operation of law. The probate court, Eugene A. Moore, J., agreed and ordered the estate to pay the claim. The respondent moved for reconsideration, alleging that the probate court should have conducted a hearing regarding whether good cause to excuse the delay existed. The probate court granted the motion, conducted a hearing, and ultimately concluded that the petitioner had not engaged in intentional fraudulent behavior and good cause existed to excuse the untimeliness of the notice. The probate court then ordered a hearing regarding the validity of the claim in light of the disallowance of the claim and the petitioner's continued claim of entitlement. The probate court judge disqualified himself from hearing the claim and the hearing was conducted by Joan E. Young, J., who entered an opinion and order finding the petitioner's claim to be uncollectible because of the absence of a writing memorializing the terms of any fee agreement or evidence establishing the petitioner's entitlement to payment under theories of estoppel or quantum meruit. The Court of Appeals entered an order on August 6, 1996 (Docket No. 196000), dismissing the petitioner's appeal for lack of jurisdiction. The Supreme Court, in lieu of granting leave to appeal, reversed and remanded the matter to the Court of Appeals for plenary consideration. 455 Mich 869 (1997). The petitioner's only challenge is that the evidence presented at the hearing following the granting of the motion for reconsideration did not supply a

factual predicate for the conclusion that good cause existed to excuse untimely notice of disallowance.

The Court of Appeals *held*:

Subsection 717(1) provides that a personal representative's failure to deliver or mail a notice of action on a claim within the statutory period shall be deemed an allowance of the claim. Subsection 717(1) also provides that if, after allowing or disallowing a claim, the personal representative changes a decision concerning the claim, the personal representative shall notify the claimant. Therefore, subsection 717(1) permits a claim that is deemed allowed as a result of the failure to disallow it within the statutory period to be disallowed subsequently by the personal representative. The respondent's untimely notice of disallowance constituted a notice of the respondent's change in decision under subsection 717(1) with respect to the prior allowance of the claim by operation of law. The probate court allowed the petitioner to adjudicate the merits of the claim, as he was statutorily entitled to do in light of his receipt of a notice of disallowance. The petitioner does not challenge the determination following that hearing that the claim should be disallowed.

Affirmed.

DECEDENT'S ESTATES — CLAIMS AGAINST ESTATES — NOTICE OF ACTION ON CLAIMS — CHANGES OF DECISION.

A claim against a decedent's estate that has been deemed allowed as a consequence of the personal representative's failure to disallow it within the statutory period for delivering or mailing notice of action on the claim may be disallowed subsequently by the personal representative, who must notify the claimant of the change in decision; the claimant then has a right to an adjudication of the claim upon a timely request filed in the probate court; an untimely notice of disallowance operates as a proper notice of change of decision by a personal representative with regard to a claim deemed allowed as a result of an untimely notice of disallowance (MCL 700.717[1]; MSA 27.5717[1]).

R. Richard Livorine, in propria persona.

Before: HOLBROOK, JR., P.J., and MARKEY and WHITBECK, JJ.

WHITBECK, J. Petitioner sought to recover attorney fees in the amount of $50,400 from an estate for services he claims to have rendered on behalf of the

decedent, John A. Gaytan, before his death. The probate court ultimately denied petitioner's claim. This Court initially dismissed petitioner's appeal for lack of jurisdiction in an order entered August 6, 1996 (Docket No. 196000). The Michigan Supreme Court, in lieu of granting leave to appeal, reversed and remanded to this Court for plenary consideration. *In re Gaytan Estate*, 455 Mich 869 (1997). We affirm the decision of the probate court, albeit on a ground other than that which it articulated.

I. BASIC FACTS AND PROCEDURAL HISTORY

The decedent was injured in an automobile accident in March 1987 and, as a consequence of his injuries, was rendered a quadriplegic. Priscilla Gaytan (hereafter respondent) contacted petitioner, a former teacher of the decedent who was also an attorney, and informed him of the accident. Thereafter, the decedent retained petitioner to represent him in a personal injury action. According to petitioner, he and the decedent entered into a "standard contingency fee agreement" providing for petitioner's receipt of twenty-eight percent of all amounts recovered by the decedent. Petitioner eventually secured a settlement on the decedent's behalf. According to respondent, as a result of this settlement petitioner received in excess of $700,000 in contingency fees and twenty-eight percent of the $7,500 monthly payments made to the decedent to provide for his care.[1]

The decedent died in April 1993. Petitioner met with respondent and informed respondent that the

[1] Petitioner stopped receiving a part of these latter monthly payments in April 1991.

decedent owed him $50,400 at the time of his death.[2] Subsequently, respondent approached petitioner about representing the estate in probate proceedings. Petitioner informed respondent that he was not a probate attorney and, hence, was unqualified to represent the estate. Petitioner then refused to represent the estate. Instead, he referred respondent to another law firm. Additionally, petitioner prepared an outline of activities respondent needed to undertake in preparation for probating the estate and, on his own admission, expended "some twenty hours" with respect to the commencement of probate proceedings.

In April 1993, respondent filed the necessary paperwork in the Oakland County Probate Court to commence independent probate proceedings and to have herself appointed as the personal representative of the estate. During June and July 1993, after discharging the first firm that she had retained to represent the estate, respondent contacted several attorneys about representing the estate. Eventually, respondent hired David W. Sommerfeld of the Butzel Long law firm. Respondent informed Sommerfeld when she met with him of petitioner's claim that the estate was indebted to petitioner in the amount of $50,400.

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[2] Respondent indicated that petitioner informed her that he had loaned the decedent the money and the decedent had not repaid the loan at the time of his death. Petitioner stated that the decedent owed him the money as a consequence of attorney fees earned and costs incurred between July 15, 1991, and April 19, 1993, in the provision of professional services

> with respect to personal financial administration and planning, development of Lake Sherwood property, liability for easement and nuisance re Lakeview property, allocation of PIP medical benefits to purchase of specialty wheel chairs, allocation of PIP medical benefits to experimental surgery, and miscellaneous personal and family matters.

During August 1993, petitioner and Sommerfeld talked by telephone and corresponded concerning petitioner's claim. Petitioner sent Sommerfeld an invoice for the $50,400 he claimed to be owed, that "detailed," in general terms, the services that petitioner claimed that he provided.

On August 20, 1993, at the request of Sommerfeld, petitioner served respondent with a statement and proof of claim in which he asserted that he was a creditor of the estate and was owed $50,400 by the estate. He also filed a copy of the claim with the probate court and sent a copy to Sommerfeld.

On November 3, 1993, respondent served petitioner with a notice of disallowance of his claim. Petitioner then petitioned the probate court for an order requiring the estate to pay his claim on the ground that his claim was allowed by operation of law pursuant to MCL 700.717(1); MSA 27.5717(1) because the notice of disallowance was not filed within the period required by statute, the notice being untimely by two days. The probate court agreed and ordered the estate to pay petitioner's claim.

Respondent filed a motion for reconsideration on the ground that good cause to excuse the delay existed and that the probate court should have conducted a hearing regarding good cause before ordering payment. The probate court conducted an evidentiary hearing regarding the existence of fraud and, after the close of proofs, found that petitioner had not engaged in "intentional fraudulent behavior." The probate court also found, however, that petitioner had a duty to disclose to respondent that she had a limited time in which to disallow his claim in light of his past professional relationship with respondent, respondent's continued reliance on his advice, and

petitioner's continued advice to respondent during the summer of 1993. The probate court also concluded that a note petitioner attached to the notice of claim could have misled respondent and resulted in respondent's not treating the claim as seriously as she should have treated it.

In light of these findings, the probate court concluded that good cause existed to excuse the untimeliness of the notice of disallowance. The probate court then ordered a hearing regarding the validity of petitioner's claim in light of respondent's disallowance of the claim and petitioner's continued claim of entitlement to payment of the $50,400. Following this hearing, the probate court concluded that the debt claimed by petitioner was uncollectible in the absence of a writing memorializing the terms of any fee agreement and in the absence of evidence establishing petitioner's entitlement to payment under theories of estoppel or quantum meruit.

II. STANDARD OF REVIEW

Questions of statutory interpretation and construction are questions of law. *Smeets v Genesee Co Clerk*, 193 Mich App 628, 633; 484 NW2d 770 (1992). Questions of law are reviewed de novo. *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994).

III. THE STATUTORY SCHEME EMBODIED IN MCL 700.717(1); MSA 27.5717(1)

Petitioner does not challenge the probate court's ruling that the untimeliness of a notice of disallowance can be excused for good cause. Additionally, petitioner does not challenge the probate court's determination that the debt is uncollectible in the

absence of evidence that the debt existed. Instead, petitioner limits his challenge to a claim that the evidence presented at the fraud hearing did not supply a factual predicate for a conclusion that good cause existed to excuse the untimely notice of disallowance.

At the outset, we note that the goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). Judicial construction is precluded where the statutory language is clear and unambiguous. *Id.* If reasonable minds can differ regarding the meaning of the statutory language, judicial construction is appropriate. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). If judicial construction is necessary, every word or phrase generally should be accorded its plain and ordinary meaning. *In re PSC's Determination Regarding Coin-Operated Telephones, No 2*, 204 Mich App 350, 353; 514 NW2d 775 (1994).

Petitioner presented his notice of claim pursuant to MCL 700.710; MSA 27.5710 and MCL 700.712(1)(a); MSA 27.5712(1)(a). Under these statutes, respondent had sixty-three days after the time for original presentation of the claim has expired or after the appointment of the personal representative, whichever is later, to mail to petitioner a notice of allowance or disallowance of the claim. Respondent mailed her notice of disallowance to petitioner on the sixty-fifth day. MCL 700.717(1); MSA 27.5717(1) provides that a personal representative's failure to deliver or mail a notice of action on the claim to a claimant within this sixty-three-day period shall be deemed an allowance of the claim. Accordingly, as petitioner correctly

asserts, by the clear and unambiguous language of subsection 717(1), *Frankenmuth Mut, supra*, respondent's failure to comply with the time limits for mailing of a notice of action resulted in petitioner's claim's being deemed allowed by operation of law. See also *In re Estate of Roddy*, 784 P2d 841, 843-844 (Colo App, 1989) (applying analogous Colorado statute that deems a claim as being allowed if the personal representative fails to mail a notice of action within sixty days).

MCL 700.717(1); MSA 27.5717(1) also provides, however, that "[i]f, after allowing or disallowing a claim, the personal representative changes a decision concerning the claim, the personal representative shall notify the claimant." As indicated above, subsection 717(1) treats a personal representative's failure to deliver or mail a notice of action within the requisite sixty-three-day period the same as a decision to allow the claim. Thus, we conclude that subsection 717(1) permits a claim that has been deemed allowed as a consequence of the personal representative's failure to disallow it within the statutory period to be disallowed subsequently by the personal representative. See also *In re Estate of Krichau*, 1 Neb App 398, 403-405; 501 NW2d 722 (1992); *In re Estate of Roddy, supra* at 843-844 (allowing a change of decision to a denial of a claim under analogous state statutes that deemed a claim accepted by the personal representative's inaction). Accordingly, respondent's untimely notice of disallowance constituted a notice of respondent's change in decision under subsection 717(1) with respect to the allowance of petitioner's claim. *In re Estate of Krichau, supra* at 403-405; *In re Estate of Roddy, supra* at 843-844.

Therefore, this change in decision triggered petitioner's right to an adjudication of the merits of his claim upon a timely request for such adjudication filed in the probate court. MCL 700.717(1); MSA 27.5717(1); *In re Gordon Estate*, 222 Mich App 148, 151-152; 564 NW2d 497 (1997). The probate court allowed petitioner to adjudicate the merits of his claim, following the decision that good cause existed to excuse the untimely notice of allowance. The probate court then later determined that petitioner's claim should be disallowed in the absence of evidence to establish the existence of any debt owed by the estate to petitioner. Petitioner does not challenge this determination.

We hold that the untimely notice of disallowance operated as a proper notice of change of decision by the personal representative. Thereafter, the probate court allowed petitioner to adjudicate the merits of his claim, as he was entitled to do in light of his receipt of a notice of disallowance. Because petitioner does not challenge the probate court's determination that the claim should be disallowed, petitioner cannot upset the disallowance of his claim by attacking the factual findings that served as the predicate for the probate court's finding of good cause. Indeed, the issue of "good cause" for a change of decision with regard to a claim by a personal representative is wholly irrelevant in light of the language and operation of MCL 700.717(1); MSA 27.5717(1).

Affirmed.

ANGEL v JAHM, INC

Docket No. 204255. Submitted June 10, 1998, at Detroit. Decided October 27, 1998, at 9:05 A.M.

A worker's compensation magistrate awarded Michael C. Angel specific-loss benefits payable by his employer, Jahm, Inc., and its insurer, Wausau Underwriters Insurance Company, after he lost part of his right leg in a motorbike accident that occurred on an island that was part of the itinerary of an employer-paid, mandatory, week-long cruise and management meeting aboard the cruise ship. The accident occurred while the plaintiff was making his way back to the ship from a shore excursion in order to prepare to attend a meeting. On appeal, the Worker's Compensation Appellate Commission reversed the award of benefits, concluding that the injury was incurred in the pursuit of an activity whose major purpose was social or recreational such that the injury, while it was incurred within a reasonable time before work, was nonetheless not incurred in the course of employment. MCL 418.301(3); MSA 17.237(301)(3). The plaintiff appealed by leave granted.

The Court of Appeals *held*:

The commission exceeded its authority when it reversed the magistrate's decision. Findings of fact by a worker's compensation magistrate are to be considered conclusive by the commission if they are supported by competent, material, and substantial evidence on the record. In this case, the magistrate's finding that the major purpose of the plaintiff's activity at the time of injury was not social and recreational was supported by competent, material, and substantial evidence. While there may have been evidence to support the commission's findings with regard to this issue, the Court of Appeals and the commission are not authorized to identify alternative findings to supplant the magistrate's findings. The Court and the commission must defer to the magistrate with regard to questions of fact.

Reversed.

WORKER'S COMPENSATION — WORKER'S COMPENSATION MAGISTRATES — WORKER'S COMPENSATION APPELLATE COMMISSION — FINDINGS OF FACT.

Findings of fact by a worker's compensation magistrate are to be considered conclusive by the Worker's Compensation Appellate Commission if they are supported by competent, material, and substantial evidence on the record.

Quinn, Borella, Stockton & Amsbaugh, P.C. (by *Arthur A. Borella*) (*Daryl Royal*, of Counsel), for the plaintiff.

Hoskins & Barney (by *Michael J. Barney*), for the defendant.

Before: WAHLS, P.J., and HOLBROOK, JR., and FITZGERALD, JJ.

WAHLS, P.J. In this worker's compensation case, plaintiff appeals by leave granted from a decision of the Worker's Compensation Appellate Commission (WCAC) reversing a magistrate's award of benefits. We reverse the decision of the WCAC and reinstate the magistrate's award.

Plaintiff is employed by defendant Jahm, Inc., as vice president of engineering. In 1993, Jahm held a week-long, senior management meeting, which plaintiff attended. The meeting was held on a cruise ship, and spouses were encouraged to attend. During some of their free time on the trip, plaintiff and his wife rented a motorbike on the island of Martinique. While riding back to the ship, plaintiff was run off the road and suffered injuries that required the amputation of his right leg above the knee.[1] Plaintiff then filed a petition seeking worker's compensation benefits for a specific loss.

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[1] Plaintiff's wife, who was riding with him, was also injured.

There were only two issues before the magistrate in this case: First, did plaintiff's injury arise "out of and in the course of his employment." MCL 418.301(1); MSA 17.237(301)(1).[2] And second, was plaintiff's injury "incurred in the pursuit of an activity the major purpose of which is social or recreational," MCL 418.301(3); MSA 17.237(301)(3).[3] The magistrate determined that plaintiff's injury arose out of and in the course of his employment and that the major purpose of plaintiff's activity at the time of injury was work-related, not social or recreational. Thus, the magistrate entered an order awarding plaintiff specific-loss benefits. Defendants then appealed to the WCAC. In their appeal, defendants raised only one issue. They claimed that, assuming plaintiff's injury arose out of and in the course of his employment, the magistrate erred in concluding that MCL 418.301(3); MSA 17.237(301)(3) did not apply.[4] Thus, the only issue before the WCAC was whether plaintiff's injury

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[2] That section reads in part:

> An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. [MCL 418.301(1); MSA 17.237(301)(1).]

[3] That section reads in part:

> An employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act. [MCL 418.301(3); MSA 17.237(301)(3).]

[4] We question whether an employer who requires attendance at an event should be permitted to argue that the major purpose of the event was social or recreational in order to avoid liability. However, the parties have not raised this issue, and we will not attempt to resolve it here.

was incurred in the pursuit of an activity the major purpose of which was social or recreational.[5] The WCAC concluded, in a 2-1 decision, that the major purpose of plaintiff's activity at the time he was injured was social or recreational, and reversed the magistrate's award.

Our review of the WCAC's decision is limited; the only issue before us is whether the WCAC exceeded its authority when it reversed the magistrate's decision. *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 538; 563 NW2d 214 (1997). Our Supreme Court has articulated the scope of the WCAC's authority:

> If the magistrate's decision is reasonably supported in the record by any competent, material, and substantial evidence, then it is conclusive and the WCAC must affirm. If it

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[5] Plaintiff argues that, as a traveling employee, he was entitled to compensation for any injury arising in the course of his travel. The "traveling employee" doctrine has previously been applied in determining whether a plaintiff's injury arose out of and in the course of his employment. Another panel of this Court recently described the doctrine:

> Traveling employees on a business trip are considered to be continuously within the scope of their employment during their trip, except when a distinct departure for a personal errand can be shown. Thus, for traveling employees, the "arising out of and in the course of employment" tests are generally met by their being away from home for their employer's benefit and being at the place of injury because of their employment. [*Eversman v Concrete Cutting & Breaking*, 224 Mich App 221, 225; 568 NW2d 387 (1997) (citations omitted).]

As noted above, defendants have not appealed the magistrate's finding that plaintiff's injury arose out of and in the course of his employment. Thus, the traveling employee doctrine does not have any direct application here. Plaintiff essentially asks us to extend the traveling employee doctrine by creating a presumption that a traveling employee on a business trip is not engaged in an activity that is primarily social or recreational in nature. Because we conclude that the magistrate's decision must be reinstated even without such a presumption, we decline to address this issue.

> does not, it is exceeding the scope of its reviewing power and impermissibly substituting its judgment for the magistrate's. In reviewing the magistrate's decision, the WCAC must do so with sensitivity and deference toward the findings and conclusions of the magistrate in its assessment of the record. If in its review the WCAC finds that the magistrate did not rely on competent evidence, it must carefully detail its findings of fact and the reasons for its findings grounded in the record. [*Id.*][6]

Here, the WCAC exceeded its authority when it reversed the magistrate's decision. The question whether a plaintiff was engaged in "an activity the major purpose of which is social or recreational" is necessarily one of fact. The testimony in this case showed that, at the time he was injured, plaintiff was traveling on a motorbike on his way back to a cruise ship to get something to eat and prepare for a business meeting. Plaintiff further testified that the meeting was to be held on the cruise ship, that the entire trip was paid for by the employer, and that the trip was essentially mandatory. This testimony constituted competent, material, and substantial evidence to support the magistrate's finding that the major purpose of plaintiff's activity at the time of his injury was not social or recreational. While there may also have been evidence to support the WCAC's findings regarding this issue,[7] this Court and the WCAC are not authorized to

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[6] The Supreme Court recently reaffirmed this holding. See *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494, 507; 581 NW2d 244 (1998).

[7] The two commissioners writing the majority opinion interspersed numerous findings of fact among their opinions and legal conclusions:

> The so-called "Senior Management Meeting" was already, from its very nature, an at-most marginal work-related event. It already

identify alternative findings that could have been supported by substantial evidence and then supplant the magistrate's findings with our own. Instead, we must defer to the magistrate with regard to questions of fact. *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494, 507-508; 581 NW2d 244 (1998). Because there was sufficient evidence to support the magistrate's findings, the WCAC erred in substituting its own findings.

The decision of the WCAC is reversed, and the decision of the magistrate is reinstated.

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had very little to it that was *not* "social or recreational." Now we add to this already less than fully work-related event an additional diversion or deviation – leaving the plush confines of the luxurious cruise ship during a designated "free" time in order to explore the island *on a motorbike*. Plaintiff and his wife decided to risk their safety by engaging in the inherently dangerous activity of riding about on a motorbike in a strange land. The idea that this deviation from a trip that was already in itself a significant deviation from normal workplace activity, all crafted to satisfy the social and recreational desires of high paid executives . . . should somehow still be deemed work-related exceeds our conception of a reasonable interpretation of the law. [Emphasis in original.]

From their findings, we can only conclude that the commissioners did not approve of the course of plaintiff's employment. Apparently, the commissioners do not believe that "high paid executives" who work in "luxurious" surroundings should qualify for worker's compensation benefits when they "significantly deviate" from "normal workplace activities." We have not found any case law or statute suggesting that any of these factors are relevant in this case. In addition, we note that all of these factors were in the control of the employer, rather than plaintiff. Perhaps the commissioners expected plaintiff to refuse to work under such conditions. We conclude that the commissioners should have confined their analysis to the question whether an employee, who the parties agreed was acting within the scope of his employment when he lost his leg, was entitled to benefits under the Worker's Disability Compensation Act. As noted above, the commissioners' only role in this regard was to determine whether the magistrate's findings were supported by competent, material, and substantial evidence.

PEOPLE v JAGOTKA

Docket No. 197753. Submitted January 13, 1998, at Detroit. Decided October 27, 1998, at 9:10 A.M. Leave to appeal sought.

Michael J. Jagotka was charged in the 52-1 District Court with operating a vehicle while under the influence of intoxicating liquor. The court, Brian W. MacKenzie, J., granted the defendant's motion to suppress blood test results on the basis that the police violated MCL 780.655; MSA 28.1259(5) (hereafter § 5) by failing to preserve the blood sample for trial. The prosecution appealed by leave granted to the Oakland Circuit Court. The court, Jessica R. Cooper, J., entered an order reversing the district court's order on the basis of the prosecution's arguments that the implied consent statute, MCL 257.625a; MSA 9.2325(1), does not require the blood sample to be preserved because the test result, not the blood sample, is the evidence and that the defendant's due process rights were not violated. The defendant appealed by leave granted.

The Court of Appeals *held*:

1. This case is not governed by the provisions of the implied consent statute because the police obtained the blood sample pursuant to a search warrant obtained after the defendant refused to submit to a Breathalyzer test. The provisions of § 5 govern this case.

2. Section 5 was violated when the blood sample was destroyed and not safely kept for the purpose of being produced or used as evidence at trial. The statute itself does not provide a remedy for its violation.

3. An appropriate remedy in a criminal case where § 5 is violated resulting in a loss of relevant evidence is to instruct the factfinder that it may infer that evidence unpreserved because of violations of the statute would have favored the defendant. However, in order to warrant an adverse inference instruction, a defendant must articulate how the violation of § 5 prejudiced the defendant.

4. The defendant articulated how he was prejudiced in this case by explaining how the lost evidence might be expected to play a significant role in his defense. An adverse inference instruction is appropriate at the defendant's trial. The order of the circuit court reversing the district court's order suppressing the blood test results must be affirmed but modified to require an adverse infer-

ence instruction at the defendant's trial. The matter must be remanded for trial.

Affirmed as modified and remanded.

MARKMAN, P.J., concurred with the majority's interpretation of § 5 and its finding that suppression is not a necessary sanction where the statute has been breached, but dissented from the finding that the statute was breached in this case. There are considerations relevant both to blood samples generally as well as to the blood samples in this case specifically that mandate the conclusion that the preservation of the samples was not "necessary for the purpose of being produced or used as evidence on any trial," as provided in § 5. The order of the circuit court should be affirmed without modification.

1. SEARCHES AND SEIZURES — INTOXICATING LIQUORS — SEARCH WARRANTS — REFUSAL OF BREATHALYZER TEST.

The search warrant procedures provided in MCL 780.655; MSA 28.1259(5), not the procedures provided in the implied consent statute, MCL 257.625a; MSA 9.2325(1), apply to a blood sample obtained pursuant to a search warrant from a person arrested for allegedly operating a motor vehicle while under the influence of intoxicating liquor who refused to submit to a Breathalyzer test (MCL 257.625; MSA 9.2325).

2. SEARCHES AND SEIZURES — EVIDENCE — CRIMINAL LAW — LOSS OF EVIDENCE — ADVERSE INFERENCE INSTRUCTION.

A violation of MCL 780.655; MSA 28.1259(5) that results in the loss of relevant evidence in a criminal proceeding may warrant instructing the factfinder that it may infer that the evidence unpreserved because of the violation of the statute would have favored the defendant; to warrant an adverse inference instruction, the defendant must articulate how the loss prejudiced the defendant's case by explaining how the lost evidence might be expected to play a significant role in the defendant's defense.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Richard H. Browne*, Chief, Appellate Division, and *Joyce F. Todd*, Assistant Prosecuting Attorney, for the people.

Traver, Lepley and Walzak (by *Daniel A. Traver*), for the defendant.

Before: MARKMAN, P.J., and MCDONALD and CAVANAGH, JJ.

MCDONALD, J. Defendant is charged with operating a vehicle while under the influence of intoxicating liquor, MCL 257.625; MSA 9.2325. Defendant appeals by leave granted a circuit court order reversing a district court order suppressing blood test results revealing that defendant's blood alcohol content was 0.18 percent. We affirm the circuit court's reversal of the district court's order suppressing the blood test results, but hold defendant is entitled to an adverse inference instruction because of the violation of the search warrant statute that occurred in this case.

On March 11, 1995, defendant was arrested and taken to the police station. The police advised defendant of his chemical test rights pursuant to subsection 6(b) of the implied consent statute, MCL 257.625a(6)(b); MSA 9.2325(1)(6)(b), but defendant refused to submit to a Breathalyzer test. After obtaining a search warrant, the police transported defendant to the hospital to obtain a blood sample, which was mailed to the Michigan State Police laboratory for testing. The toxicology report was completed March 15, 1995, and indicated defendant had a blood alcohol content of 0.18 percent. The blood sample was later destroyed pursuant to departmental procedure on May 16, 1995. On July 3, 1995, the prosecution provided defendant with a copy of the blood test results.

Defendant moved to suppress the blood test results in the district court, arguing the police violated the relevant search warrant statute, MCL 780.655; MSA 28.1259(5) (hereafter § 5), by failing to preserve the

blood sample for trial.[1] The prosecution claimed defendant had notice the blood sample would be destroyed because of discovery that took place at the pretrial conference on May 3, 1995. Although not entirely clear from the record, it appears the prosecution claimed defendant saw the lab report, which indicated the department policy to destroy samples within thirty days. However, both parties appear to agree that defendant was not provided with his own copy of the test results until July 3, 1995. The prosecution argued that despite notice the blood sample would be destroyed, defendant did not take any action. Defendant countered that the statute did not require him to take any action. Defendant also claimed he had requested the sample be saved when he requested in a letter dated April 11, 1995, an opportunity to inspect any tangible evidence the prosecution intended to introduce at trial. The prosecution also argued evidence had not been destroyed because it was the test results that would be used as evidence at trial, not the blood sample. Defendant responded that the search warrant statute does not specify that the evidence to be saved for trial must be evidence the prosecution, rather than the defendant, intends to use at trial. Finally, the prosecution argued defendant should not be in a better position because his refusal to consent required the police to get a search warrant to obtain a blood sample. Defendant argued he was in a different position because of the differences in the statutes and that there were conse-

[1] Defendant also argued the statute was violated because the police did not provide him with a copy of the tabulation. The district court ultimately rejected this argument, and it is not relevant to this appeal.

quences for refusing to consent under the implied consent statute. The district court granted defendant's motion to suppress, remarking that the case should not be treated differently than if it were a case involving a large quantity of heroin that was destroyed. The district court also reasoned that the blood sample was direct evidence relevant to the issue of defendant's blood alcohol content.

The prosecution appealed to the circuit court by leave granted, again arguing that the implied consent statute did not require the blood sample to be preserved because the test results, not the blood sample, was the evidence. The prosecution also argued defendant's due process rights were not violated by the destruction of the blood sample, relying on *California v Trombetta*, 467 US 479; 104 S Ct 2528; 81 L Ed 2d 413 (1984). The circuit court accepted the prosecution's argument and found the district court erred in suppressing the test results.

On appeal, defendant argues the blood test results should be suppressed at trial because the police violated § 5. Statutory interpretation is a question of law that this Court reviews de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997).

Section 5 provides:

> When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things so seized. The officer taking property or other things under the warrant shall forthwith give to the person from whom or

> from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken. He shall file the tabulation promptly with the court or magistrate. The tabulation may be suppressed by order of the court until the final disposition of the case unless otherwise ordered. *The property and things so seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence on any trial.* As soon as practicable after trial, stolen or embezzled property shall be restored to the owner thereof. Other things seized under the warrant shall be disposed of under direction of the court or magistrate, except that moneys and other useful property shall be turned over to the state, county or municipality, the officers of which seized the property under the warrant. Such moneys shall be credited to the general fund of the state, county or municipality. [MCL 780.655; MSA 28.1259(5) (emphasis added.)]

The thing seized in this case was defendant's blood, which was destroyed on May 16, 1995. Defendant does not allege any bad faith on the part of the police and does not dispute that the blood was destroyed pursuant to routine departmental procedure. However, because the blood was destroyed, it was not safely kept for the purpose of being produced or used as evidence at trial. Accordingly, we find the statute was violated in this case.

The issue is whether suppression of the test results is the appropriate remedy for this violation of § 5. The statute itself does not provide a remedy for its violation. The parties have not cited, and our research has not revealed, a case where the police violated § 5

by failing to preserve seized items for trial in the context of a criminal case.[2]

In *People v Stoney*, 157 Mich App 721; 403 NW2d 212 (1987), this Court addressed the issue whether test results should be suppressed in the context of the implied consent statute, MCL 257.625a; MSA 9.2325(1). In *Stoney*, the defendant's blood was drawn and tested by hospital personnel. The hospital later discarded the blood sample and forwarded the test results, which revealed the defendant's blood alcohol content was 0.21 percent, to the prosecutor pursuant to subsection 9 of the implied consent statute. This Court held the trial court erred in suppressing the test results because the plain language of subsection 1 of the implied consent statute provides it is the test results, not the blood sample itself, which are admissible at trial. *Stoney*, *supra* at 725. Moreover, this Court reasoned that while the statute provides the results of the test must, upon request, be made available to the defendant or the defendant's attorney, it does not require preservation of the sample itself. *Id.* Accordingly, this Court held the test results were admissible under the implied consent statute and the destruction of the sample was "irrelevant." *Id.*

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[2] This Court has addressed violations of other portions of § 5. See *People v Lucas*, 188 Mich App 554, 573; 470 NW2d 460 (1991) (holding the failure to leave copies of the search warrant and tabulation with the defendant was a "hypertechnical" violation of § 5 and did not require suppression of the seized evidence); *People v Myers*, 163 Mich App 120; 413 NW2d 749 (1987) (holding suppression not required where the police committed a "hypertechnical" violation of § 5 by failing to give the defendant a copy of the search warrant); *People v Tennon*, 70 Mich App 447; 245 NW2d 756 (1976) (holding the failure to make the tabulation in the presence of the defendant, a "ministerial duty," did not amount to error requiring reversal.)

However, this case is not governed by the implied consent statute because the police obtained the blood sample through a search warrant. This Court has repeatedly held that when authorities obtain a search warrant to take a blood sample, the issue of consent is removed, and the implied consent statute is not applicable. *Manko v Root*, 190 Mich App 702, 704; 476 NW2d 776 (1991); *People v Snyder*, 181 Mich App 768, 770; 449 NW2d 703 (1989); *People v Hempstead*, 144 Mich App 348, 353; 375 NW2d 445 (1985); *People v Cords*, 75 Mich App 415, 421; 254 NW2d 911 (1977). In other words, the search warrant procedure exists independently of the testing procedure set forth in the implied consent statute. *Manko*, *supra* at 704; *Snyder*, *supra* at 770. Although we recognize that the implied consent statute refers to chemical tests performed pursuant to a court order in subsection 6(b)(iv), this portion of the statute simply states that the allegedly intoxicated driver must be advised that if the driver refuses the officer's request to take the test, the test may be taken pursuant to a court order. See *Snyder*, *supra* at 771. The implied consent statute does not provide that tests performed pursuant to a court order fall within its purview. We refuse to read this into the statute as written by the Legislature. Accordingly, we must look to § 5 to determine the appropriate remedy in this case.[3]

The parties have not cited, and our research has not revealed, a case where the police violated § 5 by failing to preserve seized items for trial in the context

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[3] We also note it is clear the officers were proceeding pursuant to the search warrant statute because they complied with other requirements set forth in § 5 such as filing the tabulation, i.e., the return, and providing defendant a copy of the search warrant.

of a criminal case. However, our research has revealed that this Court has addressed a violation of § 5 in the context of a civil forfeiture proceeding in *In re Forfeiture of $25,505*, 220 Mich App 572; 560 NW2d 341 (1996).[4] There, the officers seized cash found in the ceiling of the claimant's basement that allegedly was the proceeds of his son's drug trafficking. The officers did not sequester the cash to preserve it for trial, but instead merely deposited it in a bank account. This Court assumed § 5 was violated because the prosecution did not dispute there was a violation. The claimant argued he was prejudiced by this violation because he could not test the cash for fingerprints to prove that it was his, not his son's.[5] *Id.* at 577. After examining previous decisions regarding violations of other portions of § 5, see note 2, *supra*, this Court recognized that "even in the context of criminal proceedings, suppression of the evidence is not a necessary remedy for a violation of § 5." *In re Forfeiture*, *supra* at 578. This Court explained that the language of § 5 suggested "the principal focus of the statute is to ensure police integrity rather than to create a personal legal right in the claimant. The preservation of evidence for the benefit of a party from whom property is seized is a clear benefit of § 5 but only an incidental one." *Id.* at 579. This Court concluded that summarily returning seized property to a claimant was not an appropriate remedy for a viola-

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[4] The trial court did not have the benefit of this decision at the time of its ruling. However, it was released well before the parties filed their briefs on appeal and neither party cited this decision.

[5] The claimant also contended the officers violated § 5 because they did not count the cash in his presence, which prejudiced his ability to prove his claim the officers seized more than $25,505 in cash.

tion of § 5. Instead, this Court held that "an effective remedy for a violation of § 5 is normally to instruct the factfinder that it may infer that evidence unpreserved because of violations of the statute would have favored the claimant." *Id.* at 579-580. We believe giving an adverse inference instruction is also appropriate in the context of criminal proceedings. As explained in *In re Forfeiture, supra* at 580:

> [A] violation of § 5 resulting in the loss of relevant evidence raises a rebuttable presumption that the unpreserved evidence would have been adverse to the police. The police thus act at their peril when they fail to observe the requirements of § 5.

In this case, the violation of § 5 did result in the loss of relevant evidence. We agree with the district court that the blood sample was directly relevant to the issue of defendant's blood alcohol content. We recognize the fact that the blood sample was not meaningful without test results, but we do not believe this fact negates the blood sample's relevance.

We also believe that to warrant an adverse inference instruction, a defendant must articulate how the violation of § 5 prejudiced the defendant. In *In re Forfeiture, supra* at 578-579, this Court emphasized that the claimant had alleged prejudice from the violations of § 5, namely, that he could not test the lost cash for fingerprints, which prejudiced his ability to prove his claim that the money did not belong to his son. Moreover, in *People v Lucas*, 188 Mich App 554, 573; 470 NW2d 460 (1991), where the police failed to leave copies of the search warrant and tabulation with the defendant, this Court held that the "hypertechnical" violation of § 5 did not require sup-

pression of the seized evidence, "particularly where defendant cannot articulate any harm or prejudice that resulted." We do not characterize the violation in this case as hypertechnical, however we conclude defendant must articulate how he was prejudiced in this case. In other words, defendant must explain how the lost evidence might be expected to play a significant role in his defense. Although we are disturbed at the conclusory nature of defendant's appellant brief, which fails to allege prejudice, defendant argued below the loss of the blood sample prevented him from conducting an independent analysis of the sample. Accordingly, the articulation requirement is met in this case. For these reasons, an adverse inference instruction to the jury is appropriate at trial in this case.

Finally, we note the prosecution has argued defendant's due process rights were not violated in this case, primarily relying on *Trombetta, supra*. Defendant relies on the search warrant statute, not the constitution, in arguing the police should have preserved the blood sample. Our holding is confined to interpreting the search warrant statute, and whether there was a violation of defendant's due process rights is not relevant to this determination.

Affirmed as modified and remanded for trial. We do not retain jurisdiction.

CAVANAGH, J., concurred.

MARKMAN, P.J. (*concurring in part and dissenting in part*). Although I generally subscribe to the interpretation of MCL 780.655; MSA 28.1259(5) (hereafter § 5), accorded by the majority, and specifically agree that suppression is not a necessary sanction where

the statute has been breached, I respectfully dissent from its determination that the statute has been breached in the instant case. I would therefore affirm the circuit court order reversing the district court order suppressing the blood alcohol test results.

The operative language of § 5 provides that "[t]he property and things so seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence on any trial." In my judgment, there are considerations relevant both to blood samples generally as well as to the blood samples in this case specifically, that lead me to the conclusion that the preservation of such samples was not "necessary for the purpose of being produced or used as evidence on any trial." By finding to the contrary, I believe that the majority would considerably alter traditional police practices pertaining to the preservation of blood samples.[1]

First, and most importantly, the chronology of this case indicates that the defendant had a reasonable period within which to request further testing of the blood samples before their destruction. The test results were available by March 15, 1995, and the samples were not destroyed until May 16, 1995. At least two weeks before the destruction of the samples, the defendant appears to have been presented both the results of their testing and their destruction schedule. Despite this, he did not request further testing or preservation of the samples until after they had been destroyed. I agree with the majority that a

[1] Indeed, I am also concerned about the implications of this decision for the police department's obligations to retain evidence in other contexts where it is not currently common practice, such as the preservation of large amounts of drugs seized pursuant to a search warrant.

defendant is under no affirmative obligation to object to the destruction of evidence under § 5, and I further believe that a defendant's mere awareness of an otherwise unreasonable destruction schedule does not suffice to excuse police noncompliance with § 5. However, in my judgment, the destruction schedule in this case was reasonable, altogether routine and well-established, administered in good faith, and communicated to the defendant in a manner sufficient to enable his timely and convenient objection. Thus, the defendant's failure to object to the destruction of the sample gives rise, I believe, to a strong inference concerning its lack of exculpatory potential. Indeed, I cannot think of a clearer statement by a defendant himself that a sample is not "necessary" for use at trial than the fact of his nonobjection to its destruction.[2] Is it possible to conceive that a defendant who truly believed that the preservation of evidence could lead to his exoneration would fail to ensure such preservation? Is it possible that such a defendant would tolerate the destruction of evidence "necessary" at his trial in exchange for the adverse inference

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[2] This is especially true in view of the fact that the defendant did not have the benefit of the instant decision when he chose to allow destruction of the samples. While, as a result of this decision, *future* defendants may be able more credibly to argue that their acquiescence in the destruction of blood samples should not generate an inference that the samples were viewed as unnecessary at trial, here the majority concedes that "[t]he parties have not cited, and our research has not revealed, a case where the police violated § 5 by failing to preserve seized items for trial in the context of a criminal case." *Ante* at 351, 353. Given this legal uncertainty confronting defendant at the time he made his decision to allow the destruction of evidence to proceed, it can hardly be surmised that he considered such evidence to be "necessary" in any way for his defense. That this decision itself was an altogether reasonable one, see the discussion that follows.

instruction prescribed by the majority?[3] Where a defendant has effectively acquiesced in the destruction of evidence, I do not believe that an inference adverse to the prosecutor ought to arise from such destruction.

Second, underscoring the inference—drawn from a defendant's nonobjection to the destruction of evidence after having been apprised of its imminent destruction—that such evidence is not potentially exculpatory is the simple fact that blood samples themselves are rarely "produced or used as evidence" at trial. Rather, what typically constitutes evidence are the test results relating to samples. For example, in Michigan's implied consent statute, MCL 257.625a(8); MSA 9.2325(1)(8), relating to trials for operating a motor vehicle while under the influence of intoxicating liquor (OUIL), it is the "test results" themselves that are the evidence that must be preserved for trial, not the blood, breath, or urine samples that are the basis of the testing.[4] See also *People v Stoney*, 157 Mich App 721, 725; 403 NW2d 212 (1987); *People v Tebo*, 133 Mich App 307, 309-310; 349 NW2d 172 (1984); *People v Stark*, 73 Mich App 332, 337-338; 251 NW2d 574 (1977); *California v Trombetta*, 467 US 479, 487-488; 104 S Ct 2528; 81 L

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[3] While I agree with the majority that such an adverse inference instruction may generally be appropriate where there is destruction of evidence under § 5, including under some circumstances the destruction of blood samples, such an instruction does not seem appropriate where defendant's own conduct has demonstrated the inaccuracy and impropriety of such an inference.

[4] Although I recognize that the implied consent law is not dispositive with respect to blood samples drawn pursuant to a search warrant, it does nevertheless offer insight regarding what the Legislature considered to be relevant "evidence" in connection with the investigation and trial of OUIL criminal charges.

Ed 2d 413 (1984). The blood samples are rarely produced, and therefore rarely "necessary," at trial. In focusing upon things seized "for the purpose of being produced or used as *evidence*," we must take into consideration that it is the test results, rather than the samples, that ordinarily constitute the "evidence" in a drunk driving trial.

Third, in light of the high level of accuracy and integrity of blood alcohol tests, it is extraordinarily unlikely that additional testing on the unpreserved blood samples in this case would have produced results contrary to those of the police laboratory and, therefore, have been exculpatory for the defendant. See *id.* at 489-490 (observing that, in light of the accuracy of Breathalyzer tests, the chances were "extremely low" that unpreserved breath samples would have been exculpatory). Unlike areas of analysis in which experts might reasonably disagree about the meaning or significance of evidence, blood alcohol tests are scientifically routine and impose virtually no interpretative burden upon those assessing the results, making it highly improbable that the defendant's access to the sample itself would have made a difference at trial. Indeed, the very fact that the destruction of blood samples is a routine procedure among most police departments illustrates the virtual absence of controversy regarding the accuracy of the scientific testing of blood alcohol content. Thus, in comparison to other forms of unpreserved evidence, the burden of demonstrating prejudice relative to an

unpreserved blood sample will normally be a much greater one.[5]

Fourth, even absent unpreserved blood samples, a defendant still possesses a reasonable means of impeaching the alcohol content test results where there is actual concern about the accuracy of the results. At trial, he retains the opportunity to raise questions regarding the accuracy and procedures of the particular test results at issue (e.g., equipment condition, margins of error, compliance with testing norms and practices, and human error) without resort to the blood sample itself.[6] 6 See *Stoney*, *supra* at 727; *Trombetta*, *supra* at 491.

Finally, with respect to the majority's analysis, I note that no evidence has been offered here by either party concerning the extent to which blood samples deteriorate or degrade over time and, at some point, cannot effectively be tested for alcohol content. Even under the majority's analysis, I do not believe that § 5—requiring the retention of evidence "so long as

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[5] Indeed, defendant himself has not claimed that he was harmed or prejudiced in any specific way by police procedures in this case. He does not specifically claim that access to the blood sample would have allowed him to offer exculpatory evidence, explain or mitigate the original test results, or in any other way provide himself with a stronger defense.

[6] See also *Arizona v Youngblood*, 488 US 51, 56; 109 S Ct 333; 102 L Ed 2d 281 (1988), in which the United States Supreme Court, in the context of unpreserved breath samples, refused to suppress Breathalyzer test results and remarked:

> [F]irst, "the officers here were acting in 'good faith and in accord with their normal practice' "; second, in the light of the procedures actually used the chances that preserved samples would have exculpated the defendants were slim; and third, even if the samples might have shown inaccuracy in the tests, the defendants had "alternative means of demonstrating their innocence." [Citations omitted.]

necessary for the purpose of being produced or used as evidence on any trial"—requires the preservation of samples beyond their effective testing life. Additionally, even under the majority's analysis, I do not believe that an adverse inference instruction need be given where either the trial court itself has approved the destruction of evidence or the testing procedure itself has necessarily resulted in its destruction.

I respectfully dissent and would affirm the order of the circuit court.

GALLAGHER v KEEFE

Docket No. 206705. Submitted August 11, 1998, at Grand Rapids. Decided October 27, 1998, at 9:15 A.M.

Byron P. Gallagher, after he was defeated by Linda M. Keefe in the general election for Ingham County Commissioner for the ninth district, brought an action for quo warranto in the Ingham Circuit Court against Keefe, alleging that Keefe was an ineligible candidate under MCL 46.411; MSA 5.359(11) because at the time she filed her affidavit of identification for her party's primary election she was not a resident and registered voter of the ninth district. The court, Lawrence M. Glazer, J., granted summary disposition for the plaintiff on the ground that there existed no genuine issue of material fact and the plaintiff was entitled to judgment as a matter of law. The defendant appealed.

The Court of Appeals *held*:

1. The plaintiff had standing to bring the action under MCR 3.306(B)(2) or 3.306(B)(3). MCR 3.306(B)(1)(b) provides that an action for quo warranto is to be brought by the Attorney General when the action is against a person who usurps, intrudes into, or wrongfully holds or exercises an office in a public corporation created by this state's authority. Assuming that the office of Ingham County Commissioner is an office in a public corporation created by this state's authority, MCR 3.306(B)(3) allows a person to apply to the Attorney General to have the Attorney General bring an action and, if the Attorney General declines such application, allows the person to bring the action personally by leave of the court. In this case, the plaintiff obtained the court's leave to bring his action after the Attorney General declined his request for an action by the Attorney General. Conversely, assuming that the office of Ingham County Commissioner is not an office in a public corporation created by this state's authority and that an action for quo warranto involving that office is not among those that is to be brought by the Attorney General, MCR 3.306(B)(2) allows the action to be brought by the prosecuting attorney of the proper

county, without leave of court, or, as here, by a citizen of the county by special leave of the court.

2. The plaintiff's action was not barred by laches. In an action for quo warranto, the relevant inquiry concerning laches is whether the action was commenced within a reasonable time, taking into account the excuse for delay, the probable harm to the defendant, and the detriment to the public. In this case, the defendant has not shown that the plaintiff's delay in bringing the action caused harm to the defendant and detriment to the public.

3. The trial court did not err in finding that the defendant had not satisfied the state-law requirements for candidate eligibility. MCL 46.411; MSA 5.359(11) provides that candidates for the office of county commissioner shall be residents and registered voters of the district which they seek to represent and, if elected, shall remain so to hold their office. This residency and voter-registration requirement must be met as of the date a candidate files for election to office, not as of the date of the primary as the defendant argues. The defendant became a candidate for office when she filed an affidavit of identification. At that time, the defendant was not a resident or registered voter of the district she sought to represent. Accordingly, the defendant was not an eligible candidate. The office of Ingham County Commissioner for the ninth district is vacant as of the date of the Court of Appeals opinion and must be filled pursuant to MCL 46.412; MSA 5.359(12).

Affirmed.

JANSEN, J., concurring in part and dissenting in part, stated that although the plaintiff had standing to bring the action under MCR 3.306(B)(2) and laches does not bar the plaintiff's action, the defendant satisfied the state-law requirements for candidate eligibility. A primary election is not an election for public office but is merely the selection of candidates for office by members of political parties, and a person is not a candidate for office until nominated by a party in a primary or a convention. The defendant was already a resident and registered voter of the ninth district before she became a candidate. The trial court's order granting summary disposition in favor of the plaintiff should be reversed and the results of the general election held on November 5, 1996, should be upheld.

1. EQUITY — LACHES — QUO WARRANTO.

Laches, as a defense to an action for quo warranto, involves a determination whether the action was commenced within a reasonable

time, taking into account the excuse for delay, the probable harm to the defendant, and the detriment to the public,

2. ELECTIONS — COUNTY COMMISSIONERS — RESIDENCY — VOTER REGISTRATION.

A candidate for the office of county commissioner must be a resident and registered voter of the district the candidate seeks to represent as of the date the candidate files an affidavit of identification with the county clerk's office (MCL 46.411; MSA 5.359[11]).

Lynch, Gallagher, Lynch & Martineau, P.L.L.C. (by *Richard J. Garcia*), for the plaintiff.

Miller, Canfield, Paddock and Stone, PLC (by *Michael J. Hodge* and *Sherry L. Katz-Crank*) and *Brookover & Fleischmann, P.C.* (by *George M. Brookover*), for the defendant.

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

HOEKSTRA, J. In this quo warranto action plaintiff challenges defendant's successful election to the office of Ingham County Commissioner for the ninth district. The lower court granted plaintiff summary disposition pursuant to MCR 2.116(C)(10), and defendant appeals as of right from that order. We affirm.

On May 9, 1996, defendant filed an affidavit of identification with the Ingham County Clerk's Office and paid the filing fee. See MCL 168.558(1); MSA 6.1558(1). She obtained the nomination of the Democratic Party at the primary on August 6, 1996, and at the general election on November 5, 1996, succeeded in defeating plaintiff, the Republican incumbent. Before defendant took office in January 1997, plaintiff initiated this action on December 12, 1996. Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that defendant had not sat-

isfied the state-law eligibility requirements for a candidate, MCL 46.411; MSA 5.359(11), because at the time defendant became a candidate for the election, she was neither a resident nor a registered voter in the district she sought to represent. The lower court agreed and granted plaintiff's motion, rejecting defendant's arguments that plaintiff's suit was barred by the doctrine of laches and that plaintiff lacked standing to bring suit against defendant.

In the first of two assignments of procedural error, defendant asserts that the lower court erred in finding that plaintiff had standing to bring his suit pursuant to MCR 3.306(B)(2). Defendant argues that the lower court should have instead applied MCR 3.306(B)(3)(a)-(b) and found that plaintiff did not have standing to bring suit because he lacked a "proper interest." The interpretation of court rules is a question of law that we review de novo on appeal. *In re Neubeck*, 223 Mich App 568, 570-571; 567 NW2d 689 (1997). In pertinent part, the court rule states the following:

> (B) Parties.
>
> (1) Actions by Attorney General. An action for quo warranto is to be brought by the Attorney General when the action is against:
>
> * * *
>
> (b) a person who usurps, intrudes into, or wrongfully holds or exercises an office in a public corporation created by this state's authority;
>
> * * *

(2) Actions by Prosecutor or Citizen. Other actions for quo warranto may be brought by the prosecuting attorney of the proper county, without leave of court, or by a citizen of the county by special leave of the court.

(3) Application to Attorney General.

(a) A person may apply to the Attorney General to have the Attorney General bring an action specified in subrule (B)(1). The Attorney General may require the person to give security to indemnify the state against all costs and expenses of the action. The person making the application, and any other person having the proper interest, may be joined as parties plaintiff.

(b) If, on proper application and offer of security, the Attorney General refuses to bring the action, the person may apply to the appropriate court for leave to bring the action himself or herself. [MCR 3.306. See also MCL 600.4501; MSA 27A.4501.]

In general, the effect of MCR 3.306 depends on whether the court rule assigned the action to the Attorney General. This case, which concerns plaintiff's allegation that defendant wrongfully holds or exercises office, would be a case within the purview of those assigned to the Attorney General provided that Ingham County is within the definition of a "public corporation created by this state's authority," as the phrase is used in MCR 3.306(B)(1)(b). Courts have not yet resolved the parameters of this definition. See 4 Martin, Dean & Webster, Michigan Court Rules Practice, pp 438-443. However, whether courts should employ a comprehensive definition, so as to include counties, or a more restricted definition, so as to include only quasi-proprietary corporations such as park authorities or drainage districts, is irrelevant here because under either part of the court rule,

plaintiff has standing to maintain this action against defendant.

Assuming arguendo that an Ingham County Commissioner is not an officer of a public corporation and that the action is not assigned to the Attorney General, plaintiff has standing pursuant to MCR 3.306(B)(2) because he is a citizen of the county and obtained leave of the lower court to bring this action. Conversely, assuming arguendo that an Ingham County Commissioner is an officer of a public corporation and that the action is assigned to the Attorney General pursuant to MCR 3.306(B)(1)(b), plaintiff has standing pursuant to MCR 3.306(B)(3)(b) because the Attorney General declined plaintiff's request to bring the action and plaintiff obtained leave of the lower court to bring this action himself. See *Ballenger v Cahalan*, 145 Mich App 811, 818; 378 NW2d 607 (1985) ("A private citizen, even one claiming title to the contested office, has no standing until a proper request has been made to the Attorney General and he has refused.").

Referencing the last sentence of MCR 3.306(B)(3)(a), defendant argues that plaintiff, a Republican, cannot have a "proper interest" in maintaining an action challenging the outcome of a Democratic primary. In support of this position, defendant imprudently relies on two inapposite decisions of out-of-state courts and on the statement in *Ferency v Secretary of State*, 190 Mich App 398, 415; 476 NW2d 417 (1991), vacated in part 439 Mich 1021 (1992), that "primary elections are . . . primarily party functions." Defendant's argument is without merit. First, defend-

ant's reliance on the phrase "proper interest" is misplaced because the last sentence of MCR 3.306(B)(3)(a) concerns the joinder of a party in addition to "the person making the application." Additionally, nothing in the court rule prompts the inference that a plaintiff's standing to challenge an election is dependent on the plaintiff's political party affiliation or membership. Rather, the only restriction on the face of the court rule is that the person who is granted leave to bring the action must be the one who gave the information to the Attorney General. MCR 3.306(B)(1); MCR 3.306(B)(3)(b). See also MCL 600.4501; MSA 27A.4501 ("If the attorney general receives information from a private party and refuses to act, that private party may bring the action upon leave of court."). The personal interest of the person applying for leave of the court is irrelevant. *Grand Rapids v Harper*, 32 Mich App 324, 328-329; 188 NW2d 668 (1971). Therefore, we find that the lower court reached the right result in deciding that plaintiff could maintain this action.

Next, defendant argues that the lower court erred in finding that laches did not bar plaintiff's action. We review the lower court's decision for clear error. See, e.g., *Sedger v Kinnco, Inc*, 177 Mich App 69, 73; 441 NW2d 5 (1988). The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 96-97; 572 NW2d 246 (1997). The defendant must prove a lack of due diligence on the part of the plaintiff

resulting in some prejudice to the defendant. *Id.* More specifically, in *Stokes v Clerk of Monroe Co Bd of Canvassers*, 29 Mich App 80, 87; 184 NW2d 746 (1970), this Court found that the rule to apply in actions for quo warranto is whether the action is commenced within a reasonable time, taking into account the excuse for delay, the probable harm to the defendant, and the detriment to the public. See also *Brown v Dep't of Military Affairs*, 386 Mich 194, 199; 191 NW2d 347 (1971), citing *Grix v Liquor Control Comm*, 304 Mich 269; 8 NW2d 62 (1943).

For example, in *Grix*, *supra* at 274, the defendants relied on only two facts to show laches: that the plaintiff did not bring suit until nearly two years after the plaintiff was discharged and that in the meantime another person was hired and paid for the work that was formerly done by the plaintiff. Our Supreme Court held that the defendants had not shown prejudice or detriment to justify barring the plaintiff's suit. *Id.* Similarly, in *Stokes*, *supra* at 88, where the plaintiff instituted a quo warranto action challenging the title to the office of county supervisor approximately forty days after the defendant was officially declared the winner of the election, this Court held that the delay by the defeated candidate was not unreasonable and did not preclude maintenance of the action.

Plaintiff initiated this action approximately one month after defendant was elected and several weeks before defendant took office. Defendant accuses plaintiff of waiting until after he learned who his opponent would be and after being defeated at the

general election before filing this suit. However, the record does not establish when plaintiff discovered defendant's failure to meet the eligibility requirements of MCL 46.411; MSA 5.359(11); therefore, defendant has not shown that plaintiff lacked due diligence in pursuing his claim. Additionally, defendant has not shown that the delay resulted in prejudice. Indeed, defendant herself cannot claim prejudice where she has wrongfully held office during the duration of plaintiff's suit. Moreover, the public will not bear the burden of paying a double salary because plaintiff will not be automatically reinstated and compensated for the wages lost from his previous position. See *Brown*, *supra* at 199-200. Instead, when a vacancy occurs, the vacancy is filled by appointment for the remainder of the term of the office. MCL 46.412; MSA 5.359(12). Consequently, we find that the lower court did not clearly err in deciding that laches did not bar plaintiff from enforcing his claim against defendant.

Last, we address the substantive issue defendant raises on appeal, which is that the lower court erred in finding as a matter of law that defendant had not satisfied the state-law eligibility requirements for a candidate. This Court reviews de novo an order granting summary disposition. *Waldan General Contractors, Inc v Michigan Mut Ins Co*, 227 Mich App 683, 685; 577 NW2d 139 (1998). A court properly grants a motion for summary disposition pursuant to MCR 2.116(C)(10) when, except with respect to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* 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 might differ. *Id.*

In pertinent part, MCL 46.411; MSA 5.359(11) provides that "[c]andidates for the office of commissioner shall be residents and registered voters of the district which they seek to represent and shall remain so to hold their office, if elected." In her affidavit of identification, defendant listed an apartment within the ninth district as her residence. However, at the time defendant filed the affidavit, she physically occupied a location within the twelfth district, although she considered the apartment in the ninth district her residence because she was "welcome" to stay there. There is no merit in defendant's attempt to distinguish between occupancy and residence because "residence," for registration and voting purposes, means "the place at which a person habitually sleeps, keeps his or her personal effects and has regular place of lodging." MCL 168.11; MSA 6.1011. Even if a person has more than one residence, it is "that place at which the person resides the greater part of the time" that is considered the official residence according to the statute. *Id.* Regarding her voter registration, defendant conceded that she is uncertain when she requested that the clerk's office change her voter registration from the twelfth-district address to the ninth-district address. In any event, defendant does not contend on appeal that she met the eligibility requirements of MCL 46.411; MSA 5.359(11) on May

9, 1996, the date on which she filed her affidavit of identification.

Defendant instead argues that she was eligible to be a candidate because she moved to a location within the ninth district on or about August 1, 1996, a few days before the primary election was held. This Court has previously rejected this precise argument in *Okros v Myslakowski*, 67 Mich App 397; 241 NW2d 223 (1976), which also concerned a challenge to the right of the successfully elected defendant to hold office as a county commissioner. There, this Court held that status as a candidate regarding residency and voter requirements is determined as of the date that the candidate files for election to the office, not the date of the primary. *Id.* at 401-402.

Defendant argues that this Court's subsequent decision in *Ferency*, *supra*, requires us to overrule *Okros*. Defendant's position rests on the panel's statement that "the purpose of the primary election for partisan offices is to select each major party's nominees for a particular office." *Ferency*, *supra* at 415-416, citing *Line v Bd of Election Canvassers of Menominee Co*, 154 Mich 329, 332; 117 NW 730 (1908). Defendant argues that this statement supports her position that the status of a candidate regarding residency and voter requirements is determined as of the date of the primary. However, the issue before this Court in *Ferency* was the constitutionality of closed presidential primaries in Michigan, not the eligibility requirements for a candidate to run for office. Therefore, we are not persuaded by defendant's reading of *Ferency*.

Defendant also asserts that we are not bound by *Okros*, *supra* at 401-402, because the statement on which we rely was dicta. We disagree. "[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication." *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985). In *Okros*, *supra* at 401, in order to decide whether manifest injustice would result from allowing the default judgment to stand, this Court was required to judge the merits of the defendant's argument, which was that a candidate's eligibility is determined as of the date of the primary. Therefore, the statement about when a candidate's eligibility to run for office is determined was not dicta but was essential to resolving the case.

Even if we agreed with defendant that this Court's statement in *Okros*, *supra* at 401-402, was dicta, we would adopt the reasoning of the panel in *Okros* and hold in this case that the status of a candidate regarding residency and voter requirements is determined as of the date that the candidate files for election to the office, not the date of the primary. The requirements of MCL 46.411; MSA 5.359(11) apply to "[c]andidates for the office of commissioner." Defendant became a candidate by filing an affidavit of identification with the clerk's office and paying the filing fee. See MCL 168.558(1); MSA 6.1558(1); *Grand Rapids*, *supra* at 330 ("a participant in a primary election is a candidate for office"). Because defendant did not meet the requirements of MCL 46.411; MSA 5.359(11) at the time she filed the affidavit and paid the fee, she was

ineligible to run for the office of commissioner in Ingham County. See *Okros*, *supra* at 401. Therefore, defendant's subsequent nomination and election were void.

Accordingly, we hold that the lower court properly granted plaintiff summary disposition because there is no genuine issue of material fact and plaintiff is entitled to judgment as a matter of law. The office of Ingham County Commissioner for the ninth district is vacant as of the date this opinion is released and must be filled pursuant to MCL 46.412; MSA 5.359(12).

Affirmed.

SAAD, P.J., concurred.

JANSEN, J. (*concurring in part and dissenting in part*). I concur with the majority that plaintiff has standing to bring this suit under MCR 3.306(B)(2) and that laches does not bar plaintiff's action. I respectfully dissent, however, from the majority's conclusion that defendant did not satisfy state-law eligibility requirements for a candidate in the *primary* election.

In *Line v Bd of Election Canvassers of Menominee Co*, 154 Mich 329, 332; 117 NW 730 (1908), our Supreme Court held that a primary election is not an election to public office, but is merely the selection of candidates for office by the members of a political party in a manner having the form of an election. This holding was reiterated in *Attorney General ex rel Reuter v Bay City*, 334 Mich 514, 516; 54 NW2d 635 (1952) ("A primary election is not a regular election

in any sense of the term. . . . [A] primary election is merely the selection of candidates for office by the members of a political party in a manner having the form of an election."). Subsequent history of these Supreme Court cases indicates that our Supreme Court has not overruled or modified them; thus, I believe that we are bound by these holdings. See *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Moreover, in *Ferency v Secretary of State*, 190 Mich App 398, 415-416; 476 NW2d 417 (1991), vacated in part 439 Mich 1021 (1992),[1] this Court stated:

> Although primary elections are run by the state and are regulated by the state election law, they nevertheless remain primarily party functions. That is, the purpose of a primary election for a partisan elective office is not to narrow the field of candidates down to two candidates who then run off in the general election (as in the case in primary elections for nonpartisan office). Rather, the purpose of the primary election for partisan offices is to select each major party's nominees for a particular office.

I acknowledge that this Court in *Okros v Myslakowski*, 67 Mich App 397, 402; 241 NW2d 223 (1976), held that the defendant's nomination and subsequent election were void where the defendant had failed to register to vote when he filed for the position of commissioner in Macomb County. This Court held that "[o]ne becomes a candidate when he files for election to office," and rejected the defendant's

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[1] The only portion of this Court's opinion in *Ferency* that was vacated by our Supreme Court was the decision by this Court to allow the defendant to tax costs.

contention that status as a candidate with regard to residency and voter requirements are determined as of the date of the primary. *Id.*, p 401. This Court in *Okros* purported to rely on *Grand Rapids v Harper*, 32 Mich App 324; 188 NW2d 668 (1971), for this holding. In *Grand Rapids*, this Court held that a participant in a primary election is a candidate for office within the meaning of the city charter prohibiting any city official while in office from becoming a candidate for any other office. *Id.*, pp 329-330. This Court in *Grand Rapids* did *not* hold that one becomes a candidate when filing for election to office.

Okros and *Grand Rapids* are not consistent with our Supreme Court's holding in *Line* and *Attorney General.* If primary elections, properly understood to be primarily political party functions, are not elections to public office, but merely selection of candidates for office, then a participant in a primary election is not a candidate for public office, but is merely seeking the party's nomination as a candidate for office. Therefore, I would hold that one is not a candidate for office until nominated by the party in the primary. This nomination can be done in the form of an election, or is sometimes done at party conventions.[2]

Because defendant had properly established residency before the primary election, I would reverse the trial court's order granting summary disposition in favor of plaintiff and uphold the results of the general election held on November 5, 1996.

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[2] Only the offices listed in MCL 168.534; MSA 6.1534 have primary elections.

MICHIGAN TOWNSHIP PARTICIPATING PLAN v PAVOLICH

Docket No. 205214. Submitted October 7, 1998, at Marquette. Decided October 30, 1998, at 9:00 A.M.

Michigan Township Participating Plan brought an action in the Houghton Circuit Court against Mark A. Pavolich, seeking a declaration that the defendant, a police officer for the Village of Lake Linden, was not covered under the underinsured motorist provisions of an insurance policy issued by the plaintiff to the Village of Lake Linden covering bodily injury caused to an insured by an underinsured motorist because the policy defined "insured" to include the village and its "family members," but not its employees. The court, Garfield W. Hood, J., denied summary disposition for the plaintiff and granted summary disposition for the defendant, ruling that to construe the policy as the plaintiff suggested would render the policy meaningless because the village itself could never sustain bodily injury and the village does not have family members, much less ones who can sustain bodily injury. The plaintiff appealed.

The Court of Appeals *held*:

Unambiguous contracts of insurance must be enforced as written, even if certain provisions are rendered meaningless by a plain reading of the language. In this case, the policy unambiguously provided that "insured" meant "[y]ou or any 'family member'" and that "you" meant the organization shown as the named insured in the declarations. Accordingly, the policy cannot be construed to include the defendant as an insured.

Reversed and remanded for entry of summary disposition for the plaintiff.

INSURANCE — POLICY LANGUAGE — JUDICIAL CONSTRUCTION.

Unambiguous contracts of insurance must be enforced as written, even if certain provisions are rendered meaningless by a plain reading of the language.

Bahorski, Bieglecki, Dombrowski & Baratta, P.C. (by *Timothy A. Bahorski*), for the plaintiff.

Wisti & Wisti, P.C. (by *Daniel J. Wisti*), for the defendant.

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

PER CURIAM. The trial court granted summary disposition to defendant pursuant to MCR 2.116(I)(2) in this declaratory judgment action. Plaintiff appeals as of right, arguing that the trial court incorrectly determined that defendant was insured under the policy at issue. We reverse and remand.

The parties agree to the underlying facts of this case:

> On June 11, 1994, [defendant] was employed as a police officer with the Village of Lake Linden. While on duty, [defendant] stopped to question Ronald Jutila whom he suspected of operating a motor vehicle while under the influence of intoxicating liquors. During the course of his investigation, [defendant] reached into Mr. Jutila's vehicle. As he did, Ronald Jutila attempted to drive away. [Defendant] became caught on the vehicle, was carried for some distance, and was allegedly injured. It is undisputed that [defendant] was not in, upon, getting in, on, out or off of any vehicle owned by the Village of Lake Linden at the time of his injury.
>
> [Defendant] sued Mr. Jutila. Mr. Jutila's motor vehicle insurance company settled this suit by paying the $25,000 policy limits under his policy. Because of the amount paid, [defendant] made a claim for underinsurance benefits under his employer's contract with [plaintiff]. [Plaintiff] denied the claim because [defendant] was not an insured due to the fact that he was not occupying a covered auto at the time of his alleged injuries.

> [Plaintiff] filed this declaratory judgment action and moved for summary disposition under MCR 2.116(C)(10) on the issue of whether [defendant] was an insured under the Village's contract with [plaintiff] for purposes of the underinsured motorist coverage. . . .
>
> * * *
>
> The trial court . . . issued an Order Following Consideration of Motion for Summary Disposition which not only denied [plaintiff's] motion for summary disposition but, pursuant to MCR 2.116(I)(2), granted summary judgment in appellee's favor. Judge Hood[1] concluded that "construing the policy as Plaintiff suggested would render certain portions of the policy meaningless and such a construction would be contrary to the principles of contract interpretation which mandate that meaning must be given to all terms in an insurance policy."

On appeal, this Court reviews a grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Id.* Such a motion must be supported by affidavits, depositions, admissions, or other documentary evidence, and the "adverse party may not rest upon mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial." *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

Plaintiff insured the Village of Lake Linden with an insurance policy that contained provisions relating to underinsured motorist coverage. The key issue to be

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[1] Houghton Circuit Court Judge Garfield W. Hood.

resolved is whether defendant was insured for underinsured motorist coverage under the policy language. No reported decision of this Court has addressed this issue, specifically whether a policy issued to an entity should be construed to provide coverage to individual employees of the entity on the basis that only employees, and not the entity itself, could suffer personal injuries so as to recover under the policy as written. In other words, if the insured entity could never recover under one portion of the provision as plainly written, should an ambiguity be found in the contract and a different interpretation be given to that portion so that it is not rendered meaningless.

The policy language at issue is as follows:

> INSURING AGREEMENT
>
> 1. We will pay damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of bodily injury":
>
> a. Sustained by an "insured"; and
>
> b. Caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "underinsured motor vehicle."
>
> We will pay under this coverage only after the limit of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements.
>
> 2. "Insured" as used in this endorsement means:
>
> a. You or any "family member."
>
> b. Any other person occupying "your covered auto."
>
> c. Any person for damages that person is entitled to recover because of "bodily injury" to which this coverage applies sustained by a person described in a. or b. above.

Part of the policy defines the relevant terms as follows:

> "*You*" and "*your*" mean the person or organization shown as the named insured in ITEM ONE of the declarations.

The named insured of the policy at issue, as listed in ITEM ONE of the declarations, is the Village of Lake Linden. Its employees are not listed as named insureds.

Michigan case law is replete with guidelines for determining when ambiguities are present in insurance contracts and for determining what to do when an ambiguity is found. A contract is ambiguous when its words can reasonably be understood in different ways. *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 361-362; 314 NW2d 440 (1982). If a fair reading leads one to understand there is coverage under particular circumstances and another fair reading leads one to understand there is no coverage under the same circumstances, the contract is ambiguous and should be construed against the drafter and in favor of coverage. *Id.* at 362. However, if a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear. *Id.* In other words, "[w]here the language of a policy is clear and unambiguous we cannot interpret it in such a way as to create an ambiguity where none exists." *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 448; 550 NW2d 475 (1996) (citations omitted). "[T]erms in an insurance policy must be given their plain meaning and the court cannot 'create an ambiguity . . . .' " *Heniser v Franken-*

muth Mut Ins Co, 449 Mich 155, 161; 534 NW2d 502 (1995). In fact, where a policy is clear, we are bound by the specific language set forth in the agreement. *Id.* at 160. Stated more succinctly:

> When determining what the parties' agreement is, the trial court should read the contract as a whole and give meaning to all the terms contained within the policy. The trial court shall give the language contained within the policy its ordinary and plain meaning so that technical and strained constructions are avoided. A policy is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. If the trial court determines that the policy is ambiguous, the policy will be construed against the insurer and in favor of coverage. However, *if the contract is unambiguous, the trial court must enforce it as written.* [*Royce v Citizens Ins Co*, 219 Mich App 537, 542-543; 557 NW2d 144 (1996) (citations omitted; emphasis added).]

In this case, the parties argue over whether the terms "[y]ou or any 'family member'" cover defendant such that he is entitled to underinsured coverage under the policy. If defendant qualifies as the "YOU" in the provision, he may collect underinsured benefits even if he was not occupying a covered automobile at the time of the injury. A plain reading of the policy precludes coverage for defendant. Reading the policy as a whole, and giving ordinary and plain meanings to its terms, the language cannot be reasonably understood to mean village employees and their families. Clearly, the term "you" in the provision refers only to the village. No mention is made of employees. Therefore, under the policy language, plaintiff is only obligated to pay damages to the village or any of its "fam-

ily members" that are entitled to "underinsured motor vehicle" coverage because of bodily injury. Our inquiry cannot end with this conclusion, however.

Defendant points out, and the trial court agreed, that a plain interpretation of the language renders the portion of the policy at issue meaningless. Specifically, if a plain interpretation is used, no one is entitled to receive underinsured coverage under the provision because the village cannot sustain bodily injury and cannot have family members who can sustain bodily injury. Because of this, defendant argues that the policy is ambiguous and should be construed to include employees of the village and their families. While we agree that the plain, unconstrained reading renders a portion of the policy meaningless, we disagree that there is an ambiguity. Therefore, we will not construe the language or reform the contract to include, as insureds, village employees and members of their families.

There is authority to support our holding that the contract language is not ambiguous as written and should not be reformed so as to include defendant as an insured. Numerous other jurisdictions have addressed this issue. The majority of those jurisdictions have ruled that a policy like the one at issue is not ambiguous and should be construed as written, even if certain provisions are rendered meaningless by a plain reading of the language. The arguments made in those cases and the language in the policies are substantially similar to those in this case. Several examples are discussed below.

In *Dixon v Gunter*, 636 SW2d 437 (Tenn App, 1982), the deceased was the sole stockholder of a corporation, which carried uninsured motorist coverage. The issue was whether the corporation's policy covered the deceased when he was operating a noncorporate vehicle and was not conducting corporate business. The appellant argued that because the policy covered "your [sic] or any family member," there must be coverage. She argued that the corporation could not receive personal injuries and could not have any "family member" and therefore, the court needed to look beyond the corporate structure and define "you" to mean the sole-shareholder of the corporation. The court declined to do so, noting that there was no latent ambiguity in the policy and that it was obvious to "even a casual reader" that the insured was a corporation, which could not suffer personal injuries or have a family. The court regarded the references to personal injuries and family as surplusage, and stated:

> A contract of insurance should be given a fair and reasonable construction; and likewise should be given a sensible construction, consonant with the apparent object and plain intention of the parties; a construction such as would be given the contract by an ordinary intelligent business man; and a practical and reasonable rather than a literal construction. The contract should not be given a forced, unnatural or unreasonable construction which would extend or restrict the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion or render the policy nonsensical and ineffective. [*Id.* at 441, citing 44 CJS, Insurance, § 296, pp 1163-1165.]

In *General Ins Co of America v Icelandic Builders, Inc*, 24 Wash App 656; 604 P2d 966 (1979), the plaintiff instituted a declaratory judgment action for a determination whether one of the directors of a closely held family corporation was covered under an uninsured motorist provision. The provision was contained in a policy issued to the defendant corporation. The director was injured in his personal automobile. The defendant argued that the language of the policy was ambiguous because its terms were uncertain and capable of being understood in more than one way. It argued that if the corporation was considered to be the only named insured, there was no "person" who would be entitled to uninsured coverage because a corporation "cannot sustain bodily injury so as to qualify for coverage." *Id.* at 659. Further, it argued that "this section of the policy is ambiguous because it purports to insure specific persons yet excludes any person if the named insured is a corporation." *Id.* The court disagreed with the defendant. The definitions provided by the policy made clear that the insured person was the corporation. The wording was not capable of being understood in more than one way. The court ruled that "[t]he identification of a corporation as the named insured does not so obfuscate the meaning of the term "person" as to create an ambiguity." *Id.*

> The named insured is the corporation and there is no other designated insured. The policy language describes unambiguously who is insured under the policy. There is no basis for applying rules of construction which [the defendant's director] seeks to invoke. The courts cannot create an

> ambiguity when none exists and thereby rewrite a policy. [*Id.* at 660 (citation omitted).]

In *Meyer v American Economy Ins Co*, 103 Or App 160; 796 P2d 1223 (1990), the court also rejected that individual coverage should be read into the contract simply because a failure to do so would render the provision at issue meaningless. The policy insured "You or any family member." *Id.* at 162. The policy defined the term "you" to mean "the person or organization shown as the named insured in . . . the declaration." *Id.* The named insured was the corporation. The plaintiff argued that the coverage was a nullity if literally read because the corporation could not suffer bodily injury and could not have "family members" as the term was defined. The court found that no ambiguity existed under which the plaintiff could be regarded as a named insured.

> Even if . . . there is no category one coverage if the policy is read to mean what it unambiguously says, that does not create an ambiguity. If . . . defendant has collected premiums for coverage that does not exist, that might provide the corporation with some form of remedy against defendant; it does not mean that plaintiff is covered [however]. [*Id.* at 163.]

Because there was no ambiguity, the court read the policy as written and declined to utilize rules of construction, including the rule that "every provision in the policy must be deemed to mean something," to reform the contract. *Id.*

In *Grain Dealers Mut Ins Co v McKee*, 943 SW2d 455 (Texas, 1997), the Texas Supreme Court reversed

the decision of the appellate court, which had affirmed the trial court's decision to provide coverage to an individual. The policy provided uninsured (UM) and underinsured (UIM) motorist coverage to "You and any designated person and any family member of either." *Id.* at 457. The words "you" and "your" referred to the named insured, which was a sole-shareholder corporation. The defendant argued that the policy was ambiguous. The court disagreed. "There is no reasonable interpretation of the policy that can construe [the defendant] as the 'you' to whom the covered family members are linked in the endorsements. [The defendant], unambiguously, is not the named insured." *Id.* at 458. The court held that because the corporation was the insured, not the defendant, the injured party was not a family member within the definition of the language. *Id.*

> Although interpreting an insurance policy to give a reasonable meaning to all provisions is preferable to interpreting the policy in a way that creates surplusage or leaves a portion of the policy useless or inexplicable, . . . *surplusage alone does not make an insurance policy ambiguous.* Unlike a unique contract tailor-made to the interests peculiar to each party, the UM/UIM and [personal injury protection] endorsements are standard forms crafted to accommodate a wide variety of insurance needs. [*Id.* (emphasis added).]

The court noted that the majority of jurisdictions that have considered this issue have found that the language does not create an ambiguity. *Id.* at 459. It listed numerous other cases to support the majority view. *Id.*

In most of the minority view cases, the corporations were small, closely knit, family corporations and the courts identified the corporation with the individuals for purposes of the policy. *Hager v American West Ins Co*, 732 F Supp 1072 (D Mont, 1989); *Hawkeye-Security Ins Co v Lambrecht & Sons, Inc*, 852 P2d 1317 (Colo App, 1993); *Ceci v Nat'l Indemnity Co*, 225 Conn 165; 622 A2d 545 (1993). But see *King v Nationwide Ins Co*, 35 Ohio St 3d 208; 519 NE2d 1380 (1988).

In the case at hand, the village is not a closely knit corporation or family business. It is not identified with its employees, but is a separate legal entity. Moreover, we believe that the majority approach is more appropriate and adopt it as our own. We cannot accept the proposition that an ambiguity arises whenever a plain reading of policy language renders a portion of the policy meaningless. In other words, we agree with the *McKee* court that a finding of surplusage does not equate to a finding of ambiguity. A contract is only ambiguous when its words may reasonably be understood in different ways. *Raska, supra* at 362.

In this case, there is only one interpretation that can be made when looking at the language as written. Any casual reader, giving ordinary and plain meanings to the language as written, would realize that the insured "YOU" does not refer to individual employees, but refers only to the village itself. Where the policy language describes unambiguously who is insured under the policy, there is no basis for finding an ambiguity. See *Icelandic Builders, supra.* Because

the policy is clear as written, we are bound by the specific language, *Heniser*, *supra* at 160, and will not construe the policy to cover defendant simply to avoid a finding that there is surplus language in the contract.

In this case we find that the provision as written does include surplusage. The policy is sloppily and inartfully drafted. It appears to be a standard policy, which was not tailored to the needs of the village. The language providing coverage to the village and its family members is clearly surplusage because the village cannot sustain bodily injury or have family members. However, as we have previously concluded, our ruling that this language is surplus does not require us to reform the contract. We also note that if the insurer collected premiums for coverage that does not exist, the village may have a remedy against defendant, but this "does not mean that plaintiff is covered". See *Meyer*, *supra* at 163.

On appeal, plaintiff also argues that defendant was not covered under the second portion of the underinsured motorist provision. That language provides underinsured motorist coverage to "[a]ny other person occupying 'your covered auto.' " Defendant does not contest this on appeal, nor did he contest this argument below. Therefore, resolution of this issue is unnecessary.

Reversed and remanded for entry of summary disposition in favor of plaintiff.

FAIRCLOTH v FAMILY INDEPENDENCE AGENCY

Docket No. 198222. Submitted June 11, 1998, at Detroit. Decided October 30, 1998, at 9:10 A.M.

Mary Faircloth and other former recipients of welfare benefits under the general assistance program administered by the Department of Social Services, now the Family Independence Agency, from 1979 until fiscal year 1991-92 brought an action in the Ingham Circuit Court against the department and others, seeking certification of a class action and declaratory and injunctive relief, alleging that the defendants' policy for determining eligibility for benefits under the state disability assistance (SDA) program that replaced the general assistance program violated the appropriations acts regarding such benefits for fiscal years 1991-92 and 1992-93, 1991 PA 111 and 1992 PA 168. The appropriations acts provided that a person who is medically diagnosed as incapacitated and unavailable for work for at least ninety days was eligible to receive SDA benefits. The defendants' policy provided that clients are medically eligible for SDA if they are medically eligible for medical assistance based on disability or blindness or if they have a physical or mental impairment or combination of impairments that prevent the performance of any remunerative work for ninety days or more. The policy defined work as any work or work activity usually done for remuneration. The plaintiffs alleged that the policy was invalid because the internal criteria for determining eligibility under 1991 PA 111, subsection 805(1)(b) and 1992 PA 168, subsection 805(1)(b) was not promulgated as a rule under the Administrative Procedures Act (APA) and the policy excluded applicants who fell within the scope of subsection 805(1)(b). The court, Carolyn Stell, J., denied, without prejudice, the motion to certify a class. On June 8, 1994, the court granted partial summary disposition for the plaintiffs, declaring the defendants' policy invalid and violative of the APA and the SDA appropriations acts. The court took under advisement the issue whether to grant further relief, but certified its declaratory ruling as final for purposes of appeal. The court then considered the plaintiffs' motion for postjudgment supplemental relief and ruled that it would use its general power to fashion a specific remedy to enforce its declaratory judgment. The court, as part of the remedy,

ordered the defendants to determine eligibility by means of the disability standard used for purposes of the supplemental security income (SSI) provisions of the Social Security Act, 42 USC 1382 *et seq.* The defendants appealed, and the Court of Appeals stayed further proceedings pending resolution of the appeal.

The Court of Appeals *held*:

1. The Court of Appeals has jurisdiction to consider the defendants' challenge to the June 8, 1994, order on defendants' appeal as of right from the subsequent final order that disposed of all of the plaintiffs' claims.

2. The court erred in finding that the policy constituted a rule that should have been promulgated under the APA. The policy is an interpretive statement because it merely explained the language of the appropriations acts. Where an agency policy interprets or explains a statute or rule, the agency need not promulgate the policy as a rule even if the policy has a substantial effect on the rights of a class of people, because an interpretive statement is not, by definition, a rule under the APA.

3. The defendants' policy does not constitute a rule because it does not have the force and effect of law, but rather merely explains the appropriations acts by detailing the circumstances under which a person will be deemed unavailable for work for at least ninety days. The court erred in holding the policy invalid because it was not promulgated as a rule under the APA.

4. The court erred in determining that the policy conflicted with the language of the appropriations acts.

5. The plaintiffs' argument that since a person who receives SSI, social security, or medical assistance because of a disability qualifies for SDA benefits under subsection 805(1)(a) of the appropriations acts, the Legislature must have intended a lesser standard to qualify under subsection 805(1)(b) than that used for purposes of determining SSI benefits must be rejected.

6. The plaintiffs' argument that the remaining subsections of subsection 805(1) evince the Legislature's intent that subsection 805(1)(b) encompass applicants who are capable of performing some work, but cannot meet their basic needs because of their disability must also be rejected. The Court of Appeals will not apply the disability standards applicable to persons falling within the other subsections to persons who can only qualify for benefits under subsection 805(1)(b).

7. The language of the appropriations acts does not create a "significantly" or "substantially" incapacitated standard.

8. The Legislature chose not to include in subsection 805(1)(b) language calling for consideration of vocational factors such as age, education, and previous work experience. Therefore, for purposes of subsection 805(1)(b), an applicant's capacity to work is not measured by a minimum number of hours that the applicant is able to sustain work activity or a minimum remunerative standard. The defendants correctly interpreted subsection 805(1)(b) as requiring an inability to perform any work.

9. The Legislature's inclusion in 1992 PA 168, subsection 805(1)(b) of the same language used in 1991 PA 111, subsection 805(1)(b) was an approval of the defendants' interpretation of 1991 PA 111, subsection 805(1) as requiring that a claimant be incapable of any remunerative work. The Legislature's decision to modify subsection 805(1)(b) and mandate the use of the SSI standard during fiscal year 1993-94, 1993 PA 186, subsection 805(1)(b) was not a rejection of the defendants' use of the more restrictive standard in 1991-92 and 1992-93. The matter must be reversed and remanded for entry of a judgment for the defendants.

Reversed and remanded.

CAVANAGH, J., dissenting in part, stated that the defendants' interpretation of 1991 PA 111, subsection 805(1)(b) resulted in an unjustifiably restrictive standard of eligibility for disability benefits that was contrary to the intent of the Legislature. The defendants' interpretation leads to unreasonable and unjust results. The remaining subsections of subsection 805(1) support a broader reading of the disability standard contained in subsection 805(1)(b). The Legislature's reenactment of 1991 PA 111, subsection 805(1)(b) in 1992 PA 168, subsection 805(1)(b) is not a dispositive indicator of the Legislature's intent to approve the defendants' interpretation of 1991 PA 111, subsection 805(1)(b). The grant of summary disposition in favor of the plaintiffs should be affirmed.

1. COURTS — JURISDICTION — MOTIONS AND ORDERS — APPEAL.

The Court of Appeals has jurisdiction in an appeal as of right from a trial court's final order disposing of all the claims in a case to consider a party's challenge to a prior order in the case granting partial summary disposition that was not a final order; an order granting partial summary disposition is not a final order if it provides that the trial court will conduct further proceedings to determine whether further relief should be granted with regard to the claims for which summary disposition is being granted.

2. ADMINISTRATIVE LAW — ADMINISTRATIVE PROCEDURES ACT — RULE — INTERPRETIVE STATEMENTS.

A "rule" for purposes of the rule-promulgation requirements of the Administrative Procedures Act does not include a form with instructions, an interpretive statement, a guideline, an informal pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory; an agency policy that does not have the force and effect of law but merely interprets or explains a statute or rule need not be promulgated as a rule even if it has substantial effect on the rights of a class of people (MCL 24.207[h]; MSA 3.560[107][h]).

3. SOCIAL SERVICES — DISABILITY ASSISTANCE PROGRAM — BENEFITS — ELIGIBILITY.

The Legislature's use of the terms "incapacitated," "unavailable," and "work" in the subsection of the social services appropriations acts for fiscal years 1991-92 and 1992-93 that states that a "person who is medically diagnosed as incapacitated and unavailable for work for at least 90 days" is eligible for state disability assistance program benefits indicates that factors such as age, education, and previous work experience are not to be considered under the subsection and that an applicant's capacity to work is not to be measured by the minimum number of hours that the applicant is able to sustain work activity or a minimum remunerative standard; the subsection requires an applicant to be unable to perform any remunerative work in order to be eligible for the benefits (1991 PA 111, subsection 805[1][b], 1992 PA 168, subsection 805[1][b]).

4. STATUTES — ADMINISTRATIVE LAW — AGENCY'S CONSTRUCTION OF STATUTES.

The Legislature is presumed to know of an agency's construction of a statute and adopts that construction when it reenacts the language so construed.

Michigan Legal Services (by *Susan McParland* and *Marilyn Mullane*), for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Susan A. Harris* and *Stephen H. Garrard*, Assistant Attorneys General, for the defendants.

Before: CORRIGAN, C.J., and CAVANAGH and BANDSTRA, JJ.

CORRIGAN, C.J. In this action challenging the standard for considering applications for state disability assistance program (SDA) benefits during fiscal years 1991-92 and 1992-93, defendants appeal by right the order granting plaintiffs supplemental relief. The trial court found defendants' policy regarding SDA eligibility invalid because it constituted a rule that should have been promulgated under the Administrative Procedures Act (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* It also determined that defendants' policy violated the plain meaning of the appropriations acts for fiscal years 1991-92 and 1992-93, 1991 PA 111 and 1992 PA 168. We hold that the policy regarding SDA eligibility was an interpretive statement that need not have been promulgated as a rule under the APA and that defendants correctly construed the language of the appropriations acts. We therefore reverse and remand for entry of judgment for defendants.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

The state provided welfare benefits under a general assistance program (GA) administered by the Department of Social Services[1] (DSS) from 1979 until fiscal year 1991-92. The program was not a permanent statutory enactment, but rather was contingent on the Legislature appropriating funds for the program in a line item of the DSS budget. MCL 400.14; MSA 16.414, MCL 400.18; MSA 16.418. The Legislature thus eliminated GA in 1991 by not appropriating funds for the program in the DSS budget for fiscal year 1991-92. In its place, the Legislature established the SDA program

[1] In 1995, the Legislature abolished the DSS effective March 28, 1996, and transferred its duties to the newly created Family Independence Agency. MCL 400.1 *et seq.*; MSA 16.401 *et seq.*

to provide assistance to some former GA recipients. 1991 PA 111, § 805.

1991 PA 111, § 805 provided in pertinent part as follows:

> (1) The department of social services shall operate a state disability assistance program. Persons eligible for this program shall include needy persons 18 years of age or older, or emancipated minors, who meet 1 or more of the following requirements:
>
> (a) A recipient of supplemental security income, social security, or medical assistance due to disability.
>
> (b) A person who is medically diagnosed as incapacitated and unavailable for work for at least 90 days.
>
> (c) A resident of adult foster care, home for the aged, county infirmary or substance abuse treatment center.
>
> (d) A person receiving 30-day postresidential substance abuse treatment.
>
> (e) A person diagnosed as having acquired immune-deficiency syndrome or acquired immune-deficiency syndrome related complex.
>
> (f) A person receiving special education services through the local intermediate school district.
>
> (g) A pregnant woman.
>
> (h) A caretaker of a disabled person as defined in subsections (a), (b), (e), or (f) above.

Contemporaneous with the legislative action, defendants developed a policy for determining eligibility under subsection 805(1)(b). The policy provided as follows under the heading "Standard for Determining Disability":

> Clients are medically eligible for State Disability Assistance if they are medically eligible for MA [medical assistance] based on disability or blindness or if they have a physical and/or mental impairment or combination of

impairments which prevents the performance of any remunerative work for 90 days or more.

The policy further defined the term "work" as "[a]ny work or work activity usually done for remuneration." Defendants continued the policy during fiscal year 1992-93 because the Legislature included identical language in subsection 805(1)(b) of that year's appropriations act. 1992 PA 168, subsection 805(1)(b). The Legislature, however, modified the language of subsection 805(1)(b) for fiscal year 1993-94 to provide benefits for "[a] person with a physical or mental impairment other than substance abuse which meets federal SSI disability standards, except that the minimum duration of the disability shall be 90 days." 1993 PA 186, subsection 805(1)(b). Accordingly, defendants discontinued the policy for determining disability under subsection 805(1)(b).

In February 1992, in response to defendants' implementation of the policy, plaintiffs, former recipients of assistance under the GA program, commenced this action seeking certification of a class action and declaratory and injunctive relief. Plaintiffs alleged that defendants' policy was invalid because the internal criteria for determining eligibility under subsection 805(1)(b) was not promulgated as a rule under the APA and the policy excluded applicants who fell within the scope of subsection 805(1)(b). The trial court subsequently denied, without prejudice, plaintiffs' motion to certify a class.

Defendants and plaintiffs filed cross-motions for summary disposition of plaintiffs' claims under MCR 2.116(C)(10) in March 1993. The trial court granted partial summary disposition for plaintiffs on June 8,

1994, declaring defendants' policy invalid and violative of the APA and the SDA appropriations acts. The court reasoned as follows:

> The policy for determining eligibility for SDA benefits—and this is a finding of the Court—is a rule, and should have been promulgated as a rule under the Michigan Administrative Procedures Act.
>
> The interpretive statement exception has been narrowly construed by the courts, and requires that a statement be merely be [sic] explanatory.
>
> This policy goes beyond explanatory. It essentially eliminated the medically diagnosed requirement altogether and went on to offer a restricted definition of incapacitated, as an impairment which prevents the performance of any remunerative work for 90 days or more. The plain meaning of incapacitated would certainly encompass more than this.
>
> The policy in question had the full force and effect of law, and was used to determine whether a person was eligible for SDA benefits.
>
> The preferred method of policy making is through the process of promulgation of rules. This policy clearly affected the status quo, and those affected by it should have been given an opportunity to be heard.
>
> The Court also finds that the argument that this is somehow an exception to the Administrative Procedures Act because it falls underneath the—a broad boilerplate language of the Social Services Act, is also not adopted by the Court.
>
> Therefore, the Court grants summary disposition to the Plaintiffs on Counts 12, 17, 18, and 21, finding that the definition as applied was violative of the Michigan Administrative Procedures Act and also in violation of the authorizing statute.

The court took under advisement the issue whether to grant further relief, but certified its declaratory rulings as "final" for purposes of appeal.

In April 1995, plaintiffs moved for postjudgment supplemental relief under MCR 2.605(F), arguing that because defendants had improperly denied benefits to seventy-five percent of applicants, defendants must notify previously rejected applicants and determine their eligibility under an appropriate standard. Plaintiffs urged the court to use its general power to fashion relief to grant them the additional relief necessary to give effect to the declaratory judgment because defendants had not sought to implement the court's decision. Plaintiffs further argued that the court should direct that defendants determine eligibility by means of the disability standard used for purposes of the supplemental security income (SSI) provisions of the Social Security Act, 42 USC 1382 *et seq.*

The trial court took the motion under advisement after a hearing in July 1995. Nine months later, the court ruled that it would use its general power to fashion a specific remedy to enforce its declaratory judgment. Noting that defendants had not developed an alternate standard for determining disability, the court directed that they use the SSI standard because it was the only "coherent" standard, it reasonably effectuated the Legislature's intent, and defendants had expertise in using it. Next, the court recognized that personal notice to all rejected applicants was impractical, but concluded that defendants could provide reasonable notice through the mass media and the inclusion of written materials in food stamp mailings. Therefore, the court ordered that defendants (1) include written notices and application forms in food stamp mailings during August 1996, (2) air public service announcements in the top seven television markets not less than five times in prime time during the

first two weeks of August 1996, (3) air the announcements in the top ten radio markets not less than five times during working hours in the first two weeks of August 1996, and (4) use the SSI standard to review applications. The court then dismissed plaintiffs' remaining claims as moot.

Defendants moved for reconsideration, requesting that the court amend its order to allow them to send a preapplication to all food stamp recipients in a separate mailing, which applicants could then present to the Family Independence Agency (FIA) for a full application. Defendants further requested that the court reconsider the method of providing notice because radio and television stations would not agree to air the public service announcements during the court-ordered period and some television stations would not sell air time for the announcements. The court denied defendants' motion for reconsideration, but extended the period for defendants to notify rejected applicants and redetermine eligibility and shifted the public service announcements to the first two weeks of November 1996. This Court, however, stayed further proceedings pending resolution of this appeal.

II. JURISDICTION

We reject plaintiffs' initial contention that this Court lacks jurisdiction over the trial court's June 8, 1994, order granting partial summary disposition because defendants did not timely claim an appeal from that order. The trial court certified its order granting partial summary disposition as a "final judg-

ment" under the former version of MCR 2.604(A).[2] Mere certification, however, does not resolve whether an order is actually "final." *McCarthy & Associates, Inc v Washburn*, 194 Mich App 676, 680; 488 NW2d 785 (1992). If the order is not final, this Court lacks jurisdiction under MCR 7.203. *Id.* In this case, the June 8, 1994, order was not a final order because it explicitly provided that additional proceedings would occur regarding whether the trial court would grant further relief on the claims with respect to which it had granted summary disposition. See *Children's Hosp v Auto Club Ins Ass'n*, 450 Mich 670, 677; 545 NW2d 592 (1996). Accordingly, this Court has jurisdiction to consider defendants' challenge to the June 8, 1994, order on defendants' appeal of right from the actual final order entered on April 30, 1996, which disposed of all of plaintiffs' claims.[3]

III. THE APA

Defendants argue that the trial court erred in finding their policy invalid because it was not promulgated as a rule under the APA. We agree. We review this question of law de novo. *Watson v Bureau of*

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[2] The Michigan Supreme Court amended the court rule to eliminate this procedure in May 1995, effective July 1995. The current version of MCR 2.604 only permits certification of an otherwise nonfinal order as a final order in receivership and other similar actions.

[3] Defendants improperly rely on *Comm'r of Ins v Advisory Board of the Michigan State Accident Fund*, 173 Mich App 566; 434 NW2d 433 (1988), for the proposition that they may either appeal by right from an order certified as final or wait until the final judgment to challenge that order. This Court has repudiated the *Accident Fund* interpretation of this Court's jurisdiction under MCR 7.203. *Adams v Perry Furniture Co (On Remand)*, 198 Mich App 1, 8; 497 NW2d 514 (1993); *Klco v Dynamic Training Corp*, 192 Mich App 39, 41; 480 NW2d 596 (1991).

State Lottery, 224 Mich App 639, 644; 569 NW2d 878 (1997).

The FIA is subject to the rule-promulgation requirements of the APA.[4] See *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services*, 431 Mich 172, 183; 428 NW2d 335 (1988). "The APA requires an agency to give notice of proposed rules or rule changes, to hold a public hearing, and to submit the proposed rule or rule changes to the Legislature's Joint Committee on Administrative Rules for review and approval." *AFSCME v Dep't of Mental Health*, 452 Mich 1, 9, n 8; 550 NW2d 190 (1996). An agency's failure to follow this process renders the rule invalid.[5] *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 239; 501 NW2d 88 (1993); *Blank v Dep't of Corrections*, 222 Mich App 385, 392; 564 NW2d 130 (1997), lv gtd 459 Mich 878 (1998).

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[4] MCL 400.6(1); MSA 16.406(1) grants the FIA the power to promulgate "rules necessary or desirable for the administration of programs under [the Social Welfare Act]." Under MCL 400.1b(1); MSA 16.401(2)(1), the annual appropriations acts involved in this case are considered "as a time-limited addendum to th[e] act." Therefore, the FIA and its predecessor, the DSS, had the power to promulgate rules to administer the SDA program.

[5] We reject defendants' contention that under *Blank v Dep't of Corrections*, 222 Mich App 385, 392; 564 NW2d 130 (1997), lv gtd 459 Mich 878 (1998), the trial court erred in concluding that they violated the APA. In *Blank*, *supra* at 392-401, this Court held that §§ 45 and 46 of the APA, MCL 24.245; MSA 3.560(145), MCL 24.246; MSA 3.560(146), requiring legislative approval for agency rules, are unconstitutional. This Court, however, found the remaining portion of the APA enforceable because §§ 45 and 46 could be severed from the APA without interfering with the valid object of the act. *Blank*, *supra* at 401-402. In this case, defendants did not comply with any of the requirements for promulgating rules, not merely the provisions held unconstitutional in *Blank*. Accordingly, *Blank* is not controlling. In the event defendants' policy constituted a rule, it is invalid for failure to comply with those APA rule-promulgation procedures that survived *Blank*. See *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 239; 501 NW2d 88 (1993).

In *AFSCME*, *supra* at 8, our Supreme Court parsed the APA definition of a "rule," MCL 24.207; MSA 3.560(107):

> [A] "rule" is: (1) "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability," (2) "that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency . . . ."

The statute further provides, however, that a "rule" does not include, among other enumerated exceptions, "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h); MSA 3.560(107)(h).[6]

We conclude that defendants' policy was an interpretive statement, not a rule subject to the promulgation requirements of the APA, because it merely explained the language of the appropriations acts. We reject plaintiffs' argument that the policy constituted a rule because it altered the status quo and substantially affected the rights of the general public.

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[6] Plaintiffs do not argue that defendants' policy was a "guideline" for purposes of the APA. A guideline is "an agency statement or declaration of policy which the agency intends to follow, which does not have the force or effect of law, and which binds the agency but does not bind any other person." MCL 24.203(6); MSA 3.560(103)(6). To promulgate a guideline, the agency must provide notice to the joint committee, the Legislative Service Bureau, the Governor and "each person who requested the agency in writing for advanced notice of proposed action which may affect the person," and provide a sixty-day period for written comment. MCL 24.224(1); MSA 3.560(124)(1). Plaintiffs, however, have abandoned the issue whether defendants' policy is invalid because it was not promulgated as a guideline by not raising it on appeal. See *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997), and *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997).

Although our Supreme Court has suggested in dicta that the effect a policy has on the rights of the public may require its promulgation as a rule, see *Michigan Farm Bureau v Bureau of Workmen's Compensation*, 408 Mich 141, 150, n 4; 289 NW2d 699 (1980); *Detroit Base Coalition*, *supra* at 184-185; *Clonlara*, *supra* at 247-248, Michigan courts have focused on the effect of an unpromulgated policy only where the agency establishes policies and procedures under a broad grant of authority to administer a program. See, e.g., *AFSCME*, *supra*, and *Palozolo v Dep't of Social Services*, 189 Mich App 530; 473 NW2d 765 (1991). Under those circumstances, the agency policies may have the force and effect of law because the relevant statute does not provide specific standards for eligibility and administration of the program. The policies are not interpretive statements because they do not merely interpret or explain the statute or rules from which the agency derives its authority. Rather, they establish the substantive standards implementing the program. See *Boyd v Civil Service Comm*, 220 Mich App 226, 236; 559 NW2d 342 (1996). By contrast, where an agency policy interprets or explains a statute or rule, the agency need not promulgate it as a rule even if it has a substantial effect on the rights of a class of people because an interpretive statement is not, by definition, a rule under the APA. *Michigan Farm Bureau*, *supra* at 148.

Before 1991, the Legislature appropriated monies to fund a GA program administered by the DSS in accordance with DSS rules and procedures. MCL 400.14; MSA 16.414, MCL 400.18; MSA 16.418. The Legislature did not dictate who was eligible for the program. See, e.g., 1990 PA 200. In funding the SDA program, how-

ever, the Legislature established who was eligible for benefits. 1991 PA 111, subsection 805(1)(b) and 1992 PA 168, subsection 805(1)(b) provided that a "person who [was] medically diagnosed as incapacitated and unavailable for work for at least 90 days" was eligible to receive benefits. Thus, unlike the policies at issue in *AFSCME*, *supra*, and *Palozolo*, *supra*, defendants' policy does not have the force of law because subsection 805(1)(b) governs eligibility and it remains the court's responsibility to determine the meaning of the language contained therein. See *Dep't of Civil Rights ex rel Parks v General Motors Corp*, 93 Mich App 366, 373-374; 287 NW2d 240 (1979), adopted by a plurality of the Michigan Supreme Court as its opinion 412 Mich 610; 317 NW2d 16 (1982). The court need only give appropriate deference to defendants' interpretation.[7] *General Motors Corp*, *supra*, 93 Mich App 374, n 5. Accordingly, defendants' policy does not constitute a rule because it does not have the force and effect of law, but rather merely explains the statutory provision by detailing the circumstances under which a person will be deemed "unavailable for work for at least 90 days."

Plaintiffs further mistakenly argue that defendants were required to promulgate their policy as a rule because it conflicted with the provision of the appropriations acts that it purportedly explained. Even assuming, arguendo, that the policy is more restric-

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[7] By contrast, this Court applies a three-part test to determine the validity of an agency's rules. The rules must be within the matter covered by the enabling statute, must comply with the underlying legislative intent, and must not be arbitrary or capricious. *Luttrell v Dep't of Corrections*, 421 Mich 93, 100; 365 NW2d 74 (1984); *Binsfeld v Dep't of Natural Resources*, 173 Mich App 779, 785-786; 434 NW2d 245 (1988).

tive than the statutory provisions, this factor is of no consequence. Our Supreme Court rejected plaintiffs' argument in *Clonlara, supra* at 243, quoting *Wayne Twp Metropolitan School Dist v Davila*, 969 F2d 485, 494 (CA 7, 1992):

> An interpretation not supported by the enabling act is an invalid interpretation, not a rule. Otherwise, "wrong" interpretive statements might become rules with the force of law on the false premise that they were promulgated in accordance with the APA procedures. "[B]ecause a reviewing court disagrees with an agency interpretation does not render it legislative."

Therefore, we conclude that that trial court erred in holding that defendants' policy was invalid because it was not promulgated as a rule under the APA.

IV. SUBSECTION 805(1)(B) OF THE APPROPRIATIONS ACTS

Defendants next argue that the trial court erred in determining that their policy conflicted with the language of the appropriations acts. We agree. This Court reviews questions of law, including statutory interpretation, de novo. *Watson, supra* at 644. Although it remains our responsibility to determine the meaning of the statute, we give "appropriate deference" to the agency's interpretation. See *General Motors Corp, supra*, 93 Mich App 373-374. This Court ordinarily defers to the construction of a statute by the agency charged with applying it unless the interpretation is "clearly wrong." *Jones-Jennings v Hutzel Hosp (On Remand)*, 223 Mich App 94, 105; 565 NW2d 680 (1997).

A. STATUTORY CONSTRUCTION

In construing a statute, our purpose is to ascertain the reasonable meaning of the specific language of the statute. Cf. *Gross v General Motors Corp*, 448 Mich 147, 158-159; 528 NW2d 707 (1995); *Mahrle v Danke*, 216 Mich App 343, 348; 549 NW2d 56 (1996); see, generally, Scalia, A Matter of Interpretation: Federal Courts & the Law (Princeton, NJ: Princeton University Press, 1997), pp 23-25. Judicial construction is not permitted where the plain and ordinary meaning of the statutory language is clear. *Ruff v Isaac*, 226 Mich App 1, 8; 573 NW2d 55 (1997); *Watson*, *supra* at 644.

In this case, the trial court erred in concluding that defendants' policy violated the plain meaning of the appropriations acts. Defendants' policy interpreted 1991 PA 111, subsection 805(1)(b) and 1992 PA 168, subsection 805(1)(b), which provided that a "person who [was] medically diagnosed as incapacitated and unavailable for work for at least 90 days" was eligible to receive SDA benefits. Defendants' policy explained this language under the heading "Standard for Determining Disability":

> Clients are medically eligible for State Disability Assistance if they are medically eligible for MA based on disability or blindness or if they have a physical and/or mental impairment or combination of impairments which prevents the performance of any remunerative work for 90 days or more.

The policy further defined the term "work" as "[a]ny work or work activity usually done for remuneration."

We reject plaintiffs' argument that since a person who receives SSI, social security, or medical assis-

tance because of a disability qualifies for SDA benefits under subsection 805(1)(a) of the appropriations acts, the Legislature must have intended a lesser standard to qualify under subsection 805(1)(b) than that used for purposes of determining SSI benefits. A person is disabled for SSI purposes if he is unable to engage in "substantial gainful activity" by reason of an impairment "which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 USC 1382c(a)(3)(A). The Legislature, however, could reasonably have decided to authorize benefits for someone who is unable to sustain gainful employment for twelve months because of a disability, subsection 805(1)(a), but require a higher threshold for those whose disability incapacitates them for less than a year, subsection 805(1)(b). For example, the Legislature could have reasoned that a person who is incapacitated for less than a year may be able to borrow funds to support himself and pay off the debt after resuming gainful employment. Further, the Legislature could have used the SSI standard in subsection 805(1)(b) if it intended to measure incapacity by a gainful-employment standard. We will not assume that the Legislature inadvertently omitted from subsection 805(1)(b) the requirements subsumed under subsection 805(1)(a), and then on the basis of that assumption, apply those requirements to subsection 805(1)(b). See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

We likewise reject plaintiffs' contention that the remaining subsections of subsection 805(1) of the appropriations acts evince the Legislature's intent that subsection 805(1)(b) encompass applicants who are capable of performing some work, but cannot meet

their basic needs because of their disability. The remaining subsections apply to specific categories of people (persons receiving residential care, persons receiving substance abuse treatment, AIDS victims, special education students, pregnant women, and persons caring for a disabled person). Persons in these categories qualify for benefits even if they do not satisfy the requirements of subsection 805(1)(b). We will not, under the guise of construing the statutory language, disrupt the legislative scheme by applying the disability standards applicable to persons falling within the other subsections to persons who can only qualify for benefits under subsection 805(1)(b).

We also decline to construe the instant statutory language as creating a "significantly" or "substantially" incapacitated standard where the Legislature did not employ that language. It is well established that "[w]e eschew the insertion of words in statutes unless necessary to give intelligible meaning or to prevent absurdity, without regard to our own estimate of the wisdom of the legislation." *Great Lakes Steel Corp v Employment Security Comm*, 6 Mich App 656, 661-662; 150 NW2d 547 (1967), aff'd 381 Mich 249 (1968). Here, the Legislature has used these very adverbs in other statutes to signify something less than a total- or complete-impairment standard. See, e.g., MCL 257.39a; MSA 9.1839(1) (defining "permanent handicap" for purposes of the Michigan Vehicle Code), MCL 330.2001a(5); MSA 14.800(1001a)(5) (defining "mental illness" for purposes of chapter 10 of the Mental Health Code), MCL 440.2608(1); MSA 19.2608(1) (governing a buyer's right to revoke his acceptance of nonconforming goods under the Uniform Commercial Code), and MCL 257.1403(3)(a);

MSA 9.2705(3)(3)(a) (creating a presumption that a reasonable number of attempts have been made to repair a defect in a new motor vehicle for purposes of the Michigan lemon law). We will not, under the guise of interpreting the appropriations acts, write into the acts a provision that the Legislature has declined to enact. See *Autio v Proksch Constr Co*, 377 Mich 517, 524; 141 NW2d 81 (1966).

We further decline plaintiffs' invitation to follow the federal courts' construction of the Social Security Act when determining the reasonable meaning of the Michigan SDA provision. As plaintiffs correctly note, this Court, like the federal courts, would hold invalid agency rules that impose higher standards for disability than set forth in the act. See *Sullivan v Zebley*, 493 US 521; 110 S Ct 885; 107 L Ed 2d 967 (1990). Unlike the appropriations acts involved in this case, however, the Social Security Act explicitly grants SSI benefits to people who are unable to engage in "any substantial gainful activity." The act also mandates the consideration of vocational factors. 42 USC 1382c(a)(3). Like Congress in drafting the Social Security Act, our Legislature has evinced its intent that a determination of disability or incapacitation include the consideration of vocational factors by expressly so providing within the language of a statute. For instance, in the Worker's Disability Compensation Act, the Legislature defined the term "disability" as a "limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease." MCL 418.301(4); MSA 17.237(301)(4). This Court has also held that the Legislature signaled its intent to consider vocational fac-

tors in the Michigan no-fault act by using the phrase "physically or mentally incapacitated from earning" in the statutory provision regarding the determination of when the dependency of a person terminates for purposes of receiving survivor benefits. *Vovak v DAIIE*, 98 Mich App 81, 84-86; 296 NW2d 193 (1980), construing MCL 500.3110(3); MSA 24.13110(3). Given the Legislature's inclusion of language calling for consideration of vocational factors in other statutes, we can only conclude that the Legislature chose not to include similar statutory language in 1991 PA 111, subsection 805(1)(b) and 1992 PA 168, subsection 805(1)(b).

Thus, the trial court erred in holding that defendants' policy violated the plain meaning of the appropriations acts. Importantly, it is not for the courts to debate the wisdom or public policy of this legislation. *Nummer v Dep't of Treasury*, 448 Mich 534, 553, n 22; 533 NW2d 250 (1995); see *Ready-Power Co v Dearborn*, 336 Mich 519, 525; 58 NW2d 904 (1953). We do not do so here. Our function is to construe the language of the appropriations acts as it exists, not to legislate. *Morgan v Taylor*, 434 Mich 180, 192; 451 NW2d 852 (1990). Giving the terms "incapacitated," "unavailable," and "work" their common meanings, subsection 805(1)(b) does not take into account vocational factors such as age, education, and previous work experience. As such, an applicant's capacity to work for purposes of subsection 805(1)(b) is not measured by a minimum number of hours that he is able to sustain work activity or a minimum remunerative standard. Accordingly, defendants correctly interpreted subsection 805(1)(b) as requiring an inability to perform any work.

B. LEGISLATIVE APPROVAL OF DEFENDANTS' CONSTRUCTION

Even if we concluded that the language of the appropriations acts was ambiguous, we would defer to the agency's interpretation because the Legislature approved defendants' policy for determining eligibility under 1991 PA 111, subsection 805(1)(b) when it enacted 1992 PA 168, subsection 805(1)(b), which contained the identical language contained in 1991 PA 111, subsection 805(1)(b). While plaintiffs correctly note that a failed attempt to amend a statute is ordinarily not evidence of legislative approval of an agency's construction, see *Rogers v Detroit*, 457 Mich 125, 162-164; 579 NW2d 840 (1998) (TAYLOR, J. dissenting), the Legislature is presumed to know of the agency's construction of a statute and adopts such a construction when it reenacts the language so construed. See *Canterbury Health Care, Inc v Dep't of Treasury*, 220 Mich App 23, 30; 558 NW2d 444 (1996). Welfare legislation presents an unusual application of these principles because the Legislature must reestablish the SDA program each year by appropriating funds for the program in a line item of the FIA budget. See *Saxon v Dep't of Social Services*, 191 Mich App 689, 699-700; 479 NW2d 361 (1991). Thus, the Legislature's inclusion of the same language in subsection 805(1)(b) of 1992 PA 168 was not a failed attempt to amend an act, but, rather, constituted the reenactment of the language construed by defendants as requiring that a claimant be incapable of any remunerative work.

Plaintiffs mistakenly argue that the Legislature's decision to modify subsection 805(1)(b) and mandate the use of the SSI standard during fiscal year 1993-94, 1993 PA 186, signaled the disapproval of defendants'

policy for the prior two years. Although this Court can view an amendment enacted soon after a controversy regarding a statute has arisen as a legislative interpretation of the original act and, on that basis, give it retroactive effect, *Harper v Progressive Casualty Ins Co*, 79 Mich App 764, 768; 263 NW2d 1 (1977), we decline to do so here.[8] In light of the Legislature's decision to reenact subsection 805(1)(b) in the appropriations act for fiscal year 1992-93, we do not consider the Legislature's decision to adopt the SSI standard for 1993-94 as a rejection of defendants' use of the more restrictive standard in 1991-92 and 1992-93. Accordingly, the trial court erred in determining that defendants' policy violated the language of the appropriations acts because defendants correctly construed subsection 805(1)(b) and the Legislature approved that construction by reenacting subsection 805(1)(b) for fiscal year 1992-93. See *Jones-Jennings*, *supra* at 105; *Canterbury Health Care*, *supra* at 30. We therefore reverse and remand for entry of judgment for defendants.

In light of our determination that the trial court erred in declaring defendants' policy invalid, we do not address defendants' remaining arguments.[9]

Reversed and remanded. We do not retain jurisdiction.

BANDSTRA, J., concurred.

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[8] The new subsection 805(1)(b) for fiscal year 1993-94 was not technically an amendment because the previous subsection 805(1)(b) expired at the end of fiscal year 1992-93.

[9] Defendants additionally argue that plaintiffs failed to exhaust their administrative remedies before initiating this action and that the trial court erred in granting plaintiffs supplemental relief.

CAVANAGH, J. (*concurring in part and dissenting in part*). I join in parts II and III of the majority opinion. I dissent from part IV, however, because I believe that defendants' interpretation of 1991 PA 111, subsection 805(1)(b) resulted in an unjustifiably restrictive standard of eligibility for disability benefits that was contrary to the intent of the Legislature.

Subsection 805(1)(b) provides that persons eligible for the state disability program include "[a] person who is medically diagnosed as incapacitated and unavailable for work for at least 90 days." To determine eligibility under this provision, the Department of Social Services (DSS) developed the following policy:

> Clients are medically eligible for State Disability Assistance if they are medically eligible for MA [medical assistance] based on disability or blindness or if they have a physical and/or mental impairment or combination of impairments which prevents the performance of any remunerative work for 90 days or more.

Defendants defined the term "work" as "[a]ny work or work activity usually done for remuneration."

General rules of statutory construction provide that if the plain and ordinary language of a statute is clear, judicial construction is neither necessary nor permitted. *Meyer Jewelry Co v Johnson*, 229 Mich App 177, 180; 581 NW2d 734 (1998). However, if a literal construction of a statute would produce unreasonable and unjust results inconsistent with the purpose of the statute, the court may depart from a literal construction. *Rowell v Security Steel Processing Co*, 445 Mich 347, 354; 518 NW2d 409 (1994).

I believe that defendants' interpretation of subsection 805(1)(b) leads to unreasonable and unjust results. Defendants contend that the terms "work," "employment," and "job" are not limited by such factors as the number of days and hours worked, the amount of wages received, or an individual's education and training. Hence, a person who is available to work one hour at a job that pays one dollar an hour during a ninety-day period is not entitled to benefits. Such a standard for entitlement can be met by few, if any, other than those who are hospitalized or suffer from a severe disability for the entire three- to twelve-month period.

Thus, according to defendants, the Legislature intended the following anomaly. Pursuant to 1991 PA 111, subsection 805(1)(a), a recipient of supplemental security income (SSI) is eligible for benefits. A person is disabled for SSI purposes if he is unable to engage in "substantial gainful activity" because of an impairment that lasts for one year or more. 42 USC 1382c(a)(3)(A). However, under 1991 PA 111, subsection 805(1)(b), a person who is disabled for more than ninety days but less than one year can receive benefits only if he is completely unable to perform any amount of work for any amount of compensation.

Furthermore, statutory provisions should be construed in light of other related provisions to carry out the purpose of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993). The remaining subsections of subsection 805(1) support a broader reading of the disability standard contained in subsection 805(1)(b). 1991 PA 111 authorized benefits for people receiving thirty-day substance-abuse treatment, AIDS sufferers, recipients

of special education services, pregnant women, and caretakers of disabled persons. See subsections 805(1)(d)-(h). Undoubtedly some people in each of these categories can engage in some remunerative work, but may not be able to maintain sufficient employment to support themselves. Only those who are disabled for more than ninety days but less than one year are subject to the Draconian standard adopted by defendants.

In approving defendants' interpretation of the statute, the majority relies on the fact that the Legislature reenacted § 805 for the 1992-93 fiscal year, 1992 PA 168, despite the fact that the Legislature adopted the SSI standard for the 1993-94 fiscal year, 1993 PA 186. The rules of statutory construction provide that a longstanding, consistent administrative interpretation of a statute by those charged with its execution is entitled to considerable weight and ought not be overruled without cogent reasons. *Ludington Service Corp v Acting Comm'r of Ins*, 444 Mich 481, 490; 511 NW2d 661 (1994). However, defendants' interpretation of the legislative provision at issue is not longstanding and is therefore entitled to less weight. Given the realties of the legislative process, I do not find the single reenactment of subsection 805(1)(b) to be a dispositive indicator of the Legislature's intent.

I would affirm the trial court's grant of plaintiffs' motion for summary disposition.

RHEAUME v VANDENBERG

Docket No. 201362. Submitted June 16, 1998, at Detroit. Decided October 30, 1998, at 9:15 A.M. Leave to appeal sought.

Steven and Debra Rheaume on November 3, 1995, brought an action in the Oakland Circuit Court against Weisman, Gitlin & Herkowitz, P.C., and a "John Doe" described as one of the physical therapists employed by Weisman, Gitlin & Herkowitz, P.C., alleging medical malpractice relating to physical therapy administered to Steven Rheaume on November 5, 1993. On the same day they filed their action, the plaintiffs mailed the written notice of intent to sue required by MCL 600.2912b(1); MSA 27A. 2912(2)(1) to the offices of Weisman, Gitlin & Herkowitz, P.C., indicating that notice was being given to Weisman, Gitlin & Herkowitz, P.C., and all agents, physicians, physical therapists, and employees thereof. On January 10, 1996, the plaintiffs filed an amended complaint naming as defendant Steven Vandenberg in place of "John Doe." Vandenberg moved for summary disposition, arguing that the two-year statutory period of limitation had expired because it was not tolled by the filing of the notice of intent to sue inasmuch as he was not named in the notice as required by subsection 2912b(1). The court, David F. Breck, J., denied the motion, but dismissed the complaint without prejudice on the ground that the plaintiffs had failed to comply with the requirement of subsection 2912b(1) that the notice of intent to file suit must be given 182 days before suit is filed. The court extended the notice period, during which extension the period of limitation was tolled. The plaintiffs refiled their action. Vandenberg renewed his motion for summary disposition, which the court again denied. Vandenberg appealed by leave granted.

The Court of Appeals *held:*

1. MCL 600.2912b(4); MSA 27A.5805(4) requires that a notice of intent to sue a health professional or health facility must contain, among other things, the names of all health professionals and health facilities the claimant is notifying in relation to the claim. MCL 600.5856(d); MSA 27A.5856(d) provides that if notice is given in compliance with § 2912b, the statute of limitations is tolled during the notice period mandated by § 2912b. Strict compliance with § 2912b is required for tolling of the statute of limitations. Substantial compliance will not serve to toll the statute of limitations. In this case, the plaintiffs failed to name Vandenberg in the notice of

intent to file suit. Thus the two-year period of limitation relevant to the plaintiffs' action was not tolled and it expired on November 5, 1996, making the action against Vandenberg untimely.

2. The filing of a "John Doe" complaint does not toll the statute of limitations with respect to parties not yet specifically named.

Reversed and remanded for entry of summary disposition for Vandenberg.

NEGLIGENCE — MEDICAL MALPRACTICE — NOTICE OF INTENT TO SUE.

A notice of intent to sue a health professional or health facility must strictly comply with the requirements of the statute requiring such notice in order for the two-year statute of limitations to be tolled during the presuit notice period (MCL 600.5805[4], 600.2912b[4], 600.5856[d]; MSA 27A.5805[4], 27A.2912[2][4], 27A.5856[d]).

Novara, Tesija, Michela & Priehs, P.C. (by *David A. Priehs*), for the plaintiffs.

Plunkett & Cooney, P.C. (by *Robert G. Kamenec*), for the defendant.

Before: GRIFFIN, P.J., and GRIBBS and TALBOT, JJ.

TALBOT, J. Defendant appeals by leave granted from an interlocutory order denying his motion for summary disposition. We reverse and remand.

On November 3, 1995, plaintiffs filed a medical malpractice action against the physical therapy center of Weisman, Gitlin & Herkowitz, P.C., and against a "John Doe," who was described as "one of defendant's therapists." On the same day, plaintiffs mailed written notice of their intent to sue to the offices of Weisman, Gitlin & Herkowitz, P.C. Their notice of intent to sue provided, in pertinent part:

> *This Notice is intended to apply to the following health care professionals, entities, and/or facilities as well as their employees or agents, actual or ostensible, thereof, who were involved in the treatment of the patient, Steven Rheaume:*

Weismann, Gitlin & Herkowitz, P.C. 3535 W. 13 Mile Road, Ste. 605, Royal Oak, Michigan, 48073 and all agents, physicians, physical therapists, and/or employees, actual or ostensible, thereof.

1. FACTUAL BASIS FOR CLAIM

On November 5, 1993, Steven Rheaume received physical therapy from Weisman, Gitlin & Herkowitz, P.C. Mr. Rheaume was instructed to leg press 300 pounds. During the exercise, his therapist adjusted the position of the leg machine so that he could not fully extend the weight. Immediately following the exercise, Mr. Rheaume noticed lower extremity pain that was later diagnosed as a herniated disc.

* * *

6. NAMES OF HEALTH PROFESSIONALS, ENTITIES, AND FACILITIES NOTIFIED

Weismann, Gitlin & Herkowitz, P.C. 3535 W. 13 Mile Road, Ste. 605, Royal Oak, Michigan, 48073 and all agents, physicians, physical therapists, and/or employees, actual or ostensible, thereof.

7. TO THOSE RECEIVING NOTICE: YOU SHOULD FURNISH THIS NOTICE TO ANY PERSON, ENTITY OR FACILITY, NOT SPECIFICALLY NAMED HEREIN, THAT YOU REASONABLY BELIEVE MIGHT BE ENCOMPASSED IN THIS CLAIM.

The statutory period of limitation applicable to plaintiffs' medical malpractice claim was to expire on November 6, 1995; this fact is not disputed on appeal.

When plaintiffs filed their original complaint and mailed their notice of intent to sue, they did not know the name of the treating physical therapist. Plaintiffs had requested medical records from defendant, including those for the day in question, but no name was included in the records. In December 1995, plain-

tiffs learned that defendant Steven Vandenberg was the treating physical therapist when defendant's attorney requested authorizations for the release of plaintiffs' medical and employment records. Thereafter, on January 10, 1996, plaintiffs filed an amended complaint in which they replaced the "John Doe" defendant with Vandenberg's name.

Defendant then moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that the period of limitation had expired. Defendant asserted that, because plaintiffs' notice of intent to sue did not include his name, it did not operate to toll the period of limitation during the period before plaintiffs' complaint was amended to include his name. The trial court denied defendant's motion for summary disposition, explaining that it was satisfied that plaintiffs had made diligent efforts to ascertain defendant's name and that plaintiffs' notice of intent to sue was adequate. However, the trial court dismissed plaintiffs' complaint without prejudice on the alternative ground that plaintiffs had failed to observe the 182-day presuit notice period mandated by subsection 2912b(1) of the Revised Judicature Act, MCL 600.2912b(1); MSA 27A.2912(2)(1). The trial court then extended the notice period until August 7, 1996, during which time the period of limitation would continue to be tolled. On August 7, 1996, plaintiffs again filed suit, this time against defendant only. Defendant again moved for summary disposition pursuant to MCR 2.116(C)(7), based on the statute of limitations defense, and the trial court again rejected defendant's argument, indicating that its opinion had not changed.

On appeal, defendant argues that the trial court erred in denying his second motion for summary disposition. We agree. This Court reviews decisions on

motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Guerra v Garratt*, 222 Mich App 285, 288; 564 NW2d 121 (1997). When reviewing a motion granted pursuant to MCR 2.116(C)(7), we consider all affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construe the pleadings in favor of the plaintiff. *Smith v YMCA of Benton Harbor/St Joseph*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

Section 2912b of the Revised Judicature Act provides that "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." MCL 600.2912b(1); MSA 27A.2912(2)(1); see also *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 704; 575 NW2d 68 (1997). With respect to the specific requirements of the notice, the section provides as follows:

> The notice given to a health professional or health facility under this section *shall* contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

> (f) *The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.* [MCL 600.2912b(4); MSA 27A.2912(2)(4) (emphasis added).]

The period of limitation for malpractice claims is two years. MCL 600.5805(4); MSA 27A.5805(4). However, pursuant to MCL 600.5856(d); MSA 27A.5856(d), if notice is given in compliance with the requirements of § 2912b, the statute of limitations is tolled during the notice period mandated by § 2912b. *Morrison v Dickinson*, 217 Mich App 308, 313; 551 NW2d 449 (1996).

Plaintiffs contend that substantial compliance with the requirements of § 2912b resulting in actual notice to the defendant,[1] is sufficient to toll the statute of limitations under MCL 600.5856(d); MSA 27A.5856(d). Resolution of this case turns on issues of statutory interpretation. The goal of statutory interpretation is to identify and to give effect to the intent of the Legislature. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995); *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The first step in ascertaining such intent is to focus on the specific language of the statute. *Turner*, *supra* at 27. The Legislature is presumed to have intended the meaning it plainly expressed. *McFarlane v McFarlane*, 223 Mich App 119, 123; 566 NW2d 297 (1997). Accordingly, if the plain language of the statute is clear and unambiguous, further judicial construction is not permitted, and the statute must be applied as written. *Turner*, *supra* at 27; *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992).

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[1] In order to resolve this case on legal grounds, we will assume that defendant received actual notice of plaintiffs' intent to sue within the limitations period. See *Smith*, *supra* at 554.

The language of MCL 600.5856(d); MSA 27A.5856(d) clearly provides that the statute of limitations is tolled if the notice of intent to sue is given "*in compliance with* section 2912b." (Emphasis added.) The negative implication of this section is that the statute of limitations is not tolled if the notice of intent to sue does not comply with § 2912b. The Legislature's use of the word "shall" in subsection 4 of § 2912b makes mandatory the inclusion of the "names of all health professionals" notified of an intention to sue. See, e.g., *In re Hall-Smith*, 222 Mich App 470, 472; 564 NW2d 156 (1997) (explaining that use of the word "shall" indicates a mandatory, rather than a discretionary, provision). When understood in its plain and ordinary sense, the word "name" does not encompass the broad description of defendant Vandenberg that was included in the sixth paragraph of plaintiffs' notice of intent to sue. This is so even when that broad description is considered in conjunction with the more specific factual description included in paragraph one of the notice. Simply put, a description is not a name.[2] Because the specific statutory language of § 2912b is clear and unambiguous, we are bound to apply it as written. By failing to include defendant Vandenberg's "name" in their notice of intent to sue, plaintiffs failed to comply with a specific mandatory requirement of § 2912b(4). Therefore, the statute of

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[2] In their brief on appeal, plaintiffs analogize the facts of this case to those of *Wells v Detroit News, Inc*, 360 Mich 634; 104 NW2d 767 (1960), a case in which the Michigan Supreme Court held that a plaintiff could amend his complaint after the statute of limitations had run in order to correct a "misnomer" in the naming of a corporate defendant. Because plaintiffs' original notice of intent to sue did not contain *any* name for defendant Vandenberg, this case is distinguishable from the "misnomer" situation in *Wells, supra*. The result in this case may have been different if plaintiffs had included, but merely misspelled, defendant Vandenberg's name in their notice of intent to sue.

limitations was not tolled pursuant to MCL 600.5856(d); MSA 27A.5856(d), and plaintiffs' complaint naming Vandenberg as a defendant was not timely filed. While there may be strong policy arguments to be made against the "name" requirement of subsection 2912b(4)(f), this Court is not the proper forum for those arguments. See *Jennings v Southwood*, 446 Mich 125, 142; 521 NW2d 230 (1994); *Allstate Ins Co v Dep't of Ins*, 195 Mich App 538, 547; 491 NW2d 616 (1992).

Finally, plaintiffs have suggested two alternative grounds on which we might affirm the decision of the trial court. We are not persuaded by these arguments. Plaintiffs' argument that the amended complaint specifically naming Vandenberg as a defendant related back to the timely filed "John Doe" complaint is without merit. The filing of a "John Doe" complaint does not toll the statute of limitation with respect to parties not yet specifically named. See, e.g., *Thomas v Process Equipment Corp*, 154 Mich App 78, 84; 397 NW2d 224 (1986). Moreover, plaintiffs' arguments contesting the constitutionality of § 2912b are also unconvincing, given this Court's recent decision in *Neal*, *supra* at 716-723. For the reasons stated, we hold that the trial court should have granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7).

Reversed and remanded to the trial court with directions that an order of summary disposition be entered in favor of defendant. We do not retain jurisdiction.

PEOPLE v CONNOLLY

Docket No. 203967. Submitted September 9, 1998, at Detroit. Decided November 3, 1998, at 9:00 A.M. Leave to appeal sought.

William Connolly and Ross W. Thibaudeau were each charged in the Detroit Recorder's Court with one count of conspiracy to possess with intent to deliver marijuana, and Connolly was additionally charged with possession of a firearm during the commission of a felony. An undercover police officer, after being introduced by an informant to Thibaudeau as a seller of marijuana, twice gave Thibaudeau handful samples from a bale of marijuana to enable Thibaudeau to look for someone willing to buy the whole bale. Connolly emerged as a willing buyer. The court, Kirsten Frank Kelly, J., on motions by the defendants, dismissed the charges, ruling that the defendants had been entrapped because the undercover police officer engaged in conduct so reprehensible that it cannot be tolerated when he gave the marijuana samples to Thibaudeau without retaining control over what Thibaudeau could do with them. The prosecution appealed.

The Court of Appeals *held*:

Entrapment will be found where the police engage in impermissible conduct that would induce a law-abiding person to commit a crime or where the police engage in conduct so reprehensible that it cannot be tolerated. Reprehensible and intolerable conduct by the police includes commission by the police of criminal, dangerous, or immoral acts in an effort to furnish a target with the opportunity to commit an offense. In this case, the trial court clearly erred in finding entrapment. Giving two small samples from a nearly fifty-pound bale of marijuana to a suspected drug trafficker in order for him to find potential buyers does not constitute reprehensible conduct by the police.

Reversed and remanded.

CRIMINAL LAW — ENTRAPMENT.

Entrapment will be found where the police engage in impermissible conduct that would induce a law-abiding person to commit a crime

> or where the police engage in conduct so reprehensible that it cannot be tolerated; reprehensible and intolerable conduct by the police includes the commission by the police of criminal, dangerous, or immoral acts in an effort to furnish a target with the opportunity to commit an offense.

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 *Don W. Atkins*, Assistant Prosecuting Attorney, for the people.

David A. Goldenberg, P.C. (by *David A. Goldenberg*), for William Connolly.

Becker & Associates (by *William Hill*), for Ross W. Thibaudeau.

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

KELLY, J. The prosecution appeals as of right from orders granting motions by defendants William Connolly and Ross W. Thibaudeau to dismiss the charges against them on the basis of a finding of entrapment. The charges had been conspiracy to possess with intent to deliver marijuana against both defendants. Connolly additionally had been charged with possession of a firearm during the commission of a felony. We reverse and remand.

BACKGROUND

In May of 1996, Officer Corey Williams of the Livonia Police Department arrested Walter Short and his wife. During a subsequent interview, Short informed Williams of certain persons involved in the trafficking of narcotics. Because Short agreed to cooperate with

Williams and give him the names of these persons, he was not charged with a crime. Approximately two weeks after the interview, Short contacted Williams and informed him that defendant Thibaudeau was interested in purchasing marijuana.

On June 19, 1996, Williams instructed Short to call Thibaudeau and inform him that Short knew someone who had marijuana to sell. Thibaudeau did not answer the phone. Short left a message that he should contact him about what they had previously talked about. On June 24, 1996, Williams again instructed Short to contact Thibaudeau by telephone. Short told Williams that he would use the word "machines" in place of marijuana during the conversation. Thibaudeau stated that he was interested and wanted to meet with Short to discuss the transaction. On June 26, 1996, Short called Thibaudeau again to confirm the meeting and told him that he would bring a sample of the forty-nine pounds of the marijuana so that Thibaudeau could "shop it around."

On June 27, 1996, Short called Thibaudeau to tell him that he wanted to bring the sample to Thibaudeau's home. He agreed, but was not there when Williams and Short arrived at the address. On July 9, 1996, Williams and Short went to Thibaudeau's home to deliver the sample. Williams let Thibaudeau see the forty-nine pounds of marijuana and cut off a corner of the bale to let Thibaudeau shop it around to potential financiers of the deal. After this meeting, Williams began dealing directly with Thibaudeau.

On July 10, 1996, Thibaudeau paged Williams. Williams returned the page and was informed that

Thibaudeau had a friend, Bill,[1] who was interested in the entire forty-nine pounds of marijuana. Later that day, Williams and Thibaudeau met to discuss the terms of the sale. Thibaudeau stated that he needed another sample to show Bill because he had smoked the first sample. In the evening of the same day, Williams and Thibaudeau met at a local restaurant where Williams gave Thibaudeau another sample of the marijuana.

On July 11, 1996, Thibaudeau called Williams to inform him that Connolly was at his home with the money for the transaction. Williams called Short to inform him that he was going to Thibaudeau's home. Short then went to Thibaudeau's home to confirm that the money was there. Short called Williams to tell him the deal was in place. The defendants were then arrested by the Livonia police.

At the evidentiary hearing, the trial court concluded that the police conducted a "fishing expedition" with the forty-nine pounds of marijuana. The trial court found that the police manufactured the crime and "aggravated the illegal use of drugs" when Williams gave Thibaudeau two samples of marijuana without exercising control over the narcotics. As a result, the trial court ruled that defendants had been entrapped by reprehensible police conduct that society could not tolerate. The trial court granted defendants' motions to dismiss.

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[1] This person, also known as "Wild Bill," turned out to be defendant Connolly.

THE ISSUE OF ENTRAPMENT

The prosecution argues that the trial court erred in concluding that defendants were entrapped because the police conduct in this case was not so reprehensible as to constitute entrapment. We agree. This Court reviews a trial court's finding concerning entrapment under the "clearly erroneous" standard. *People v Williams*, 196 Mich App 656, 661; 493 NW2d 507 (1992). The trial court's findings are clearly erroneous if, after review of the record, this Court is left with a firm conviction that a mistake has been made. *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996).

Entrapment is analyzed according to a two-pronged test, with entrapment existing if either prong is met. *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). The trial court must consider whether (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. *Id.* Defendants concede that they were not entrapped under the first prong of the entrapment test, specifically arguing that they were entrapped under the second prong of the test because of reprehensible police conduct.

Under the second prong of the test, entrapment exists where "the police conduct is so reprehensible that we cannot tolerate the conduct and will bar prosecution on the basis of that conduct alone." *Williams*, *supra* at 663. Entrapment could also occur under the second prong of the entrapment test if the furnishing

of the opportunity for a target to commit an offense "requires the police to commit certain criminal, dangerous, or immoral acts." *People v Jamieson*, 436 Mich 61, 95-96; 461 NW2d 884 (1990) (CAVANAGH, J., concurring).

The prosecution is correct in its assertion that undercover drug sales conducted by the police do not constitute entrapment per se. *People v Butler*, 444 Mich 965, 966 (1994). However, the trial court did not rely on the "reverse buy" situation alone in its findings. The prosecution is also correct in its assertion that *People v Butler*, 199 Mich App 474; 502 NW2d 333 (1993), was reversed by the Michigan Supreme Court. 444 Mich 965. Yet, the trial court did not state that it was relying on this Court's decision in *Butler*, *supra*, but simply stated that, of the narcotics entrapment cases, the facts in *Butler*, *supra*, were the "most closely analogous."

In the instant case, defendants were not immediately arrested after defendant Thibaudeau received marijuana from Officer Williams. Walter Short, Officer Williams' informant, offered the sample in one of the telephone conversations between Short and defendant Thibaudeau. In addition, Officer Williams was persuaded to give defendant Thibaudeau a second sample to show to his buyer/money man, defendant Connolly, because defendant Thibaudeau said he had smoked the first one. Defendants alleged, and the trial court agreed, that this type of police conduct of placing controlled substances in the societal stream is highly reprehensible and cannot be tolerated. In *Peo-*

ple v Forrest, 159 Mich App 329, 336; 406 NW2d 290 (1987), we noted that

> [w]e recognize that some jurisdictions have held that the government's conduct in providing drugs is "reprehensible." However, we refuse to adopt a similar per se rule. Such a rule would inhibit otherwise legitimate law enforcement techniques which are oftentimes the only way the police can obtain evidence in drug-related offenses.

We also accept the prosecutor's argument that a law enforcement officer may distribute controlled substances to another person as a means of detecting criminal activity. MCL 333.7304(4); MSA 14.15(7304)(4).[2] Further, we do not believe that giving two small samples from a nearly fifty-pound bale of marijuana to suspected drug traffickers in order for them to find potential buyers amounts to intolerable reprehensible

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[2] MCL 333.7304; MSA 14.15(7304) reads in relevant part:

> (1) The requirement of licensure is waived for the following persons in the circumstances described in this section:
>
> * * *
>
> (e) An officer or employee of this state, or a political subdivision or agency of this state who is engaged in the enforcement of a state or local law relating to controlled substances and who is authorized to possess controlled substances in the course of that person's official duties.
>
> * * *
>
> (4) a law enforcement officer exempted by this section may distribute a controlled substance to another person in the course of that officer's duties as a means to detect criminal activity or to conduct a criminal investigation.

Paragraph 4 was added by amendment in 1994. 1994 PA 221, § 1. This appears to be the result of a codification of this Court's decision in *Williams*, *supra*.

conduct. To do otherwise would give drug traffickers an unfair advantage when the police engage in a "reverse buy" situation. In other words, by affirming the decision of the trial court, we would be encouraging drug dealers to insist on samples when buying narcotics in order to avoid the consequences of dealing with undercover police officers or agents.

We are not persuaded by defendants' argument that the police failed to exercise control over the samples and thus acted in an intolerable fashion. Had the police engaged in the distribution of a substantial quantity of the marijuana intended as bait in the sting operation, we would be inclined to say the police intended "to commit certain criminal, dangerous, or immoral acts," which could not be tolerated. *Jamieson*, *supra* at 95-96 (CAVANAGH, J., concurring). However, because the quantities involved in this case were of such a small amount[3] and the samples were intended to be used in the routine technique of shopping the drugs around to potential drug traffickers, we will not characterize such activity as intolerably reprehensible police conduct. As such, this Court is left with a firm conviction that a mistake has been made.

Reversed and remanded.

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[3] The parties described the samples as consisting of handful amounts cut from the corner of the bale of marijuana.

DEPYPER v SAFECO INSURANCE COMPANY OF AMERICA

Docket No. 202965. Submitted October 6, 1998, at Detroit. Decided November 3, 1998, at 9:05 A.M. Leave to appeal sought.

Shannon Depyper brought an action in the Macomb Circuit Court against Safeco Insurance Company of America, alleging wrongful denial of a claim for first-party, no-fault insurance benefits under an automobile insurance policy issued by the defendant to the plaintiff and her husband. In denying the claim, the defendant had contended that cancellation of the policy for nonpayment of premium had taken effect before the date of the accident giving rise to the claim and that such cancellation had been pursuant to a written notice of cancellation sent to the plaintiff. The plaintiff moved for summary disposition, arguing that the policy had not been canceled because the written notice of cancellation had not complied with the requirement of MCL 500.3020(5); MSA 24.13020(5), now MCL 500.3020(6); MSA 24.13020(6), that the notice include a statement that the insured should not operate an uninsured vehicle. The court, Michael D. Schwartz, J., denied the motion. A jury returned a verdict in favor of the defendant, and the court entered a judgment consistent with the verdict. The plaintiff appealed.

The Court of Appeals *held*:

The defendant's failure to give the warning required by subsection 3020(5) rendered its cancellation notice ineffective. An effective cancellation of an insurance policy requires strict compliance with the cancellation clause. Insurance contracts should be construed in light of statutory requirements, and mandatory statutory provisions should be read into insurance contracts. Pursuant to subsection 3020(5), the defendant was required to include in its notice of cancellation the warning about not operating an uninsured vehicle. The Legislature intended the required warning to deter the operation of uninsured vehicles, and actual knowledge by the plaintiff that she should not have operated an uninsured vehicle did not render the lack of notice harmless.

Reversed and remanded for entry of judgment for the plaintiff.

O'CONNELL, J., concurring, stated that the majority opinion properly reflects the current state of the law, but also stated that the public policy behind the statutorily mandated warning not to operate an uninsured vehicle is to protect third parties from uninsured and financially irresponsible motorists, that such public policy is not being served by applying the statute in a manner that benefits the plaintiff, and that the plaintiff should not be able to evade the consequences of wrongdoing in the form of knowingly driving an uninsured vehicle.

INSURANCE — NO-FAULT — NOTICES OF CANCELLATION — WARNING AGAINST OPERATING UNINSURED VEHICLES.

A written notice by a no-fault insurer to an insured of cancellation of the policy must include a statement that the insured shall not operate or permit the operation of the vehicle for which the notice of cancellation is given, or operate any other vehicle unless the vehicle is insured as required by law; failure to include such statement in the notice of cancellation renders the cancellation notice ineffective (MCL 500.3020[5]; MSA 24.13020[5], now MCL 500.3020[6]; MSA 24.13020[6]).

Law Offices of Wayne J. Miller, P.C. (by *Jonathan H. Frank*), for Shannon Depyper.

Siemion, Huckabay, Bodary, Padilla, Morganti & Bowerman, P.C. (by *Raymond W. Morganti*), for Safeco Insurance Company of America.

Before: HOEKSTRA, P.J., and CAVANAGH and O'CONNELL, JJ.

CAVANAGH, J. Plaintiff Shannon Depyper appeals as of right from the jury verdict in favor of defendant Safeco Insurance Company of America in this action for recovery of no-fault benefits. We reverse and remand for entry of judgment in favor of plaintiff.

The facts of this case are essentially undisputed. Plaintiff and her husband[1] were insured under a no-fault automobile insurance policy issued by defendant. Plaintiff and her husband failed to pay a premium that was due on September 22, 1992. Plaintiff was injured in an automobile accident on October 27, 1992. Defendant refused to pay the claim, asserting that the insurance policy had been canceled effective October 20, 1992, because the premium had not been paid.

Defendant produced a copy of a letter dated October 6, 1992, to support its contention that plaintiff had been given notice of the impending cancellation of the policy. However, although defendant's policy contains a provision stating that defendant will comply with state-law notice requirements for terminating an insurance policy, the cancellation letter did not comply with the requirement in MCL 500.3020(5); MSA 24.13020(5)[2] that a notice of cancellation contain a statement that the insured should not operate an uninsured vehicle.

On October 8, 1993, plaintiff filed the instant action, asserting that defendant had wrongfully denied her claim.[3] On May 3, 1995, plaintiff filed a motion for

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[1] Plaintiff and her husband are now divorced.

[2] The statute was amended by 1995 PA 288 to redesignate this provision as MCL 500.3020(6); MSA 24.13020(6). The prior version is considered here because rights and obligations under an insurance policy vest at the time of the accident, *Clevenger v Allstate Ins Co*, 443 Mich 646, 656; 505 NW2d 553 (1993), and plaintiff's accident occurred in 1992.

[3] Two additional parties took part in the trial court proceedings, although they are not involved in this appeal. The trial court permitted the Department of Social Services to intervene on the basis that it would be subrogated to plaintiff's right to collect for her medical expenses because

summary disposition pursuant to MCR 2.116(C)(9) and (10). Plaintiff contended that she never received a cancellation notice from defendant. Plaintiff further argued that the cancellation notice produced by defendant was ineffective because it did not comply with MCL 500.3020(5); MSA 24.13020(5).

The trial court denied plaintiff's motion on September 13, 1995. The trial court found that defendant's noncompliance with MCL 500.3020(5); MSA 24.13020(5) did not invalidate the cancellation notice because "strict compliance with the warning requirement would not protect against cancellation and preserve the contract of insurance." The case proceeded to trial on the question whether plaintiff had received the notice that her insurance was canceled, and a jury found in favor of defendant. The order incorporating this verdict was entered on October 22, 1996.

In her sole issue on appeal, plaintiff contends that the trial court erred in denying her motion for summary disposition. On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must

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it had made medical payments for her under a Medicaid program. In addition, plaintiff filed an amended complaint on October 18, 1994, in which she sought to bar the Michigan Conference of Teamsters Health and Welfare Fund from obtaining reimbursements for payments for medical expenses that it had made on her behalf, which it claimed had been done erroneously.

determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

Because the parties' dispute concerns a statutory requirement, rather than an interpretation of the language of the insurance policy itself, we conclude that the trial court's reliance on contract principles alone was misplaced. As the Supreme Court has stated:

> The policy and the statutes related thereto must be read and construed together as though the statutes were a part of the contract, for it is to be presumed that the parties contracted with the intention of executing a policy satisfying the statutory requirements, and intended to make the contract to carry out its purpose.
>
> A policy of insurance must be construed to satisfy the provisions of the law by which it was required, particularly when the policy specifies that it was issued to conform to the statutory requirement; and where an insurance policy has been issued in pursuance of the requirement of a statute which forbids the operation of a motor vehicle until good and sufficient security has been given, the court should construe this statute and the policy together in light of the legislative purpose. [*Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525, n 3; 502 NW2d 310 (1993), quoting 12A Couch, Insurance, 2d (rev ed), § 45:694, p 331-332.]

Defendant's policy states it will comply with state-law notice requirements for terminating an insurance policy.[4] Michigan law provides:

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[4] The policy states:

> If the law in effect in your state requires any longer notice or any special form of or procedure for giving notice, or modifies any of

> A notice of cancellation, including a cancellation notice under section 3224, shall be accompanied by a statement that the insured shall not operate or permit the operation of the vehicle to which notice of cancellation is applicable, or operate any other vehicle, unless the vehicle is insured as required by law. [MCL 500.3020(5); MSA 24.13020(5).]

The cardinal rule of statutory construction is to give effect to the Legislature's intent. When statutory language is clear and unambiguous, courts must apply it as written. The statutory language is given its ordinary and generally accepted meaning. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997). However, if reasonable minds may differ on the meaning of a statute, judicial construction may be appropriate. *USAA Ins Co v Houston General Ins Co*, 220 Mich App 386, 389-390; 559 NW2d 98 (1996).

The general rule is that an effective cancellation of an insurance policy requires strict compliance with the cancellation clause. *Blekkenk v Allstate Ins Co*, 152 Mich App 65, 74; 393 NW2d 883 (1986). Insurance contracts should be construed in light of statutory requirements, and mandatory statutory provisions should be read into insurance contracts. *Id.* at 78. The use of the word "shall" in a statute connotes a mandatory duty or requirement. *Scarsella v Pollak*, 232 Mich App 61, 63-64; ___ NW2d ___ (1998); *Hadfield v Oakland Co Drain Comm'r*, 218 Mich App 351, 357; 554 NW2d 43 (1996). Thus, pursuant to MCL

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the stated termination reasons, we will comply with those requirements.

500.3020(5); MSA 24.13020(5), defendant was required to include the warning about not operating an uninsured vehicle in its notice of cancellation. It is undisputed that the notice of cancellation that defendant sent to plaintiff did not contain the statutorily required warning.[5] However, the statute is silent with regard to the consequences when a cancellation notice does not include the mandatory warning.[6]

There appears to be no case law in Michigan directly on point regarding whether a timely notice of cancellation that omits the warning against driving an uninsured vehicle invalidates the entire cancellation notice. This Court did, however, touch on this issue when construing MCL 500.3020(1); MSA 24.13020(1) in *Blekkenk, supra.* In *Blekkenk,* the insured orally requested that his insurance agent cancel his insurance policy, but was thereafter injured in an automobile accident. *Id.* at 69. This Court held that the warning statement was not required where the insured, rather than the insurer, cancels the policy. *Id.* at 71. However, it is clear from its discussion of the issue that the *Blekkenk* panel recognized the mandatory nature of the requirement when the insurer cancels a policy.

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[5] Defendant has provided no explanation for its failure to include the warning in the notice of cancellation.

[6] In contrast, the Legislature has specified that

> no cancellation shall be effective unless a written notice of cancellation is mailed by certified mail, return receipt requested, to the insured at the last address known to the insurer either through its records, the personal records of the agent who wrote the policy, or as supplied by the insured. [MCL 500.3224(2); MSA 24.13224(2).]

Other jurisdictions have generally held that strict compliance by an insurer with a statute governing cancellation notices is essential to effect cancellation by such notices. See *Pearson v Nationwide Mut Ins Co*, 325 NC 246, 256; 382 SE2d 745 (1989). The statutory warning at issue in this case is intended to accompany the necessary ten-day notice of cancellation required by MCL 500.3020(1)(b); MSA 24.13020(1)(b), which is applicable when an insurer cancels the policy.[7] *Blekkenk, supra.* The required warning that the insured should not operate an uninsured vehicle encourages her to obtain replacement insurance within the ten-day period. The warning also serves a deterrent purpose by reminding the insured that she cannot drive without insurance. Cf. *Mong v Allstate Ins Co*, 15 AD2d 257; 223 NYS2d 218 (1962); *Crisp v State Farm Mut Ins Co*, 256 NC 408; 124 SE2d 149 (1962).[8]

Defendant contends that the warning is intended solely to protect third parties, namely, members of the public who may be injured in accidents involving uninsured motorists. We disagree. While the public undoubtedly benefits from a warning that deters unin-

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[7] The requirement of a ten-day notice of cancellation serves the purpose of giving the insured time to obtain other insurance or, alternatively, "simply to order their affairs so that the risks of operating without insurance will not have to run." *Lease Car of America, Inc v Rahn*, 419 Mich 48, 54; 347 NW2d 444 (1984); *State Automobile Mut Ins Co v Babcock*, 54 Mich App 194; 220 NW2d 717 (1974).

[8] Michigan's warning provision is distinguishable from New York's and North Carolina's respective provisions because it does not require that the insured be notified of any criminal penalties, although it is noteworthy that the no-fault act provides for misdemeanor penalties for noncompliance in MCL 500.3102(2); MSA 24.13102(2).

sured individuals from driving, the clear language of the statute provides that the warning is to be given to the *insured*. Cf. *Allstate Ins Co v DAIIE*, 73 Mich App 112, 115-116; 251 NW2d 266 (1976). The logical conclusion, therefore, is that the Legislature intended the warning to benefit the recipients by reminding them that they should not operate uninsured vehicles.

Defendant also points out that plaintiff has admitted that she knew that it is illegal to drive a car that is uninsured. Defendant argues that requiring strict compliance with the warning requirement would lead to an absurdity because plaintiff was already aware of the information that the warning would have conveyed. However, nothing in MCL 500.3020(5); MSA 24.13020(5) relieves an insurer from its obligation to include the warning against driving an uninsured vehicle when its insured knows of the obligation to maintain insurance. Moreover, the fact of actual knowledge does not render the lack of notice harmless because one purpose of notice is to deter the operation of the automobile after the effective date of cancellation of insurance.[9]

Insurance laws and policies are to be liberally construed in favor of policyholders, creditors, and the public. *Blekkenk*, *supra* at 77; *Murphy v Seed-Roberts Agency, Inc*, 79 Mich App 1, 11; 261 NW2d 198 (1977).

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[9] Furthermore, if we accepted defendant's argument, cases such as this will turn on what the insured actually knew, which often cannot be established through external evidence. In at least some instances, insureds would be faced with the difficult choice of lying about what they knew or losing their no-fault coverage. A more straightforward result is obtained simply by requiring insurers to comply with MCL 500.3020(5); MSA 24.13020(5).

Construing MCL 500.3020(5); MSA 24.13020(5) liberally, in favor of policyholders, and giving due regard to the deterrent purpose of the warning, we hold, as a matter of law, that defendant's failure to give the warning mandated by MCL 500.3020(5); MSA 24.13020 (5) renders its cancellation notice ineffective. Hence, we reverse the trial court's denial of summary disposition and remand for entry of judgment in favor of plaintiff.

Reversed and remanded for entry of judgment in favor of plaintiff. We do not retain jurisdiction.

HOEKSTRA, P.J., concurred.

O'CONNELL, J. (*concurring.*) I do not find the majority's resolution of this case to be unreasonable, especially because defendant failed to follow all of the statutory requirements for proper cancellation of plaintiff's insurance policy.[1]

I write separately to address my public policy concerns with the effect of MCL 500.3020(5); MSA 24.13020(5) under the facts of this case. Plaintiff concedes that the public policy behind the statutory notice requirements is to protect third parties from

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[1] My reluctance to approve the majority's well-reasoned opinion stems from the jury determination that plaintiff received actual notice that her insurance was canceled and from plaintiff's admission that she knew that it was against the law to operate her motor vehicle without insurance. A long line of cases follows the reasoning in *Jones v Shafer Iron Co*, 96 Mich 98; 55 NW 684 (1893), in which the Supreme Court stated: "The question of notice or knowledge is one of fact for the jury. Actual knowledge, however acquired, dispenses with the necessity for notice." *Id.* at 99. In the present case, plaintiff knew that it was against the law to operate her vehicle without insurance, and the jury determined that she had actual notice of the cancellation. Applying a commonsense approach, these facts should be dispositive of this case.

uninsured and financially irresponsible motorists. The instant case involves a claim for first-party, no-fault benefits (not third-party) by an individual who knowingly allowed her insurance to lapse and then knowingly operated the uninsured vehicle. Although public policy may be properly served in protecting third parties from financially irresponsible motorists such as plaintiff, I do not see how public policy is served by applying the statute to benefit plaintiff herself. It has long been the policy of this state that "literal constructions that produce unreasonable and unjust results that are inconsistent with the purpose of the act should be avoided." *Rowell v Security Steel Processing Co*, 445 Mich 347, 354; 518 NW2d 409 (1994).

While I am troubled by both the public policy considerations in this case and plaintiff's being able to evade the consequences of her wrongdoing (knowingly driving an uninsured motor vehicle), I do not find either issue to be dispositive of this case. The central task before this Court is to resolve the dilemma of which of the two wrongdoers should be held accountable for the transgressions of both. Unless the Legislature amends the notice provision in question to provide a better solution to this dilemma, I am resigned to accept that the majority opinion properly reflects the current state of the law.

REPUBLIC BANK v MODULAR ONE LLC

Docket No. 203358. Submitted June 2, 1998, at Detroit. Decided November 3, 1998, at 9:10 A.M.

Republic Bank brought an action in the Genesee Circuit Court against Modular One LLC and Eric Adams, seeking to quiet title to eight residential lots that the plaintiff had purchased at a foreclosure sale. Modular One, even though it did not have a residential builder's license, had improved each of the lots with the installation of a modular home and had filed a construction lien with respect to each property before the properties had been foreclosed and sold to the plaintiff. The plaintiff sought the discharge of each of the liens and moved for summary disposition with respect to Modular One, contending that the liens were unenforceable because the lack of a residential builder's license barred Modular One from enforcing the liens and because the inclusion of nonlienable items in the lien amount invalidated the liens. Modular One argued that the plaintiff lacked standing to challenge the liens and that the former owners of the properties had waived the statutory licensing requirement. The court, Judith A. Fullerton, J., granted summary disposition for the plaintiff, holding that the plaintiff had standing to challenge the liens and that the liens were unenforceable because Modular One did not have a residential builder's license. Modular One appealed.

The Court of Appeals *held*:

1. Because its purchase of the properties at foreclosure vested in the plaintiff title to the properties, the plaintiff had standing to bring an action pursuant to the provisions of MCL 600.2932(1); MSA 27A.2932(1) to quiet its title by challenging the validity of the construction liens that clouded its title to the properties.

2. MCL 339.2412; MSA 18.425(2412) provides that a person may not maintain an action for collection of compensation for the performance of an act or contract for which a residential builder's license is required without first alleging and proving that the person performing the work had a residential builder's license during the performance of the act or contract. The act thus prohibits an unlicensed contractor from suing to collect a money judgment for work for which a residential builder's license is required or from

seeking a money judgment by means of a counterclaim for such work. However, § 2412 does not prohibit an unlicensed contractor from defending on the merits a suit brought for breach of contract.

3. Although Modular One could not maintain an action to enforce its lien by virtue of the statutory bar of § 2412, it could, in response to the plaintiff's suit seeking the equitable remedy of an order quieting title, demand that the plaintiff be prepared to do equity by providing compensation to Modular One for the improvements made to the properties the plaintiff now holds. Accordingly, the trial court, before granting the plaintiff the equitable relief that it sought, should have determined whether equity required that the plaintiff provide compensation to Modular One for the improvements that it made to the properties.

Reversed and remanded.

EQUITY — LICENSES — RESIDENTIAL BUILDER'S LICENSING ACT — EQUITABLE CLAIMS — CONTRACTORS' LIENS.

The provision of the residential builder's licensing act that prevents an unlicensed builder from bringing suit for a money judgment does not bar such a builder from seeking that a plaintiff that has brought an equitable action do equity before any relief is granted; accordingly, a court, before granting a plaintiff the equitable relief of an order granting the plaintiff title clear of a builder's construction lien filed by an unlicensed residential builder, must determine whether equity requires that the plaintiff first do equity by compensating the unlicensed builder for any improvements made to the property (MCL 339.2412; MSA 18.425[2412]).

Miller, Canfield, Paddock and Stone. P.L.C. (by *Lawrence M. Dudek* and *Elisa M. Angeli*), and *Dean, Dean, Segar & Hart, P.C.* (by *Robert L. Segar*), for the plaintiff.

Rosati Associates, P.C. (by *A. D. Rosati*), for the defendant.

Before: MARKMAN, P.J., and SAAD and HOEKSTRA, JJ.

MARKMAN, P.J. Defendant Modular One (hereinafter defendant) appeals as of right the trial court's grant of plaintiff's motion for partial summary disposition on the basis that defendant's liens on certain properties

were invalid and unenforceable.[1] We reverse and remand.

I. FACTS AND PROCEEDINGS

This case arises out of plaintiff's action to quiet title to eight residential lots in Flint Township that it purchased through foreclosure. Plaintiff sought to remove defendant's lien claim with respect to each of the properties. Defendant improved each of the lots with the installation of modular houses, then placed a construction lien on each property before the properties were foreclosed and purchased by plaintiff. Plaintiff asserts that defendant's liens were invalid because defendant did not possess a statutorily required residential builder's license at the time that it made the improvements on these properties.

Plaintiff moved for summary disposition, contending that defendant's liens were unenforceable because (1) the lack of a residential builder's license barred defendant from enforcing the liens and (2) the inclusion of nonlienable items in the lien amounts invalidated the liens. Defendant did not file an answer to the motion for summary disposition, but at the hearing regarding the motion it relied on the following defenses: (1) plaintiff lacked standing to challenge the liens and (2) the former owners of the properties had waived the statutory licensing requirement. The trial court granted plaintiff's motion for summary disposition, reasoning that the liens were unenforceable because defendant did not have a builder's license. The court also determined that plaintiff did have

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[1] Plaintiff moved for summary disposition only against defendant Modular One, because the case relative to defendant Eric Adams was administratively closed because of Adams' bankruptcy.

standing to challenge the liens because it was the owner of the properties. We reverse the trial court's grant of summary disposition.

II. ANALYSIS

This Court reviews decisions concerning motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

> MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

First, we address defendant's argument that plaintiff did not have standing to challenge the validity of the liens because it was not a party to the construction contract and it did not obtain the rights of the original owners by virtue of its purchase through foreclosure. A construction lien gives the lienor an in rem interest in the property that it has improved. *Old Kent Bank of Kalamazoo v Whitaker Constr Co*, 222 Mich App 436, 439; 566 NW2d 1 (1997). "Although the proceeding to foreclose on the construction lien originates from the contract, it is an action directed at the property rather than the person or entity who contracted for the services." *Dane Constr, Inc v Royal's Wine & Deli, Inc*, 192 Mich App 287, 292-293; 480 NW2d 343 (1991). Thus, while an action seeking to enforce the provisions of a construction contract

would take place between the contracting parties, an action seeking to enforce or to attack a construction lien that arose out of such a contract must take place among those with an interest in the property. Here, plaintiff acquired title to the properties at issue through foreclosure. Pursuant to MCL 600.3236; MSA 27A.3236, a foreclosure sale vests in the purchaser "all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter . . . ." Further, the Legislature codified actions to quiet title and authorized suits to determine competing parties' respective interests in land in MCL 600.2932(1); MSA 27A.2932(1). *VanAlstine v Swanson*, 164 Mich App 396, 400; 417 NW2d 516 (1987). Subsection 2932(1) provides as follows:

> Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff . . . .

As the owner through foreclosure, plaintiff had title to the property. Because any encumbrance on the property would cloud its title to the property, plaintiff could challenge the validity of any liens clouding its title. Accordingly, the trial court correctly determined that plaintiff could bring this suit to quiet title.

We next turn to the propriety of the trial court's grant of summary disposition because defendant's liens were unenforceable. MCL 339.2412; MSA 18.425(2412) provides:

> A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and

> alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.

By its terms, MCL 339.2412; MSA 18.425(2412) prevents an unlicensed contractor from suing to collect a money judgment. *Parker v McQuade Plumbing & Heating, Inc*, 124 Mich App 469, 471; 335 NW2d 7 (1983). An unlicensed contractor also cannot collect on a counterclaim. *Id.* However, this statutory language does not deprive an unlicensed builder of *all* rights. *Barbour v Handlos Real Estate & Building Corp*, 152 Mich App 174, 184; 393 NW2d 581 (1986). In *Parker*, *supra* at 471, this Court held that the statute was intended to protect the public as a shield, not as a sword, and, therefore, does not prohibit an unlicensed contractor from defending a breach of contract suit on its merits. The statute removes only an unlicensed contractor's power to sue, not its power to defend. *Id.*

Further, the Supreme Court determined in *Kirkendall v Heckinger*, 403 Mich 371, 374; 269 NW2d 184 (1978), that, although an unlicensed contractor may not be able to recover on a contract, equity mandated that a contractor be compensated for work that has been performed:

> "It is a cardinal principle that equity will not aid a party in doing that which is not equitable. He who seeks equity must be prepared to do equity." *Goodenow v Curtis*, 33 Mich 505, 509 (1876).
>
> See, also, *Bonninghausen v Hansen*, 305 Mich 595; 9 NW2d 856 (1943).

> The plaintiffs sought an equitable remedy. Before ordering the conveyance to [plaintiff Dennis Kirkendall], the trial court was obliged to determine the amount the plaintiffs were required to pay the defendants in order to do equity. As the equitable mortgagee, [defendant Carl] Heckinger was entitled as a condition to reconveyance to reasonable expenditures for improvements on the property made with the [plaintiffs'] consent (and in fact with [one plaintiff's] active participation) while [defendant Carl] Heckinger had title to the property.

This Court also applied this equitable principle to an equitable suit against an unlicensed builder in *Green v Ingersoll*, 89 Mich App 228, 231-232; 280 NW2d 496 (1979). Relying on *Kirkendall*, this Court stated:

> So too in this case, as noted by the trial judge, it was plaintiffs who first invoked the equity powers of the court. . . . Although we . . . hold that the court was precluded, under the statute, from granting defendants any relief on their counterclaim, he [sic] was bound to determine the relative equitable rights of all parties in fashioning the appropriate relief.
>
> . . . If the court determines that plaintiffs are entitled to the equitable relief which they seek, it shall also determine what plaintiffs must pay defendants in order to do equity. [*Id.* at 237.]

Although defendant here could not maintain an action to enforce its lien because it was unlicensed, MCL 339.2412; MSA 18.425(2412), on the basis of the reasoning of *Green* and *Kirkendall*, it appears that plaintiff may nevertheless be required to compensate defendant for its work on the properties. In other words, in order to receive the equitable relief of an unclouded title, *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992), plaintiff must first do equity. Plaintiff argues that this

case is distinguishable from *Green* and *Kirkendall* because in those cases, unlike this case: (1) the parties were in contractual privity with each other and therefore had consented to the improvements, (2) a mortgagor/mortgagee relationship existed between the parties, and (3) the parties were in a buyer/seller relationship, *Utica Equipment Co v Ray W Mallow Co*, 204 Mich App 476, 479, n 1; 516 NW2d 99 (1994). However, in our judgment, a thorough reading of *Kirkendall*, *supra*, *Green*, *supra*, and *Barbour*, *supra*, indicates that none of these factors acts as a bar to requiring that plaintiff first do equity in this case.

First, although the plaintiffs in *Kirkendall*, *supra* at 372, asked for and even participated in the construction of the house at issue there, the defendant builder in *Green* fully constructed the house before plaintiffs entered into the picture and bought the house, *Green*, *supra* at 231. Thus, this Court applied the equity principle of *Kirkendall* in *Green* without requiring a construction contract or actual consent for the construction. Also, we believe that a requirement of contractual privity would not make sense here, where the focus is upon the property and the equitable value of the work on it, rather than upon any contract to do work. In an equitable action, such as plaintiff's suit to quiet title, a court "'looks at the whole situation and grants or withholds relief as good conscience dictates.'" *Morren*, *supra* at 410, quoting *Hunter v Slater*, 331 Mich 1, 7; 49 NW2d 33 (1951). Therefore, the existence or lack of a contract or a recorded lien should not be the determinative consideration in deciding whether equity requires that a builder be compensated for work on an owner's property. Whether the owner contracted for the work, or implicitly approved

it by buying the property with the builder's improvements, as here, the owner has benefited at the expense of the builder.

Second, we note that there was no actual mortgage between the parties in either *Kirkendall* or *Green*. The trial court in *Kirkendall*, *supra* at 373, concluded that the defendant was an equitable mortgagee, which means simply that a "lien [was] required by the facts and circumstances of the parties' relationship." 1 Cameron, Michigan Real Property Law (2d ed), § 18.5, p 658. In that case, the key circumstance that mandated a finding of an equitable mortgage was the conveyance of the property by the plaintiff to the unlicensed builder, with reconveyance to take place once the plaintiff had paid for the construction and the improvements made to the property by the builder. *Kirkendall*, *supra* at 373. In *Green*, *supra* at 232, although the parties discussed a mortgage, it was never executed. Instead, the defendant builder filed a lien against the property for the amount still owing on the house, and the plaintiff sued to remove the lien cloud from the title on the basis of the defendant's unlicensed status, as here. Unlike *Kirkendall*, there was not even a finding of an equitable mortgage in *Green*. Thus, there was no mortgagor/mortgagee relationship between the parties. Similarly, here there appears to be no actual mortgage between the parties.[2] Because the holding in *Green*, applying the prin-

[2] In defendant's brief on appeal, defendant alleges, among other facts, that plaintiff worked with defendant to secure mortgage loans for each of the properties at issue here to be developed by defendant. The implications of this plan on the relationship of the parties are not clear from the allegations before us. However, it appears that at the time of the trial court proceedings in this case, there was a separate pending case in the trial court regarding the relationship between the parties here, the out-

ciple of equity, was not based on, nor did it even mention, a mortgage, *Green*, *supra* at 237, this factor also does not bar the requiring of equity by plaintiff in this case.

Third, we address the dictum found in a footnote in *Utica*, *supra*, requiring a buyer/seller relationship as a prerequisite to equity in an unlicensed contractor case. While we are not constrained to follow this dictum, we also find that the Court in *Utica* misread the law regarding this issue: Although *Kirkendall* and *Green* did involve buyer and seller parties, the *Kirkendall* equity principle was also applied in *Barbour*, *supra*, where the parties did not have a buyer-seller relationship. In that case, the plaintiff owned the land and paid the defendant for the construction of the building upon it and a mortgage to finance the project. *Barbour*, *supra* at 180-181. Thus, it appears that this Court has not required a buyer/seller relationship in order to apply the equity principle in this type of case.

Overall, application of the *Kirkendall* equity principle seems fairly straightforward: Where one party seeks an equitable remedy against an unlicensed builder who has performed residential construction work on property, and circumstances indicate that equity requires that the builder be paid for that work, the party seeking equity must first do equity by compensating the builder. See *Green*, *supra* at 237. Here, defendant held liens on plaintiff's properties that could not be executed because it was an unlicensed builder, MCL 339.2412; MSA 18.425(2412), and plain-

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come of which is unknown to us. For this reason, and because these allegations were not introduced, argued, or decided in the court below, we will not address them for the first time on appeal here.

tiff was fully aware of the recorded liens as well as the improvements before it purchased the properties. We believe that the circumstances in this case warrant application of the equity principle without regard to the existence of a contract, a mortgage, or a buyer/seller relationship. Whether the builder holds a mortgage or a lien, or simply performed work on the property for which collection cannot be made because the builder is unlicensed, the important considerations are whether the plaintiff will benefit through equity at the expense of the defendant builder and thus whether equity requires payment for the work under the particular circumstances of the case. Here, defendant would have been able to sue to collect on the lien but for his unlicensed status, and plaintiff seeks to avoid payment for work on the properties that it knew were still owing at the time that it purchased the properties. In our judgment, under these circumstances, where plaintiff sought to quiet title to its property at the expense of the equitable rights of defendant, as in *Kirkendall*, *Green*, and *Barbour*, plaintiff is required to do equity and pay for defendant's work on its property before it can receive the equity of an unclouded title.[3]

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[3] Plaintiff also argues that defendant's appeal is moot because it failed to file an action to enforce its claims of lien within one year from the time it recorded its liens pursuant to MCL 570.1117; MSA 26.316(117), and that the inclusion of nonlienable items in the lien amounts invalidated the liens. With regard to the statute of limitations issue, we do not believe that defendant was required to bring a meritless suit in order to preserve its right to receive equity. Because defendant's liens were unenforceable as a result of his being unlicensed, any suit on his part would have served only to preserve his rights should plaintiff decide to sue defendant in the future. Where a suit is brought in equity and does not rely upon the statute, as here, the statutory limitations period should not, in our judgment, act as an absolute bar, although an equity court may consider all the circumstances of a case in determining equity. In addition, with regard to the

Applying these principles, we believe that the trial court incorrectly held that defendant's liens were unenforceable because defendant did not have a builder's license. As a precondition to resolving plaintiff's action to quiet title, the court should have determined if defendant was entitled to payment for the work he performed on the property. Because the court concluded only that defendant's liens were invalid, the court essentially allowed MCL 339.2412; MSA 18.425(2412) to be used as a sword rather than being used as a shield, contrary to this Court's holdings in *Parker*, *supra* at 471; *Green*, *supra* at 235-37.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

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lien amount, any recovery by defendant here will be based on equitable principles and reflect the equitable value of his work. It will not be either based on or limited by any contract or statutory considerations. See *Kirkendall v Heckinger*, 105 Mich App 621, 630; 307 NW2d 699 (1981) (Kirkendall II). We emphasize that it can hardly be said that an unlicensed builder who disregards the statutory licensing requirement and receives equity is thereby in a better position than a licensed builder suing under a contract, inasmuch as the former cannot affirmatively sue or counterclaim for any payments on a mortgage, lien, or contract. See *Charles Featherly Constr Co v Property Development Group, Inc*, 400 Mich 198; 253 NW2d 643 (1977). An unlicensed builder can only recover money if he is first sued, and the suit is for equitable relief, *Kirkendall*, *supra*, and any recovery is limited to the equitable relief judged appropriate by the court, rather than to any amount agreed to in a contract.

MICHIGAN STATE EMPLOYEES ASSOCIATION v LIQUOR CONTROL COMMISSION NO 2

Docket No. 200373. Submitted January 7, 1998, at Lansing. Decided November 6, 1998, at 9:00 A.M. Leave to appeal sought.

The Michigan State Employees Association and others brought an action for declaratory and injunctive relief in the Ingham Circuit Court, seeking a declaration that an administrative rule promulgated by the Liquor Control Commission as part of the commission's plan to privatize the state-operated liquor warehousing and distribution system was unenforceable. The rule, AACS, R 436.1802, defined an "authorized distribution agent" (ADA) under the planned system. The court, James R. Giddings, J., issued a temporary restraining order, denied the defendant's motion for summary disposition, and granted summary disposition in favor of the plaintiffs. The court reasoned that provisions of the Administrative Procedures Act (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*, providing for approval or veto of proposed administrative rules by the Legislature's Joint Committee on Administrative Rules (JCAR) represented a valid, limited retention of control by the Legislature over the rule-making process. The court concluded that the defendant's promulgation of the rule despite the JCAR's disapproval violated the APA and therefore the rule was invalid. The Court of Appeals granted the defendant leave to appeal, dissolved the temporary restraining order, and stayed any further trial court proceedings pending resolution of the issues raised by the defendant.

The Court of Appeal *held*:

1. The sections of the APA that require JCAR or legislative approval of proposed rules, MCL 24.245; MSA 3.560(145), MCL 24.246; MSA 3.560(146), violate Const 1963, arts 3 and 4 and are invalid. The remainder of the APA is enforceable because procedural protections still exist within the APA even in the absence of §§ 45 and 46.

2. The Liquor Control Act, MCL 436.1 *et seq.*; MSA 18.971 *et seq.*, as amended by 1996 PA 440, while contemplating that the defendant may promulgate new rules governing ADA qualification and selection, does not mandate that the defendant promulgate new

rules before it may begin implementing its privatization plan by selecting ADAs. The trial court erred in denying the defendant's motion for summary disposition on the basis that the defendant was required to promulgate new rules before selecting ADA's. The orders granting summary disposition in favor of the plaintiffs and denying the defendant's motions for summary disposition must be reversed, and the matter must be remanded to the trial court for further proceedings.

Reversed and remanded.

1. ADMINISTRATIVE LAW — ADMINISTRATIVE PROCEDURES ACT — RULES — APPROVAL BY JOINT COMMITTEE ON ADMINISTRATIVE RULES — CONSTITUTIONAL LAW.

Requirements in the Administrative Procedures Act for approval by the Legislature's Joint Committee on Administrative Rules of proposed administrative rules of executive agencies are invalid because they violate the separation of powers principle established in the constitution and enable the Legislature to avoid adherence to the constitutional requirements that it legislate only by bills approved by majorities of both the Senate and the House of Representatives and that all bills passed by the Legislature must be first presented to the Governor for approval before becoming law (Const 1963, arts 3, 4; MCL 24.245, 24.246; MSA 3.560[145], 3.560[146]).

2. STATUTES — ADMINISTRATIVE LAW — ADMINISTRATIVE PROCEDURES ACT.

The Legislature enacted the Administrative Procedures Act to provide procedural protection where a personal right, duty, or privilege is at stake; the remainder of the act is enforceable when a court finds portions of the act to be invalid where procedural protections still exist within the act in the absence of the invalid provisions (MCL 24.201 *et seq.*; MSA 3.560[101] *et seq.*).

3. INTOXICATING LIQUORS — LIQUOR CONTROL ACT — AUTHORIZED DISTRIBUTION AGENTS.

The provisions of the Liquor Control Act added by 1996 PA 440 do not require the Liquor Control Commission to promulgate new rules before selecting and appointing authorized distribution agents to operate the privatized liquor warehousing and distribution system provided for by 1996 PA 440; 1996 PA 440 requires that one seeking appointment as an authorized distribution agent under a privatized system satisfy already existing and applicable licensure qualifica-

tions created by the commission pursuant to MCL 436.7; MSA 18.977.

Fraser Trebilcock Davis & Foster, P.C. (by *Brandon W. Zuk*), for the plaintiffs.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Mark Matus*, Assistant Attorney General, for the defendant.

Amici Curiae:

Honigman Miller Schwartz and Cohn (by *John D. Pirich*), for General Wine Company and General Wine and Liquor Company.

Dykema Gossett PLLC (by *Michael J. Brown*), for Michigan Licensed Beverage Association.

Buesser, Buesser, Black, Lynch, Fryhoff & Graham, P.C. (by *Timothy T. Fryhoff*), for J. Lewis Cooper Co. and NWS Michigan, Inc.

Before: MURPHY, P.J., and GRIBBS and GAGE, JJ.

GAGE, J. State liquor employee plaintiffs initiated the instant suit in response to defendant's announcement in early 1996 that it intended to privatize the state-operated liquor warehousing and distribution system, thus closing state-operated liquor warehouses and stores and terminating plaintiffs' employment. In October 1996, plaintiffs sought a declaration that an administrative rule promulgated by defendant that defined an "authorized distribution agent" (ADA) under the planned privatized liquor distribution system was unenforceable. In January 1997, the trial court issued a temporary restraining order prohibiting defendant

from closing any state-operated liquor warehouses or stores and from laying off state liquor employees. Defendant appeals by leave granted. We reverse and remand.

In furtherance of its privatization plan, defendant drafted a proposed administrative rule defining and establishing qualifications for ADAs, who would warehouse and distribute liquor under the privatized plan. Defendant complied with the then-existing rule-promulgation requirements outlined by the Administrative Procedures Act (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*, including holding a public hearing regarding the proposed rule, MCL 24.241; MSA 3.560(141), and submitting the proposed rule to the Legislative Services Bureau and the Joint Committee on Administrative Rules (JCAR), a legislative committee consisting of five senators and five representatives, MCL 24.235(1); MSA 3.560(135)(1), for approval. MCL 24.245; MSA 3.560(145). Under the statutory scheme, defendant was prohibited from promulgating or adopting its proposed rule until either (a) the Legislature by concurrent resolution approved the rule or (b) the JCAR approved the rule. MCL 24.245(9); MSA 3.560(145)(9). However, without awaiting legislative approval, defendant filed the proposed rule with the Secretary of State on September 10, 1996, thus violating APA subsections 45(9) and 46(1), MCL 24.246(1); MSA 3.560(146)(1). The JCAR subsequently advised defendant of its disapproval of the proposed rule. However, the published rule appears at 1996 AACS, R 436.1802, and became effective on September 11, 1996.

Plaintiffs filed their original complaint in October 1996. Plaintiffs alleged that defendant's promulgation of Rule 436.1802 despite the JCAR's disapproval violated APA §§ 45 and 46 and requested that the court enjoin defendant from implementing its privatization plan. Defendant moved for summary disposition on the basis that §§ 45 and 46 authorized the Legislature to act in violation of provisions of articles 3 and 4 of the 1963 Michigan Constitution, which provisions this opinion later addresses.

On December 19, 1996, the Legislature adopted 1996 PA 440. This act defined an ADA and otherwise amended the Liquor Control Act, MCL 436.1 *et seq.*; MSA 18.971 *et seq.*, to provide for the potential privatization of the state-operated liquor warehousing and distribution system. See MCL 436.2ee, 436.3, 436.3a; MSA 18.972(31), 18.973, 18.973(1).

After the enactment of 1996 PA 440, defendant filed an amended motion for summary disposition, arguing that the enactment rendered moot plaintiffs' complaint. Defendant claimed that the enactment explicitly authorized its utilization of ADAs and the implementation of its privatization plan. Plaintiffs responded that (1) different terms contained in 1996 PA 440 and defendant's proposed rule indicated that the Legislature did not approve defendant's proposed rule or repudiate the JCAR's veto of the proposed rule and (2) 1996 PA 440 mandated that, in the event defendant privatized the system, it establish rules governing authorized distribution agents before it could select or appoint such agents.

Pursuant to plaintiffs' request, the trial court on January 10, 1997, issued a temporary restraining order prohibiting defendant from appointing or utilizing ADAs and from laying off any state liquor employees or closing state liquor warehouses or stores. The trial court subsequently amended the temporary restraining order to require that defendant continue to accept and fill liquor orders under the state-operated system. The temporary restraining order was to remain in effect until January 28, 1997, when the court would determine whether to issue a preliminary injunction.

Also on January 10, 1997, the trial court denied defendant's amended motion for summary disposition. The court believed that a question existed regarding the validity of defendant's proposed rule in light of the statutory amendments regarding privatization. The court also believed that, in the event the proposed rule was invalid, defendant would likely have to adopt valid rules or take some other action before it could appoint ADAs.

The trial court also subsequently denied defendant's original motion for summary disposition, instead granting summary disposition to plaintiffs. The court reasoned that the APA provisions providing for JCAR approval or veto of proposed administrative rules represented a valid, limited retention of control by the Legislature over the rule-making process. The court concluded that defendant's promulgation of its proposed rule despite the JCAR's disapproval violated §§ 45 and 46 and that the proposed rule was therefore invalid.

Defendant filed several motions with this Court on January 13, 1997, including a motion for a stay of the temporary restraining order and an emergency application for leave to appeal. On January 21, 1997, in an unpublished order, this Court granted defendant's application for leave to appeal and dissolved the trial court's temporary restraining order, on the basis that plaintiffs had failed to demonstrate that they would suffer irreparable harm absent injunctive relief.

On January 28, 1997, in an unpublished order, this Court stayed any further trial court proceedings in this matter pending our resolution of the issues raised in defendant's application for leave to appeal. We now consider those issues.

Defendant first argues that APA §§ 45 and 46, which require JCAR or legislative approval of proposed rules, are unconstitutional and therefore it need not have awaited JCAR approval of its proposed rule before promulgating and implementing the rule. Defendant contends that §§ 45 and 46 violate the following provisions of the Michigan Constitution: (1) article 3, § 2, the provision establishing a separation of legislative, judicial, and executive powers, (2) article 4, §§ 1 and 22, vesting legislative power in a Senate and House of Representatives, and requiring that all legislation arise by bill, (3) article 4, § 26, providing that no bill may become a law until approved by a majority of each house of the Legislature, (4) article 4, § 33, requiring presentation of all bills to the Governor before they may become law, and (5) article 4, § 37, which permits the Legislature to "empower a joint committee . . . acting between sessions, to suspend any rule or reg-

ulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session. Such suspension shall continue no longer than the end of the next regular legislative session." We review the constitutionality of a statute, which is a question of law, under the de novo standard. *Sills v Oakland General Hosp*, 220 Mich App 303, 311; 559 NW2d 348 (1996).

This Court has recently addressed the constitutionality of §§ 45 and 46 in *Blank v Dep't of Corrections*, 222 Mich App 385; 564 NW2d 130 (1997), and concluded that these provisions violate articles 3 and 4 of the Michigan Constitution. In *Blank*, several Michigan prison inmates challenged the validity of administrative rules promulgated by the Department of Corrections that established new prison visitation policies. *Id.* at 389. The Department of Corrections had promulgated and begun enforcing the administrative rules at issue without having first obtained JCAR or legislative approval as required by §§ 45 and 46. *Blank*, *supra* at 390. The prison inmates claimed that the visitation rules were invalid because the Department of Corrections failed to adhere to the APA's rule-making provisions. *Id.* at 391. The department countered that §§ 45 and 46 were unconstitutional. *Blank*, *supra*.

The *Blank* Court agreed that §§ 45 and 46 violated article 4 of the Michigan Constitution. *Blank*, *supra* at 397-398. While the Court recognized that the Legislature could properly delegate rule-making authority to administrative agencies, it noted that the Legislature could only subsequently interfere with such delegated

authority according to constitutionally prescribed law-making procedures. *Id.* at 396. The Court concluded that §§ 45 and 46 enabled the Legislature to avoid adherence to the constitutional requirements that it legislate only by bills (Const 1963, art 4, § 22) approved by majorities of both the Senate and the House of Representatives (Const 1963, art 4, § 26), and the requirement that all bills passed by the Legislature must be first presented to the Governor for approval before becoming law (Const 1963, art 4, § 33). *Blank, supra* at 396-397. The Court reasoned as follows:

> Because the procedures in § 45 do not mirror the requirements of article 4 of our constitution, the Legislature is interfering with the delegated authority by something short of a "law." By giving the JCAR the authority to veto administrative rules proposed by an executive agency, the Legislature has delegated legislative power to a smaller legislative body that can effectively negate a valid action of an agency without following the restrictions of article 4 of our constitution. Although administrative rules have the force and effect of law, when an agency makes rules, it is not "legislating," and therefore not bound by the requirements of article 4, because it must act pursuant to and within the confines of the legislative delegation of power. However, when the JCAR acts, it has the power to speak on the subject at issue without any specified limitations and, in accordance with its own will, it is essentially "legislating" without the confines of article 4. The Legislature may not do indirectly what it cannot do directly. Even when the Legislature acts by concurrent resolution, it is not making "law." Such resolutions are not "bills" and are not presented to the Governor for approval as required by article 4 of our constitution. [*Blank, supra* at 397 (citations omitted).]

The Court noted that its holding that §§ 45 and 46 were unconstitutional aligned Michigan with the majority of other states who had considered the constitutionality of similar legislative review processes. *Blank*, *supra* at 393, n 2, 394-395. Because § 45's JCAR and legislative resolution rule-approval procedures were determined to be unconstitutional, § 46's prohibition against filing proposed rules with the Secretary of State without accompanying certificates of legislative approval was rendered a nullity. *Blank*, *supra* at 398.

The *Blank* Court also concluded that §§ 45 and 46 violated the separation of powers principle established within article 3, § 2 of the constitution. The Court found that the absence of a provision requiring presentment to the Governor of a legislative veto of proposed rules created the type of unchecked legislative power that article 3, § 2 sought to avoid. *Blank*, *supra*.

We agree with the *Blank* Court that §§ 45 and 46 violate articles 3 and 4 of the Michigan Constitution, and we adopt the *Blank* Court's reasoning. Therefore, defendant's failure to comply with these unconstitutional provisions does not invalidate its promulgated rule.

Like the state prison inmates in *Blank*, plaintiffs contend that §§ 45 and 46, if declared unconstitutional, may not be severed from the APA because legislative review of proposed rules represents a primary APA objective. Plaintiffs claim that therefore the entire APA must be discarded in light of our determination

that §§ 45 and 46 violate articles 3 and 4 of the constitution. We disagree.

MCL 8.5; MSA 2.216 directs that when a court finds a portion of an act invalid, the remainder of the act should be enforced to the extent that it can be given effect consistent with the legislative intent behind the act. In enacting the APA, the Legislature intended to "provide procedural protection where a personal right, duty or privilege is at stake." *Midland Twp v State Boundary Comm*, 401 Mich 641, 671; 259 NW2d 326 (1977); *Blank*, *supra* at 402. Therefore, because procedural protections still exist within the APA even in the absence of §§ 45 and 46, in the form of public notice and public hearing requirements regarding proposed rules, see MCL 24.241-24.244; MSA 3.560(141)-3.560(144), the remainder of the APA remains enforceable. *Blank*, *supra*.

Furthermore, even assuming as plaintiffs suggest that legislative veto power over proposed rules constituted a primary APA objective, the Legislature may still exercise veto power over proposed rules without relying on §§ 45 and 46. As subsection 51(b), MCL 24.251(b); MSA 3.560(151)(b) recognizes, the Legislature may enact a bill, passed by a majority of both houses and presented to the Governor, that revokes a proposed rule with which it disagrees. *Blank*, *supra*. Pursuant to subsection 51(a), MCL 24.251(a); MSA 3.560(151)(a), the Legislature may also adopt a resolution expressing its disapproval of a rule in the hope that the promulgating agency would acknowledge the legislative disapproval and amend the rule accordingly. Finally, article 4, § 37 of the constitution grants

the Legislature the limited authority between legislative sessions to suspend by concurrent resolution the enforcement of rules promulgated by agencies after the end of a legislative session. As the *Blank* Court noted, this narrow constitutional delegation of legislative power by resolution supports the conclusion that, other than between sessions, the Legislature must legislate as article 4 of the constitution prescribes. *Blank*, *supra* at 399-401.

Defendant next contends that even if its promulgated rule is invalid because of its failure to comply with §§ 45 and 46, 1996 PA 440 authorized it to select and appoint ADAs without first having promulgated an administrative rule regarding ADAs. Although we are not required to address this issue in light of our resolution of defendant's first argument, we take this opportunity to address the important new statutory provisions involved. We conclude that the Liquor Control Act, while contemplating that defendant may promulgate rules governing ADA qualification and selection, does not mandate that defendant promulgate rules before it may begin implementing its privatization plan by ADA selection.

None of the provisions of the Liquor Control Act added by 1996 PA 440 require that defendant promulgate new rules. Section 2ee of the Liquor Control Act merely defines an ADA as a person approved by defendant to engage in certain enumerated activities. Section 3 indicates that the sale, delivery, or importation of liquor may be performed by, among others, an ADA approved by defendant. Subsection 3a(1) indicates that if defendant decides to implement a priva-

tization plan, it "shall . . . by order appoint authorized distribution agents to engage in the warehousing and delivery of spirits," which ADAs will be "subject to uniform requirements, including business operating procedures, which [defendant] *may* prescribe by rule. . . ." Our review of this statutory language, in light of the fact that "shall" usually designates a mandatory provision, while "may" ordinarily designates a permissive provision, *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993), leads us to conclude that the Legislature did not intend to mandate that defendant promulgate rules before selecting and appointing ADAs. We reject as unreasonable plaintiffs' suggestion that "may" should be interpreted as mandatory, because nothing in the context of this statutory provision supports such an interpretation. *Mull v Equitable Life Assurance Society of the United States*, 444 Mich 508, 519; 510 NW2d 184 (1994).

Nor do we accept plaintiffs' contention that § 7 of the Liquor Control Act, MCL 436.7; MSA 18.977, mandates that defendant promulgate rules as a prerequisite to its selection and appointment of ADAs. Section 7 provides that defendant "*shall* adopt rules and regulations governing the carrying out of this act and the duties and responsibilities of licensees in the proper conduct and management of their licensed places." (Emphasis added.) Defendant has, as § 7 requires, adopted many rules implementing the Liquor Control Act and governing the selection and conduct of liquor license holders. See licensing qualification rules in the 1979 Michigan Administrative Code and 1980-1996

Annual Supplements, Rule 436.1101 *et seq.* Subsection 3a(2)(a) explains that one becomes eligible for ADA appointment on satisfying several conditions, including that the "person satisfies all applicable commission rules prescribing qualifications for licensure promulgated under section 7." Subsection 3a(2)(a)'s reference to § 7 does not indicate that defendant must adopt preprivatization rules. By its terms, subsection 3a(2)(a) merely requires that one seeking ADA appointment satisfy already existing and applicable licensure qualifications that defendant had created pursuant to § 7. Subsection 3a(2)(a)'s requirement that potential ADAs satisfy any applicable licensure rules ensures that the already existing rules apply to this section and that defendant may not select ADAs without applying standards. Therefore, we conclude that the trial court erred in denying defendant's amended motion for summary disposition on the basis that defendant was required to promulgate rules before selecting ADAs.

We reverse the trial court's orders granting plaintiffs summary disposition and denying defendant's motions for summary disposition.

Remanded to the Ingham Circuit Court for any further proceedings consistent with this opinion. We do not retain jurisdiction.

Reversed and remanded.

SCHELL v BAKER FURNITURE COMPANY

COLLINS v BAKER FURNITURE COMPANY

Docket Nos. 194794, 194795. Submitted March 11, 1998, at Grand Rapids. Decided November 6, 1998, at 9:05 A.M. Leave to appeal sought.

Ronda Schell and Sandra Collins, while represented by the same attorney, each brought an action in the Kent Circuit Court alleging sexual harassment by Baker Furniture Company. The cases were assigned to different judges, and neither case was resolved following a settlement conference and mediation. The cases became subject to a "Settlement Week" conference order by the chief judge of the Kent Circuit Court, which order required the presence of clients and persons with authority to settle at such conference. When Schell and Collins failed to appear for their consolidated settlement conference, which their attorney attended while having the authority to settle their claims, Chief Judge Dennis C. Kolenda, on his own motion, dismissed their actions with prejudice pursuant to MCR 2.401(G)(1) for their failure to attend the conference. Schell and Collins moved to set aside the dismissals, but the chief judge denied their motions. Schell and Collins appealed, and their appeals were consolidated.

The Court of Appeals *held*:

1. The chief judge abused his discretion in dismissing the plaintiffs' actions. Although MCR 2.401(G)(1) provides that failure to attend a settlement conference may be grounds for dismissal under MCR 2.504(B), dismissal is neither mandated nor warranted in the cases at bar. First, the Settlement Week conference constituted the second settlement conference for both plaintiffs. Second, the plaintiffs' counsel had authority to settle the plaintiffs' claims and engage in meaningful settlement negotiations. There was no evidence that the plaintiffs had avoided settlement discussions or repeatedly ignored court orders. Third, dismissal is a harsh sanction that should be reserved for the most egregious violations of the court rules. Fourth, the entry of the involuntary dismissal was improper because the chief judge failed to comply with MCR

2.504(B), which provides that a defendant may move for dismissal of the action or claim against the defendant where the plaintiff fails to comply with the court rules or a court order. MCR 2.504(B) provides no mechanism for a court to dismiss a case sua sponte as the chief judge did in these cases.

2. The chief judge's review, consideration, and reliance on the mediation evaluations in these cases was inappropriate. Under MCR 2.403(N)(4), a trial court acting as trier of fact may not open a sealed mediation evaluation filed with the court clerk until after the trial court has rendered judgment.

3. The chief judge's interim and temporary reassignment of the cases to himself for the purpose of conducting Settlement Week was not authorized under MCR 8.110(C)(3)(b) or 8.111(D)(4).

Orders of dismissal vacated; cases remanded to their assigned judges for further proceedings.

PRETRIAL PROCEDURE — SETTLEMENT CONFERENCES — PARTIES' FAILURE TO ATTEND — DISMISSAL OF ACTIONS.

A trial court has discretionary power to dismiss an action as a sanction for the plaintiff's failure to attend a scheduled settlement conference; dismissal must be on the motion of the defendant, and not on the court's own motion; dismissal is a harsh sanction that should be reserved for the most egregious violations (MCR 2.401[G][1], 2.504[B]).

Harold S. Sawyer, for the plaintiffs.

Warner Norcross & Judd LLP (by *Paul T. Sorensen* and *Tanya E. Buhk*), for the defendant.

Before: MARKEY, P.J., and GRIFFIN and WHITBECK, JJ.

PER CURIAM. In these consolidated cases, plaintiffs appeal by right the Kent Circuit Court Chief Judge's orders of March 12, 1996, dismissing their claims for their failure to personally appear for a special court-ordered settlement conference. We vacate and remand.

These cases arise out of two separate complaints of sexual harassment against defendant filed in 1994. The two plaintiffs hired the same lawyer and are targeting the same employee at defendant's company. Two different circuit judges presided over these cases, and each case was set for trial after initial settlement conferences held in 1995 did not resolve plaintiffs' claims.

On January 16, 1996, the chief judge ordered all parties to participate in a "Settlement Week" conference, stating that "[c]lients and persons with authority to settle shall be present" and that "[f]ailure to prepare for, attend, or meaningfully participate in this settlement conference *may result in the imposition of sanctions*." (Emphasis added.) Counsel for the parties agreed to consolidate the settlement conferences for the two plaintiffs on Monday, March 11, 1996.

Neither plaintiff attended the settlement conference. Although plaintiffs' counsel originally informed his clients erroneously that they need not attend unless he contacted them, he apparently later attempted to reach both clients over the weekend to secure their appearance. Unfortunately, it appears that one client was confused with respect to attending either the Friday or the Monday court dates, and counsel could not timely contact the other. The facilitator conducting the settlement conference informed the chief judge that neither plaintiff was present, but defendant's counsel and a representative of defendant from out of state were ready to proceed. Immediately, the chief judge, already conducting court on other matters, ordered each case dismissed

with prejudice pursuant to MCR 2.401(G)(1) "[b]ecause plaintiff failed to appear for a duly-scheduled and duly-noticed settlement conference, which failure the order scheduling the conference said would result in an adverse judgment."

Plaintiffs moved to set aside the dismissals, but the chief judge denied the motions, finding that under MCR 2.401(G)(1) dismissal would not cause manifest injustice due in large part to the nuisance value awarded to plaintiffs' claims at mediation and because plaintiffs cannot evade the fault of counsel in advising his clients not to appear.[1]

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[1] Specifically, the chief judge stated in his order denying plaintiffs' motions to set aside the dismissal, more accurately, motions to reinstate:

> What those [nuisance value mediation] evaluations say is that both cases are, in the judgment of seasoned mediators, very weak cases, that neither plaintiff is likely to establish defendant's liability. MCR 2.403(K)(4). Had plaintiffs appeared, good faith settlement discussions ensued, and settlement not been achieved, each plaintiff would be entitled to continue with this case, even though the prospects for success do not appear good. However, because those prospects are poor, it is not manifestly unjust to now dismiss these cases because plaintiffs and their counsel did not cooperate with the Court. It would, to the contrary, be unjust to reinstate these cases, thereby ignoring a *failure to cooperate with the Court and taking time away from some other case where there had been compliance with court orders. When there are very real questions about the viability of a case, it is not unjust to end that case as authorized by the rules when the plaintiff does not proceed appropriately.* It may be that dismissing a strong case is not unjust when the plaintiff has ignored a settlement conference. Efforts to resolve cases are essential to the fair and orderly handling of crowded dockets, and standing up a court may forfeit any right to complain when the rules are enforced. Cf., *Hearn v Schendel*, 355 Mich 648, 653 [; 95 NW2d 849] (1959). That issue need not be confronted in these cases, however. Dismissing cases which the mediation process has identified as lacking in merit is not unjust.

Although plaintiffs raise several issues on appeal, they all boil down to whether the chief judge abused his discretion in dismissing plaintiffs' claims against defendant because plaintiffs did not attend the court-ordered Settlement Week negotiations. We conclude he did.

Because MCR 2.401(F) and (G) give the court discretion to dismiss a plaintiff's claims for failure to participate in pretrial proceedings, we review for an abuse of that discretion. Indeed, an unbiased person reviewing the evidence would conclude that the trial court had insufficient justification for determining that plaintiffs' complaints should be dismissed for their inadvertent failure to personally attend the second settlement conference in these matters. See *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994) *Banaszewski v Colman*, 131 Mich App 92, 95; 345 NW2d 647 (1983); see also *Jack's Factory Outlet v Pontiac State Bank*, 95 Mich App 174, 178-179; 290 NW2d 114 (1980) (imposition of discovery sanctions under GCR 1963, 313.2, the predecessor of MCR 2.313, also reviewed for an abuse of discretion).

MCR 2.401(F) and (G) read as follows:

. . . This year's Settlement Week was equally successful, resulting [in] 55% of the cases summoned, including several which would have taken 6-8 weeks to try and which settled for very large sums of money. *Not dealing sternly with plaintiffs' failures to appear would undermine the effectiveness of an extremely useful tool for preserving access to the courts.* It is not merely a matter of expediting settlements or docket control. Good docket management and settlements open up time for those cases which need it. [Emphasis added.]

(F) Presence of Parties at Conference. In the case of a conference at which meaningful discussion of settlement is anticipated, the court may direct that *persons with authority to settle the case*, including the parties to the action, agents of parties, representatives of lienholders, *or* representatives of insurance carriers:

(1) be present at the conference; or

(2) be immediately available at the time of the conference. The court's order may specify whether the availability is to be in person or by telephone.

* * *

(G) Failure to Attend; Default; Dismissal.

(1) Failure of a party or the party's attorney to attend a scheduled conference, as directed by the court, constitutes a default to which MCR 2.603 is applicable or grounds for dismissal under MCR 2.504(B).

(2) The court shall excuse the failure of a party or the party's attorney to attend a conference, and enter an order other than one of default or dismissal, if the court finds that

(a) entry of an order of default or dismissal would cause manifest injustice; or

(b) the failure to attend was not due to the culpable negligence of the party or the attorney.

The court may condition the order of the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2). [Emphasis added.]

Dismissal is the harshest sanction that the court may impose on a plaintiff. Even though the court rules permit the imposition of this sanction in *appropriate* circumstances, we do not believe that it is either mandated or warranted in the cases at bar.

First, the 1996 Settlement Week in the Kent Circuit Court constituted the *second* settlement conference for both plaintiffs. "Settlement Week" is apparently an

effective, innovative attempt that has been held twice in the Kent Circuit Court within a four-year period to resolve certain cases short of trial; however, no court rule specifically authorizes the operation of this intensive, selective settlement effort.[2] Second, it is undisputed that plaintiffs' counsel had complete authority to settle the cases and engage in meaningful settlement negotiations. Both cases had been pending since 1994, had progressed without any problems and were ready for trial. Importantly, both cases had been mediated and had regular settlement conferences. There is no evidence whatsoever that plaintiffs had historically avoided settlement discussions or had repeatedly ignored court orders. Indeed, the miscommunication and misunderstanding that occurred between plaintiffs' counsel and plaintiffs was certainly not an intentional act of defiance of a court order, which makes the chief judge's automatic imposition of involuntary dismissal even more troubling.

Third, in a similar context, both this Court and legal commentators have recognized that under MCR 2.313(B)(2)(c),[3] the rule setting forth sanctions for

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[2] Because it is not our role, we express no opinion regarding whether the Michigan Court Rules should be modified to facilitate the holding of "Settlement Weeks."

[3] While MCR 2.313

> is supported by existing caselaw affirming the discretionary power of the court to dismiss an action or to enter a default judgment against a party who fails to comply with the discovery rules or who violates a court order mandating discovery, *that same caselaw indicates that those procedural sanctions are a "drastic" step, and should only be imposed for flagrant and wanton actions by a party. The willful, that is intentional, refusal of a party to comply with court ordered discovery would support such drastic steps.* [2

discovery failures, dismissal is warranted only in extreme cases.

Although MCR 2.401, unlike MCR 2.313, does not elaborate on the sanction options available to the court for a party's failure to participate in the litigation process, we believe that the intent underlying both provisions is the same: dismissal, the harshest sanction, should be reserved for the most egregious violations of the court rules. Indeed, the intent of MCR 2.401(F) is to ensure that the parties conduct meaningful settlement talks, which can only be accomplished where "persons with authority to settle the case, including the parties to the action [or] the agents of parties" are in attendance. Because in the case at bar, plaintiffs' agent, their counsel, had full authority to settle both lawsuits, it appears that the intent underlying the court rule was satisfied.

Neither can we read MCR 2.401(G) in a vacuum: it must be interpreted considering the purpose of the entire court rule on settlement conferences. To automatically dismiss a case that had proceeded through the litigation process for approximately two years, had been subject to one previous settlement conference, and had been mediated, merely for a party's failure to personally appear when no evidence exists that their personal appearance had any bearing on counsel's ability to settle the case, is an abuse of discretion and an inappropriate attempt to force a settlement. See *Henry v Prusak*, 229 Mich App 162, 170-

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Martin, Dean & Webster, Michigan Court Rules Practice, p 367 (emphasis added).]

171; 582 NW2d 193 (1998), citing *Woods v Murdock*, 177 Mich App 210, 213; 441 NW2d 63 (1989). Moreover, we note that the wording of the court order mandating plaintiffs to personally appear advises that failure to attend "may result in the imposition of sanctions." The manner, however, in which the chief judge summarily ordered dismissal of these two cases was tantamount to a form of "strict liability;" consequently, it was an abdication of the exercise of any judicial discretion. Moreover, once the dismissal was entered, plaintiffs were faced with the burden of moving to reinstate the case pursuant to MCR 2.401(G)(2).

Fourth, we believe that entry of the involuntary dismissal was also improper because the chief judge failed to comply with MCR 2.504(B), as incorporated by reference into MCR 2.401(G)(1). According to the parties' presentation during oral argument, once the facilitator determined that plaintiffs were not going to attend the Settlement Week conference, he merely presented the chief judge with a prepared order for involuntary dismissal of plaintiffs' claims. The chief judge, who was at the time presiding over another matter, automatically signed the order.

MCR 2.401(G)(1) states that a party's failure to attend a scheduled conference constitutes *grounds* for dismissal under MCR 2.504(B). Thus, dismissal under MCR 2.401(G)(1) must proceed according to the strictures of MCR 2.504(B)(1), which states that "a defendant may *move* for dismissal of an action or a claim against that defendant" where the plaintiff fails to comply with the court rules or a court order.

(Emphasis added.) MCR 2.504(B) provides no mechanism for a court to dismiss a case sua sponte, nor do we find any evidence in the record that defendant moved to dismiss plaintiffs' complaints for their failure to personally attend the Settlement Week conference.

We doubt that this requirement is a mere technicality, i.e., that if these cases are reinstated, defendant will immediately move to dismiss or, that under these circumstances, defense counsel would have moved to dismiss at the time of the Settlement Week conference. Attorneys use their discretion regarding when to seek sanctions against the opposing party and will frequently opt not to pursue sanctions. We can surmise that that is, in fact, a reason the chief judge automatically dismisses or defaults parties who fail to comply with the exact letter of his Settlement Week order.

Here, the chief judge acted on his own initiative, irrespective of the requirements in MCR 2.401(G) and MCR 2.504(B), in dismissing plaintiffs' complaints. We believe, therefore, that the chief judge misunderstood the extent of his ability to dismiss cases under MCR 2.401(G).

Two other issues also warrant our resolution. We consider the chief judge's decision to review, consider, and, indeed, rely to some extent on the mediation award in ruling on plaintiffs' motion to set aside the dismissal to have been inappropriate. Under MCR 2.403(N)(4), the mediation clerk places a copy of the mediation evaluation and the parties' acceptances or rejections in a "sealed envelope for filing with the

clerk of the court." If the trial court is acting as the trier of fact, it may not open the envelope, and the parties may not reveal the evaluation amount until after the judge has rendered judgment. *Id.* Although an involuntary dismissal operates as an adjudication on the merits, see MCR 2.504(B)(3), as indicated, we have concluded that for several reasons the chief judge improperly entered the involuntary dismissal order, in which case the chief judge was not entitled to review the mediation evaluations, even though he was not the trial judge assigned to either case.[4] It also appears that justifying denial of plaintiffs' motion to reinstate on this basis was "boot strapping" under these particular facts. In sum, it is manifest that the contents of a mediation evaluation should not have any effect on a trial court's resolution of the merits of a case.

Finally, there is nothing in the chief judge rule, MCR 8.110, that permits a chief judge of a circuit court to temporarily reassign cases to himself for "Settlement Week" only. MCR 8.110(C)(3)(b) expressly permits the chief judge to direct the apportionment and assignment of the court's business, subject to MCR 8.111 regarding assignment of cases. MCR 8.111

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[4] While this error may have been harmless, given the statements that the chief judge made in his order denying plaintiffs' motion to set aside the dismissal, we continue to believe that it was highly irregular for the chief judge to publicly reveal the mediation award. Neither the mediation briefs nor the mediation evaluation are available to the trial court for its review, so we see no purpose to be served by his review of the evaluation other than to give the appearance that cases with a high mediation award for plaintiffs would be less susceptible to dismissal under MCR 2.401. This untenable appearance should be avoided at all costs.

permits a chief judge to reassign cases "in order to correct docket control problems resulting from the requirements of this rule." MCR 8.111(D)(4). Nonetheless, even if the chief judge could implement Settlement Week under a broad reading of MCR 8.110(C)(3)(b), unsettled cases would remain assigned to their original judges. The chief judge's interim and temporary reassignment of the cases to himself for the sole purposes of conducting Settlement Week was not authorized under the court rules. Thus, we hold that the chief judge should not have entered any substantive orders in either of these consolidated cases.

In conclusion under the particular facts of these cases, we find that the chief judge abused his discretion: an unprejudiced person, reviewing the evidence before the court, would say that there was no justification or excuse for his automatic dismissal sua sponte of plaintiffs' longstanding complaints. Further, the chief judge should not have entered any substantive orders in these cases that were not properly assigned to him. We therefore vacate the orders of dismissal and the orders denying reinstatement and remand these consolidated cases back to their assigned judges for further proceedings consistent with the court rules.[5] We do not retain jurisdiction.

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[5] We are aware of at least one recent unpublished opinion of this Court that reaches the opposite conclusion. It lacks precedential value. Moreover, we do not accept either its reasoning or its result. *Vanderploeg v Parisian*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 1998 (Docket No. 196555).

In re WAYNE COUNTY PROSECUTOR

Docket No. 205448. Submitted August 12, 1998, at Detroit. Decided November 10, 1998, at 9:00 A.M.

The Wayne County prosecutor brought an action in the Wayne Circuit Court against the Parole Board and the Department of Corrections, seeking an order of superintending control requiring the defendants to allow the plaintiff to intervene as a party in parole revocation proceedings against reoffending parolees before the Parole Board. The court, James J. Rashid, J., dismissed the complaint. The plaintiff appealed.

The Court of Appeals *held*:

The circuit court did not abuse its discretion in denying superintending control in the absence of a clear legal duty by the Parole Board to allow intervention by county prosecutors in parole revocation hearings.

1. The statutory framework governing parole revocation proceedings against reoffending parolees, MCL 791.238 *et seq.*; MSA 28.2308 *et seq.*, does not provide for participation by county prosecutors in parole revocation hearings.

2. Parole revocation proceedings are contested cases under the Administrative Procedures Act (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* Although the APA has no provisions regarding intervention in contested cases, an administrative agency such as the Parole Board may allow intervention at its discretion. The plaintiff contends that a county prosecutor has an interest in the outcome of a parole revocation hearing because if the parolee is denied reconsideration for parole for several years, the prosecutor can choose not to prosecute the parolee for the commission of a new crime inasmuch as the parolee will remain incarcerated for a substantial period following revocation of parole. The interest identified by the plaintiff, while laudable, is a broad public interest that is simply too attenuated to entitle the plaintiff to intervene as a party in this case.

3. MCL 49.153; MSA 5.751, which authorizes county prosecutors to appear for the state or their counties in court, does not apply in parole revocation proceedings, which are conducted before the Parole Board, not before a court.

4. Parole revocation proceedings are different from probation revocation proceedings in court. The plaintiff cannot claim that he has a right to participate in parole revocation proceedings by analogy to probation revocation proceedings, where he has the right to participate.

Affirmed.

PAROLE — PAROLE REVOCATION PROCEEDINGS — PARTICIPATION BY COUNTY PROSECUTORS.

No statute or administrative rule confers on a county prosecutor the right to participate or intervene in a parole revocation proceeding against a reoffending parolee; however, the Parole Board, at its discretion, may allow such intervention (MCL 791.238 *et seq.*; MSA 28.2308 *et seq.*).

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

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

Before: CORRIGAN, C.J., and MACKENZIE and R. P. GRIFFIN*, JJ.

PER CURIAM. Plaintiff, the Wayne County prosecutor, appeals as of right from an order dismissing his complaint for superintending control. We affirm.

Plaintiff brought this action to obtain an order requiring defendants, the Department of Corrections and the Parole Board, to allow plaintiff to intervene as a party in parole revocation proceedings in cases where the Parole Board is considering revocation based on a parolee's alleged commission of a felony. It is plaintiff's contention that, in instances where there are several years remaining in the reoffending parolee's maximum sentence for the paroled offense,

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

it would be more expedient for the Parole Board to rescind parole and order a lengthy period before the offender would again be considered for parole than it would be to prosecute the parolee for the new offense. The circuit court dismissed plaintiff's complaint, concluding that the Parole Board has no clear legal duty to allow the prosecutor to intervene as a party in parole revocation proceedings.

I

Superintending control is an extraordinary remedy, and extraordinary circumstances must be presented to convince a court that the remedy is warranted. 4 Martin, Dean & Webster, Michigan Court Rules Practice (2d ed), p 331. For an order of superintending control to issue, the plaintiff must show that a clear legal duty has not been performed by the defendant. *Beer v Fraser Civil Service Comm*, 127 Mich App 239, 242; 338 NW2d 197 (1983). The grant or denial of an order of superintending control is within the sound discretion of the court considering the matter. *In re Goehring*, 184 Mich App 360, 366; 457 NW2d 375 (1990). Absent an abuse of discretion, this Court will not disturb the denial of a request for an order of superintending control. *Id.*

II

The Parole Board is part of the Department of Corrections. MCL 791.231a; MSA 28.2301(1). MCL 791.234; MSA 28.2304 and MCL 791.235; MSA 28.2305 govern the procedures surrounding parole interviews and the decision to grant or deny parole. Although the statutes no longer expressly so provide, the length of the parole period is generally discretionary with the Parole Board. See *Lane v Dep't of Corrections*,

383 Mich 50, 61; 173 NW2d 209 (1970). Under MCL 791.234(7); MSA 28.2304(7), the Parole Board's decision to grant or deny parole is appealable to the circuit court by the prisoner, the prosecutor, or the victim. See also MCR 7.104(D). The circuit court's decision, in turn, may be appealed by leave to this Court. MCR 7.104(D)(6).

A prisoner on parole is still in the "legal custody and control" of the Department of Corrections. MCL 791.238(1); MSA 28.2308(1). If a parolee commits a new crime while on parole and the prosecutor opts not to prosecute the parolee for the new crime, the department issues a warrant for the return of the parolee. MCL 791.238(1); MSA 28.2308(1). A parolee is entitled to a preliminary probable cause hearing within ten days after arrest for parole violation, MCL 791.239a(1); MSA 28.2309(1)(1), and is entitled to a fact-finding hearing before a member of the Parole Board or a hearing officer within forty-five days of return to prison. MCL 791.240a(1); MSA 28.2310(1)(1). The parolee is entitled to be represented by counsel at the parole revocation hearing. MCL 791.240a(2); MSA 28.2310(1)(2). Additionally, the parolee is entitled to hear the evidence against the parolee, to testify and present evidence, and to cross-examine witnesses. *Id.* A parole violation must be established by a preponderance of the evidence, MCL 791.240a(5), (6); MSA 28.2310(1)(5), (6).

After the hearing, the hearing officer prepares a report and recommendation for disposition by the Parole Board. MCL 791.240a(5); MSA 28.2310(1)(5). The board then enters an order either rescinding parole or reinstating it. MCL 791.41; MSA 28.2311. A rescinding order also sets the length of time before

the offender will again be eligible for parole. See *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 583, n 29; 548 NW2d 900 (1996). That period can range from one day to the maximum sentence imposed for the original offense, in the discretion of the board. *Id.*; MCL 791.238(2); MSA 28.2308(2). Parole revocation proceedings are contested cases under the Administrative Procedures Act (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*, and judicial review of the proceedings is available under the APA. *Penn v Dep't of Corrections*, 100 Mich App 532, 537-540; 298 NW2d 756 (1980).

III

The statutory framework outlined above includes participation by the prosecutor and the victim when a prisoner is granted parole. Significantly, however, it does not provide for such participation at parole revocation proceedings. A court must not judicially legislate by adding into a statute provisions that the Legislature did not include. *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 421; 565 NW2d 844 (1997). In the absence of a statutory provision that would permit a prosecutor to participate in parole revocation hearings, the Parole Board had no clear legal duty to allow plaintiff to intervene. Accordingly, we find no abuse of discretion in the circuit court's decision to deny plaintiff's request for an order of superintending control.

IV

Plaintiff argues that, even if the statutes governing parole revocation proceedings do not include a provision contemplating a prosecutor's participation in the proceedings, a right to intervene exists by way of the

APA. As explained in LeDuc, Michigan Administrative Law, § 6:16, pp 27-28:

> Michigan's Administrative Procedures Act has no provisions regarding intervention. In the absence of a statute providing some guidance as to who is entitled to participate or intervene in a contested case proceeding, intervention has remained largely the province of individual agency policy and the discretion of administrative hearing judges and officers. These policies may be embodied in rule, but they are more likely revealed by the customs and practices of the agency in conducting contested cases.
>
> Except for the circumstances of clear statutory direction or agency rules about intervention, one seeking to intervene is left with the arguments that can be based on the definition of contested case and parties in the APA and the nature of the interests which may be affected in a particular contested case setting. Basically, the argument that must be made is that the contested case will determine the legal rights, duties, or privileges of the person seeking intervention, and that the person seeking to intervene is properly seeking and entitled of right to be admitted as a party.

Thus, where, as here, there is no statutory or administrative rule governing intervention, an administrative agency's decision whether to allow a person to intervene in a contested case is discretionary; again, there is no particular clear legal duty to allow intervention. The one exception is if the person wishing to intervene can show entitlement to "party" status under the APA. The APA defines a "party" as "a person or agency named, admitted, or properly seeking and entitled of right to be admitted as a party in a contested case." MCL 24.205(4); MSA 3.560(105)(4). With regard to who is a party for purposes of contested cases, Professor LeDuc states:

> [O]ne may turn to four sources to find out who a party in a contested case can be. As usual, the first source is the underlying statute, which either may identify specifically, at least by class or general description, those who are entitled to a contested case hearing, or may identify the interests which are protected, giving the possessors of those interests a status which entitles them to be admitted as a party. The second source is due process, under which property and liberty interests are protected and subject to the APA contested case provisions to protect their possessors. The third source is the APA itself, which identifies legal rights, interests, and privileges as protected, if they are to be determined in the contested case proceeding. The fourth source is the agency rules, which may, like a statute, identify those who are entitled to receive a contested case hearing. [Michigan Administrative Law, § 6:15, pp 26-27.]

Under the parole revocation statutes, due process, the APA, and the department's administrative rules, the only persons with a protected interest who are entitled to a parole revocation hearing are the parolee, whose protected interest involves the loss of conditional liberty, and the department, which has "legal custody and control" of the parolee. See *Penn*, *supra*, pp 537-538; MCL 791.238(1); MSA 28.2308(1). Plaintiff contends that a county prosecutor has an interest in the outcome of a parole revocation hearing because if the parolee is denied reconsideration for parole for several years, the prosecutor—satisfied that the parolee will remain imprisoned for a substantial period—can choose not to prosecute the new crime and save taxpayer money. The interest identified by plaintiff, while laudable, is a broad public interest that is simply too attenuated to entitle plaintiff to party status in parole revocation proceedings. Certainly, the outcome of parole revocation proceedings may be one of many factors taken into consideration

by a prosecutor when deciding whether to prosecute a reoffending parolee. Nevertheless, the outcome of the parole revocation proceedings has virtually no effect on the prosecutor's *ability* to prosecute or to otherwise carry out official responsibilities. In the absence of any direct bearing on plaintiff's prosecutorial duties, he is not entitled to party status in a parolee's revocation hearing under the APA. Accordingly, the Parole Board did not have a clear legal duty to allow plaintiff to intervene as a party. The circuit court did not abuse its discretion in refusing to order superintending control.

V

Plaintiff raises additional reasons why he should be allowed to intervene in parole revocation proceedings. He maintains that he is an interested party under MCL 49.153; MSA 5.751, which provides:

> The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested.

This statute authorizes the prosecutor to appear in courts. Parole revocation proceedings are not prosecutions, and the Department of Corrections is not a court or a part of the judiciary. *People v Raihala*, 199 Mich App 577, 579; 502 NW2d 755 (1993); *Penn*, *supra*, pp 536-537. The statute does not confer plaintiff party status in parole revocation proceedings.

Plaintiff also claims that he should be allowed to intervene in parole revocation proceedings because they are analogous to probation revocation hearings, where prosecutors routinely participate. However,

parole and probation occupy different places in the law. Probation is an alternative to confining an offender and is granted at the discretion of the trial court in lieu of incarceration. *People v Greenlee*, 133 Mich App 734, 736; 350 NW2d 313 (1984). The trial court's decision to revoke probation and impose a term of imprisonment involves imposition of a different sentence to replace the order of probation. *People v Saylor*, 88 Mich App 270, 275; 276 NW2d 885 (1979). It is therefore an extension of the original trial court proceedings in which the prosecutor participates. In contrast, parole revocation involves the Parole Board's decision to rescind its parole order and return the parolee to prison to continue serving an existing sentence. *Raihala*, *supra*, pp 579-580. There is no additional trial court involvement, and hence no additional prosecutorial involvement.

VI

We appreciate plaintiff's attempt to take advantage of a reoffending parolee's unserved maximum sentence in lieu of instituting yet another felony prosecution against the parolee. Plaintiff's approach is expedient and would benefit taxpayers as well as ease court dockets. A policy that reoffending parolees could face long-term parole ineligibility might also serve as a disincentive to violate parole and thus reduce recidivism. As the circuit court noted, however, plaintiff's arguments involve lawmaking and therefore must be directed to the Legislature rather than the courts. See *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992). We cannot read into the parole revocation statutes a duty to allow prosecutors to intervene in the proceedings when no such

duty exists. *Empire Iron Mining*, *supra*. However, we can, and do, urge the Legislature to consider amending the parole revocation statutes to allow prosecutor participation, just as it has seen fit to allow participation when parole is granted.

Finally, although we hold that the trial court did not abuse its discretion in finding that the Parole Board had no clear legal duty to allow plaintiff to intervene in parole revocation proceedings, we stress that intervention remains available in the board's discretion. See LeDuc, *supra*. We also note that, if the prisoner whose parole has been revoked is again granted parole within a period that the prosecutor believes is unacceptably short, the prosecutor can appeal the decision to grant parole at that time. MCL 791.234(7); MSA 28.2304(7). These measures are cumbersome and offer marginal assurance that they will result in the Parole Board's increased use of reoffending parolees' unserved maximum sentences. Until the Legislature acts, however, those are the measures available to plaintiff to accomplish his objectives.

Affirmed.

DECAMINADA v COOPERS & LYBRAND, LLP

Docket No. 200089. Submitted June 10, 1998, at Detroit. Decided November 17, 1998, at 9:00 A.M.

Joseph E. DeCaminada brought an action in the Wayne Circuit Court against Coopers & Lybrand, L.L.P., and others, alleging age discrimination and conversion as a result of Coopers & Lybrand's termination of his employment. The defendants did not file an answer but, instead, filed a motion to compel arbitration, alleging that the plaintiff had signed an agreement containing a valid arbitration clause. The court, Sean F. Cox, J., denied the defendants' motion. The defendants sought leave to appeal. The plaintiff then moved for entry of a default and entered a default in the trial court on the basis of the defendants' failure to file a timely answer. The plaintiff then moved to dismiss the application for leave to appeal. The Court of Appeals, in lieu of deciding the motion to dismiss, granted the application for leave to appeal and instructed the parties to address in their appellate briefs the issue of the effect of the default.

The Court of Appeals *held*:

1. The motion to compel arbitration was a motion under MCR 2.116. Once the defendants filed a timely application for leave to appeal, the time for filing an answer was extended until after the application was resolved. MCR 2.108(C)(1). Thus, the plaintiff's entry of a default was improper, and the Court of Appeals therefore declined to dismiss the defendants' appeal.

2. The trial court erred in denying the motion to compel arbitration. The arbitration clause in the parties' agreement is enforceable under a section of the Federal Arbitration Act, 9 USC 2. The exclusionary language in another section of the act, 9 USC 1, does not apply to the agreement in this case. The plaintiff's claims are arguably covered by the language in the parties' agreement.

3. An arbitration clause is enforceable under the Federal Arbitration Act, regardless of whether a plaintiff was specifically aware of the scope of the clause, unless the plaintiff can show grounds for

revocation. Here, the plaintiff did not assert any grounds for revocation.

4. Where, as here, the Federal Arbitration Act applies, it preempts any state law or policy that specifically invalidates arbitration agreements. Therefore, the plaintiff's argument that the arbitration agreement violates Michigan public policy must fail.

Reversed.

1. PLEADING — MOTIONS — APPEAL.

A defendant generally must serve and file an answer or take other action permitted by law or the Michigan Court Rules within twenty-one days after being served with a summons and a copy of the complaint in Michigan; if, before filing a responsive pleading, the defendant brings a motion for summary disposition under MCR 2.116 and the motion is denied, the defendant must serve and file a responsive pleading within twenty-one days after notice of the denial; if the defendant files an application for leave to appeal within twenty-one days after notice of the denial, the time for filing the responsive pleading is extended until twenty-one days after the denial of the application unless the appellate court orders otherwise (MCR 2.108[A][1],[C][1]).

2. ARBITRATION — CONSTITUTIONAL LAW — FEDERAL ARBITRATION ACT.

The Federal Arbitration Act governs actions in both federal and state courts arising out of contracts involving interstate commerce; state courts are bound under the Supremacy Clause to enforce the substantive provisions of the act; the exclusionary clause of the act contained in 9 USC 1 that excludes application of the act to certain employees is limited to employees directly engaged in the movement of goods in interstate commerce (US Const, art VI, cl 2; 9 USC 1-15).

3. ARBITRATION — CONSTITUTIONAL LAW — FEDERAL ARBITRATION ACT — KNOWLEDGE OF ARBITRATION AGREEMENT.

The Federal Arbitration Act preempts any state law or policy that specifically invalidates arbitration agreements governed by the act; an arbitration clause in an agreement is enforceable under the act, regardless of whether a plaintiff is specifically aware of the scope of the clause, unless the plaintiff can show grounds for revocation (US Const, art VI, cl 2; 9 USC 2).

4. ARBITRATION — CONTRACTS.

A court, to ascertain the arbitrability of an issue, must consider whether there is an arbitration provision in the parties' contract,

> whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract; any doubts about the arbitrability of an issue should be resolved in favor of arbitration.

Morris & Doherty, P.C. (by *E. Michael Morris* and *Paul F. Doherty*), and *Morganroth & Morganroth* (by *Mayer Morganroth*), for the plaintiff.

Honigman Miller Schwartz and Cohn (by *Ronald S. Longhofer* and *Amy B. Folbe*), for the defendants.

Before: WAHLS, P.J., and HOLBROOK, JR., and FITZGERALD, JJ.

WAHLS, P.J. In this age discrimination and conversion action, defendants appeal by leave granted from an order denying their motion to compel arbitration. We reverse.

The facts of the underlying lawsuit are not at issue on appeal. Essentially, plaintiff worked for defendant Coopers & Lybrand, L.L.P., for over thirty years before he was terminated. Plaintiff then filed suit alleging that his termination was the product of age discrimination and that defendants wrongfully converted his former clients. It is undisputed that plaintiff signed an arbitration agreement in which he agreed to arbitrate certain claims against defendant Coopers & Lybrand. In response to plaintiff's complaint, defendants filed a motion to compel arbitration. The trial court denied defendants' motion without explanation. We granted defendants' subsequent application for leave to appeal.

Before addressing the trial court's decision to deny defendants' motion to compel arbitration, we must

address a procedural matter. Defendants did not originally file an answer to plaintiff's complaint. Instead, they filed their motion to compel arbitration, and, when their motion was denied, filed an application for leave to appeal. After defendants filed their application, plaintiff moved for entry of a default and entered a default below. Plaintiff then filed a motion to dismiss defendants' application for leave to appeal, arguing that, after the default, the court rules prohibited defendants from pursuing their appeal. In lieu of deciding plaintiff's motion to dismiss, this Court granted the application for leave to appeal and instructed the parties to address the issue in their appellate briefs. Having reviewed plaintiff's argument, we conclude that he misinterprets the court rules.

Generally, a defendant "must serve and file an answer or take other action permitted by law or these rules within 21 days after being served . . . ." MCR 2.108(A)(1). However,

> [w]hen a motion . . . is filed, the time for pleading set in [MCR 2.108(A)] is altered as follows, unless a different time is set by the court:
>
> (1) If a motion under MCR 2.116 made before filing a responsive pleading is denied, the moving party must serve and file a responsive pleading within 21 days after notice of the denial. However, if the moving party, within 21 days, files an application for leave to appeal from the order, the time is extended until 21 days after the denial of the application unless the appellate court orders otherwise. [MCR 2.108(C)(1).]

Here, despite plaintiff's protestations, defendants' motion to compel arbitration was a motion under

MCR 2.116. See MCR 2.116(C)(7).[1] Thus, once defendants filed a timely application for leave to appeal, the time for filing an answer was extended until after the application was resolved. Under these circumstances, plaintiff's entry of a default was improper, and we decline to dismiss defendants' appeal.[2]

Defendants raise only one issue on appeal. They argue that plaintiff signed a "Partners and Principals Agreement" containing a valid arbitration clause and, therefore, that the trial court erred in denying their motion to compel arbitration. We agree.

We review a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). The Federal Arbitration Act (FAA), 9 USC 1-15, governs actions in both federal and state courts arising out of contracts involving interstate commerce. *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995). To ascertain the arbitrability of an issue, a court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether

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[1] The fact that the motion was not labeled as one for summary disposition under MCR 2.116(C)(7) is irrelevant. MCR 2.116(C)(7) authorized the motion, regardless of how it was labeled.

[2] Alternatively, even if plaintiff's entry of a default had been proper, plaintiff has not cited anything in the court rules suggesting that a default divests this Court of jurisdiction to consider a properly filed application for leave to appeal.

the dispute is expressly exempt from arbitration by the terms of the contract. *Id.* Any doubts about the arbitrability of an issue should be resolved in favor of arbitration. *Id.*

Here, plaintiff signed a Partners and Principals Agreement that included the following arbitration clause:

> Any claim or controversy not specifically provided for in Section 12.2[3] arising out of the provisions of this Agreement, the interpretation thereof, or the practice, business or affairs of the Firm shall be settled by arbitration in New York, New York, in accordance with the rules of the American Arbitration Association then in effect. Judgment may be entered upon the award granted in such arbitration and such award may be enforced in any court having jurisdiction.

Another clause states that the agreement "shall be governed by the laws of the State of New York."

Defendants rely on the FAA for the proposition that the arbitration clause in the Partners and Principals Agreement is enforceable. Specifically, they rely on 9 USC 2, which states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable,

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[3] The parties appear to agree that § 12.2 does not apply to plaintiff's claims.

> and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Plaintiff argues that the FAA does not apply, citing 9 USC 1, which defines the term "commerce." That section provides, in part: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Defendants respond that the Partners and Principals Agreement is not an employment contract and that, even if it is, it is not a contract of a "class of workers engaged in foreign or interstate commerce." We believe that defendants have the better argument.

State courts are bound, under the Supremacy Clause, US Const, art VI, cl 2, to enforce the FAA's substantive provisions. *Kauffman v Chicago Corp*, 187 Mich App 284, 286; 466 NW2d 726 (1991). While there is some disagreement in the federal courts regarding the scope of the exclusionary language in 9 USC 1, it seems clear to us that it does not apply to the Partners and Principals Agreement in this case. Plaintiff simply cannot show that the agreement was a contract of employment of a "class of workers engaged in foreign or interstate commerce."

We have not found any Michigan cases addressing the scope of the exclusionary provision in 9 USC 1. However, the Sixth Circuit Court of Appeals has adopted a narrow construction of that clause. *Asplundh Tree Expert Co v Bates*, 71 F3d 592, 600-601 (CA 6, 1995). After a lengthy review of other cases, the court summarized its analysis:

> We conclude that the exclusionary clause of § 1 of the Arbitration Act should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are. We believe this interpretation comports with the actual language of the statute and the apparent intent of the Congress which enacted it. The meaning of the phrase "workers engaged in foreign or interstate commerce" is illustrated by the context in which it is used, particularly the two specific examples given, seamen and railroad employees, those being two classes of employees engaged in the movement of goods in commerce. [*Id.*]

We find the reasoning in *Asplundh* persuasive, and we adopt it as our own. Thus, we conclude that the exclusionary provision in 9 USC 1 is limited to employees directly engaged in the movement of goods in interstate commerce. Clearly, plaintiff is not such an employee, and the exclusionary provision does not apply to the Partners and Principals Agreement in this case.[4]

Plaintiff also argues that his claims are outside the scope of the agreement to arbitrate. Plaintiff's argument can succeed only if we adopt a very narrow reading of the arbitration clause. This, we decline to do. As noted above, any doubts about the arbitrability of an issue should be resolved in favor of arbitration. Here, the parties agreed to arbitrate claims "arising out of . . . the practice, business or affairs of the Firm

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[4] The parties also dispute whether the Partners and Principals Agreement is a "contract of employment" at all. Because it is clear that plaintiff is not a member of a class of workers engaged in foreign or interstate commerce, we need not address this issue.

. . . ." Plaintiff's claims are arguably covered by this language, and, resolving any doubts in favor of arbitration, the trial court should have granted defendants' motion to compel arbitration.

Plaintiff also asserts that he did not knowingly and voluntarily agree to arbitrate these claims. His argument rests on an opinion from the Ninth Circuit Court of Appeals, *Prudential Ins Co of America v Lai*, 42 F3d 1299 (CA 9, 1994), where the court concluded that an arbitration clause is not binding unless the plaintiffs "knowingly contract to forego their statutory remedies in favor of arbitration." *Id.* at 1305. With due respect to the Ninth Circuit Court of Appeals, there is nothing in the language of the FAA to support a "knowledge" requirement. Under the FAA, an arbitration clause "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 USC 2 (emphasis added). Thus, an arbitration clause is enforceable, regardless of whether a plaintiff is specifically aware of its scope, unless the plaintiff can show grounds for revocation. See *Beauchamp v Great West Life Assurance Co*, 918 F Supp 1091 (ED Mich, 1996).[5] Here, plaintiff has not asserted any

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[5] We agree with the sentiments expressed by the court in *Beauchamp, supra* at 1096, 1098:

> Fortunately, *Prudential* is not binding precedent because this court is not persuaded by its reasoning. The portions of the legislative history relied upon by the Ninth Circuit are slender reeds upon which to rest the weighty and novel conclusion that an arbitration clause is only binding when the claimant has actual knowledge that his particular employment discrimination claims will be covered by the agreement. This conclusion flies in the face of the language of the Civil Rights Act of 1991, the Supreme Court's opinion in *Gilmer*

grounds for revocation of the Partners and Principals Agreement, and the arbitration clause is enforceable.

Finally, plaintiff argues that the arbitration agreement violates Michigan public policy. Plaintiff relies on an opinion by Justice CAVANAGH in *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405; 550 NW2d 243 (1996), and on two subsequent cases from this Court, *Rushton v Meijer, Inc (On Remand)*, 225 Mich App 156; 570 NW2d 271 (1997), and *Rembert v Ryan's Family Steakhouse, Inc*, 226 Mich App 821; 575 NW2d 287 (1997). However, the FAA did not apply in any of these cases. *Heurtebise, supra* at 419; *Rushton, supra* at 166; *Rembert, supra* at 825.[6] This is a crucial distinction, because application of the FAA implicates the Supremacy Clause, which precludes us from applying our state constitution or laws to defeat

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[*v Interstate/Johnson Lane Corp*, 500 US 20; 111 S Ct 1647; 114 L Ed 2d 26 (1991)], and fundamental principles of contract law.

* * *

Accordingly, this court chooses not to treat *Prudential* as persuasive precedent, instead holding, consistently with *Gilmer*, that a party is generally chargeable with knowledge of the existence and scope of an arbitration clause within a document signed by that party, in the absence of fraud, deception, or other misconduct that would excuse the lack of such knowledge.

[6] We note that Justice CAVANAGH's opinion in *Heurtebise* was not binding on us initially, because it was signed by only three justices. However, the panel in *Rushton* adopted Justice CAVANAGH's opinion, making it binding on subsequent panels pursuant to MCR 7.215(H)(1). When the panel in *Rembert* addressed this issue, it declared a conflict with *Rushton*, pursuant to MCR 7.215(H)(2). The *Rembert* panel would have concluded that prospective arbitration agreements in employment contracts are not barred by public policy. *Rembert, supra* at 822-823. The opinion in *Rembert* has since been vacated, and a conflict panel has been convened. *Id.* at 821-822. However, the conflict panel has not yet issued a decision.

federal legislation. US Const, art VI, cl 2. Thus, as the United States Supreme Court has held, where the FAA applies, it preempts any state law or policy that specifically invalidates arbitration agreements. *Doctor's Associates, Inc v Casarotto*, 517 US 681, 686-688; 116 S Ct 1652; 134 L Ed 2d 902 (1996).[7] The Michigan public policy cited by Justice CAVANAGH in *Heurtebise* would specifically invalidate prospective arbitration clauses to the extent they apply to civil rights claims. Because the FAA applies in this case, this public policy is clearly preempted,[8] and plaintiff's argument must fail.

Because plaintiff's claims were subject to a valid and enforceable arbitration agreement under the FAA, the trial court erred in denying defendants' motion to compel arbitration.

Reversed.

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[7] As the Court noted in *Doctor's Associates*, state laws governing contracts in general do not conflict with the FAA simply because they also affect arbitration contracts. Such laws are not preempted. *Doctor's Associates, supra* at 686-687.

[8] Defendants also argue that Michigan public policy is inapplicable because New York law governs the agreement. Having concluded that federal law preempts Michigan public policy, we need not address this issue.

KERNEN v HOMESTEAD DEVELOPMENT COMPANY

Docket No. 205879. Submitted September 1, 1998, at Detroit. Decided November 17, 1998, at 9:05 A.M. Leave to appeal sought.

Lloyd and Donna Kernen brought an action in the Oakland Circuit Court against Homestead Development Company, alleging that the defendant's proposed discharge of treated wastewater into a wetland on its property would flow into a wetland located on the plaintiffs' adjoining property and thereby constitute a trespass, a nuisance, and a violation of the Michigan Environmental Protection Act (MEPA), MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.*, now part of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.1701 *et seq.*; MSA 13A.1701 *et seq.* The plaintiffs sought injunctive relief, future damages, and a reversal of the decision of the Department of Natural Resources, now the Department of Environmental Quality, to grant the defendant a permit under the National Pollution Discharge Elimination System (NPDES), 33 USC 1342, allowing the discharge of treated sewage. On cross-motions for summary disposition, the court, Joan E. Young, J., granted partial summary disposition for the plaintiffs with respect to the trespass claim, denying the request for injunctive relief and awarding nominal damages of $1. The court granted summary disposition for the defendant with respect to the nuisance and MEPA claims, affirmed the decision of the DNR to issue an NPDES permit to the defendant, and apportioned costs. The plaintiffs appealed the denial of a permanent injunction and the apportionment of costs, and the defendant cross appealed the grant of summary disposition to the plaintiffs with regard to their trespass claim.

The Court of Appeals *held*:

1. The trial court erred in granting summary disposition to the plaintiffs with regard to their anticipatory trespass claim. Because the trespass alleged by the plaintiffs was merely anticipatory, they had no cause of action for trespass on which summary disposition could have been granted. While an injunction may lie when a tort is merely threatened, a cause of action for damages will not. The trial court should have considered the plaintiffs' anticipatory trespass

claim only in the context of their request for injunctive relief. The trial court's grant of partial summary disposition for the plaintiffs was in error and must be reversed.

2. The trial court did not err in balancing the relative equities between the parties and in denying the requested injunction. Other than general claims that the value of their property will be lowered in the eyes of prospective purchasers and that they have a basic right to its exclusive use and possession, the plaintiffs presented no evidence that they will suffer any specific, let alone irreparable, harm to their property such that an injunction should have been issued.

3. The trial court erred in awarding damages because any claim for damages is premature inasmuch as the defendant has yet to discharge treated sewage.

4. The issue concerning the apportionment of costs is rendered moot by the reversal of the grant of partial summary disposition to the plaintiffs.

Affirmed in part and reversed in part.

1. TORTS — THREATENED TORTS — INJUNCTIONS — CAUSES OF ACTION.

An injunction may lie when a tort is merely threatened, but a cause of action for damages will not.

2. INJUNCTIONS — DISCRETIONARY RELIEF.

Injunctive relief is an extraordinary remedy that is issued at the discretion of a trial court and only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.

3. INJUNCTIONS — FACTORS.

Factors considered in determining the propriety of issuing an injunction include the nature of the interest to be protected, the relative adequacy to the plaintiff of injunction and of other remedies, any unreasonable delay by the plaintiff in bringing suit, any related misconduct on the part of the plaintiff, the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, the interests of third persons and of the public, and the practicability of framing and enforcing the order or judgment.

Rentrop, Vanderkloot, Haynes & Morrison, P.C. (by *Jeffrey K. Haynes* and *C. Thomas Ludden*), for the plaintiffs.

Winter, PLC (by *Stephen D. Winter* and *Ann Marie Uetz*), for the defendant.

Before: TALBOT, P.J., and FITZGERALD and YOUNG, JR., JJ.

YOUNG, JR., J. Plaintiffs appeal as of right an order denying their request for a permanent injunction that would prohibit defendant from discharging treated wastewater into a wetland on its property, which wastewater would then flow south into a wetland located on plaintiffs' property. Plaintiffs also appeal the trial court's decision to apportion costs. Defendant cross appeals the trial court's grant of summary disposition to plaintiffs with regard to their claim that the proposed discharge would constitute a trespass. We affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. INTRODUCTION

Plaintiffs and defendant own adjoining parcels of land in Holly Township that are divided by East Holly Road. Plaintiffs' parcel, located south of the road, consists of fifty-four acres, twenty-five of which are covered by a wetland (the "Lacey Lake north wetland").[1] Defendant's property is situated north of East Holly Road. Defendant's property also contains a wetland (the "Miner wetland") that is connected to plaintiffs' wetland to the south via a culvert that passes under East Holly Road. Natural accumulations of water (characterized by plaintiffs as "sheet flow") drain from defendant's property to plaintiffs' property

[1] Plaintiffs also own a second parcel that is not at issue here.

to the adjacent Lacey Lake, which is part of the Shiawassee River. The Shiawassee River, in turn, eventually flows into Lake Huron. Plaintiffs do not own all of the Lacey Lake north wetland; the wetland extends further south past their property to Lacey Lake itself.

B. DEFENDANT'S SEWAGE TREATMENT PLAN

Defendant planned to develop its property into a manufactured-home community and sought permission to connect its proposed development to the Village of Holly's municipal wastewater treatment system. After that request was denied, defendant successfully obtained a permit from the Michigan Department of Natural Resources (DNR) allowing defendant to discharge treated sewage into its Miner wetland.[2] As a consequence, such discharged treated sewage would flow south through the Miner wetland to the culvert under East Holly Road into plaintiff's Lacey Lake north wetland, and from there into adjacent Lacey Lake.

Defendant's permit was issued pursuant to the National Pollution Discharge Elimination System (NPDES), established under 33 USC 1342. The NPDES is part of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, 33 USC 1251 *et seq.* Under the water resources protection provisions of Michigan's Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq.*; MSA 13A.3101 *et seq.*, the DNR (now the Depart-

[2] It is undisputed that, under the permit the DNR issued, defendant would be allowed to discharge up to 166,000 gallons of effluent a day.

ment of Environmental Quality [DEQ]) is responsible for issuing NPDES permits in Michigan and ensuring that those permits comply with applicable federal law and regulations. See Michigan Environmental Law Deskbook, vol 1, § 4.3, p 4-4. Indeed, permits issued by the DNR are subject to review by the federal Environmental Protection Agency. See 33 USC 1342(b).

C. PROCEEDINGS BELOW

Plaintiffs initially challenged defendant's permit in administrative proceedings before the DNR. In addition to challenging the permit on the ground that it failed to comply with the requirements of the various water pollution statutes, plaintiffs also challenged the permit on the ground that it authorized an illegal trespass over plaintiffs' property. Plaintiffs' administrative challenges were dismissed, and the issuance of the permit was upheld. Significantly, the DNR held that the trespass claim fell outside its jurisdiction and constituted a private matter between the parties.

Before development could begin, plaintiffs filed suit against defendant in the Oakland Circuit Court, alleging that the planned discharge of treated sewage would constitute a trespass, a nuisance, and a violation of the Michigan Environmental Protection Act (MEPA), MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.* (the provisions of which are now contained in Article I, Part 17 of the NREPA, MCL 324.1701 *et seq.*; MSA 13A.1701 *et seq.*) Plaintiffs sought both injunctive relief and future damages. Plaintiffs also asked the trial court to reverse the DNR's decision granting the NPDES permit to defendant.

Following cross-motions for summary disposition, the trial court granted partial summary disposition to plaintiffs on their trespass claim, but granted summary disposition with regard to defendant on plaintiffs' nuisance and MEPA claims.[3] The trial court also affirmed the DNR's decision to issue the NPDES permit.[4] The court subsequently denied defendant's motions for reconsideration and relief from judgment. Following a hearing, the trial court denied plaintiffs' request for injunctive relief and awarded nominal damages of $1 on plaintiffs' trespass claim. In so doing, the court balanced the equities involved and determined that plaintiffs failed to show harm sufficient to warrant an injunction. Finally, the court apportioned costs among the parties to reflect the fact that plaintiffs prevailed on their trespass claim, while defendant prevailed on the nuisance and MEPA claims, as well as on plaintiffs' request for injunctive relief. See MCR 2.625(B).

II. ANALYSIS

A. DEFENDANT'S CROSS APPEAL

We first address defendant's cross appeal, in which it is contended that the trial court erred in granting

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[3] Plaintiffs do not appeal the dismissal of their nuisance and MEPA claims.

[4] Plaintiffs have not appealed the trial court's decision affirming the DNR's issuance of the NPDES permit. The clean water regulations at issue here apparently are sufficiently stringent that the treated discharge permitted is subject to the "near drinking water standard" and thus should not be harmful if consumed. Consequently, on appeal, plaintiffs focus not on the fact that the anticipated treated sewage will be actually harmful in an environmental sense, but on the *perceived* harm that disclosure of the fact that treated sewage flows through their property will have on the value of their property.

summary disposition to plaintiffs with regard to their anticipatory trespass claim. We agree, but for entirely different reasons than those advanced by defendant.

Because the trespass alleged by plaintiffs was merely *anticipatory*, plaintiffs had no cause of action for trespass for which summary disposition could have been granted. While an injunction may lie when a tort is merely threatened, see *Adkins v Thomas Solvent Co*, 440 Mich 293, 315; 487 NW2d 715 (1992), a cause of action for damages will not. See *Davidson v Bugbee*, 227 Mich App 264, 269; 575 NW2d 574 (1997) ("A cause of action accrues when all the elements of the claim have occurred and can be alleged in a proper complaint"). Thus, the trial court should have considered plaintiffs' anticipatory trespass claim only in the context of their request for injunctive relief. Any claim for actual trespass was premature. Therefore, the trial court's order granting partial summary disposition to plaintiffs was erroneous and must be reversed.

B. PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

Plaintiffs essentially maintain that the trial court erred in balancing the relative equities between the parties and in failing to enjoin the proposed discharge. We find no error.

"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." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992). Granting injunctive relief is within the sound discretion of the trial court. *Holland v Miller*, 325

Mich 604, 611; 39 NW2d 87 (1949); *Jeffrey*, *supra* at 263. We review the trial court's decision for an abuse of discretion. *Holly Twp v Holly Disposal, Inc*, 440 Mich 891 (1992); *Seifert v Buhl Optical Co*, 276 Mich 692, 699; 268 NW 784 (1936).

At the outset, we note that both parties make various arguments regarding the legal right, if any, of defendant to make the proposed discharge. Plaintiffs' position essentially is that *any* increase in the flow of surface water onto their property, regardless of its cleanliness, will constitute an invasion of their private property rights warranting an injunction. Defendant, on the other hand, maintains that, because the discharge is authorized by the DNR and the Lacey Lake north wetland is subject to regulation under the applicable clean water acts, plaintiffs have no right to object. Defendant also argues that the Lacey Lake north wetland is part of a natural watercourse and that defendant has the right as a riparian owner to increase the flow of water between the properties even if it is to plaintiffs' detriment. Finally, defendant argues that, even if the discharge constitutes a technical trespass, plaintiffs are not entitled to an injunction because the equities favor defendant.

We reject as unfounded defendant's claim that there can be no trespass because the Lacey Lake north wetland is subject to regulation by the DNR under the Clean Water Act and the water resources protection provisions of the NREPA, MCL 324.3101 *et seq.*; MSA 13A.3101 *et seq.*, and that defendant is "authorized" by the NPDES permit to discharge treated sewage into it. Defendant fails to cite any particular provision of the relevant statutes or any other authority for its

apparent belief that these statutes somehow preempt the common-law rights of the owner of a lower estate. Nor are we persuaded by defendant's argument that plaintiffs cannot object to the discharge because they do not "own" the water flowing through the wetland. For the reasons stated below, we also reject plaintiffs' argument that, because the part of the Lacey Lake north wetland located on their property is "private property," is not "navigable," and has not been "impressed with the public trust," defendant has no right to "enter" it by way of the proposed discharge.

Defendant's right, if any, to discharge treated wastewater into the Lacey Lake north wetland depends on the answer to the following question: Is the Lacey Lake north wetland part of a natural "watercourse,"[5] such that the rules regarding the rights of riparian[6] owners apply, or is this case governed by the rules relating to the flow of "surface water"[7] between adjoining properties? If the water flow can be charac-

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[5] Our Supreme Court has defined a "watercourse" as "'[a] natural stream of water fed from permanent or periodical natural sources and usually flowing in a particular direction in a defined channel, having a bed and banks or sides, and usually discharging itself into some other stream or body of water.'" *Grand Rapids & I R Co v Round*, 220 Mich 475, 478; 190 NW 248 (1922), quoting Black's Law Dictionary (2d ed).

[6] "Land which includes or is bounded by a natural watercourse is defined as riparian." *Thies v Howland*, 424 Mich 282, 287-288; 380 NW2d 463 (1985).

[7] "Surface waters" are defined as "waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence." *Fenmode, Inc v Aetna Casualty & Surety Co*, 303 Mich 188, 192; 6 NW2d 479 (1942). Such waters are lost by percolation, evaporation, or by reaching some definite watercourse or substantial body of water into which they flow. *Id.*

terized as a natural watercourse to which defendant has riparian rights, then defendant may make "reasonable use" of it. *People v Hulbert*, 131 Mich 156; 91 NW 211 (1902); *Thies v Howland*, 424 Mich 282, 288, n 3; 380 NW2d 463 (1985); *White Lake Improvement Ass'n v Whitehall*, 22 Mich App 262, 272, n 11; 177 NW2d 473 (1970). However, even if riparian rules apply, defendant cannot pollute the water, see *Dohany v Birmingham*, 301 Mich 30; 2 NW2d 907 (1942); *Attorney General ex rel Wyoming Twp v Grand Rapids*, 175 Mich 503; 141 NW 890 (1913), or unreasonably increase the flow to the extent that it floods plaintiffs' property. Cf. *Richards v Ann Arbor*, 152 Mich 15; 115 NW 1047 (1908); see also generally anno: *Right to drain surface water into natural watercourse*, 28 ALR 1262; 78 Am Jur 2d, Waters, § 13, pp 458-459, §§ 132-133, pp 580- 582.

On the other hand, if the law relating to the flow and disposition of surface waters applies, then the proposed discharge would arguably constitute at least a technical trespass. Under Michigan law, the owner of a lower or servient estate "must receive the surface water from the upper or dominant estate in its natural flow." *Bennett v Eaton Co*, 340 Mich 330, 335-336; 65 NW2d 794 (1954). However, it is equally clear that the owner of the upper estate has no right to increase the amount of water that would otherwise naturally flow onto the lower estate. *Id.* at 336-337; see also *Allen v Morris Bldg Co*, 360 Mich 214, 217; 103 NW2d 491 (1960); *Schmidt v Eger*, 94 Mich App 728, 738;

289 NW2d 851 (1980); *Lewallen v City of Niles*, 86 Mich App 332, 334; 272 NW2d 350 (1978).[8]

The problem in this case is that the precise character of the water flow between plaintiffs' and defendant's properties was never really litigated below. Indeed, defendant did not raise this issue until its motion for reconsideration of the trial court's grant of partial summary disposition to plaintiffs. Certainly, the trial court never ruled on the issue.[9] However, the resolution of this issue is not necessary for purposes of deciding whether the trial court correctly declined to issue an injunction. Even assuming that the Lacey Lake north wetland is *not* part of a natural watercourse, that it merely serves as an outlet for the periodic draining of natural surface waters accumulating on defendant's property, and that defendant therefore has no right to increase the flow of such water onto

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[8] The distinction between natural watercourses and outlets for the flow of surface waters was alluded to in *Gregory v Bush*, 64 Mich 37; 31 NW 90 (1887), where the Court stated:

> We do not think this ravine can be termed a natural watercourse. It is simply an outlet for surface water at certain seasons of the year. It has no defined bed or channel, with banks and sides. . . . It is therefore not governed by the well-settled rules applying to natural streams. No right can be claimed by defendant to run this water upon the land of complainant . . . because it is a water-course. He must therefore be governed by the law relating to the flow and disposition of surface water . . . . [*Id.* at 41.]

[9] We further note that, while the legal rules for determining what constitutes a "watercourse" as opposed to the natural flow of "surface waters" are well-defined, this is a determination that depends heavily on the facts of a given case. Compare *Hilliker v Coleman*, 73 Mich 170; 41 NW 219 (1889), and *Rummell v Lamb*, 100 Mich 424; 59 NW 167 (1894), with *Gregory v Bush*, 64 Mich 37; 31 NW 90 (1887).

plaintiffs' property, it is clear that plaintiffs failed to establish a right to injunctive relief at this time.

Citing *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 145; 500 NW2d 115 (1993), plaintiffs argue that the trial court erred in applying a balancing test. However, even were we to assume that the proposed discharge would constitute a technical trespass, as the trial court noted, the *Kratze* Court held only that a court "is *not bound* to engage in a balancing of the relative hardships and equities if the encroachment resulted from an intentional or willful act." *Id.* (emphasis added). We are not persuaded that the trial court erred in balancing the equities in this case. The general rule, as stated in *Kratze*, is that " 'the court will balance the benefit of an injunction to plaintiff against the inconvenience and damage to defendant, and grant an injunction or award damages as seems most consistent with justice and equity under all the circumstances of the case.' " *Id.* at 143, n 7, citing *Hasselbring v Koepke*, 263 Mich 466, 480; 248 NW 869 (1933); see also *Monroe Carp Pond Co v River Raisin Paper Co*, 240 Mich 279; 215 NW 325 (1927) (upholding denial of an injunction even though the plaintiff, a lower riparian owner, suffered compensable damages as a result of the defendant's pollution of a stream). Moreover, 4 Restatement Torts, 2d, §936, pp 565-566, cited with approval in *Kratze*, *supra* at 142, n 6, provides that the following factors be taken into account in determining the propriety of issuing an injunction:

(a) the nature of the interest to be protected,

(b) the relative adequacy to the plaintiff of injunction and of other remedies,

(c) any unreasonable delay by the plaintiff in bringing suit,

(d) any related misconduct on the part of the plaintiff,

(e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,

(f) the interests of third persons and of the public, and

(g) the practicability of framing and enforcing the order or judgment.

As the trial court noted in its written opinion, the water cases that plaintiffs cite in support of their request for an injunction all involve a showing of harm. See, e.g., *Ruehs v Schantz*, 309 Mich 245; 15 NW2d 148 (1944); *Peacock v Stinchcomb*, 189 Mich 301; 155 NW 349 (1915); *Bruggink v Thomas*, 125 Mich 9; 83 NW 1019 (1900); *A P Cook Co v Beard*, 108 Mich 17; 65 NW 518 (1895). Here, other than general claims that the value of their property will be lowered in the eyes of prospective purchasers and that plaintiffs have a basic right to its exclusive use and possession, plaintiffs presented no evidence that they will suffer any specific, let alone irreparable, harm to their property.[10] Moreover, plaintiffs do not dispute the trial court's finding that the harm to defendant in granting the injunction would be considerable.

Finally, on its face, the statutory provision, MCL 600.2919; MSA 27A.2919, that plaintiffs cite in support of their argument that injunctive relief for continuing trespasses has been codified, applies only to specific

[10] Plaintiffs' expert never attempted to quantify the harm that plaintiffs perceived would flow from the fact that treated and presumably environmentally harmless sewage would be discharged onto their property.

types of damage to land not at issue. In sum, we cannot say that the trial court abused its discretion in denying plaintiffs' request for an injunction. Accordingly, we affirm the trial court's decision in that regard.

C. DAMAGES

On the basis of its determination that plaintiffs' failed to show that any material harm would result from the proposed discharge, the trial court awarded nominal damages. However, as stated, *any* claim for damages is premature because defendant has not yet begun operating its proposed waste treatment facility. Therefore, the trial court erred in awarding even nominal damages to plaintiffs.[11]

D. COSTS

Finally, plaintiffs argue that the trial court erred in apportioning costs. However, because we reverse the trial court's grant of partial summary disposition to plaintiffs, this issue is moot. See *Michigan Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997).

Affirmed in part and reversed in part.

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[11] We do note that, in the event that the discharge of treated wastewater *does* commence and plaintiffs can show that they suffered harm as a result, nothing in this opinion should be construed as preventing plaintiffs from seeking another injunction or bringing a cause of action for damages.

CENTRAL CARTAGE CO v FEWLESS

Docket No. 199433. Submitted September 8, 1998, at Lansing. Decided November 20, 1998, at 9:00 A.M. Leave to appeal sought.

Central Cartage Co. and others brought an action in the Ingham Circuit Court against Terry L. and Susan A. Fewless and others, alleging several claims, including breach of fiduciary duty by Terry Fewless, a former employee of Central Cartage. At the close of the evidence, the trial court, Peter D. Houk, J., granted the defendants' motion for a directed verdict with regard to several claims and granted the plaintiffs' motion for a directed verdict with regard to their claim for commissions paid by a third party to defendant Susan A. Fewless, doing business as SKAN Consulting, while Terry Fewless was employed by Central Cartage. The jury found that Terry Fewless did not breach his fiduciary duty to Central Cartage after his termination and returned a verdict of no cause of action with regard to the remaining counts. The plaintiffs appealed from the court's judgment and order of no cause of action consistent with the jury verdict. The defendants cross appealed from the order directing the verdict with regard to the commissions paid to SKAN.

The Court of Appeals *held*:

1. The court properly denied the plaintiffs' motion for judgment notwithstanding the verdict or a new trial. In light of the fact that an agreement not to compete did not exist between Terry Fewless and Central Cartage, reasonable minds could differ regarding the question whether, after Terry Fewless was terminated and Central Cartage knew all the relevant facts surrounding the SKAN/third-party situation, Terry Fewless and a new company he incorporated after his termination from Central Cartage, Total Quality, Inc. (TQI), were free to pursue the commissions that the third party had been paying SKAN. Reasonable minds could also differ regarding whether TQI represented a usurpation of a business opportunity rightly belonging to Central Cartage.

2. This case is not governed by *Production Finishing Corp v Shields*, 158 Mich App 479 (1987). The facts distinguish this case from *Production Finishing*.

3. The plaintiffs' motion for judgment notwithstanding the verdict was properly denied with regard to their claim that, after his termination, Terry Fewless caused a customer of Central Cartage to pull its business from Central Cartage and direct it to one of TQI's customers. Reasonable minds could differ with regard to this issue.

4. The court properly instructed the jury.

5. The court properly granted a directed verdict in favor of the defendants with regard to the plaintiffs' allegation of a conspiracy between Terry and Susan Fewless, SKAN, and TQI to obtain and use proprietary information in an attempt to usurp the plaintiffs' corporate opportunities.

6. The court erred in denying the defendants' motion for offer of judgment sanctions under MCR 2.405 on the basis that, because the defendants' offer to stipulate the entry of a judgment provided that the proposed judgment was to be paid in installments, it was not for a "sum certain" as contemplated by the court rule. The order denying the motion for offer of judgment sanctions must be reversed and the matter must be remanded for consideration of the appropriate fees to be awarded.

7. The court properly granted the plaintiffs a directed verdict with regard to their claim for commissions paid to SKAN while Terry Fewless was still employed by Central Cartage. That part of the court's judgment and order must be affirmed. However, the matter must be remanded for correction of the judgment and order to reflect that the directed verdict was not against TQI, which was not in existence at that time.

8. The directed verdict against Susan Fewless and SKAN was properly granted with regard to their conduct before Terry Fewless was terminated by Central Cartage.

9. A directed verdict was properly granted against Terry Fewless with regard to the violation of his fiduciary duty to Central Cartage by diverting from Central Cartage the commissions earned by SKAN while Terry Fewless was employed by Central Cartage.

Affirmed in part, reversed in part, and remanded.

O'CONNELL, P.J., dissenting, stated that this case is not distinguishable from *Production Finishing*, where the Court of Appeals found that the plaintiff was entitled to a judgment as a matter of law because the defendant breached his fiduciary duties by diverting a corporate business opportunity for his own personal gain. Here, the court committed error requiring reversal in limiting the plaintiffs' damages to the period that Terry Fewless was employed by Central Cartage. The impropriety of Terry Fewless' amassing of profits from his appropriation of the plaintiffs' rightful business opportuni-

ties did not cease with the termination of the employment relationship. Any commissions earned from Terry Fewless' wrongful diversion rightfully belong to the plaintiffs. The order granting the plaintiffs a directed verdict should be affirmed and the matter should be remanded for a determination of the total profits acquired as a result of the breach of fiduciary duty and usurpation of corporate opportunity.

1. APPEAL — MOTIONS AND ORDERS — JUDGMENT NOTWITHSTANDING THE VERDICT.

The Court of Appeals reviews the denial of a motion for judgment notwithstanding the verdict by viewing the evidence and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party; the jury verdict must stand if reasonable jurors could honestly have reached different conclusions.

2. AGENCY — FIDUCIARY'S DUTY.

A fiduciary owes the principal a duty of good faith and may not act for personal benefit at the principal's expense during the course of the agency; all profits made in the execution of a fiduciary's agency belong to the principal; a fiduciary is accountable to the principal for any profit the fiduciary makes when the fiduciary personally acquires any pecuniary advantage from third parties by means of being the fiduciary.

3. PRETRIAL PROCEDURE — OFFERS OF JUDGMENT — WORDS AND PHRASES — SUM CERTAIN — INSTALLMENT PAYMENTS.

A written offer to stipulate the entry of a judgment that is unequivocal and for a specific amount and a specific rate of interest is a "sum certain" for purposes of MCR 2.405; the fact that a proposed judgment for a sum certain is to be payable in installments does not render the proposed judgment invalid or not for a sum certain.

Foster, Swift, Collins & Smith, P.C. (by *Robert E. McFarland* and *Kathryn M. Niemer*), for the plaintiffs.

Abood Law (by *Andrew P. Abood*), for the defendants.

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

NEFF, J. In this case involving allegations of a breach of fiduciary duty by an employee, plaintiffs, Central Cartage Co. (Central), CenTra, Inc., Central Transport, Inc., P.A.M. Transport, Inc. (P.A.M.), C.C. Eastern, Inc., and C.C. Southern, Inc., appeal from a judgment and order of no cause of action consistent with a jury verdict of no cause of action in favor of defendants Terry L. and Susan A. Fewless, Susan A. Fewless doing business as SKAN Consulting (SKAN), and Total Quality, Inc. (TQI). Defendants cross appeal from the trial court's directed verdict in favor of the plaintiffs regarding plaintiffs' claim for $55,000 received by SKAN from a third party while Terry Fewless was an employee of Central. We affirm in part, reverse in part, and remand.

I

Central is one of several wholly owned transportation subsidiaries of CenTra. The majority of Central's business is in the automotive industry, transporting parts from surrounding states to various automobile plants in Michigan. Because Michigan is considered an "inbound" state, one of Central's goals is to produce business going out of Michigan so that its trucks do not travel outward empty.

Terry Fewless began working for Central in 1976, eventually becoming regional vice president of automotive sales. Fewless secured Wyeth-Ayerst Laboratories (Wyeth) as a customer for Central. Wyeth produced baby formula and other nutritionals in a plant in Mason and needed to transport its products out of state; it was therefore an important account for Central. Various United States Department of Agriculture and Food and Drug Administration regulations

require that Wyeth's infant formula stay within a certain temperature range. Because Central had only "dry vans," rather than more costly steel-lined temperature-controlled trailers, Wyeth permitted Central to transport Wyeth freight only within a relatively small area. Central used cargo heaters on the trucks when needed in the winter months, with limited success.

In 1991, Fewless made a "single source" proposal to Wyeth on Central's behalf, in an attempt to obtain brokerage fees.[1] Fewless advised Central's owner/chief executive officer, Matty Moroun, of the potential for large revenues from Wyeth if Central were to obtain temperature-controlled trucks for more lengthy trips. According to Fewless, Moroun said that he was not interested, saying "That's not our type of business."[2]

In the spring of 1992, Wyeth became concerned about a potential nationwide railway strike. Representatives of Wyeth contacted Fewless for assistance in finding a temperature-controlled carrier who could handle Wyeth's freight on long interstate trips. Fewless learned that Navajo Express, one of Central's carriers for automotive parts, had a large fleet of temperature-controlled trailers and advised Navajo to contact Wyeth.[3]

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[1] This concept, developed in the mid-1980s with the deregulation of the trucking industry, involves providing administrative/analytical expertise and brokerage services to customers. In implementing the single source concept, Central seeks to direct business to one of its affiliates, but uses other carriers when necessary.

[2] It is generally understood that temperature-controlled trailers and dry vans constitute wholly different markets.

[3] At trial, Fewless testified that he advised Moroun about the opportunity to haul additional Wyeth freight, and that Moroun knew that Fewless had recommended that Wyeth contact Navajo in this regard.

Navajo offered Fewless a commission for sending the Wyeth business its way, but Fewless declined, apparently recognizing that it would be inappropriate because he was an employee of Central. Wyeth continued to use Navajo after the railway strike ended, and Fewless' wife, Susan, set up SKAN, which received a six to seven percent commission on the Wyeth freight transported by Navajo.[4] Fewless never advised Moroun that Susan was going to be an agent for Navajo with regard to Wyeth freight or that she was receiving commission payments from Navajo.

Realizing that there was great potential for profit in the field of temperature-controlled trucking, Fewless incorporated TQI, applied for a property broker's license, and signed a lease for office space in anticipation of establishing his own third-party logistics company. Fewless testified that he did not actually solicit any business for TQI while he was an employee of Central, and this assertion was confirmed by representatives of both Wyeth and Navajo.

In early December 1992, when confronted with rumors that he had started another company, Fewless admitted that his wife had formed a company that was receiving revenues from Navajo. Fewless tendered a resignation letter to Moroun, in which he stated his intention to start his own logistics company and his desire to maintain a close relationship with Central. On December 7, 1992, Central terminated

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[4] Conflicting evidence was presented regarding whether Navajo or Terry Fewless suggested that Susan set up SKAN. It is undisputed, however, that Susan had absolutely no prior experience in the trucking industry and that her sole duties for Navajo consisted of two to three hours a week of relatively simple paperwork. For her efforts, SKAN received over $63,000 from Navajo from April through December 1992.

Fewless' employment. Within a few months after Fewless left Central, TQI entered into written agreements with both Wyeth and Navajo.

Meanwhile, Central began losing more and more of Wyeth's business, which virtually ceased by the end of 1993. A representative of Wyeth testified regarding several temperature-related service failures that required a quarantine of its product, as well as a marked deterioration in the cleanliness of Central's trailers and poor driver attitudes. Wyeth instituted a new policy that required transportation in a temperature-controlled environment to prevent product freezing. Wyeth's position was that it would have continued to use Central or P.A.M. if they had provided temperature-controlled trailers, competitive rates, and competitive service.[5]

Plaintiffs filed a multiple count complaint against defendants, alleging breach of contract, a common-law obligation not to compete, intentional misrepresentation, innocent misrepresentation, silent fraud, conspiracy to commit fraud, interference with existing contractual relationships, interference with prospective business relations, interference with contractual relations, a right to an accounting, and breach of fiduciary duty.[6] At the close of the evidence, the trial court granted defendants' motion for a directed verdict with regard to several claims and granted plaintiffs' motion for a directed verdict

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[5] Although Central owned a few temperature-controlled trailers, they were primarily used to transport automobile windshields, and were never offered to Wyeth.

[6] Defendants filed a counterclaim, but all counts were either voluntarily withdrawn or were the subject of summary disposition in favor of plaintiffs.

regarding their claim for $55,000 paid by Navajo to SKAN while Fewless remained employed by Central. The jury specifically found that Fewless did not breach his fiduciary duty to Central after his termination and returned a verdict of no cause of action on all remaining counts.

II

Plaintiffs first argue that the trial court erred in denying their motion for judgment notwithstanding the verdict (JNOV) or a new trial. We disagree.

In reviewing the denial of a motion for JNOV, this Court views the evidence and all legitimate inferences that may be drawn from the evidence in a light most favorable to the nonmoving party. *Jones v Powell*, 227 Mich App 662, 676; 577 NW2d 130 (1998). "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

A

Plaintiffs insist that because the court held defendants liable for the $55,000 in commissions paid by Navajo while Fewless was employed by Central, defendants are also liable for all commissions paid by Navajo to SKAN, and later to TQI, after Fewless was terminated by Central. Specifically, plaintiffs argue that these subsequent commission payments were a mere continuation of Fewless' breach of his fiduciary duties. We disagree.

A fiduciary owes a duty of good faith to his principal and is not permitted to act for himself at his principal's expense during the course of his agency. *Pro-*

duction Finishing Corp v Shields, 158 Mich App 479, 486-487; 405 NW2d 171 (1987). A corollary to this rule is that all profits made in the execution of a fiduciary's agency belong to the principal *Id.* Accordingly, "[i]f an agent acquires any pecuniary advantage to himself from third parties by means of his fiduciary character, he is accountable to his employer for the profit made." *Id.* at 487; see also *Michigan Crown Fender Co v Welch*, 211 Mich 148, 159-160; 178 NW 684 (1920).

Without question, Fewless breached his fiduciary duties to Central by failing to advise that Navajo was paying SKAN commissions for Wyeth freight. However, we disagree with plaintiffs' assertion that, even after Fewless was terminated from his employment and had advised Central of the situation involving SKAN and Navajo, all future commissions also rightly belonged to Central ad infinitum. We find that, particularly in light of the fact that an agreement not to compete did not exist between Central and Fewless, reasonable minds could differ regarding the question whether, after Fewless was terminated and Central was armed with all relevant facts surrounding the SKAN/Navajo situation, Fewless and TQI were free to pursue these revenues. *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 382; 512 NW2d 86 (1994). Accordingly, the trial court properly denied plaintiffs' motion for JNOV.

B

Similarly, we find that reasonable minds could differ regarding the issue whether the temperature-controlled transportation brokerage company started by Fewless after his termination from Central repre-

sented a usurpation of a business opportunity rightly belonging to Central.

Plaintiffs insist that this question is governed by *Production Finishing, supra.* We find this reliance is misplaced. In *Production Finishing,* the defendant was the president of a steel polishing company that had long sought to purchase Ford Motor Company's steel polishing business. Upon learning that Ford was considering selling its polishing business, the defendant notified his employer of the opportunity and made an offer to purchase on the employer's behalf. Ford responded that it would not sell to the employer because it feared a monopoly in the area. The defendant then inquired into the possibility of purchasing the business for himself. Ford agreed, and the defendant made preparations to purchase the business without advising his employer that Ford had refused to sell to it and without stating his intention to purchase the business in his individual capacity. This Court held that the defendant breached his fiduciary duties and had diverted a business opportunity of the employer. In doing so, the Court stated that Ford's refusal to deal with the employer did not relieve the defendant fiduciary from liability when he failed to disclose the refusal to his principal. *Production Finishing, supra* at 489-490.

The facts in the present case are significantly different. Fewless repeatedly asked Moroun to consider purchasing refrigerated trailers in order to obtain longer routes and more Wyeth business. Although the evidence is conflicting, reasonable minds could find that Moroun flatly rejected the business opportunity because the trailers were too expensive and because his primary freight, automobile parts, could easily

damage the trailers. These facts distinguish this case from *Production Finishing*, *supra*, where the employer never wavered in its desire to obtain the business opportunity usurped by the employee.[7] Absent an agreement not to compete, Fewless was free, upon the termination of his employment, to use his skill, experience, and general knowledge to compete against Central in both the refrigerated trucking industry and the third-party logistics business. *SCD Chemical Distributors*, *supra* at 381.[8]

C

Plaintiffs argue that after his termination, Fewless caused Wyeth to pull its business from Central and direct it to one of TQI's customers. Our review of the record reveals ample evidence from which the jury could find that the reasons for Central's loss of Wyeth's business was a decline in service and a refusal to provide Wyeth with temperature-controlled trailers. Because reasonable minds could differ with regard to this issue as well, the trial court properly denied plaintiff's motion for JNOV.

III

Plaintiffs next challenge the jury instructions given by the trial court. Specifically, plaintiffs argue that certain special instructions tendered by them should

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[7] Moreover, testimony was presented that although Fewless incorporated TQI and made other preparations to establish his new business, he did not solicit any customers before his termination from Central. Although some evidence presented at trial tends to refute this fact, this was a question of fact properly left for the jury's consideration.

[8] Although plaintiffs suggest that Fewless used proprietary information of Central in establishing TQI, the evidence presented at trial regarding this was conflicting. Accordingly, a grant of JNOV would have been improper.

have been given, certain special instructions tendered by defendants should not have been given, and the order in which the instructions were given caused undue confusion among the jurors. We disagree.

Generally, a trial court may give an instruction not covered by the standard instructions as long as the instruction accurately states the law and is understandable, concise, conversational, and nonargumentative. *Bordeaux v Celotex Corp*, 203 Mich App 158, 169; 511 NW2d 899 (1993). Supplemental instructions need not be given if they would add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jury to decide the case intelligently, fairly, and impartially. *Mull v Equitable Life Assurance Society*, 196 Mich App 411, 422-423; 493 NW2d 447 (1992), aff'd 444 Mich 508; 510 NW2d 184 (1994). Moreover, it is error to instruct a jury with regard to a matter not sustained by the evidence or the pleadings. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). Jury instructions are to be reviewed in their entirety, and there is no error requiring reversal if, on balance, the theories of the parties and the applicable law were fairly and adequately presented to the jury. *Mull, supra* at 423.

We agree with the trial court that many of plaintiffs' special instructions were repetitious of other instructions given to the jury. The court incorporated portions of plaintiffs' instructions regarding the duties of a fiduciary into the charge given to the jury, thus affording plaintiffs the favorable language they desired while lessening the danger of repetition. The challenged instructions tendered by defendants regarding an employee's duty not to compete and Fewless' status as an employee at will were appropri-

ate in light of the evidence presented and the theories of the parties. Moreover, we find nothing in the order of the instructions that would have rendered them unduly confusing to the jurors.

After reviewing the jury instructions in their entirety, we conclude that the trial court presented the theories of the parties and the applicable law fairly and adequately. Accordingly, reversal is not warranted on this ground.

IV

Plaintiffs next argue that the trial court committed error requiring reversal when, after directing a verdict in favor of plaintiffs regarding the $55,000 paid by Navajo to SKAN before December 7, 1992, it advised the jury as follows:

> Earlier in this case I advised you that certain matters had been resolved and were no longer for you to consider. I will now advise you that the Defendant, Susan Fewless, has been resolved out of this case and you need not consider claims that relate to Susan Fewless.

Because plaintiffs cite no authority for their position, we deem this issue abandoned. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997). We note, however, that the court's advisement was neutral and in no way prejudiced plaintiffs.

V

Plaintiffs argue that the trial court erred in granting defendants' motion for a directed verdict with regard to count VI, which alleged a conspiracy between Terry Fewless, Susan Fewless, SKAN, and TQI to obtain and use proprietary information in an attempt to usurp

plaintiffs' corporate opportunities regarding Navajo and Wyeth. We disagree, because no evidence was presented that would support the conclusion that Susan Fewless or SKAN ever received, or conspired to obtain, proprietary information from the other plaintiffs. Because reasonable jurors could not have honestly reached different conclusions regarding this issue, the trial court's grant of a directed verdict with regard to this count was appropriate. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 524; 529 NW2d 318 (1995).

VI

Defendants raise the following issues on cross appeal.

A

Defendants first challenge the trial court's denial of their motion for offer of judgment sanctions pursuant to MCR 2.405. We agree that the trial court erred in determining that because the proposed judgment was to be paid in installments, rather than in a lump sum, it was not for a "sum certain" as contemplated by the court rule.

MCR 2.405(B) provides that, until twenty-eight days before trial, a party may serve on his opponent a written offer to stipulate the entry of a judgment. If the opponent rejects the offer and the adjusted verdict is more favorable to the offeror than the average offer, the offering party may recover actual costs from the offeree. MCR 4.205(A).

On May 16, 1995, defendants served on plaintiffs an offer to stipulate entry of judgment of $90,000, payable in three annual installments of $30,000 at eight

percent interest. Plaintiffs responded that they did not believe the offer to be valid for two reasons: it was untimely, and it was invalid because the judgment was to be paid in installments. On July 20, 1995, defendants filed a second offer, this time offering to stipulate entry of judgment in the amount of $250,000, payable in five annual installments of $50,000 at six percent interest. Plaintiffs filed a counteroffer of judgment dated August 7, 1995, offering to stipulate the entry of a judgment in the amount of $550,000.

At issue here is the definition of "offer" found in MCR 2.405(A)(1):

> "Offer" means a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued. If a party has made more than one offer, the most recent offer controls for the purposes of this rule.

Few cases have addressed the question of what constitutes a "sum certain" for purposes of MCR 2.405. In *Hessel v Hessel*, 168 Mich App 390, 395; 424 NW2d 59 (1988), this Court held that, in a divorce proceeding, a proposed property settlement did not constitute a "sum certain":

> The definition of an "offer" at MCR 2.405(A)(1), quoted above, refers to the offer of a sum certain. A proposed property settlement does not offer a sum certain; it offers a division of marital property. This case is illustrative: defendant "offered" plaintiff real estate, a car, household furnishings, and certificates of deposit which would presumably vary in worth depending on when they were withdrawn. In no sense of the phrase can these items be equated with a "sum certain." Even if the worth of the property were considered a "sum" for purposes of MCR 2.405, such worth is

by no means "certain," as this case also demonstrates. Defendant valued the property he offered plaintiff at $143,200, while the trial court's valuation of that same property was approximately $108,000.

In a more recent case, *Wilkins v Gagliardi*, 219 Mich App 260, 274; 556 NW2d 171 (1996), the trial court held that a defense offer for $500 "plus costs attributable to those portions of the plaintiffs' complaint that were not dismissed" was for a "sum certain" as required by MCR 2.405.

In *Haberkorn v Chrysler Corp*, 210 Mich App 354; 533 NW2d 373 (1995), this Court addressed another aspect of MCR 2.405(A) and distinguished an offer to settle and an offer of judgment. There, the defense offer, though including the amount of $500,000, merely expressed a willingness to settle, but did not express a willingness "to stipulate to the entry of a judgment in a sum certain," as required by the court rule.

Turning to the present case, we find that defendants' offer, which was for a specific amount ($250,000), and had a specific interest amount to be applied (six percent), constitutes a "sum certain" for purposes of MCR 2.405. Further, in contrast to the situation in *Haberkorn, supra*, defendants were not merely presenting an offer to settle. To the contrary, they unequivocally offered to enter into a stipulation of judgment.

Nor does the fact that the proposed judgment was to be payable in installments render it invalid for purposes of MCR 2.405. Nothing in the court rule prohibits a party from presenting an offer of judgment that is to be payable over time. Moreover, MCL 600.6201(1); MSA 27A.6201(1) provides that a judge

may enter an order permitting a defendant to pay in installments any judgment previously rendered in the judge's court. Thus, even if defendants' offer of judgment did not so provide, defendants easily could have petitioned the trial court for permission to pay the judgment in installments.

Plaintiffs argue that there is no certainty that all the installments will ever be paid, or that assets of defendants will be available in the case of bankruptcy proceedings. The risk of noncollection exists, however, for virtually every money judgment. Nothing in MCR 2.405 requires that the offer of judgment be "guaranteed collectible." Further, plaintiffs remain free to pursue all legal means for the collection of an installment judgment, save garnishment. MCL 600.6245; MSA 27A.6245.

In light of the purpose of MCR 2.405, which encourages parties to seriously engage in the settlement process and avoid prolonged litigation, *Freysinger v Taylor Supply Co*, 197 Mich App 349, 354; 494 NW2d 870 (1992), we hold that the trial court erred in determining that the inclusion of installments rendered defendants' offer of judgment invalid and not for a "sum certain." Accordingly, the trial court's order denying the motion for offer of judgment sanctions is reversed and the matter is remanded for consideration of the appropriate fees to be awarded pursuant to MCR 2.405.

B

Defendants challenge the trial court's grant of plaintiffs' motion for a directed verdict in the amount of $55,000, representing payments by Navajo to SKAN before Fewless' termination from Central. We affirm

the trial court's ruling, but remand this case to the trial court for correction of its written judgment to accurately reflect the court's judgment made on the record.

The trial court ruled that plaintiffs were entitled to the commission payments paid by Navajo to SKAN while Fewless was still employed by Central. Accordingly, the court orally granted plaintiffs' motion for a directed verdict against all defendants except TQI, which, the court stated, was not in existence at the time. The court's written order, however, states that the directed verdict is against all defendants.

1

Defendants argue that the court erred in granting a directed verdict against Susan Fewless and SKAN because, at that point in the trial, they were no longer parties to the lawsuit. Specifically, defendants note that, immediately before hearing plaintiffs' motion for a directed verdict, the court had granted defendants' motion for a directed verdict with regard to all counts involving Susan Fewless and SKAN.

We find defendants' argument is without merit. The record reveals that some of the proofs at trial were taken slightly out of order to accommodate witnesses and avoid needless repetition. As a result, plaintiffs' and defendants' motions for a directed verdict were heard at the same hearing by agreement of counsel. However, it is abundantly clear that the court's grant of a directed verdict in favor of defendants Susan Fewless and SKAN was for those claims regarding actions that occurred after December 7, 1992, when Fewless was terminated from his employment with Central. The trial court properly determined that

Susan Fewless and SKAN remained parties regarding their conduct that occurred before December 7, 1992.

2

Defendants also challenge the entry of a directed verdict against Fewless and state that evidence was presented that supports the conclusion that he did not breach his fiduciary duty to Central. We disagree.

Fewless recommended that Navajo contact Wyeth regarding Wyeth's refrigerated shipping needs in anticipation of the national railway strike. When Fewless declined compensation offered to him personally by Navajo, an alternate arrangement was set up whereby Susan Fewless and SKAN would receive commissions from Navajo for the Wyeth freight. The record establishes that the only reason Navajo chose Susan Fewless as its agent was because she could consult with Fewless.

As a fiduciary, Fewless owed Central a strict duty of good faith and was not permitted to engage in activities in the course of his duties for his own benefit. *Production Finishing, supra* at 486. In violation of these duties, Fewless diverted from Central $55,000 in commissions earned during the course of his employment. Reasonable minds could not find otherwise. Accordingly, the trial court's grant of a directed verdict with regard to this issue was proper.

3

Defendant TQI seeks relief from judgment pursuant to MCR 2.612(A)(1), which provides as follows:

> Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initia-

> tive or on motion of a party and after notice, if the court orders it.

Because this case is on appeal, the trial court may not amend the judgment except by order of this Court.

The purpose behind MCR 2.612(A)(1) is " 'to make the lower court record and judgment accurately reflect what was done and decided at the trial level.' " *McDonald's Corp v Canton Twp*, 177 Mich App 153, 159; 441 NW2d 37 (1989) (citation omitted). Here the written judgment does not comport with the trial court's intended and orally expressed ruling that the directed verdict was to be entered against all defendants except TQI. We thus remand this case to the trial court to correct the judgment to accurately reflect what was decided by the trial court.

VII

We reverse the trial court's denial of defendants' motion for offer of judgment sanctions and remand for consideration of the appropriate fees to be awarded pursuant to MCR 2.405. Also, pursuant to MCR 2.612(A)(2), we remand this case for correction of the trial court's written order granting plaintiffs' motion for a directed verdict. We affirm the judgment of the trial court in all other respects. We do not retain jurisdiction.

Affirmed in part, reversed in part, and remanded.

WAHLS, J., concurred.

O'CONNELL, P.J. (*dissenting*). The majority opinion adroitly distinguishes this case from *Production Finishing Corp v Shields*, 158 Mich App 479; 405 NW2d 171 (1987). I cannot join in that exercise. The facts of

Production Finishing are nearly identical to those of the present case. In *Production Finishing*, this Court summarized the situation as follows:

> Reasonable minds could not honestly disagree in this case. The facts indicate that plaintiff is entitled to a judgment as a matter of law. Shields breached his fiduciary duties to the corporation by diverting a corporate business opportunity for his own personal gain. Shields did so when he pursued the Ford polishing business and purchased the Ford equipment while president of Production Finishing without full disclosure to the corporation. [*Id.* at 485.]

This Court reversed the denial of the corporation's motion for judgment notwithstanding the verdict and remanded for further proceedings regarding damages for the defendant's breach of fiduciary duty and usurpation of corporate opportunity. Because the facts of *Production Finishing* are nearly identical to the facts in this case, I would do the same here.

Defendant Terry Fewless was regional vice president for automotive sales for plaintiff Central Cartage Co., which was affiliated with plaintiffs CenTra, Inc., Central Transport, Inc., and C.C. Southern, Inc. Fewless also acted as consultant for plaintiff P.A.M. Transport, Inc. Fewless was a trusted corporate officer. While working for plaintiffs, Fewless started another company in his wife's name and began diverting plaintiffs' potential business to his wife's company.[1] More specifically, Fewless was funneling corporate busi-

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[1] Reasonable minds cannot dispute that Fewless' wife, Susan, had no experience in the trucking industry and that the profits she earned were the result of Fewless' diversion of a corporate opportunity. Susan Fewless, doing business as SKAN Consulting, was simply the vehicle Fewless used to receive the profits from his personal cultivation of his employers' potential business opportunities.

ness opportunities to his wife's company without full disclosure to his employers.[2] When confronted with rumors that he had started a new company and was diverting corporate opportunities to his wife's company, Fewless offered to resign, but was instead abruptly terminated. Shortly thereafter, Fewless entered into written contracts with plaintiffs' customers to perform essentially the same work that he had done for them during the course of his employment with plaintiffs.

This complex case[3] went to trial on June 10, 1996. After fifteen days of trial, the parties rested their respective cases. The trial court then directed a verdict for plaintiffs in the amount of $55,000. That figure represented revenues received by Fewless' wife's company during the time that Fewless worked for plaintiffs. The trial court's decision regarding the motion for a directed verdict limited plaintiffs' damages to the period Fewless was employed by plaintiffs. In my opinion, the trial court committed error requiring reversal in limiting plaintiffs' damages to the period that Fewless was their employee.[4]

Plaintiffs' damages for Fewless' breach of fiduciary duty and usurpation of corporate opportunity are not properly limited to the profits Fewless earned from

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[2] While employed with Central Cartage, Fewless incorporated his own business, applied for his own broker's license, and entered into a lease for office space. For obvious reasons he did not disclose any of this information to plaintiffs, including Central Cartage.

[3] Although the original complaint contained numerous counts of alleged misconduct and the lower court file is extensive, in this opinion I address only the central error that occurred below.

[4] That error was then compounded by the trial court's failure to inform the jury that the court had granted a partial directed verdict for plaintiffs.

plaintiffs' customers while Fewless remained in plaintiffs' employ.

> "A corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for his own personal gain. The rule is that if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake which is, from its nature, in the line of the corporation's business and is of practical advantage to it, and which is one in which the corporation has an interest or a reasonable expectancy, and if, by embracing the opportunity, the self interest of the officer or director will be brought into conflict with that of this corporation, the law will not permit him to seize the opportunity for himself. If he does, the corporation may claim the benefit of the transaction." [*Production Finishing, supra* at 485-486, quoting 18B Am Jur 2d, Corporations, § 1770, pp 623-624, and citing 19 CJS, Corporations, § 785, p 161; anno: *Fairness to corporation where "corporate opportunity" is allegedly usurped by officer or director*, 17 ALR4th 479.]

In the present case, the trial court in essence determined that Fewless diverted a corporate business opportunity from his employers for his own personal gain. Although the trial court correctly ruled that Fewless had acted adversely to the interest of his employers, the court erred in limiting the calculation of damages to cover only the time when Fewless was employed by plaintiffs. The impropriety of Fewless' amassing of profits from his appropriation of plaintiffs' rightful business opportunities did not cease with the employment relationship. Any commissions earned from Fewless' wrongful diversion rightfully belonged to plaintiffs.

"If an agent acquires any pecuniary advantage to himself from third parties by means of his fiduciary

character, he is accountable to his employer for the profit made." *Production Finishing, supra* at 487. This rule applies to transactions "consummated after the fiduciary relationship is ended, if they began during the existence of the relationship or were founded on information or knowledge acquired during the relationship." 18B Am Jur 2d, Corporations, § 1774, p 627. As our Supreme Court has stated, " 'Except with the full knowledge and consent of his principal, an agent . . . cannot . . . take advantage of the knowledge acquired of his principal's business to make profit for himself at his principal's expense.' " *Stephenson v Golden (On Rehearing)*, 279 Mich 710, 736; 276 NW 849 (1937), quoting Mechem's Outlines of Agency (1901 ed), § 148.

Once the trial court determined that Fewless acquired a pecuniary advantage for himself from plaintiffs' customers through a breach of fiduciary duty, the trial court should have awarded damages based on a determination of the total amount of profits acquired as a result of the breach.

I would affirm the trial court's decision to grant plaintiffs a directed verdict in this case, and remand to the trial court for further proceedings consistent with this opinion. Fewless is accountable to his former employers for all profits flowing from his breach of fiduciary duty and usurpation of corporate opportunity.

PEOPLE v FOX (AFTER REMAND)

Docket No. 198890. Submitted November 3, 1998, at Grand Rapids. Decided November 20, 1998, at 9:05 A.M. Leave to appeal sought.

Jason M. Fox was convicted by a jury in the Mason Circuit Court of escape from jail while awaiting trial for a felony, of malicious destruction of police property, and of breaking and entering a building with intent to commit a felony. The testimony at trial established that a pane of glass in the exterior window of the cell that the defendant and others occupied had been broken, apparently from the inside, and that there were fresh cuts, apparently made by a hacksaw blade, on the bars of the window. It was also discovered that the perimeter fence surrounding the jail had been cut at a spot across from the window of the defendant's cell, so that the fence could be opened like a door. There was testimony by various other prisoners that the defendant broke out the window pane, that someone had handed something through the opening to the defendant, that the defendant had been observed trying to cut through the bars, and that the defendant had indicated that he intended to escape through the window. During the jury's deliberations, the defense counsel indicated to the court that after the prosecution had rested he had been supplied with materials relating to two statements given to the police by another prisoner, the first being to the effect that the prisoner had observed three individuals cut through the perimeter fence and pass things into the cellblock through the broken window and the second indicating that the prisoner had not been an eyewitness to the incident but had overheard conversations concerning the escape. The defense counsel argued that despite the inculpatory nature of the prisoner's statements, the defendant was prejudiced by the failure of the prosecution to provide the defense with these materials in a timely manner. The court, Richard I. Cooper, J., concluded that the defendant had not been prejudiced and denied any relief. The defendant appealed. The Court of Appeals, retaining jurisdiction, ordered the matter remanded to the trial court for the purpose of the making of a motion for a new trial. The trial court denied the motion for a new trial, concluding that the defendant's due process rights had not

been violated by the belated delivery of the materials relating to the statements made to the police by the prisoner, that there was sufficient evidence to support the conviction of malicious destruction of police property, that the convictions had not resulted in double jeopardy, and that there was no juror misconduct mandating reversal of the convictions.

After remand, the Court of Appeals *held*:

1. The defendant's assertion that he was denied due process by the prosecution's withholding of exculpatory information is without merit. The alleged exculpatory information consisted of interviews and notes of police investigators that, for the most part, would have been inadmissible hearsay if the defense had tried to use them at trial. The documents contain very little, if any, admissible evidence that is even arguably exculpatory, and the defendant has made no specific claims regarding the actual effect the late delivery of those documents had on the formulation of his defense.

2. The record fails to support the defendant's assertion that he was prejudiced by the prosecution's initial inclusion on its witness list of the prisoner who gave the two statements that were included among the late-delivered documents and members of that prisoner's family, only to be followed by the deletion of those names from the witness list just before trial. The trial court found, and the record supports, that the removal of those persons from the witness list was because they had recanted their statements and because of the inconsistencies in the stories told by the prisoner and his family.

3. Because the jury was fully informed that the defendant denied involvement in the attempted jail escape, the defendant was not prejudiced by the late delivery of an audio tape and the purported transcription of a conversation on that tape between the defendant and a prisoner who was wearing a concealed radio transmitter, a conversation in which the defendant disavowed knowledge of the attempted escape. Further, the defendant's Fifth Amendment right against self-incrimination was not violated by use of the radio transmitter under these circumstances.

4. The defendant was convicted of destruction of police property under the provisions of MCL 750.337b; MSA 28.609(2), which clearly makes the wilful and malicious destruction or injury of the personal property of a police department a felony. Because the statute clearly speaks only of the personal property of the police and the window that was the subject of this charge was part of the jail building and thus real property, the trial court erred in holding that the evidence adduced at trial supported the conviction of

destruction of police property. Accordingly, the conviction of destruction of police property must be vacated.

5. The defendant's conviction of both jail escape and breaking and entering with intent to commit a felony, the predicate felony of which being the jail escape, does not violate the constitutional prohibition against double jeopardy on the basis of multiple punishments for the same offense. The constitutional protection against double jeopardy on the basis of multiple punishments for the same offense is a restriction on a court's ability to impose punishment in excess of that intended by the Legislature, not a restriction on the Legislature's power to establish punishment. Because the offense of jail escape and the offense of breaking and entering involve violation of distinct societal norms, there is no indication that the Legislature intended the offense of jail escape to be subsumed in the offense of breaking and entering. Accordingly, the offenses may be considered to be separate and subject to multiple punishment, and there is no violation of the prohibition against double jeopardy.

6. The trial court did not abuse its discretion in denying the defendant's motion for a new trial based on the failure of two jurors to acknowledge during voir dire that they were acquainted at work with each other and a third juror, inasmuch as the defendant failed to demonstrate the jurors' impartiality was impaired by the fact that they had a common employer.

Vacated in part and affirmed in part.

1. CRIMINAL LAW — DESTRUCTION OF POLICE PROPERTY — JAIL WINDOWS.

The wilful and malicious destruction of a jail window will not support a conviction of the felony of destruction of personal property of a police department, a jail window being real property rather than personal property and the statute specifically limiting its scope to the destruction of personal property (MCL 750.337b; MSA 28.609[2]).

2. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — CRIMINAL LAW.

The constitutional protection against double jeopardy on the basis of multiple punishments for the same offense is a restriction on a court's ability to impose punishment in excess of that intended by the Legislature, not a restriction on the Legislature's power to establish punishment (US Const, Am V; Const 1963, art 1, § 15).

3. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — JAIL ESCAPE — BREAKING AND ENTERING WITH INTENT TO COMMIT A FELONY.

The conviction both of the offense of jail escape and of the offense of breaking and entering with intent to commit a felony, where the

predicate offense of the breaking and entering charge is the jail escape, does not violate the constitutional prohibition against double jeopardy; there is no indication that the Legislature did not intend that these two offenses should not be considered to be separate and distinct and subject to separate conviction and punishment (US Const, Am V; Const 1963, art 1, § 15; MCL 750.110, 750.197[2]; MSA 28.305, 28.394[2]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Cris VanOosterum*, Prosecuting Attorney, *Carole F. Barnett-Stopper*, Assistant Attorney General, for the people.

J. Nicholas Bostic, for the defendant.

AFTER REMAND

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

CAVANAGH, J. Defendant was convicted by a jury of escape while awaiting trial for a felony, MCL 750.197(2); MSA 28.394(2), of malicious destruction of police property, MCL 750.377b; MSA 28.609(2), and of breaking and entering of a building with intent to commit a felony, MCL 750.110; MSA 28.305. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to concurrent terms of five to fifteen years for the escape conviction, five to fifteen years for the malicious destruction of police property conviction, and eight to twenty years for the breaking and entering conviction. Defendant appeals as of right. We vacate defendant's conviction of malicious destruction of police property but affirm his remaining convictions and sentences.

On March 25, 1996, corrections officers at the Mason County Jail discovered a broken window in

one of the cells. Glass was found outside the window. A closer inspection revealed the presence of fresh cut marks on the window bars. Across from the broken window, the fence surrounding the jail had been cut so that it opened like a door. Three inmates, including defendant and Jeff Stakenas, occupied the cell with the damaged window.

Stakenas testified that defendant had told him that his "boys" were coming to get him out. Defendant told Stakenas that he was going to break the window so that his friends could pass a hacksaw blade through, at which point he would try to saw through the bars. One night Stakenas heard noises that he believed to be someone cutting through the outside fence. Defendant told Stakenas to watch the door for guards. Defendant then took Stakenas' crutch and used it to break out the window. Stakenas saw a gloved hand come through the window and pick out pieces of glass. Although Stakenas did not see anyone pass defendant hacksaw blades, he observed defendant trying to cut through the bars.

Craig Allen Cook, Jr., an inmate at the Mason County Jail, said that around the second week in March, defendant approached him and asked if he wanted to leave jail. Defendant told him that the window in his cell was broken, the fence outside was cut open, and he had hacksaw blades with which to cut the bars. Three days later, Cook testified, defendant told him he was going to get a .22 caliber pistol so he could get keys from a guard and asked Cook again if he wanted to escape. Cook never actually saw a gun or a hacksaw in defendant's possession.

Another inmate, Doug LeClair, stated that in early March defendant said that he did not plan on serving his time. Later, defendant informed LeClair that someone had come to the jail, cut the fence, broken the window, and handed him a gun through the opening because he was going to break out. After LeClair spoke with a detective, he talked to defendant while wearing a concealed radio transmitter. LeClair testified that he told defendant that authorities had questioned him about the escape, and defendant said something like "I don't know what you're talking about."

After the jury began deliberating, defense counsel noted that earlier that day, after the prosecution had rested, he had received the following items from the police: (1) an audio tape; (2) two partial transcript pages of the conversation purported to be on the tape; and (3) approximately thirty pages of supplemental reports from the sheriff's department, including reports regarding inmate Michael Thompson. The prosecutor conceded that defense counsel had not been provided with these items, but stated that he, the prosecutor, had not been in possession of the materials and that, in any case, the materials were not exculpatory. Defense counsel conceded that there was "obviously a lot of damaging material in there from Defendant's standpoint," but argued that even if the information were not exculpatory, it might have led to exculpatory evidence, and furthermore the information might have affected whether defendant testified at trial. The trial court concluded that defendant had not been prejudiced and denied any relief. The jury subsequently found defendant guilty

of escape while awaiting trial for a felony, of malicious destruction of police property, and of breaking and entering of a building with intent to commit a felony.

At a posttrial hearing to expand the record, Cris VanOosterum, the prosecutor at defendant's trial, reiterated that he had not received copies of the materials until after they had been given to defense counsel. In addition, VanOosterum testified that he had been informed that Thompson wanted to make a statement in connection with the attempted escape and had directed the sheriff's department to take his statement. Later, VanOosterum was approached by Thompson's mother, who reported that Clay Fox had told her that he, his brother Brian, Tommy Green, and a fourth person had broken into the Mason County Jail yard on more than one occasion to help defendant escape. On another occasion, when her daughter was present, Clay Fox told Ms. Thompson that he and others were responsible for the attempt to break defendant out of jail. VanOosterum shared all this information with defense counsel. However, the morning of the trial, Ms. Thompson told VanOosterum that she could not remember anything and, if she were called as a witness, that would be the extent of her testimony. Accordingly, VanOosterum informed defense counsel that he would not be calling the Thompsons as witnesses.

Subsequently, defendant moved for a new trial. At the hearing concerning defendant's motion, Detective Jordan Hartley testified that Thompson had indicated that he had information regarding the cutting of the security fence at the jail. Thompson stated that he

had witnessed Brian Fox, Clay Fox, and an unknown female cutting the fence and passing things into the cellblock through a broken window. Hartley told Thompson that he would have to take a polygraph examination; Thompson initially agreed but later changed his mind. Subsequently, Thompson told Hartley that Tommy Green, rather than an unidentified female, had accompanied Brian and Clay Fox. In addition, Thompson denied being an eyewitness to the incident, saying that he had merely overheard conversations regarding the escape. Hartley stated that no agreements were made with Thompson in exchange for his testimony or cooperation.

Thompson testified that he became an inmate at the Mason County Jail in July of 1996. He contacted the police regarding the March escape attempt in hopes of obtaining a deal for himself. Both of the statements that he gave Hartley were untrue; he had not witnessed the incident and had not taken part in conversations about it until afterward. Thompson stated that the police encouraged him to lie and told him that he would have to say that he had been an eyewitness. Thompson acknowledged that the police had told him that he would have to take a lie detector test.

The trial court denied defendant's motion for a new trial. The court concluded that defendant's right to due process had not been violated by the belated delivery of the materials because defendant had not been prejudiced. The court reasoned that the use of Thompson's testimony would have been problematic because it was clear that he went into the interviews seeking a deal, and his claim that the police told him

what to say was "dramatically inconsistent" with their insistence that he take a polygraph test. The trial court also rejected defendant's claims regarding the sufficiency of the evidence in support of the conviction of malicious destruction of police property, double jeopardy violations, and juror misconduct.

I

Defendant first argues that he was denied due process because the prosecutor, in violation of a discovery request, withheld exculpatory information. A defendant has a due process right of access to certain information possessed by the prosecution. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In order to establish a *Brady* violation, a defendant must prove (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281; ___ NW2d ___ (1998).

After carefully reviewing the record, we find no *Brady* violation. The alleged exculpatory information consists of interviews and notes by police investigators that would for the most part have been inadmissible hearsay if the defense tried to offer them. The documents contain very little, if any, admissible evidence that is even arguably exculpatory. In determining the materiality of undisclosed information, a

reviewing court may consider any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. *Id.* However, although defendant makes general observations concerning how the delayed disclosure of materials *can affect* defense strategy, he makes no specific claims regarding the *actual effect* of the late delivery of the materials on his defense. We note that defendant was able to recall at least one witness and question him regarding information contained in the materials. Moreover, defendant did not request a continuance because of his belated receipt of the materials.

Defendant contends that he was prejudiced by late disclosure of the materials because the prosecutor included Thompson, his mother, and his sister on the witness list he supplied to defense counsel during the week immediately preceding trial, but then abruptly dropped them from his list immediately before trial. Defendant contends that the prosecutor was "bluffing" and asserts that this tactic might have affected the defense strategy, including the decision whether defendant would testify, and led defense counsel to waste time preparing for testimony that the prosecutor had no intention of using. However, defendant fails to explain how this allegation of prosecutorial misconduct is related to the late delivery of the various items. Moreover, defendant points to no evidence that establishes that the prosecutor included the Thompsons on his witness list only for tactical reasons. The trial court found that the prosecutor decided not to use the Thompson witnesses because they had recanted their statements and because of

inconsistencies in their stories. The trial court found the prosecutor to be credible; we will not disturb this finding. See *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997).

Defendant also argues that he was prejudiced by the late delivery of the materials because during the presentation of the prosecution's case he was unaware of Tommy Green's alleged threats to several inmates. We find no indication that evidence favorable to defendant was thereby suppressed. At the hearing concerning defendant's motion for a new trial, Thompson denied telling Hartley that he lied because he was afraid of Green. Defendant failed to call LeClair, Cook, and Stakenas at the hearing concerning his motion for a new trial to establish whether their testimony had been influenced by threats from Green.[1]

Defendant next contends that the transcript of the recording made of the conversation between LeClair and defendant was exculpatory because defendant denied involvement in the attempted jail escape. However, defendant elicited the substance of that exchange when LeClair testified as a defense witness.[2] Because the jury was informed that defendant

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[1] Defendant also contends that Hartley testified falsely when he stated at trial that he interviewed only two inmates, Cook and LeClair. At the hearing concerning defendant's motion for a new trial, Hartley stated that he also interviewed Thompson and another inmate. Hartley explained that at trial he had answered the question in the context of what he had done on the initial day of the investigation; he had interviewed Thompson and the other inmate at a later time. While Hartley's description of his investigation was incomplete, we do not find that a new trial is required. Defendant has failed to demonstrate that Hartley's testimony resulted in the suppression of evidence favorable to him. See *Brady*, *supra*.

[2] The trial transcript contains the following passage from LeClair's testimony as a defense witness:

had disavowed knowledge of the attempted escape, we conclude that defendant was not prejudiced by the tardy delivery of the transcript.

Defendant also argues that the prosecution violated his Fifth Amendment right against self-incrimination by outfitting another prisoner with a concealed radio transmitter to have a conversation with defendant while defendant was in custody. However, the United States Supreme Court has held that *Miranda*[3] warnings were not required where a law enforcement officer posed as a fellow inmate of a suspect in order to obtain information because the situation did not involve the coercive atmosphere of questioning by a

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Q. Did you have conversations with Mr. Fox while you were wearing the wire?

A. Yeah, I said something to him when we were going through the library on the way back to east cell.

Q. Did you testify this morning "no" when that question was asked of you?

A. Yes.

Q. I'll give you a chance; did you have conversations with him while you had the wire on?

A. I said something to him on the way through. Depends on what you call conversation. If we were sitting down talking, no, we weren't. When I come out of the, there was a room there where they put the wire on, and the library is right next to it. I come out, there was a bunch of people there going into the library at that time. And Jason was standing there. And I was standing there. And I said, "Jason, they're trying to"—or I said, " Jason, they called me in there and asked me questions about the Jail Escape or attempted Escape", whatever it is. And Jason heard me say that. He took off to the other side of the library. And from there I went to my cell.

Q. He didn't respond to your question?

A. Yeah, I think he said something. I'm not real positive on this. And I think he said something like, "I don't know what you're talking about" or whatever. But that was the extent of it. If that is a conversation, I mean that's the extent of it.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

known police officer. See *Illinois v Perkins*, 496 US 292; 110 S Ct 2394; 110 L Ed 2d 243 (1990). Similarly, we find no violation of the right against self-incrimination based on another prisoner's surreptitiously acting as a police agent while conversing with defendant.

II

Defendant next contends that there was insufficient evidence to support his conviction of malicious destruction of police property. This conviction was predicated on the breaking of the window in the county jail. Defendant maintains that the window constituted "real property," while MCL 750.377b; MSA 28.609(2) refers only to "personal property."

MCL 750.377b; MSA 28.609(2) provides:

> Any person who shall wilfully and maliciously destroy or injure the *personal property* of any fire or police department, including the Michigan state police, shall be guilty of a felony. [Emphasis added.]

On appeal, we review de novo questions of law regarding statutory interpretation. *People v Sheets*, 223 Mich App 651, 655; 567 NW2d 478 (1997). Our goal in interpreting statutes is to ascertain the intent of the Legislature. The first criterion in determining the Legislature's intent is the specific language of the statute. If the plain and ordinary meaning of the language is clear, judicial construction is normally neither permitted nor necessary. *Id.* at 656. In interpreting statutes, words are to be given their common, generally accepted meaning. The court should presume that every word has some meaning and should avoid any construction that would render a statute, or

any part of it, surplusage or nugatory. *People v Nickerson*, 227 Mich App 434, 439; 575 NW2d 804 (1998).

In Black's Law Dictionary (6th ed), p 1217, "personal property" is defined as "everything that is the subject of ownership, not coming under denomination of real estate." "Real property" is defined as "[l]and, and generally whatever is erected or growing upon or affixed to land." *Id.* at 1218. A fixture is not personal property, but rather is part of real property. *Wayne Co v Britton Trust*, 454 Mich 608, 615; 563 NW2d 674 (1997). Property is a fixture if (1) it is annexed to the realty, whether the annexation is actual or constructive, (2) its adaptation or application to the realty being used is appropriate, and (3) there is an intention to make the property a permanent accession to the realty. *Id.* at 610. Under this definition, the window of a building clearly constitutes a fixture and thus is an item of real property, not personal property.

The trial court noted that there was "a legislative deficiency in language" but found that MCL 750.377b; MSA 28.609(2) proscribed the breaking of the window at issue. We conclude that the trial court erred in failing to apply the statute as written. MCL 750.377b; MSA 28.609(2) uses the term "personal property" and is therefore inapplicable to the destruction of real property such as the window of the county jail. To construe MCL 750.377b; MSA 28.609(2) as applying to real property would be to read the statute as if it simply stated "property," rather than "personal property." Such a construction violates the established rule of statutory interpretation providing that every word in a statute has meaning and no word should be rendered

nugatory. See *Nickerson, supra.* Accordingly, because the evidence presented at trial related to the destruction of real property, rather than personal property, we vacate defendant's conviction of malicious destruction of police property.[4]

We recognize that our decision leads to the anomalous result that the destruction of real property of a police or fire department is treated less seriously than the destruction of personal property.[5] However, this outcome is dictated by the plain language of the statute. If a change is to be made, it must be done by the Legislature and not by the courts.

III

Defendant next asserts that the use of prison escape as the predicate offense for breaking and entering with intent to commit a felony violated the prohibitions against double jeopardy in the United States and Michigan Constitutions, US Const, Am V; Const 1963, art 1, § 15.[6] A double jeopardy issue constitutes a question of law that is reviewed de novo on

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[4] Defendant also argues his conviction of malicious destruction of police property was not supported by the evidence because the jail building, and thus the window, was owned by the county and not by any police or fire department. Because we have already determined that defendant's conviction must be vacated, we do not address whether the window at issue constituted the property of a police department.

[5] The conduct at issue would be subject to prosecution under MCL 750.380; MSA 28.612, which prohibits wilful and malicious destruction or injury to the building of another with the crime being a felony if the damage is over $100, a misdemeanor if the damage is $100 or less.

[6] Defendant also argues that his convictions of both malicious destruction of police property and breaking and entering violated the constitutional prohibition against double jeopardy. However, because we have already vacated defendant's conviction of malicious destruction of police property, resolution of this issue is unnecessary.

appeal. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

One of the protections of the Double Jeopardy Clauses of the United States and Michigan Constitutions is to prohibit the state from imposing multiple punishments for the same offense. *North Carolina v Pearce*, 395 US 711, 717-719; 89 S Ct 2072; 23 L Ed 2d 656 (1969); *People v Sturgis*, 427 Mich 392, 399; 397 NW2d 783 (1986). The constitutional protection against multiple punishment for the same offense is a restriction on a court's ability to impose punishment in excess of that intended by the Legislature. Because the Legislature has the sole power to define crime and fix punishment, the Double Jeopardy Clause is not a limitation on the Legislature's power to establish punishment. *People v Price*, 214 Mich App 538, 541; 543 NW2d 49 (1995). Accordingly, even if the crimes are the same, a double jeopardy challenge based on multiple punishment will not succeed if it is evident that the Legislature intended to authorize cumulative punishments. In determining legislative intent, a court must identify the type of harm the Legislature was intending to prevent. Statutes prohibiting conduct that violates distinct societal norms generally can be viewed as separate and as permitting multiple punishments. *Id.*

We find no double jeopardy violation. The elements of breaking and entering an occupied dwelling with intent to commit a felony are as follows: (1) a breaking and entering; (2) of an occupied dwelling; and (3) with felonious intent. *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996). In contrast, the jail escape statute requires a

showing that (1) the defendant was lawfully imprisoned in a jail or other place of confinement while awaiting legal proceedings or transfer to prison and (2) the defendant broke or attempted to break the jail or place of confinement, regardless of whether an escape was actually made. MCL 750.197(2); MSA 28.394(2). Each statute protects against different societal norms. The breaking and entering statute applies to all occupied buildings. In contrast, the jail escape statute is specifically directed at maintaining the security of jails, thereby protecting the public from accused persons likely to be dangerous, as well as ensuring that accused persons appear at legal proceedings and convicted persons remain confined.

Defendant argues that because the maximum punishment for breaking and entering is ten years, and the maximum punishment for jail escape is four years, the Legislature could not have intended multiple punishment for the two offenses. However, although there is a difference in the length of possible punishment, that fact is not dispositive where one crime does not build on the elements of the other, imposing a greater sentence for aggravating factors. *People v Robideau*, 419 Mich 458, 487-488; 355 NW2d 592 (1984). There is no indication that the Legislature intended the crime of prison escape to be subsumed in the offense of breaking and entering. Accordingly, we find that defendant's convictions of jail escape and breaking and entering an occupied building with the intent to commit a felony do not violate double jeopardy.

IV

Defendant next argues that the trial court abused its discretion in denying defendant's motion for a new trial because of juror misconduct. Before this Court will order a new trial on the ground of juror misconduct, some showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury. *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998).

Defendant asserts that he is entitled to a new trial because two jurors did not acknowledge that they were acquainted with each other and a third juror. The third juror did state that he knew two other people on the jury; however, defense counsel did not ask any additional questions.[7] All three jurors testified at the hearing concerning defendant's motion for a new trial. The three jurors all worked for the same employer; however, none of the three had supervisory control over either of the others. Although they were acquainted from work, they did not socialize together. Each juror testified that knowing the two other jurors affected neither his or her ability to remain impartial nor the partiality of the jury as a whole. The trial court noted that in a rural county it was likely that people would know each other and found that there was no evidence that defendant had been prejudiced. Because defendant has not demonstrated that the jurors' impartiality was impaired, we conclude that the trial court did not err in denying defendant's motion for a new trial.

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[7] At the hearing concerning defendant's motion for a new trial, defense counsel testified that he did not hear the juror state that he knew two other jurors.

V

Finally, defendant argues that he is entitled to a new judge on remand. We have not found that remand is required. We briefly note, however, that even if remand were necessary, we would not find that disqualification of the trial judge is warranted. The record does not reflect a showing of actual bias or prejudice against defendant. See *People v Gomez*, 229 Mich App 329, 331; 581 NW2d 289 (1998). Contrary to defendant's argument, repeated rulings against a litigant do not require disqualification of a judge. See *People v Houston*, 179 Mich App 753, 759; 446 NW2d 543 (1989).

Defendant's conviction of malicious destruction of police property is vacated. Defendant's remaining convictions and sentences are affirmed.

CHAMBERS v TRETTCO, INC

Docket No. 202151. Submitted June 10, 1998, at Lansing. Decided November 20, 1998, at 9:10 A.M. Leave to appeal sought.

Robyn Chambers brought an action in the Washtenaw Circuit Court against Trettco, Inc., and ADP, Inc., alleging that Trettco, her former employer, is vicariously liable under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, for workplace sexual harassment of the plaintiff by her Trettco supervisor. The court, Donald E. Shelton, J., denied a motion by Trettco for a directed verdict and thereafter entered judgment on a jury verdict for the plaintiff. Trettco appealed.

The Court of Appeals *held*:

1. The evidence presented at trial supported a finding of hostile work environment based on several severe or pervasive acts of harassment by the supervisor.

2. An employer is subject to vicarious liability to a victimized employee for a hostile work environment created by a supervisor. When no tangible employment action is taken against the employee, the employer may raise an affirmative defense to liability or damages by showing that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. In this case, the jury, on the basis of ample evidence, found that Trettco failed to take prompt remedial action after it knew or should have known of the hostile work environment created by the supervisor.

3. Any error made by the trial court in instructing the jury that an employer is strictly liable if a supervisor sexually assaults or molests an employee through the exercise of supervisory power was harmless in view of the ample evidence of hostile work environment supportive of a finding of vicarious liability on the part of Trettco, and in view of the fact that the jury did not specifically find strict liability.

Affirmed.

O'CONNELL, J., dissenting, stated that vicarious liability of an employer for sexual harassment in the form of hostile work envi-

ronment requires a showing by the plaintiff that a recurring problem existed or a repetition of an offending incident was likely and the employer failed to rectify the problem upon adequate notice. In this case, a telephone conversation between the plaintiff and a Trettco regional director did not constitute actual or constructive notice of the claimed sexual harassment. The conversation did not alert the regional director that the plaintiff was being sexually harassed, but only that she had an unspecified problem at work. The plaintiff also failed to establish quid pro quo sexual harassment. Accordingly, Trettco should not be held liable for sexual harassment.

CIVIL RIGHTS — SEXUAL HARASSMENT — HOSTILE WORK ENVIRONMENT — SUPERVISORS — EMPLOYER LIABILITY.

An employer is subject to vicarious liability to a victimized employee for a hostile work environment created by a supervisor; when no tangible employment action is taken against the employee, the employer may raise an affirmative defense to liability or damages by showing that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise; no affirmative defense is available when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*).

Garris, Garris, Garris & Garris, P.C. (by *Steven Z. Garris*), for Robyn Chambers.

MacDonald and Goren, P.C. (by *Cindy Rhodes Victor* and *Lawrence C. Atorthy*), for Trettco, Inc.

Before: JANSEN, P.J., and MARKEY and O'CONNELL, JJ.

JANSEN, P.J. Defendant[1] appeals as of right from a jury's verdict in favor of plaintiff in this sexual harassment case. We affirm.

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[1] Because defendant Trettco, Inc, doing business as HDS, is the only defendant involved in this appeal, the use of the term "defendant" will refer solely to Trettco.

Defendant, a corporation engaged in managing food service operations for various businesses, hired plaintiff as a temporary cook in June 1995, intending to use plaintiff in various locations pending possible placement in a permanent position. Defendant initially assigned plaintiff to take the place of a cook at ADP, Inc., in Ann Arbor. During this assignment, while the regular on-site supervisor was on vacation, defendant assigned a temporary supervisor, Paul Wolshon. According to the evidence at trial, Wolshon immediately commenced a pattern of sexually harassing plaintiff. Plaintiff filed suit against defendant, alleging assault, sexual assault, sexual harassment, and retaliatory discharge. Plaintiff agreed to dismiss her claims of assault and sexual assault at the close of her proofs at trial, and she withdrew her claim of retaliatory discharge before closing argument. The jury found in plaintiff's favor with respect to her claim of sexual harassment.

This appeal essentially concerns an employer's vicarious liability (respondeat superior) in a sexual harassment case brought under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* The arguments made by the employer in this case have been squarely rejected by the United States Supreme Court in *Burlington Industries, Inc v Ellerth*, 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998), and *Faragher v Boca Raton*, 524 US ___; 118 S Ct 2275; 141 L Ed 2d 662 (1998).[2] The Supreme Court held that the labels "quid pro quo" and "hostile work environ-

[2] Our Supreme Court has noted that "[o]ur courts have consistently relied on the federal judiciary for guidance when addressing the Michigan Civil Rights Act." *Koester v Novi*, 458 Mich 1, 11-12; 580 NW2d 835 (1998).

ment" are not controlling for purposes of establishing employer liability. *Ellerth*, *supra*, 141 L Ed 2d 648, 655. However, for any sexual harassment preceding the employment decision to be actionable, the conduct must be severe or pervasive. *Id.*, p 648. Further, an employer can be liable for a supervisor's sexual harassment where the employer's own negligence is a cause of the harassment. *Id.*, p 651. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. *Id.*

First, defendant's claim that plaintiff failed to establish a claim of sexual harassment in the form of hostile work environment is meritless.[3] During a one-week period in July 1995, Paul Wolshon, a "float manager" (but not plaintiff's full-time manager) engaged in numerous incidents of sexually harassing plaintiff. There was evidence that Wolshon rubbed plaintiff's buttocks, grabbed her breasts, asked plaintiff to go to a hotel and have oral sex with him, and rubbed whipped cream on plaintiff's hands and stated, "Now tell everybody you were creamed by Paul." One of plaintiff's co-workers also testified that Wolshon stated that he would like to put whipped cream on his tongue and put it between plaintiff's legs and lick plaintiff's breasts. The same co-worker also saw Wolshon grab plaintiff's breasts. Plaintiff also testified

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[3] Moreover, to the extent that defendant argues that plaintiff failed to establish a prima facie case of quid pro quo sexual harassment, we need not address that claim because the Supreme Court has made clear that the labels "quid pro quo" and "hostile work environment" are not controlling for purposes of establishing employer liability. Thus, we only address whether Wolshon's conduct was severe or pervasive enough to be actionable.

that these types of harassing incidents occurred every day of the week that Wolshon was her supervisor.

Defendant's claim that plaintiff's allegations are "a discrete, singular set of occurrences" that were not sufficiently outrageous to form a single incident of hostile work environment is incorrect and meritless. The evidence proferred by plaintiff was clearly sufficient to establish a hostile work environment claim of sexual harassment because it was severe or pervasive. Therefore, the jury's finding that Wolshon sexually assaulted or molested plaintiff through the use of his supervisory powers over her is entirely supportable by the evidence presented. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict on this basis.

Further, defendant's claims that the terms of plaintiff's employment were not affected by her rejection of Wolshon's overtures and that plaintiff did not believe that any terms of her employment would be affected by accepting or rejecting the sexual overtures are likewise without merit. Plaintiff was discharged from her position on September 11, 1995. Defendant claimed that she was discharged because of her failure to arrive for work or call regarding her absence. Plaintiff claimed that she was never told why she was discharged. Even if the discharge was not related to the sexual harassment incidents, the terms of plaintiff's employment were clearly affected; that is, Wolshon's harassment toward her was severe or pervasive and created an intimidating, hostile, or offensive work environment. *Id.*, p 648; *Faragher, supra*, 141 L Ed 2d 675; *Harris v Forklift Systems, Inc*, 510 US 17, 21; 114 S Ct 367; 126 L Ed 2d 295 (1993); *Radtke v Everett*, 442 Mich 368, 382-383; 501

NW2d 155 (1993). It is not necessary that a plaintiff suffer economic harm or tangible discrimination. *Harris*, *supra*, p 21.

All that was necessary was that plaintiff show that the supervisor created a hostile work environment, which the evidence at trial showed that she did. Thus, we turn to the question of the employer's vicarious liability.

With respect to the question of vicarious liability, the Supreme Court held:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. [*Ellerth*, *supra*, 141 L Ed 2d 655; *Faragher*, *supra*, 141 L Ed 2d 689.]

In the present case, the jury found that defendant failed to take prompt remedial action after it knew or should have known that plaintiff had been sexually harassed. This finding is supportable by the evidence presented at trial. Plaintiff testified that she spoke to Kevin McLaughlin, the regional director of operations for HDS, on the telephone on July 6, 1995. McLaughlin asked plaintiff if something was wrong, and

McLaughlin testified that he could sense that something was bothering plaintiff. Plaintiff indicated that she could not express her complaints of Wolshon at that time because Wolshon was standing next to her. McLaughlin told plaintiff that he would be at ADP, Inc., on July 8, 1995, and would speak to her at that time. It is disputed whether McLaughlin went there on July 8. He testified that he went there, but plaintiff made no attempt to talk to him. However, plaintiff testified that McLaughlin never went to ADP that week.

When plaintiff's regular supervisor, Jennifer Hostutler, returned to work on July 11, 1995, plaintiff reported her specific complaints regarding Wolshon. Hostutler asked plaintiff to write down her allegations, which plaintiff did. Plaintiff also testified that she spoke to McLaughlin, who told her that he would investigate the matter. Plaintiff testified that McLaughlin never asked her what happened regarding Wolshon and that no one from HDS ever contacted her or informed her of any results of the investigation.

In reviewing the evidence and all legitimate inferences drawn from the evidence in a light most favorable to plaintiff, *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997), plaintiff has satisfied the requirements of *Ellerth* and *Faragher*. That is, defendant is subject to vicarious liability for an actionable hostile environment created by Wolshon, plaintiff's immediate supervisor. Assuming that plaintiff was not discharged for reporting Wolshon's actions, although there is no tangible employment action, defendant may raise the affirmative defense that it exercised reasonable care to prevent and cor-

rect promptly any sexually harassing behavior and that plaintiff failed to take advantage of any preventive or corrective opportunities provided by defendant or to otherwise avoid harm. Here, the jury could have, and apparently did, reject McLaughlin's testimony and accept plaintiff's testimony regarding defendant's attempts to prevent or correct Wolshon's sexually harassing behavior. Accordingly, the jury could reasonably infer that defendant was vicariously liable for Wolshon's sexually harassing behavior because defendant failed to exercise reasonable care to prevent and correct promptly Wolshon's behavior.

The facts of the present case are as compelling as those in *Ellerth* or *Faragher* to support a finding in favor of the plaintiff. In *Ellerth*, the plaintiff did not allege that she suffered a tangible employment action at the hands of her supervisor, but the Supreme Court held that this was not dispositive. Rather, the employer is still subject to vicarious liability for the supervisor's activity, but the employer has the opportunity to assert and prove the affirmative defense to liability. *Ellerth*, *supra*, p 655. In *Ellerth*, the plaintiff clearly alleged that she was subjected to a hostile work environment created by the supervisor, but she did not inform anyone in authority about the supervisor's conduct, despite knowing that the employer had a policy against sexual harassment. *Id.*, p 645. Summary judgment against the plaintiff was reversed, and the district court was given the opportunity to decide whether to allow the plaintiff to amend her pleadings or supplement discovery.

Similarly, in *Faragher*, the plaintiff was subjected to a hostile work environment created by two supervisors, and the plaintiff reported the behavior to

another supervisor, who took no action against the other two supervisors. Further, the employer failed to disseminate its policy against sexual harassment among its employees and its officials made no attempt to keep track of the conduct of supervisors, such as the two involved in this case. The employer also failed to include any assurance that the harassing supervisors could be bypassed in registering complaints. *Faragher*, *supra*, p 689. The Supreme Court held, as a matter of law, that, under those circumstances, the defendant could not be found to have exercised reasonable care to prevent the supervisors' conduct *Id.*, p 690. Therefore, the district court's judgment in favor of the plaintiff was reinstated by the Supreme Court.

Accordingly, the trial court did not err in denying defendant's motion for a directed verdict on the basis of respondeat superior. The jury could properly find that defendant was vicariously liable for the acts of its supervisor.

Finally, defendant argues that the trial court's instruction to the jury that an employer is strictly liable if a supervisor sexually assaults or molests an employee through the exercise of his supervisory powers was erroneous. We find that any error in the trial court's instruction regarding strict liability was harmless, MCR 2.613(A), because there is ample evidence of a hostile work environment sufficient to establish defendant's vicarious liability, and the jury specifically found that defendant failed to take prompt remedial action after it knew or should have known that plaintiff had been sexually harassed, a finding that is supported by the evidence presented at

trial. Moreover, there was no specific finding by the jury that defendant was strictly liable.

Affirmed.

MARKEY, J., concurred.

O'CONNELL, J. (*dissenting*). I respectfully dissent. A prima facie case of hostile-workplace sexual harassment under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, includes among its requirements that the plaintiff show that the employer bears responsibility for the alleged harassment under the doctrine of respondeat superior, which ordinarily requires a showing that either a recurring problem existed or a repetition of an offending incident was likely and that the employer failed to rectify the problem upon adequate notice. *Radtke v Everett*, 442 Mich 368, 382, 395; 501 NW2d 155 (1993). Plaintiff in the instant case has failed to satisfy this requirement.

An employer has a duty to investigate and take remedial action in response to a claim of sexual harassment only upon actual or constructive notice of the offensive environment. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 235; 477 NW2d 146 (1991). In denying the motion for a directed verdict, the trial court stated that the jury could reasonably conclude that plaintiff communicated to the regional director of operations that there was a problem and that the latter failed to respond as promised, and that those conclusions could support a finding that the employer sanctioned a continuing hostile environment. However, I conclude that plaintiff's general indication to the regional director over the telephone that something was wrong did not sufficiently alert him to the problem as to constitute actual or con-

structive notice on defendant's part that sexual harassment was taking place. It is not reasonable to infer from the regional director's vague understanding that something was amiss that he had notice of sexual harassment.[1] Because plaintiff presented no evidence that she complained about the problem to anyone

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[1] The facts of this case are as follows:

Defendant, a corporation engaged in managing food service operations for various businesses, hired plaintiff as a temporary cook in June 1995, intending to use plaintiff in various locations pending possible placement in a permanent position. Defendant initially assigned plaintiff to take the place of a cook at one location. During this assignment, while the regular on-site supervisor was on vacation, defendant assigned a temporary supervisor. According to the evidence, this temporary supervisor immediately commenced a pattern of harassing plaintiff. The temporary supervisor allegedly rubbed plaintiff's buttocks, grabbed her breasts, and made various verbal innuendoes, including asking her to join him in a hotel room for sex. The temporary supervisor persisted in this behavior despite plaintiff's resistance. Plaintiff complained to co-workers that she wished to quit her job, but the co-workers encouraged her to stay. During this time, plaintiff indicated on the telephone to defendant's regional director of operations that something was wrong. However, because the offending supervisor was nearby, plaintiff did not feel at liberty to describe the problem. The regional director said he would come to the location to talk to plaintiff, but no meeting between plaintiff and the director followed. Plaintiff neither initiated that conversation nor attempted to contact the person listed in her employee handbook for fielding complaints of sexual harassment.

Plaintiff reported the pattern of harassment to her regular supervisor upon the supervisor's return from vacation and was instructed to put her allegations in writing. Plaintiff complied, and the regional director said he would investigate the complaint. Plaintiff never saw the offending person again and the lower court record is devoid of what, if any, action defendant took against the offending temporary supervisor.

When the cook plaintiff had been replacing returned from sick leave, plaintiff was transferred to other locations that defendant served. After several weeks defendant terminated plaintiff's employment, citing her failure to report to work. Plaintiff testified that she had stopped receiving assignments and that defendant failed to return her calls.

with supervisory responsibility before she spoke to her normal supervisor upon the latter's return and the offender's departure, or that anyone with authority to act otherwise had notice that sexual harassment was taking place, the facts as plaintiff alleges them simply did not trigger defendant's duty to take action to alleviate the problem. Further, because the offender was no longer situated at plaintiff's work location when defendant did learn of a sexual harassment complaint, defendant breached no duty to take remedial action as regarded plaintiff once defendant had notice of a complaint.

Plaintiff likewise failed to establish a prima facie case of quid pro quo sexual harassment. The Civil Rights Act provides that discrimination on the basis of sex includes where the employee's submission to or rejection of sexual overtures "is used as a factor in decisions affecting such individual's employment . . . ." MCL 37.2103(i)(ii); MSA 3.548(103)(i)(ii). A party pressing a claim under this provision must establish that the party was the subject of unwanted sexual conduct or communication and that the employer used the party's submission to or rejection of the improper conduct as a factor in a decision affecting the party's employment. *Champion v Nation Wide Security, Inc*, 450 Mich 702, 708-709; 545 NW2d 596 (1996). In the instant case, plaintiff has failed to show that any terms or conditions of her employment were affected by her rejection of the temporary supervisor's advances.[2]

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[2] The majority finds it significant that defendant eventually terminated her employment. However, because plaintiff withdrew her claim of retaliatory discharge, and does not argue on appeal that her subsequent termination by defendant was related to her allegations of harassment, defend-

Plaintiff does not allege that the temporary supervisor ever suggested that plaintiff's job would be affected, for better or worse, by her response to his overtures. Instead, plaintiff argues that the supervisor's continuing harassment was itself in response to plaintiff's initial rejection of his advances, that continuing pattern then being a decision affecting her employment for purposes of her quid pro quo claim.

Plaintiff relies on *Champion*, where a security guard was raped by her supervisor. Following a pattern of unwanted sexual innuendoes, the supervisor called the guard at home and asked her to come to work for an unscheduled shift on a Saturday. *Id.* at 705. The supervisor had dismissed all other security personnel. *Id.* at 706. After business hours, with only the two of them on the premises, the supervisor ordered the guard into a remotely situated room, locked the door, demanded sex from the guard, then raped her when she refused to cooperate. *Id.* The guard chose never to report to work for that employer again. Our Supreme Court held that the decision to rape was, in effect, a decision to effect a constructive discharge. *Id.* at 711. The Court further held that such behavior, whether or not the employee resigns, constitutes a decision affecting the plaintiff's employment in response to her refusal to submit to the supervisor's sexual requests. *Id.* at 711, n 5. The Court declared, "we hold an employer strictly liable where the supervisor accomplishes the rape through

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ant's termination of plaintiff's employment may not properly be regarded as evidence of a change in plaintiff's circumstances of employment for purposes of substantiating plaintiff's sexual harassment claim.

the exercise of his supervisory power over the victim." *Id.* at 713-714.

The Court tailored the above rule closely to the facts at hand. The facts of the instant case are not nearly as compelling as those in *Champion.* Plaintiff complained that the temporary supervisor offended her with sexual commentary and by grabbing her breasts and rubbing her buttocks, all this during the four work days of the offender's temporary supervisory assignment. However, there is no evidence, beyond plaintiff's assertion, that the offending supervisor continued his inappropriate behavior in response to plaintiff's initial rejection of his advances. Although plaintiff's allegations are serious and represent highly offensive and inappropriate conduct, the behavior alleged falls far short of the violence and outrageousness described in *Champion.* Plaintiff has failed to offer evidence that her circumstances of employment were affected by her response to the unwanted sexual provocation or that she endured the harassment under threat of adverse consequences.

The majority opinion emphasizes the offensive nature of the acts allegedly committed by plaintiff's temporary supervisor. I agree with the majority opinion that the alleged misconduct is both offensive and harmful. Such behavior is always actionable against the offender, but here plaintiff has chosen instead to commence suit against the offender's employer. Because an employer's duty to take action exists only where the employer had actual or constructive notice of the offending behavior, *Downer, supra,* plaintiff has failed to set forth a prima facie case against defendant. Plaintiff provided defendant with no specific notice of the offensive conduct while it was

occurring. The only indication a person in a position of authority received during that four-day pattern of misconduct was plaintiff's indistinct indication to the regional manager that something was amiss when the regional manager happened to reach plaintiff on the telephone. Imputing notice of sexual harassment to an employer on the basis of such nebulous implications would have the effect of making an employer an insurer of an employee's personal anguish of which the employer had little or no understanding. Rendering employers vulnerable to liability under such circumstances would be poor public policy. Accordingly, I do not share the majority's eagerness to regard the regional manager's vague understanding that plaintiff was unhappy about something as triggering defendant's duty to take action. Nor do I join the majority in characterizing the four-day period of offensive behavior by a temporary supervisor as a pervasive condition of employment instead of an isolated set of circumstances. While the record suggests that the temporary supervisor engaged in egregious and actionable conduct, imputing liability to defendant under these facts would be contrary to both the letter of the law and the interests of justice.

For these reasons, I would remand this case to the trial court with instructions to enter judgment in favor of defendant.

LEWIS v DEPARTMENT OF CORRECTIONS

Docket No.194240. Submitted June 10, 1998, at Grand Rapids. Decided November 20, 1998, at 9:15 A.M.

Man Lewis, Jr., a prison inmate, filed a petition in the Ingham Circuit Court appealing a determination by a Department of Corrections hearing officer that the petitioner had committed a major misconduct violation. The court, Peter D. Houk, J., granted the petitioner's motion to waive or suspend filing fees to ensure the petitioner a timely review of the petition. However, the court reserved the right to reinstate the obligation to pay the fees at the conclusion of the case. The court granted the respondent's motions to dismiss or affirm the hearing officer's decision and to tax costs. The court, finding that the reason for the waiver no longer existed, reinstated the petitioner's obligation to pay the filing fees and required the petitioner to pay fifty percent of his present and future income till the debt was satisfied. The petitioner appealed by leave granted.

The Court of Appeals *held*:

1. Competent, material, and substantial evidence supported the hearing officer's decision. It was thus manifest that the question to be reviewed on which the decision of this case depended was so insubstantial as to need no argument or formal submission to the trial court. The court properly granted the respondent's motion to dismiss or affirm.

2. The trial court provided the petitioner an opportunity to establish his indigency and did not revoke the initial filing fee waiver without first investigating the petitioner's then-existing financial status.

3. The court properly attempted to ascertain the petitioner's financial status by requiring him to supply the relevant information.

4. The court properly reinstated the fee obligation and required the petitioner to make installment payments on the fee debt.

5. The shelter and subsistence benefits afforded the petitioner while being punished in prison is not the receipt of "public assistance" contemplated in MCR 2.002(C).

Affirmed.

1. ADMINISTRATIVE LAW — JUDICIAL REVIEW.

A circuit court and the Court of Appeals both review a ruling of a hearing officer in the same manner and determine whether the ruling was authorized by law or rule and if it was supported by competent, material, and substantial evidence on the whole record (MCL 791.255[4]; MSA 28.2320[55][4]).

2. ACTIONS — FILING FEES — WAIVER — REINSTATEMENT.

A trial court that has previously granted a waiver or suspension of a petitioner's obligation to pay filing fees but that has reserved the right to reinstate the obligation at the end of the case may, after investigating the petitioner's then-existing financial status at the end of the case, revoke the initial filing fee waiver and reinstate the obligation to pay the fees where it finds that the reason for the waiver no longer exists; the court may require the petitioner to supply any relevant financial information to aid its determination; the reinstated obligation to pay the fees may provide for the payment of the fees in installments where the court finds that the petitioner has the present or future ability to pay the fees in installments (MCR 2.002).

3. PRISONS AND PRISONERS — ACTIONS — FEES — WAIVER — WORDS AND PHRASES — PUBLIC ASSISTANCE.

The reference to "public assistance" in the court rule providing for the suspension of court fees and costs with regard to a party that is receiving any form of public assistance does not include a person's receipt of shelter and subsistence benefits that are afforded to the person by the Department of Corrections while the person is a prisoner (MCR 2.002[C]).

Man Lewis, Jr., in propria persona.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Charles C. Schettler, Jr.*, Assistant Attorney General, for the respondent.

Before: WHITE, P.J., and HOOD and GAGE, JJ.

GAGE, J. Petitioner appeals by leave granted trial court orders granting respondent's motion to dismiss and reinstating petitioner's obligation to pay filing fees. We affirm.

Petitioner is a prison inmate. In September 1994, he filed a petition with the Ingham Circuit Court appealing the determination of a Department of Corrections hearing officer that petitioner had committed a major misconduct violation. In October 1994, the trial court granted petitioner's motion to waive or suspend filing fees "to ensure [petitioner] of a timely review of [his] complaint," but reserved the right to reinstate the obligation to pay the fees at the conclusion of the case. In May 1995, the trial court granted respondent's motion to dismiss or affirm the hearing officer's decision pursuant to MCR 7.105(J), and suggested that respondent would be entitled to costs and attorney fees on the filing of a proper motion. Respondent then filed a motion to tax costs, which the trial court granted. In granting the motion, the court sua sponte ordered reinstatement of petitioner's obligation to pay filing fees pursuant to MCR 2.002(G) on the basis that the reason for the waiver, to ensure petitioner an expedient review of his complaint, no longer existed.

Petitioner first contends that the trial court erred in dismissing his petition for judicial review of the hearing officer's decision. We review the hearing officer's decision in the same limited manner as the circuit court. *Barker Bros Constr v Bureau of Safety & Regulation*, 212 Mich App 132, 141; 536 NW2d 845 (1995). We must determine whether the hearing officer's ruling was "authorized by law or rule and whether the decision . . . [was] supported by competent, material and substantial evidence on the whole record." MCL 791.255(4); MSA 28.2320(55)(4). Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evi-

dence. *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 218 Mich App 734, 736; 555 NW2d 267 (1996), aff'd 458 Mich 540; 581 NW2d 707 (1998). In light of the hearing officer's opportunity to hear the testimony and view the witnesses, we give great deference to the hearing officer's factual findings and credibility determinations. *Arndt v Dep't of Licensing & Regulation*, 147 Mich App 97, 101; 383 NW2d 136 (1985).

The hearing officer did not err in concluding that petitioner had committed a major misconduct violation. Pursuant to MCL 791.251 *et seq.*; MSA 28.2320(51) *et seq.*, and certain administrative rules regarding prisoner misconduct, the hearing officer had authority to find petitioner guilty of a major misconduct violation and to impose an appropriate punishment. See 1987 AACS, R 791.5501; 1995 AACS, R 791.5505. Furthermore, the record illustrates that the hearing officer's decision was supported by substantial evidence. The reporting corrections officer described the major misconduct incident involving petitioner's failure to follow his direct order. Another witness corroborated the details of the reporting officer's description of these events. Their descriptions constituted substantial evidence supporting the hearing officer's conclusion. Petitioner conveyed a different version of the underlying events and offered affidavits from other prisoners that supported his version of the incident. However, the hearing officer found petitioner's version of the story less credible than the reporting officer's, noting that many of petitioner's supporting witnesses failed to cooperate with the hearing investigator. In light of the deference afforded a hearing officer's credibility determinations,

Arndt, supra, we find that competent, material, and substantial evidence existed to support the hearing officer's conclusion that petitioner was guilty of a major misconduct violation. It was thus manifest that the question to be reviewed on which the decision of this case depended was so unsubstantial as to need no argument or formal submission to the trial court, MCR 7.105(J)(3)(a), and the trial court properly granted respondent's motion to dismiss or affirm.

Next, petitioner makes several arguments challenging the trial court's reinstatement of the obligation to pay filing fees. Petitioner contends that the trial court erred in reinstating his obligation to pay filing fees before making a determination regarding his financial status and in improperly placing on him the burden of proving his continuing indigence. MCR 2.002 governs the waiver or suspension and reinstatement of the obligation to pay filing fees. We review de novo the interpretation of a court rule, a question of law. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

MCR 2.002 authorizes a trial court to relieve an indigent person of his obligation to pay filing fees. The procedure set forth in MCR 2.002 assures that a complainant will not be denied access to the courts on the basis of his indigence. *Wells v Dep't of Corrections*, 447 Mich 415, 419; 523 NW2d 217 (1994). "If a party shows by ex parte affidavit or otherwise that he or she is unable because of indigency to pay fees and costs, the court shall order those fees and costs either waived or suspended until the conclusion of the litigation." MCR 2.002(D). At the end of the case, "the court may on its own initiative order the person for whom the fees or costs were waived or suspended

to pay those fees or costs when the reason for the waiver or suspension no longer exists." MCR 2.002(G).

This Court has addressed in several published opinions prior attempts by the Ingham Circuit Court to reinstate the initially suspended or waived filing fees of prison inmate petitioners. In *Koss v Dep't of Corrections*, 184 Mich App 614, 617; 459 NW2d 34 (1990), this Court held that the trial court did not abuse its discretion in reinstating the obligation to pay suspended filing fees pursuant to MCR 2.002(G) when the suspension was due to the court process, not the prisoner petitioner's indigence, and when there was no determination that the petitioner would forever be unable to pay the fees. Later, in *Langworthy v Dep't of Corrections*, 192 Mich App 443; 481 NW2d 726 (1992), this Court again upheld the trial court's reinstatement of the obligation to pay the fees when it had noted that it suspended the fees to ensure timely review of the prisoner petitioner's complaint and that, because such review had occurred, the reason for the suspension no longer existed. *Id.* at 445-446.

In another, subsequent case involving filing fee reinstatement, this Court more closely examined the circuit court's practice of suspending fees at the outset of litigation initiated by a prison inmate to ensure timely review of his complaint, only to eventually reinstate the obligation to pay the fees at the end of the case because the reason for the suspension no longer existed. *Martin v Dep't of Corrections (On Remand)*, 201 Mich App 331; 505 NW2d 915 (1993). The *Martin* Court concluded that before revoking a previously granted waiver or suspension of filing fees and costs pursuant to MCR 2.002(G), a court must

determine whether the litigant is indigent at the time of the revocation of the waiver or suspension. *Id.* at 335. Because the trial court had made no effort to discern the prison inmate's financial status at the conclusion of the litigation, the *Martin* Court reversed the reinstatement of the obligation to pay the fees and remanded for a determination regarding the prisoner litigant's current financial status. *Id.*

The trial court in the instant case, like the trial courts in *Koss*, *supra*, and *Langworthy*, *supra*, attempted to justify its reinstatement of the obligation to pay the filing fees by explaining that it had initially waived these fees "to ensure [petitioner] a timely review of his Complaint," but that "the reasons for the waiver no longer exist[ed] . . . ." The trial court explained its decision to reinstate the filing fees obligation as follows:

> In making its determination, the Court takes judicial notice of the fact that [respondent] supplies housing, food, clothing, medical care, transportation, if any, educational opportunities and recreational opportunities free of charge to all prisoners. Any objections to reinstatement of the filing fees pursuant to MCR 2.002(G) and taxation of costs shall be filed within 21 days from the date of this Order. [Petitioner] shall address what employment he has had with [respondent] from the filing of this action to the present time, and if not employed, the reason for such unemployment. [Petitioner] shall also address transactions from his prisoner account for the same period of time. Petitioner shall further address why 50% of any present and future funds posted to [petitioner]'s account should not be automatically deducted to satisfy the filing fee and taxation of costs. If [petitioner] fails to file a brief within 21 days from the date of this order, the Court will deem this matter uncontested and enter the following Order reinstating fees . . . .

Therefore, before actually reinstating petitioner's obligation to pay filing fees, the trial court first provided petitioner the opportunity to establish his indigency. The court thus made its order of reinstatement conditional and did not violate the *Martin* principle by revoking the initial filing fee waiver without first investigating petitioner's then-existing financial status.

In response to petitioner's contention that the trial court should not have required him to prove his indigence, we find proper that the court attempted to ascertain petitioner's financial status by requiring him to supply the relevant information. This Court in *Martin* did not require that a court reinstating the obligation to pay filing fees establish a petitioner's indigency in any particular manner. Furthermore, MCR 2.002(D) places the initial burden of establishing indigence on the petitioner requesting a waiver of filing fees. Additionally, this Court has previously granted a trial court discretion to determine a petitioner's financial status by requiring that he provide the court with a new affidavit regarding his financial status, by requesting an affidavit from the Department of Corrections, or by adopting some similar procedure. *Hadley v Ramah*, 134 Mich App 380, 389-390; 351 NW2d 305 (1984).

In response to the trial court's conditional order of reinstatement, petitioner submitted a certificate showing his prisoner account activity for the period from October 1995 to April 1996, which indicated that petitioner had $360 in deposits, $328.18 in charges and withdrawals, an actual balance of $28.25, and a spendable balance of $0. Petitioner also indicated that he had been employed at nearly all institutions in which he had previously resided and that he was then

unemployed but on a waiting list for a law library clerk or tutor position. The trial court denied petitioner's objections to the reinstatement of the obligation to pay filing fees, noting that petitioner had been employed, had "disabled his ability to pay filing fees" by withdrawing funds from his spending account, and had previously filed twenty-seven unsuccessful cases in the Ingham Circuit Court.

Although the information provided by petitioner established that he had no spendable funds at the time the trial court decided to reinstate the obligation to pay filing fees, we do not believe the court erred in requiring petitioner to pay fifty percent of his current and future income toward satisfaction of his filing fee debt. This Court in *Koss*, *supra*, recognized that, when there was no determination that a prisoner petitioner would forever be unable to satisfy his filing fee obligation, it was reasonable for the court to require that money be withdrawn from the prisoner's account from time to time to pay the fee. The *Martin* Court did not address the propriety of a court's requiring an indigent to make installment payments to satisfy the filing fee obligation, but merely required that the court examine the party's financial status before reinstating the obligation to pay fees. In the instant case, no evidence indicated that petitioner would forever be unable to pay his filing fees. To the contrary, petitioner alleged that he had held many prior jobs in prison and, although unemployed at the time the trial court conditionally ordered reinstatement of his obligation to pay filing fees, petitioner expressed his expectation that he would again secure employment as a law library clerk or as a tutor. The documents regarding petitioner's prison account reflected depos-

its amounting to $360 for a six-month period. While most of the charges to petitioner's account went toward legal postage and copying costs, the records also indicated that petitioner had spent over $124 at the prison store over the same six-month period. We conclude that, on the basis of this evidence, the trial court did not abuse its discretion in reinstating petitioner's filing fees obligation and requiring installment payments. *Koss*, *supra*. See also *People v LaPine*, 63 Mich App 554, 557-558; 234 NW2d 700 (1975). Interpreting MCR 2.002(G)'s predecessor provision, this Court held in *LaPine* that, "[s]o long as reimbursement fairly reflects the defendant's ability to pay, we conclude that the trial court, after furnishing transcripts to an appealing defendant, did not abuse its discretion by imposing a requirement of reimbursement to the county after the defendant is paroled and has obtained employment." *Id.* at 558.

We conclude that the trial court complied with *Martin*, *supra*, by examining petitioner's financial situation before reinstating his obligation to pay filing fees. In light of the *Koss* Court's recognition of installment payments as a valid exercise of discretion and the legislative mandate that courts reinstate filing fees obligations when evidence of a prisoner's ability to pay exists,[1] we uphold the trial court's order requiring

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[1] The approach taken by the trial court in ordering reinstatement of the obligation to pay filing fees according to an installment plan resembles that adopted by the Legislature in enacting 1996 PA 555. Although this enactment, embodied at MCL 600.2963; MSA 27A.2963, effective on June 1, 1997, does not apply to the instant case, we find that considering the Legislature's approach is instructive in ruling on the propriety of the instant trial court's order of reinstatement. Subsection 2963(1) explains that when a prisoner files a civil complaint or appeal and requests a filing fee waiver on the basis of indigence, the court must require the prisoner to pay the filing fees and must suspend filing of the prisoner's action until

that petitioner contribute half of any future deposits toward payment of his filing fees. We note that the trial court's decision does not hinder petitioner's access to the judicial system. Moreover, the trial court's decision reflects Michigan's now statutorily embodied public policy that those who spend valuable judicial resources should be required to "take economic responsibility for their decisions to sue." House Legislative Analysis, SB 1215, January 28, 1997, p 5. If the trial court were unable to fashion such payment plans, individuals like petitioner, who has filed twenty-seven unsuccessful actions in the Ingham Circuit Court, would essentially be subsidized by Michigan taxpayers to file at no cost even frivolous civil actions or appeals from administrative hearings determinations and would be able to force whatever defendants they targeted to expend the time and money involved in defending these actions.

Petitioner also argues that the trial court was required to waive his filing fees because he, as an inmate of the Department of Corrections, qualified as a person receiving public assistance. See MCR 2.002(C). However, we do not deem the shelter and

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the prisoner submits the filing fee. The court may order a reduced, partial filing fee when the prisoner's account contains "less than the full amount of the filing fee required by law . . . ." Subsection 2963(3). When a court orders a partial filing fee, the court *shall*, in addition "order the prisoner to make monthly payments in an amount equal to 50% of the deposits made to the account. Payments under this subsection shall continue until the full amount of the filing fee is paid." Subsection 2963(5). When the court has initially waived filing fees pursuant to MCR 2.002 because the prisoner plaintiff has "no assets and no means by which to pay the initial partial filing fee, the court shall order the fees and costs to be paid by the prisoner in the manner provided in this section when the reason for the waiver or suspension no longer exists." Subsection 2963(7). Thus, the trial court's decision in this case achieves the result that the statute would mandate were petitioner to file his action today.

subsistence benefits afforded petitioner while being punished in prison to be the beneficent "public assistance" contemplated by MCR 2.002(C).

Finally, petitioner suggests that the trial court's order reinstating his obligation to pay filing fees interfered with his ability to provide himself effective assistance of counsel on appeal by adversely affecting his state of mind. Petitioner relies on the Sixth Amendment of the United States Constitution. Because this amendment by its terms only guarantees assistance of counsel "[i]n all criminal prosecutions," we conclude that petitioner's argument in this context is without merit. Furthermore, in light of petitioner's successful perfection of the instant appeal and his ability to produce a brief on appeal raising the issues we have addressed, we find no interference of any kind with his appeal of the trial court's decision.

Affirmed.

ADAMS OUTDOOR ADVERTISING v CITY OF EAST LANSING

Docket No. 200655. Submitted May 5, 1998, at Grand Rapids. Decided November 20, 1998, at 9:20 A.M. Leave to appeal sought.

Adams Outdoor Advertising and others brought an action in the Ingham Circuit Court against the city of East Lansing, seeking declaratory and injunctive relief with regard to a provision of the city's sign code that required the removal of nonconforming signs within a specified amount of time and did not provide for the payment of any compensation to Adams for the removal of its nonconforming signs. The court, Thomas L. Brown, J., granted Adams' motion for partial summary disposition, finding that the contested provision was enacted without legislative authority. The city appealed and the Court of Appeals affirmed in an unpublished opinion per curiam, decided April 20, 1990 (Docket Nos. 110816-110818). The Supreme Court reversed the decision of the Court of Appeals, finding the city had the authority to enact its sign code, including the disputed provision. The Court remanded the matter to the trial court to resolve the issue whether the enforcement of the provision resulted in a taking without just compensation. 439 Mich 209 (1992). On remand, the court ruled that, with regard to Adams' billboards located on rooftop leaseholds, the enforcement of the provision resulted in a taking because Adams was deprived of all economically viable use of the property. With respect to the freestanding billboards in dispute that are located on property owned by Adams, the court ruled that there was a taking and permanently enjoined the city from enforcing the disputed provision against Adams. The court determined the amount of Adams' loss with respect to both the rooftop and freestanding billboards. The city appealed.

The Court of Appeals *held*:

1. The property interests involved in this matter, whether leasehold or fee simple, are real property interests.

2. Even though the city has the legislative authority to enact its sign code and even though the sign code has a valid police power purpose, if the code goes too far in regulating Adams' use of its real property, a taking for which compensation is due will be recognized.

3. As applied to Adams' billboards, the enforcement of the disputed provision constitutes a taking regardless of whether Adams was given a reasonable time to comply with the code and recover a substantial return on its investment.

4. It is realistic and fair to consider each of Adams' real property interests separately for purposes of the taking analysis.

5. The court properly found that the disputed provision, as applied to Adams' rooftop leaseholds, constituted a categorical taking that deprived Adams of all economically beneficial use of the leasehold. The city does not dispute the method used to value the rooftop leaseholds. The order of the trial court must be affirmed with respect to the rooftop billboards.

6. The court, for purposes of determining whether the enforcement of the disputed provision with regard to the freestanding billboards constituted a taking, should have engaged in an ad hoc factual inquiry centering on three factors: the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct investment-backed expectations. The question whether the regulation denies the owner economically viable use of the land requires at least a comparison of the value removed with the value that remains. The court considered only the second factor, and only in a limited manner, and made a finding regarding the value removed but not the value remaining.

7. The order with respect to the freestanding billboards must be reversed and the matter must be remanded for a calculation of the value remaining and a reevaluation of the taking claim under the three-part balancing test.

Affirmed in part, reversed in part, and remanded.

1. CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — LAND USE REGULATIONS — TAKINGS — COMPENSATION.

A taking may be found where a land use regulation denies an owner economically viable use of the land; a taking for which compensation is due will be recognized where a land use regulation goes too far in regulating an owner's use of real property, even if the regulation is enacted pursuant to legislative authority and has a valid police power purpose.

2. CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — SIGN CODES — TAKINGS — COMPENSATION.

Enforcement of a municipal sign code that provides that any existing signs on the effective date of the code or any amendment thereto that does not at that time comply with all the code provisions or

amendments thereto shall not be placed, maintained, or displayed after a certain future date may result in a taking for which compensation may be due even though the code gives the sign owner a reasonable period to comply with the ordinance and recover a substantial return on the owner's investment.

3. CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — REAL PROPERTY — TAKINGS.

The government may effectively "take" a person's property by overburdening it with regulations; land use regulations effectuate a taking in two general situations: where the regulation does not substantially advance a legitimate state interest or where it denies an owner economically viable use of the land; the latter situation is further subdivided into categorical takings, where the owner is deprived of all economically beneficial or productive use of the land and should automatically recover for the taking, or a taking recognized on the basis of the traditional balancing test whereby a reviewing court must engage in an ad hoc, factual inquiry centering on three factors: the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct investment-backed expectations; although there is no set formula for determining when a taking has occurred under the balancing test, the question whether the regulation denies the owner economically viable use of the land requires at least a comparison of the value removed with the value that remains.

Fraser Trebilcock Davis & Foster, P.C. (by *Michael H. Perry*), for Adams Outdoor Advertising.

McGinty, Jakubiak, Frankland, Hitch & Henderson, P.C. (by *Thomas M. Hitch*), for the city of East Lansing.

Amicus Curiae:

Bodman, Longley & Dahling LLP (by *James J. Walsh*), for Outdoor Advertising Association of Michigan.

Before: SAWYER, P.J., and KELLY and SMOLENSKI, JJ.

SMOLENSKI, J. Defendant city of East Lansing appeals as of right a final order granting declaratory and injunctive relief in favor of plaintiff Adams Outdoor Advertising. We affirm in part, reverse in part, and remand.

Adams is a company engaged in the business of owning off-premises billboards[1] and leasing the space on these billboards for advertising purposes. In East Lansing, Adams has billboards placed at three different locations. Specifically, at 111 North Harrison and 1108 East Grand River, Adams has three and two, respectively, billboards located on building rooftops pursuant to leases. And, on a narrow strip of property owned by Adams at 1502 West Grand River (the Point), Adams has a total of seven sign faces on five freestanding billboards. All the free-standing billboards at the Point measure twelve feet by twenty-five feet (three hundred square feet) except for one "rotary" or "bulletin" billboard, which measures fourteen feet by forty-eight feet.

In 1975, East Lansing adopted a comprehensive sign code. Under the code, Adams' previously lawful rooftop and freestanding billboards became nonconforming. Specifically, Adams' rooftop billboards were prohibited by the code. The seven sign faces at the Point exceeded the number of signs permitted at this location under the code and violated the code's spacing and setback requirements. In addition, the rotary billboard at the Point exceeded the code's height and three hundred square foot maximum display area

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[1] Off-premises billboards direct attention to a use, business, commodity, service, or activity not conducted, sold, or offered upon the premises where the signs are located. See *Adams Outdoor Advertising v East Lansing*, 439 Mich 209, 213-214; 483 NW2d 38 (1992) (*Adams I*).

requirements. Subsection 8.39(8) of the code, as subsequently amended, gave Adams until May 1, 1987, to eliminate its nonconforming signs:[2]

> 8.39 *Alterations to Signs.* Any existing sign on the effective date of this Chapter or any amendment hereto, which does not at that time comply with all of the provisions hereof, including any amendment:
>
> * * *
>
> (8) Shall not be placed, maintained, or displayed by any person on or after May 1, 1987.

The code did not provide for the payment of any compensation for the removal of Adams' nonconforming billboards.

In early 1987, East Lansing informed Adams that it would be cited for a violation if its nonconforming signs were still in place after the May 1, 1987, deadline. After Adams applied for and was denied a variance by East Lansing's Building Board of Appeals, Adams and others filed suit against East Lansing, seeking declaratory and injunctive relief.

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[2] The "elimination of nonconforming uses and structures over a specified period of time is commonly referred to as 'amortization.' " *Adams I*, n 1, *supra* at 216, n 12. One court observed as follows with respect to the use of the term "amortization" to describe such an ordinance:

> The ordinance here requires that nonconforming signs must be removed or brought into conformance within a specified period of time after they become nonconforming. This is referred to as "amortization," but in reality it is no more than notice to the owner and user of the sign that they have a period of time to make whatever adjustments or other arrangements they can. This is probably not a proper use of the word "amortization," and so used it contains no connotation of compensation or a requirement therefor. [*Art Neon Co v City & Co of Denver*, 488 F2d 118, 121 (CA 10, 1973).]

As relevant to this case, Adams contended that subsection 8.39(8) was enacted without statutory authority and constituted a taking without just compensation. The trial court subsequently found that subsection 8.39(8) was enacted without legislative authority and granted Adams' motion for partial summary disposition. This Court affirmed. *Adams Outdoor Advertising v East Lansing*, unpublished opinion per curiam, decided April 20, 1990 (Docket Nos. 110816-110818).

In *Adams Outdoor Advertising v East Lansing*, 439 Mich 209, 212, 219; 483 NW2d 38 (1992) (*Adams I*), our Supreme Court reversed the decision of this Court on the ground that East Lansing had the authority under subsection 4i(5) of the home rule city act, MCL 117.4i(5); MSA 5.2082(5),[3] to enact its sign code, including subsection 8.39(8). The Court remanded to the trial court to resolve the taking issue.

On remand, the taking issue proceeded to a trial. At the outset of the trial, the court initially ruled that subsection 8.39(8), as applied to Adams' rooftop billboards, constituted a taking because Adams was deprived "of all economically viable use of the property . . . ." The court ruled that it would defer its ruling with respect to Adams' freestanding billboards at the Point until it heard the evidence with respect to the amount of economic loss that Adams would sustain at this location as a result of complying with the sign code.

Although emphasizing that East Lansing had not offered to pay any compensation and that Adams was

[3] Redesignated as MCL 117.4i(f); MSA 5.2082(f) by 1991 PA 175.

not seeking any compensation but, rather, was seeking a ruling regarding the enforceability of subsection 8.39(8), Adams offered the testimony of an expert in the appraisal of off-premises billboards for the purpose of establishing the amount of economic loss that it would sustain. Adams' expert testified that he had used the income capitalization method to arrive at an estimated value of each of Adams' three sign locations in East Lansing as of November 1996. With respect to the Point, the expert testified that he estimated that the present gross income for the seven sign faces at the Point was approximately $64,500, with a significant portion of this figure (approximately $33,000) attributable to the income produced by the rotary billboard. The expert testified that he understood that under the code Adams would still be permitted to maintain four sign faces at the Point. The expert testified that in going from seven sign faces to four sign faces Adams would lose approximately $44,500 in gross income, which, after applying a 32.6 percent expense ratio (approximately $14,500 in estimated expenses), yielded a loss of $30,000 in net income. The expert testified that $30,000 net income capitalized at a ten percent rate of return yielded an estimated loss at the Point of $300,000. The expert testified that he estimated that the value of the losses that Adams would incur at 111 North Harrison and 1108 East Grand River was $57,500 and $55,000 respectively.

Following the proofs, the court ruled that subsection 8.39(8), as applied to the billboards located at the Point, constituted a taking. Reducing the capitaliza-

tion rate from ten percent to seven percent,[4] the court determined that the loss to Adams at the Point, 111 North Harrison, and 1108 East Grand River was $200,000, $40,250, and $38,500, respectively. The court subsequently entered a final order (1) declaring that subsection 8.39(8), as applied to Adams' billboards, constituted a taking of Adams' property without just compensation in violation of the United States and Michigan Constitutions, and (2) permanently enjoining East Lansing from enforcing subsection 8.39(8) against Adams. East Lansing appeals as of right from this order.

On appeal, East Lansing raises numerous grounds in support of its contention that the trial court erred in determining that subsection 8.39(8), as applied to Adams' billboards, constitutes a taking. Specifically, East Lansing argues that no taking has occurred because the billboards are personal property and the United States Supreme Court has recognized that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless . . . ." *Lucas v South Carolina Coastal Council*, 505 US 1003, 1027-1028; 112 S Ct 2886; 120 L Ed 2d 798 (1992). This argument demonstrates the importance of precisely identifying the property interest claimed to have been taken.

In *In re Acquisition of Billboard Leases & Easements*, 205 Mich App 659, 661; 517 NW2d 872 (1994),

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[4] The court explained that Adams' expert had indicated that the ten percent rate was comprised of seven percent for income stream and three percent for risk factors. In reducing the capitalization rate from ten percent to seven percent, the court stated that no risk existed in this case.

governmental entities had condemned not only billboards but also leaseholds on which the billboards were located. The issue on appeal to this Court was the determination of just compensation for these property interests. *Id.* With respect to the condemned billboards, there was no dispute that just compensation was owed for their full value, and the parties apparently agreed that "this can be determined by estimating the cost of the billboards as 'new less depreciation.' " *Id.* at 661, n 1. With respect to the leaseholds on which the billboards were located, this Court recognized that "[r]egardless of whether a billboard is classified as personal property or a fixture, the leaseholds and air rights that were taken from defendants are real property. This Court has previously held that income capitalization is a proper method of estimating the value of income-producing real property." *Id.* at 662.

In Adams' trial brief in this case, Adams specifically relied on *Acquisition of Leases* for its assertions that the billboards were income-producing real property and that the income capitalization method was the proper method for determining the value of this property. At the outset of the trial, the court ruled as follows:

> The Court finds no merit to Defendant's assertion that there is no right to compensation for leasehold interests such as those possessed by Adams Outdoor Advertising. . . .
>
> As to the proper method of calculating the amount of compensation, the Court finds that the income capitalization method, that is the present value [sic] the future cash flows, is the proper method to be employed.

In light of these rulings and this Court's decision in *Acquisition of Leases*, *supra*, Adams then successfully moved to have excluded from evidence exhibits pertaining to the cost and depreciation of the billboards, which, we note, would be relevant in establishing the value of the billboards themselves. See *Acquisition of Leases*, *supra* at 661, n 1.

Thus, despite whatever imprecise characterizations have been used in this case, i.e., that the property taken by subsection 8.39(8) is Adams' "billboards," a review of the record makes it abundantly clear that this case was tried on the theory that the property interests claimed to have been taken by East Lansing's sign code are Adams' real property interests, whether leasehold or fee simple, in the places where its billboards are located. East Lansing's argument that no taking occurred because the billboards are personal property misapprehends the nature of the property interests claimed to have been taken in this case and is therefore rejected.

Next, East Lansing contends that our Supreme Court's decision in *Adams I* makes clear that its power to regulate billboards under the home rule city act is not limited to the same extent that its power to zone is restricted under the zoning enabling act, MCL 125.581 *et seq.*; MSA 5.2931 *et seq.*, with respect to nonconforming uses. We agree. See *Adams I*, *supra* at 216-217. East Lansing also contends that its sign code, which was enacted for safety and aesthetic reasons, is a valid exercise of its police power and that Adams is not immune from these ordinances. Again, we have no quarrel with this proposition. See *Queenside Hills Realty Co, Inc v Saxl*, 328 US 80, 83; 66 S Ct 850; 90 L Ed 1096 (1946). East Lansing thus con-

cludes that it can enforce its sign code against Adams even if it means the complete elimination of off-premises advertising and that no claim of a taking can be sustained. We cannot agree with this conclusion. Rather, " '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' " *K&K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998) (quoting *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 [1922]). More specifically, even if a land use regulation substantially advances a legitimate state interest, a taking may be found where "the regulation denies an owner economically viable use of his land." *K&K*, *supra* at 576. Thus, we reject East Lansing's argument that it can enforce its sign code against Adams and no claim of a taking can be maintained. In other words, even though East Lansing has the legislative authority to enact its sign code and even though the code has a valid police power purpose, if the code goes too far in regulating Adams' use of its real property, a taking for which compensation is due will be recognized. *K&K*, *supra*.

Next, East Lansing contends that subsection 8.39(8) does not constitute a taking as applied to Adams' signs because Adams was given a reasonable period to comply with the sign code and recover its investment. In making this argument, East Lansing relies on *Art Neon Co v City & Co of Denver*, 488 F2d 118 (CA 10, 1973), and other cases that have found that ordinances analogous to subsection 8.39(8) do not constitute a taking of property without just compensation. However, in *Adams I*, *supra* at 234-237, Justice LEVIN,

in a separate opinion, rejected the rationale of these cases:

> The courts approving amortization[5] as a reasonable imposition on private property rights have based their conclusions upon policy arguments of dubious merit. Further, the authorities to the contrary, while less numerous, are more persuasive.
>
> Authorities holding that amortization is constitutionally permissible invariably begin by acknowledging the principle that nonconforming uses are not subject to immediate termination.[6] Zoning enactments have traditionally been prospective in effect, partly in the expectation, it has been said, "that existing nonconforming uses would be of little consequence and . . . would eventually disappear." But, as a commentator observed, "the number of nonconforming uses did not decrease, but rather increased due to indifferent or unsympathetic administration of the zoning ordinances, incorrect granting of variances, and influential political pressures."
>
> The impetus for amortization may be communal frustration with how long it has taken nonconforming uses to "eliminate themselves." The Supreme Court of Missouri [in *Hoffmann v Kinealy*, 389 SW2d 745, 750 (Mo, 1965)] explained that some communities have addressed the problem of persistent, nonconforming uses by recourse to legislative legerdemain:
>
> "[Z]oning zealots have been casting about for other methods or techniques to hasten the elimination of nonconforming uses. In so doing, only infrequent use has been made of the power of eminent domain, primarily because of the expense of compensating damaged property owners, but increasing emphasis has been placed upon the amortization or tolerance technique which conveniently bypasses the troublesome element of compensation."

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[5] Amortization is a term commonly applied to ordinances that eliminate nonconforming signs over time. See n 2, *supra*.

[6] For an example of such a case, see East Lansing's cited case of *Art Neon*, *supra* at 121-122.

Courts in states passing favorably on amortization "reason" that, where the private loss to property owners is outweighed by the public benefit of amortizing nonconforming uses, there is no constitutional difficulty if the period of amortization is reasonable.[7] A reasonable amortization period has been said to be one that allows affected property owners adequate time to recover their investment. In this connection, reference is sometimes made to the economic life of the property, such as a "depreciation" period, either in financial accounting or tax accounting terms.[8]

While a community is surely empowered to exercise police power in furtherance of public heath, safety, and general welfare, and "[e]very exercise of the police power is apt to affect adversely the property interest of somebody," the notion that the right or need of the community to exercise its police power may somehow "outweigh" private property interests runs counter to the constitutional limitation requiring payment of just compensation for a taking.

The introduction of a temporal component does not alter the analysis. As the court in [*Hoffmann, supra* at 753] said:

"To our knowledge, no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use properly might be terminated *immediately*. In fact, the contrary is implicit in the amortization technique itself which would validate a taking *presently* unconstitutional by the simple expedient of *postponing* such taking for a 'reasonable' time. All of this leads us to suggest, as did the three dissenting justices in *Harbison v City of Buffalo* [4 NY2d 553, 566-567; 176 NYS2d 598; 152 NE2d 42 (1958)], that it would be a strange and novel doctrine indeed which would approve a municipality taking private property for public use without compensation *if the property was not too valuable and the taking was not too soon*, and prompts us to repeat the caveat of Mr. Justice Holmes in [*Pennsylvania Coal, supra* at 416], that '[w]e are in danger of for-

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[7] For an example of such a case, see East Lansing's cited case of *Art Neon, supra*.

[8] For an example of such a case, see East Lansing's cited case of *Art Neon, supra* at 122.

getting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' "

The application of "generally accepted accounting principles" in this context is unpersuasive. No reasonable person would seriously suggest that the owner of the Empire State Building could be required, in the exercise of the police power, to remove the building from the land, or even to rebuild it to current specifications, at the conclusion of a thirty- or fifty-year period mandated pursuant to the Internal Revenue Code as representing the useful life of buildings for tax depreciation purposes, without paying just compensation. [Citations omitted.]

Justice LEVIN also noted:

A further factor sometimes taken into account in calculation of a reasonable amortization period is whether the affected property owner, by virtue of the *prospective* ban on the similar use of property by other owners in the community, receives the benefit of a temporary "monopoly" on the nonconforming use. The implicit assumption of this analysis is that the community has a greater right to deprive persons of the use and enjoyment of their property if the community has taken action that indirectly enhances the value of such property.

This argument, like the balance of the analysis applied by the courts finding that amortization does not effect a taking, overlooks the principle that unless a property right is at the outset insubstantial, neither the state nor local governmental units to which the state delegates police power may deprive persons of the use and enjoyment of their property without paying just compensation. The gratuitous, and assertedly fortuitous effects, if any, of "monopoly" do not alter this principle. [*Adams I*, *supra* at 236, n 47.]

Justice LEVIN's separate opinion in *Adams I* did not command a majority of the justices[9] and therefore is not binding on this Court. *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244, 248; 570 NW2d 304 (1997). Nevertheless, we find Justice LEVIN's opinion persuasive and adopt it as our own. Thus, for the reasons expressed in Justice LEVIN's opinion, we reject East Lansing's contention that subsection 8.39(8), as applied to Adams' billboards, does not constitute a taking because Adams has been given a reasonable period to comply with the ordinance and recover a substantial return on its investment.

Next, East Lansing contends that no claim of a taking can be sustained in this case because enforcement of subsection 8.39(8) against Adams' off-premises billboards does not deny Adams all economically beneficial use of its property.

As indicated previously, the property interests claimed to have been taken in this case are real property interests. Thus, we find the appropriate analysis enunciated in *K&K*, *supra* at 576-577 (citations omitted):

> The United States Supreme Court has recognized that the government may effectively "take" a person's property by overburdening that property with regulations. . . . While all taking cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where

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[9] Specifically, the majority opinion, noting that the trial court had not addressed the taking issue, stated that Justice LEVIN's analysis of the taking issue was "dicta, interesting dicta, but irrelevant to the outcome of this case." *Id.* at 219, n 15.

the regulation denies an owner economically viable use of his land.

The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in [*Penn Central, supra*].

In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . . ." In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir[y]," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct investment-backed expectations.

The Court further explained:

While there is no set formula for determining when a taking has occurred under [the balancing] test, it is at least "clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains." [*Id.* at 588 (citation omitted).]

With respect to Adams' rooftop billboards, East Lansing's claim that subsection 8.39(8) does not deny Adams all economically beneficial use of its property is dependent on East Lansing's argument that the applicable "unit of property" is not each individual sign, but, rather, is Adams' aggregate signs in either

the "entire Lansing metro market" or the East Lansing area. East Lansing contends that application of subsection 8.39(8) to Adams' rooftop billboards therefore does not constitute a taking because, even after the rooftop billboards are eliminated, Adams will still have signs in either the Lansing or East Lansing markets and thus Adams has not been denied all economically beneficial use of its property.

As explained in *K&K*, *supra* at 578-580 (citations omitted):

> One of the fundamental principles of taking jurisprudence is the "nonsegmentation" principle. This principle holds that when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole. Courts should not "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Rather, we must examine the effect of the regulation on the entire parcel, not just the affected portion of that parcel.
>
> The denominator parcel is also not limited to each parcel of property. As explained by the United States Court of Appeals for the Federal Circuit in *Tabb Lakes, Ltd v United States*, 10 F3d 796, 802 (CA Fed, 1993):
>
> "Clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, ipso facto, constitute a taking in every case where it exercises its statutory authority." [Citations omitted.]
>
> This Court has previously found the nonsegmentation principle applicable to two adjoining parcels of property with unity of ownership. . . .
>
> * * *

> Determining the size of the denominator parcel is inherently a factual inquiry. As explained in *Ciampitti v United States*, 22 Ct Cl 310, 318-319 (1991):
>
> "Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment."

In this case, East Lansing raises the "denominator parcel" issue for the first time on appeal. Generally, issues not raised before the trial court are not preserved for appeal. *Schellenberg v Rochester Lodge No 2225*, 228 Mich App 20, 28; 577 NW2d 163 (1998). It is true that this Court may address constitutional questions not raised below where no question of fact exists and the interests of justice and judicial economy so dictate. *Great Lakes Division of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 426; 576 NW2d 667 (1998). However, determining the denominator parcel is a factual inquiry. *K&K*, *supra* at 580. Thus, we decline to consider this issue.

In any event, contrary to East Lansing's argument on appeal, it is clear from the record that the denominator parcel used by the trial court was not Adams' individual signs. Rather, the denominator parcel used by the trial court was Adams' real property interests in the places where its signs are located, i.e., its fee simple interest at the Point and its separate leasehold interests at 111 North Harrison and 1108 East Grand River, with the income generated by the individual

signs simply used to determine the value of these real property interests. Even if we were to consider the denominator parcel issue, we would find no error because, under the factors enunciated in *K&K*, it is realistic and fair to consider each of Adams' real property interests separately for purposes of the taking analysis in this case. *Id.* at 580.

The trial court found that subsection 8.39(8), as applied to Adams' rooftop leaseholds, constituted a categorical taking. Because the code requires that the rooftop billboards must be removed and no suggestion has been made that Adams might make some other economic or beneficial use of its rooftop leaseholds, we find no error in this regard. We further note that East Lansing raises no argument with respect to the method used to value the rooftop leaseholds. Therefore, we affirm the trial court's final order with respect to Adams' rooftop billboards.

Finally, East Lansing contends that even when the Point is considered the denominator parcel, enforcement of subsection 8.39(8) does not deny Adams all economically beneficial use of the Point because Adams will still be permitted to have four sign faces at this location under the code. East Lansing contends that the trial court thus erred in determining that subsection 8.39(8), as applied to the Point, constitutes a taking.

As indicated previously, Adams was primarily concerned at trial with establishing the amount of its loss at the Point. In determining this amount, the appraiser's testimony assumed that Adams would be permitted to maintain four sign faces at the Point generating approximately $20,000 in gross income, thus indicating that subsection 8.39(8) does not deny

Adams all economically beneficial or productive use of its fee simple at the Point. Therefore, for the purpose of determining whether enforcement of subsection 8.39(8) effected a taking at the Point, the trial court should have applied the ad hoc factual inquiry required by the three-part balancing test, including " 'a comparison of the value removed with the value that remains.' " *K&K*, *supra* at 588 (citation omitted).[10]

However, with respect to the Point, the trial court considered only the second factor (the economic effect of the regulation on the claimant) of the three-part balancing test. Moreover, the court considered this factor only in a limited manner. Specifically, as did Adams, the court focused only on the value of the loss sustained by Adams at the Point. Thus, while the court made a specific finding with respect to the value removed at the Point, the court made no specific finding with respect to the value remaining at the Point. We note that such a value might be calculated on the present record where it was assumed that Adams would be permitted to maintain four sign faces generating a gross income of $20,000. However, Adams disputed this assumption below, arguing that even assuming four sign faces were theoretically or mathematically possible at the Point, there was no showing that the signs would be "usable."

Therefore, as in *K&K*, *supra* at 588, we believe it would be "imprudent to decide whether there was a taking of [Adams'] property [at the Point] on the basis

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[10] To be fair, although the taking cases relied on by our Supreme Court in *K&K* were decided before the trial in this case, *K&K* itself, with its excellent summary of the law in this area, was not decided until after the trial in this case.

of an inadequate record." Therefore, we reverse the trial court's final order with respect to the Point and remand to the trial court for further consideration. The court must calculate the value remaining at the Point and then reevaluate Adams' claim of a taking at the Point under the three-part balancing test. The trial court may, but need not, take additional proofs to supplement the existing record as it, in its learned discretion, deems necessary to properly consider the three-part balancing test.

In summary, we affirm the trial court's final order with respect to Adams' rooftop billboards. We reverse the trial court's final order with respect to Adams' freestanding billboards at the Point and remand for further proceedings in accordance with this opinion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

PEOPLE v CRAWFORD

Docket No. 200722. Submitted June 9, 1998, at Grand Rapids. Decided November 20, 1998, at 9:25 A.M. Leave to appeal sought.

Norman Crawford was convicted by a jury in the Oakland Circuit Court of solicitation of murder and thereafter pleaded guilty of being a fourth-offense habitual offender. The court, Steven N. Andrews, J., sentenced the defendant to fifteen to thirty years of imprisonment. The defendant appealed.

The Court of Appeals *held*:

1. The trial court did not err in denying the defendant's motion to dismiss the charge of solicitation of murder, which motion was based on a claimed violation of the 180-day rule. Only 152 days of the delay between when the defendant was charged with solicitation of murder while incarcerated in the Oakland County Jail awaiting trial on embezzlement charges and when trial on the charge of solicitation of murder commenced can be attributed to the prosecution.

2. Because no violation of the 180-day rule occurred, the defendant was not prejudiced by defense counsel's error in stipulating that the 180-day period began on the date of the defendant's arraignment instead of the date on which the defendant was charged. Without evidence of prejudice, the defendant cannot maintain a claim of ineffective assistance of counsel.

3. The trial court did not err in denying the defendant's motion for a directed verdict. The prosecution presented witnesses whose testimony was sufficient to support a rational juror's conclusion that the defendant purposely sought to have a prosecution witness in his embezzlement trial killed and that the defendant engaged a person to do the killing. The defendant failed to establish the affirmative defense of renunciation inasmuch as he failed to establish a voluntary and complete renunciation of his criminal purpose. The defendant's failure to pay the negotiated down payment for the killing he sought did not constitute notice of renunciation of the solicitation of murder. Even if the defendant had notified the solicitee of intent to renounce, the defendant would still have failed to establish the affirmative defense of renunciation because he failed to warn and cooperate with law enforcement officials or engage in

other substantial efforts to prevent the solicited event from occurring.

4. The trial court did not err in denying the defendant's request for a jury instruction regarding the affirmative defense of renunciation inasmuch as the defendant failed to present evidence with regard to all elements of the affirmative defense.

5. The trial court did not err in denying the jury's request for a trial transcript in light of an agreement between the prosecution and defense counsel that the jury should be advised that no transcript existed.

6. The trial court did not improperly limit cross-examination of a prosecution witness concerning his status as an habitual offender and did not err in sustaining the prosecution's objection to questioning of the witness regarding delay by the witness in notifying authorities of the defendant's solicitation of murder. The witness was extensively cross-examined about his criminal background, and the witness was unsure about the timing of events.

7. The defendant's habitual offender sentence does not violate the principle of proportionality.

Affirmed.

1. CRIMINAL LAW — INMATES — 180-DAY RULE — ATTRIBUTIONS OF DELAY — APPEAL.

A trial court's attributions of delay in the prosecution of an outstanding charge against a person incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison is reviewed on appeal for clear error (MCL 780.131; MSA 28.969[1]; MCR 6.004[D][1]).

2. CRIMINAL LAW — INMATES — 180-DAY RULE.

Delay greater than the 180 days allowed by statute in the prosecution of an outstanding charge against a person incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison may not violate the 180-day rule where the prosecutor has taken good-faith action to promptly ready the case for trial (MCL 780.131; MSA 28.969[1]; MCR 6.004[D][1]).

3. CRIMINAL LAW — INMATES — 180-DAY RULE.

Among the delays in the prosecution of an outstanding charge against a person incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison that may be attributed to the defendant are delay stemming from adjournment requested by the defendant and delay caused by stipulated adjournment (MCL 780.131; MSA 28.969[1]; MCR 6.004[D][1]).

4. CRIMINAL LAW — INEFFECTIVE ASSISTANCE OF COUNSEL.

Ineffective assistance of counsel cannot be found without evidence of prejudice to the defendant.

5. CRIMINAL LAW — TRIAL — DIRECTED VERDICTS.

The Court of Appeals, in reviewing a trial court's decision regarding a motion for a directed verdict, views the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt; circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime.

6. CRIMINAL LAW — SOLICITATION OF MURDER.

Solicitation to commit murder occurs when the solicitor purposely seeks to have someone killed and tries to engage someone to do the killing (MCL 750.157b; MSA 28.354[2]).

7. CRIMINAL LAW — SOLICITATION OF MURDER — AFFIRMATIVE DEFENSES — RENUNCIATION.

Renunciation is an affirmative defense to solicitation of murder and is established with a preponderance of the evidence indicating that the defendant, under circumstances manifesting a voluntary and complete renunciation of criminal purpose, notified the solicitee of the defendant's intent to renounce and either warned and cooperated with law enforcement officials or engaged in other substantial efforts to prevent the solicited event from occurring (MCL 750.157b[4]; MSA 28.354[2][4]).

8. CRIMINAL LAW — JURY INSTRUCTIONS — AFFIRMATIVE DEFENSES.

A defendant asserting an affirmative defense must produce some evidence regarding all elements of the defense before the trial court is required to instruct the jury with regard to the affirmative defense.

9. SENTENCES — HABITUAL OFFENDERS — PROPORTIONALITY.

Review by the Court of Appeals of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality without reference to the Sentencing Guidelines.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Richard H. Browne*, Chief, Appellate Division, and *Janice A. Kabodian*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Richard B. Ginsberg*), for the defendant on appeal.

Before: WHITE, P.J., and HOOD and GAGE, JJ.

GAGE, J. Defendant appeals as of right a sentence of fifteen to thirty years' imprisonment imposed after a jury found him guilty of solicitation of murder, MCL 750.157b; MSA 28.354(2), and after he pleaded guilty of being a fourth-offense habitual offender, MCL 769.12; MSA 28.1084. We affirm.

In June 1995, defendant was confined to the Oakland County Jail awaiting trial on embezzlement charges. Ameer Ross, another Oakland County Jail inmate, testified at trial that defendant approached him and asked if he knew someone who could kill a witness in his upcoming trial on embezzlement charges. Ross testified that defendant gave him the witness' name and address on a piece of paper. Ross and defendant discussed a price for the murder. After some negotiation, Ross reduced the initial price of $6,000 for the murder to $2,000 with a $500 down payment. Ross testified that defendant agreed to this price and stated that his uncle would pay the money. Although Ross advised defendant that he would contact his brother about killing the witness, Ross instead contacted the sheriff. Defendant denied at trial that he had made this inquiry, alleging that he had discussed bribing the witness, not murdering him.

The sheriff's department arranged to have Deputy Andre Ewing pose as Ross' brother and visit defendant in jail to discuss the murder. Ewing testified that defendant told him that he wanted someone "offed." When Ewing asked him what he meant, defendant stated, "I want him taken out." Defendant and Ewing

then negotiated a price of $2,000 for the murder. Ewing testified that defendant agreed to deposit $200 in Ross' account by 6:00 P.M. that night, and to pay $1,800 the next day after completion of the job. Ewing recalled that he asked defendant twice whether he was sure he wanted the murder done and that defendant replied affirmatively both times. Although defendant testified that he had only discussed bribing the witness, Ewing testified that bribery never entered the conversation.

Defendant never transferred any money to Ross' account, and the witness whom defendant wanted "offed" appeared at defendant's embezzlement trial and testified against him. On August 11, 1995, defendant was both sentenced for the embezzlement conviction and charged with solicitation of murder.

Defendant first argues that the trial court erred in denying his motion to dismiss for violation of the 180-day rule. We review the trial court's attributions of delay for clear error. *People v England*, 177 Mich App 279, 286; 441 NW2d 95 (1989).

The 180-day rule, codified at MCL 780.131; MSA 28.969(1), states that an inmate of the Department of Corrections must "be brought to trial within 180 days" after the prosecution is given notice of untried charges against him. MCL 780.131(1); MSA 28.969(1)(1). However, when a pretrial delay greater than 180 days occurs, the rule is still satisfied if the prosecutor has taken good-faith action within that period to promptly ready the case for trial. MCR 6.004(D)(1). The 180-day period commences when either

> (a) . . . the prosecutor knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison, or
> (b) . . . the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison. [MCR 6.004(D)(1)(a), (b).]

Defendant argues that the trial court utilized an improper starting point in making its 180-day rule calculations and that the court improperly attributed to defendant certain periods of pretrial delay. Although the parties stipulated that the beginning of the 180-day period was October 4, 1995, it is defendant's position that the 180-day period began on August 11, 1995, the day defendant was charged with solicitation of murder. The prosecutor was aware at that point that defendant was incarcerated and awaiting a prison sentence for his embezzlement conviction. MCR 6.004(D)(1).

Even granting defendant's argument that the 180-day period began on August 11, 1995, no violation of the rule occurred because fewer than 180 days between then and November 18, 1996, the date defendant's trial began, were chargeable to the prosecutor. The trial court found at a September 19, 1996, hearing that 335 days had elapsed from the October 4, 1995, arraignment until defendant's September 11, 1996, motion for dismissal, 194 of which were chargeable to the defendant and 141 to the prosecution. However, because defendant stipulated at a May 2, 1996, pretrial conference that his trial would begin on July 23, 1996, the trial court clearly erred in attributing to the prosecutor the eighty-two-day period of

delay between these dates. *People v Pelkey*, 129 Mich App 325, 329; 342 NW2d 312 (1983). The prosecutor should be charged with the following unexplained pretrial delays, *England*, *supra* at 285: (1) the fifty-four-day delay between August 11, 1995, and defendant's October 4, 1995, arraignment; (2) the seventeen days between the trial court's adjournment of a scheduled December 19, 1995, pretrial hearing and January 5, 1995, when the parties stipulated to again adjourn this hearing; (3) the fifty-seven days from July 23, 1996, the stipulated trial start date, until September 19, 1996, when defendant requested new counsel; and (4) the twenty-four days from the final pretrial conference on October 25, 1996, until the first day of trial on November 18, 1996, a total of 152 days.[1]

The remaining 312 days are chargeable to defendant as follows: (1) the seventy-six days from defendant's October 4, 1995, arraignment until December 19, 1995, the first scheduled pretrial date, to which defendant stipulated; (2) the 118 days from January 5, 1996, until May 2, 1996, covering two stipulated adjournments of the pretrial conference;[2] (3) the

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[1] It is questionable whether this time should be charged to the prosecution under the circumstance that defendant agreed with the October 4 date as the beginning date for counting the 180 days. Had defendant asserted the August 11 date, it is possible that the prosecutor would have made a record regarding the prearraignment delay, would have challenged the court's attributing only 194 days to defendant, and would have insisted on an earlier trial date.

[2] Defendant argues that he should not be charged with the stipulated adjournments because the prosecutor failed to writ him out of prison to appear in court on the dates scheduled. We reject this argument because defense counsel also requested a pretrial motion hearing date, and because there is no indication that defendant could not have been brought to court well before the next scheduled date had counsel not stipulated the adjourned date.

eighty-two days from the May 2, 1996, pretrial conference and the stipulated starting date of trial on July 23, 1996; and (4) the thirty-six days between defendant's request for and receipt of new counsel on September 19, 1996, and the October 25, 1996, pretrial conference. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 196; 579 NW2d 82 (1998) (delay stemming from adjournment requested by defendant is chargeable to defendant); *Pelkey*, *supra* (delay caused by stipulated adjournment attributable to defendant). Because fewer than 180 days of pretrial delay were attributable to the prosecutor, we conclude that no violation of the 180-day rule occurred.

Second, defendant claims that his trial counsel was ineffective for stipulating the erroneous October 4, 1995, start date for 180-day rule delay calculation purposes. We disagree. Without evidence of prejudice, ineffective assistance cannot be found. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defense counsel clearly erred in stipulating that the 180-day period began on the date of defendant's arraignment, October 4, 1995, instead of the date he was charged, August 11, 1995. However, because no violation of the 180-day rule occurred, defendant was not prejudiced by defense counsel's error. We find no ineffective assistance of counsel.

Third, defendant argues that the trial court erred in denying his motion for a directed verdict because the prosecution failed to establish all the elements of solicitation of murder and because defendant proved the affirmative defense of renunciation. In reviewing a trial court's decision regarding a motion for a directed verdict, this Court views the evidence

presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt. *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).

Pursuant to MCL 750.157b(1); MSA 28.354(2)(1), " 'solicit' means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation." Solicitation to commit murder is a specific intent crime that requires proof that the defendant intended that a murder would in fact be committed. *People v Vandelinder*, 192 Mich App 447, 450; 481 NW2d 787 (1992). Solicitation to commit murder occurs when (1) the solicitor purposely seeks to have someone killed and (2) tries to engage someone to do the killing. *Id.* Solicitation is complete when the solicitation is made. *Id.* A contingency in the plan may affect whether the victim will be murdered, but does not change the solicitor's intent that the victim be murdered. *Id.* at 450-451. Actual incitement is not necessary for conviction. *People v Salazar*, 140 Mich App 137, 143; 362 NW2d 913 (1985) (a defendant who attempted to incite an undercover police officer to commit murder could not escape conviction merely because the officer would not actually kill someone).

Defendant argues that the prosecutor did not establish that defendant promised or offered to pay for a murder. The prosecutor presented testimony from

Ross and Ewing that defendant stated his desire to have a witness in his embezzlement trial killed and that he was willing to pay $2,000 for the murder. According to Ewing, defendant explained that he wanted Ewing to "off" or "take out" the potential witness against him, and that he would pay Ewing $2,000. We find that this testimony was sufficient to support a rational juror's conclusion that defendant purposely sought to have a witness in his embezzlement trial killed and engaged Ewing to do the killing.

Defendant further contends that even if the elements of solicitation to commit murder are found, he established the affirmative defense of renunciation. Whether defendant's behavior satisfied the statutorily defined renunciation defense is a legal question of statutory interpretation that we review de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

The Legislature provided for the following renunciation defense to solicitation of murder:

> It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose, the actor notified the person solicited of his or her renunciation and either gave timely warning and cooperation to appropriate law enforcement authorities or otherwise made a substantial effort to prevent the performance of the criminal conduct commanded or solicited, provided that conduct does not occur. The defendant shall establish by a preponderance of the evidence the affirmative defense under this subsection. [MCL 750.157b(4); MSA 28.354(2)(4).]

The goal of statutory construction is to ascertain and facilitate the intent of the Legislature. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994). The first criterion in determining intent is the specific

language of the statute. *People v Pitts*, 216 Mich App 229, 232; 548 NW2d 688 (1996). Subsection 157b(4) specifically requires that the solicitor (1) notify the solicitee of the solicitor's intent to renounce the crime *and* either (2)(a) warn and cooperate with law enforcement officials or (2)(b) engage in other substantial efforts to prevent the event solicited from occurring.

Defendant explains that, according to the terms of his deal with Ewing, Ewing would not kill the witness unless defendant had first made a $200 down payment on the murder. Defendant alleges that he fulfilled the notice element of the renunciation defense by refraining from making this down payment. However, defendant's mere nonpayment was insufficient to constitute notice of his alleged intent to renounce the solicitation. As the trial court astutely observed, defendant's mere nonpayment may be attributed to other reasons: that defendant, though still intending that the witness die, was simply unable to obtain funds for the down payment; or, as the trial court theorized, that defendant's nonpayment of the deposit represented an attempt to obtain something for nothing. Ross' testimony that, after the targeted witness testified against defendant in his embezzlement trial, defendant expressed his displeasure that the job had not been carried out indicates a contrary intent. Because subsection 157b(4) requires renunciation "under circumstances manifesting a *voluntary and complete* renunciation of his or her criminal purpose," and because no such circumstances exist here, we conclude that defendant's failure to make a down payment on the murder did not satisfy the required notice element of the renunciation defense.

Furthermore, even had we accepted defendant's notice argument, defendant completely failed to demonstrate any attempt to either warn and cooperate with law enforcement or engage in other substantial efforts to stop Ewing from killing the witness. Because subsection 157b(4) requires both notice and further efforts by the solicitor to prevent the solicited event from occurring, we conclude that defendant's inability to establish any further efforts on his part bar his assertion of the renunciation defense.

Fourth, defendant claims that the trial court erred in denying his request to instruct the jury with regard to the affirmative defense of renunciation. We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). A court must instruct the jury so that it may correctly and intelligently decide the case. *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence. *Piper, supra.* A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense. *People v Lemons*, 454 Mich 234, 248; 562 NW2d 447 (1997). In the instant case, defendant failed to present a prima facie defense of renunciation. Because defendant failed to present evidence regarding all elements of the affirmative defense of renunciation, the trial court correctly denied the requested instruction. *Id.* at 250.

Fifth, defendant argues that the trial court committed error requiring reversal in denying the jury's request for the trial transcript. We disagree. Both defense counsel and the prosecutor were present when the trial court read the notes from the jury requesting the trial transcript. The trial judge discussed the contents of these notes with the prosecutor and defense counsel, who both agreed that no trial transcript existed and that the trial court should so advise the jury. Therefore, we conclude that the trial court did not abuse its discretion in denying the jury's trial transcript request. *People v Wytcherly (On Rehearing)*, 176 Mich App 714, 715-716; 440 NW2d 107 (1989).

Next, defendant argues that the trial court erred in improperly limiting his cross-examination of Ross regarding the charges and penalties Ross was facing and regarding the timing of Ross' discussions with deputies about defendant's murderous inquiries. A trial court's limitation of cross-examination is reviewed for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995).

The trial court did not prevent defendant from eliciting Ross' criminal background. The court sustained the prosecutor's objection to an inquiry by defense counsel regarding Ross' status as a fourth-offense habitual offender. Before this objection, the defense had established that Ross was in the Oakland County Jail in June 1995 awaiting sentencing after pleading guilty to a charge of larceny by conversion, that he had pleaded guilty of being a fourth-offense habitual offender, and that he was residing in jail at the time of defendant's solicitation trial. Immediately after the court had sustained the prosecutor's objection,

defense counsel went on to establish that Ross had received a one-year sentence and had been granted work release. Defense counsel further inquired whether Ross had been promised anything in exchange for his testimony against defendant, to which Ross responded negatively, and questioned Ross regarding a previous situation in which Ross had testified against someone accused of solicitation of murder. We conclude that any alleged error in the trial court's precluding defendant's inquiry regarding Ross' fourth-offense habitual offender status was harmless in light of defendant's extensive cross-examination.

We find no error requiring reversal in the trial court's sustaining the prosecutor's objection to certain questions regarding Ross' delay in reporting the alleged solicitation. Before the objection, defendant was able to elicit through extensive questioning that Ross was unsure about the timing of the events. Any alleged error would again have been harmless given defendant's extensive cross-examination establishing Ross' uncertainty regarding the sequence of events.

Finally, defendant claims that his sentence was excessive and disproportionate. This Court's review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 635-636, 650-654; 461 NW2d 1 (1990), without reference to the guidelines. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 636.

Defendant argues that the trial court abused its discretion in failing to take into consideration that he was a nonviolent offender and that his nine prior felonies were generally property-related crimes. Because defendant qualified as a fourth-offense habitual offender, the trial court had broad discretion to sentence him to any period of incarceration up to life. MCL 769.12(1)(a); MSA 28.1084(1)(a). The trial court sentenced defendant to a minimum term of fifteen years' imprisonment. In light of defendant's extensive record that included nine prior felony convictions, and considering the very serious nature of the crime, we conclude that the sentence was proportionate to the offense and the offender. Furthermore, even if defendant had not been a fourth-offense habitual offender, his minimum sentence would have fallen within the guidelines range and would have been presumptively proportionate. *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994). Affirmed.

TODD v DEPARTMENT OF CORRECTIONS

Docket No. 196169. Submitted June 9, 1998, at Grand Rapids. Decided November 20, 1998, at 9:30 A.M.

Gernnie McCleese, as personal representative of the estate of Steven McCleese, deceased, brought an action in the Muskegon Circuit Court against Charles Todd and other employees of the Department of Corrections (DOC), seeking damages as the result of the death of Steven McCleese while he was an inmate in the custody of the DOC. The plaintiff brought a separate similar action in the Court of Claims against the DOC. When the DOC refused to represent and indemnify Todd, he filed a motion in the circuit court seeking the right to bring a third-party action in the circuit court against the DOC for indemnification, attorney fees, and costs. The Court of Claims issued an order joining the Court of Claims action with the circuit court action. The circuit court, James M. Graves, Jr., J., over the objection of the DOC that the circuit court lacked subject-matter jurisdiction because the Court of Claims has exclusive jurisdiction of third-party claims against the state, entered an order allowing Todd to add the DOC as a third-party defendant in the circuit court action. The DOC was dismissed by stipulation as a defendant in the plaintiff's action, but the stipulation specifically provided that the DOC was not dismissed as a third-party defendant in the cross-claim filed by Todd. A judgment of damages in favor of the plaintiff and against Todd was entered pursuant to a mediation evaluation that had been accepted by both of those parties. Thereafter, the circuit court granted summary disposition for Todd with respect to his third-party claim against the DOC, finding that the DOC had wrongfully denied Todd representation and indemnification in violation of the provisions of the collective bargaining agreement governing Todd's employment by the DOC. The DOC appealed.

The Court of Appeals *held*:

1. Lack of subject-matter jurisdiction may be raised at any time. When a court is without jurisdiction of the subject matter, any action with respect to a cause, other than dismissal of the cause, is absolutely void.

2. The Court of Claims has exclusive jurisdiction over claims made against the state, including third-party claims against the

state. A complaint seeking from the state either damages alone or damages and equitable relief must be filed in the Court of Claims.

3. Pursuant to the provisions of MCL 600.6421; MSA 27A.6421, actions brought in the Court of Claims may be joined for trial with cases that arise out of the same transaction or series of transactions that are pending in any of the circuit courts of the state. Although an action in the Court of Claims may be joined with an action in a circuit court for the purpose of speedy and efficient resolution, the circuit court having jurisdiction over the circuit court action with which the Court of Claims action is joined may not exercise original subject-matter jurisdiction over third-party claims filed against the state in the circuit court.

4. The joinder of the action brought against the DOC in the Court of Claims with the action brought against Todd in the circuit court did not create jurisdiction in the circuit court to adjudicate Todd's separate third-party complaint against the DOC. Todd's third-party complaint did not arise from, and was not filed in, the Court of Claims action, but, rather, Todd's third-party complaint arose from, and was filed in, the circuit court action in which he was a defendant in his individual capacity. Accordingly, the circuit court lacked subject-matter jurisdiction to consider and decide the claim for indemnification against the state brought by Todd by way of a third-party complaint in the circuit court action. Any claim by Todd for indemnification by the state should have been brought in a separate action in the Court of Claims.

5. Because the circuit court lacked subject-matter jurisdiction to take any action with respect to the third-party complaint other than the dismissal of it, all of the circuit court's actions with respect to the third-party complaint were void.

Reversed.

1. COURTS — JURISDICTION — SUBJECT-MATTER JURISDICTION.

Lack of subject-matter jurisdiction may be raised at any time; when a court is without jurisdiction of the subject matter, any action with respect to a cause, other than dismissal of the cause, is absolutely void.

2. COURTS — COURT OF CLAIMS — JURISDICTION — THIRD-PARTY CLAIMS.

The Court of Claims has exclusive jurisdiction over claims made against the state, including third-party claims against the state; a complaint seeking from the state either damages alone or damages and equitable relief must be filed in the Court of Claims (MCL 600.6419; MSA 27A.6419).

3. ACTIONS — COURT OF CLAIMS — CIRCUIT COURTS — JOINDER — THIRD-PARTY CLAIMS.

An action brought in the Court of Claims, by statute, may be joined with an action brought in a circuit court for the purpose of speedy and efficient resolution where the two actions arise out of the same transaction or series of transactions; however, the circuit court with jurisdiction over the circuit court action with which the Court of Claims action is joined may not exercise original subject-matter jurisdiction over any third-party claims filed against the state in the circuit court (MCL 600.6421; MSA 27A.6421).

Muth and Shapiro, P.C. (by *Douglas B. Shapiro*), for Gernnie McCleese.

Williams, Hughes, Corwin & Sininger, LLP (by *Theodore N. Williams, Jr.*), for Charles Todd.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *Allan J. Soros*, Assistant Attorney General, for the Department of Corrections.

Before: WHITE, P.J., and HOOD and GAGE, JJ.

PER CURIAM. Third-party defendant Michigan Department of Corrections (DOC) appeals as of right from the orders granting the motion of third-party plaintiff Charles Todd to file a third-party complaint, and subsequent orders[1] entered pertaining to the third-party complaint. We reverse the court's order granting third-party plaintiff's motion to file a third-party complaint and vacate the subsequent related orders.

I

Plaintiff's decedent, an inmate at the Brooks Correctional Facility, drowned while assigned to a work crew supervised by Todd. Plaintiff filed a suit for

[1] The DOC's claim of appeal states that it appeals from seven orders of the circuit court.

damages against the DOC in the Court of Claims, *McCleese v Dep't of Corrections* (No. 94-15319 CM). Plaintiff also filed a suit for damages against Todd and other individual DOC employees in the Muskegon Circuit Court, *McCleese v Todd* (No. 94-31415 NO).

Todd sought representation and indemnification from the DOC, relying on the collective bargaining agreement between the Michigan Corrections Officers Association and the DOC. The DOC denied his request. Todd retained a private attorney and, on May 23, 1994, filed a motion in the circuit court seeking to add the DOC as a third-party defendant. The third-party complaint sought indemnification, attorney fees, and costs.

On May 24, 1994, the Court of Claims sua sponte issued an order joining the Court of Claims case and the circuit court case pursuant to MCL 600.6421; MSA 27A.6421. The DOC responded to Todd's motion to add it as a third-party defendant, asserting that the circuit court lacked subject-matter jurisdiction because the Court of Claims has exclusive jurisdiction of third-party claims against the state. The circuit court issued an opinion and order granting Todd's motion on June 20, 1994.

In its motion for rehearing and reconsideration, the DOC again argued that the circuit court lacked subject-matter jurisdiction. On July 12, 1994, the circuit court entered an order allowing Todd to add the DOC as a third-party defendant in the circuit court case. The court denied the DOC's motion for reconsideration.

On July 26, 1994, the DOC filed a motion for summary disposition under MCR 2.116(C)(4), asserting that Todd had failed to exhaust administrative remedies. Subsequently, in March 1995, a "stipulation and

order dismissing lawsuits against defendant Berghuis and defendant Michigan Department of Corrections" was entered. The order stated that it "does not provide for dismissal of DOC as third party defendant in the cross-claim filed by Todd."

In May 1995, the court denied the DOC's motion for summary disposition. In January 1996, Todd filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). In March 1996, an order of judgment was entered against Todd in the amount of $250,000, Todd and plaintiff each having accepted the mediation evaluation entered relative to the other.

On April 1, 1996, the circuit court entered an order granting Todd's motion for summary disposition under MCR 2.116(C)(10), ordering the DOC to pay Todd's reasonable attorney fees in defending the action by plaintiff, and ruling that Todd had been wrongfully denied legal representation and indemnification by the DOC, in violation of the collective bargaining agreement. The DOC's motion for reconsideration was denied.

II

The DOC first argues that the circuit court lacked subject-matter jurisdiction to permit and decide Todd's third-party complaint. We agree.

A

Lack of subject-matter jurisdiction may be raised at any time. *Winters v Dalton*, 207 Mich App 76, 79; 523 NW2d 636 (1994). Whether subject-matter jurisdiction exists is a question of law for the court, which we review de novo. MCR 2.116(C)(4); *Dep't of Natural Resources v Holloway Constr Co*, 191 Mich App 704,

705; 478 NW2d 677 (1991). Jurisdiction does not inhere in a court; jurisdiction is conferred on a court by the power that creates it. *Detroit v Rabaut*, 389 Mich 329, 331; 206 NW2d 625 (1973). When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void. *Williams v Shin*, 111 Mich App 84, 90; 314 NW2d 529 (1981).

The Court of Claims has exclusive jurisdiction over claims made against the state of Michigan, including third-party claims against the state. *Id.* at 86-87; MCL 600.6419; MSA 27A.6419. The exclusive jurisdiction of the Court of Claims extends to "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." *Lowery v Dep't of Corrections*, 146 Mich App 342, 347; 380 NW2d 99 (1985); MCL 600.6419(1)(a); MSA 27A.6419(1)(a). A complaint seeking only money damages against the state must be filed in the Court of Claims, as must a complaint seeking both money damages and equitable relief against the state. *Silverman v Univ of Michigan Bd of Regents*, 445 Mich 209, 217; 516 NW2d 54 (1994).

Court of Claims cases may be joined for trial with cases arising out of the same transaction or series of transactions that are pending in any of the various circuit courts of the state. MCL 600.6421; MSA 27A.6421. Once joined, "[a] case in the court of claims shall be tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury under the supervision of the same trial judge." *Id.* The purpose of the joinder statute is to permit joinder of actions arising out of the

same transaction in order to ensure their speedy and efficient resolution. *Longworth v Dep't of State Hwys*, 110 Mich App 771, 776; 315 NW2d 135 (1981). However, the fact that actions initially filed in the Court of Claims can be heard by a circuit judge sitting as the Court of Claims does not mean that the circuit judge may exercise original subject-matter jurisdiction over third-party claims filed against the state in the circuit court. *Williams*, *supra* at 89-90.

B

The order of joinder did not create jurisdiction in the circuit court to adjudicate Todd's separate third-party complaint against the DOC. Todd has cited no authority, nor have we found any, to support a contrary finding. Todd's third-party complaint did not arise from, and was not filed in, the Court of Claims case, which, following the order of joinder, the circuit judge was authorized to hear sitting as the Court of Claims. Rather, Todd's third-party complaint arose from, and was filed in, the circuit court case against him in his individual capacity, in which the circuit judge was not sitting as the Court of Claims.

The circuit court's opinion granting Todd's motion to file a third-party complaint against the DOC stated in pertinent part:

> The Court continues to hold that the instant action is governed by the rules in *Longworth v Highway Dep't* [*supra* at 775-775]. The Court held at page 775 that the joinder provision of MCL 600.6421, MSA 27A.6421 provides for what is in effect a "consolidation" of the two actions. MCR 2.505(3) provides that in consolidated actions the Court may "enter orders concerning the proceedings to avoid unnecessary cost or delay." Indeed, at page 776 the *Longworth* court noted that the purposes of MCL 600.6421,

> MSA 27A.6421 "is to permit joinder of actions arising out of the same transaction in order to ensure their speedy and efficient resolution." If the Court accepted defendant's reasoning, it would have added to the cost and delay, and would have hindered a speedy and efficient resolution, to have required Todd to go back to the Court of Claims to file his action for indemnification, and then have the Court of Claims order the action joined with the circuit court action. In the absence of any case law directly on point, the Court continues to hold that the purposes of the aforementioned statute and court rule, and the holdings of *Longworth*, *ibid*, support a rule that *after* a court of claims action has been consolidated with a circuit court action, the State of Michigan may be named as a party defendant or third-party defendant in the circuit court action in the court which at the time is simultaneously exercising concurrent jurisdiction as both a circuit court and court of claims.

In *Longworth*, the plaintiffs brought suit in the Court of Claims against the Department of State Highways and Transportation and brought a separate suit in the circuit court against three construction companies. The Court of Claims case was joined with the circuit court case on the plaintiffs' motion. On the morning of trial, the plaintiffs reached a settlement with the three construction companies. The department filed a motion to remove the case to the Court of Claims, which was denied. The case against the department was tried, and damages were awarded to the plaintiffs. On appeal, this Court rejected the department's argument that the trial court lacked jurisdiction after the circuit court case was dismissed:

> The purpose of [MCL 600.6421; MSA 27A.6421] is to permit joinder of actions arising out of the same transaction in order to ensure their speedy and efficient resolution. . . . While no case speaks precisely to this point, we are convinced that the purpose of the joinder provision would be

> ill-served by requiring a removal under these circumstances, since such a removal would result both in delay and in inefficient use of judicial resources. Accordingly, we find that the trial court correctly denied defendant's motion for removal. [*Longworth*, *supra* at 776-777.]

Longworth holds only that a Court of Claims action properly joined with a circuit court action under the statute need not be removed to the Court of Claims when the circuit court action is resolved before trial. Stated differently, the circuit judge, properly sitting as the Court of Claims with subject-matter jurisdiction over the Court of Claims action, was not divested of the jurisdiction to sit as the Court of Claims when the circuit court case with which the Court of Claims case was joined was dismissed. *Longworth* does not address the subject-matter jurisdiction issue presented in the instant case: the effect of an order of the Court of Claims joining a Court of Claims case and a circuit court case on the circuit court's subject-matter jurisdiction over a proposed third-party complaint in the circuit court case seeking money damages from the state. Further, although one of the aims of MCL 600.6421; MSA 27A.6421 is to ensure the speedy and efficient resolution of cases arising out of the same transaction, a circuit court cannot assume subject-matter jurisdiction in order to promote efficiency where there is otherwise no jurisdiction. The circuit judge's authority to sit as a Court of Claims judge extended only to the Court of Claims case and, consequently, only to claims asserted against the state in the Court of Claims case. The circuit court had no subject-matter jurisdiction over a claim against the state brought in the circuit court case, and the circuit court could not assume that jurisdiction on

its own. See *Williams*, *supra*. The claim for indemnification should have been brought in the Court of Claims.

The circuit court having lacked subject-matter jurisdiction, any action with respect to Todd's third-party complaint against the DOC, other than to dismiss it, was void. *Fox v Bd of Regents of the Univ of Michigan*, 375 Mich 238, 242; 134 NW2d 146 (1965). For that reason, we reverse the circuit court's order granting Todd's motion to file his third-party complaint and vacate the subsequent orders pertaining to the third-party complaint. Because the circuit court was without jurisdiction to render its decisions concerning the merits of the claims raised in the third-party complaint, we need not address on the merits the issues raised on appeal concerning the propriety of those decisions.

Reversed.

MESSENGER v INGHAM COUNTY PROSECUTOR

Docket No. 200094. Submitted June 9, 1998, at Lansing. Decided November 20, 1998, at 9:35 A.M.

Gregory G. Messenger brought an action in the Ingham Circuit Court against the Ingham County Prosecutor, seeking disclosure pursuant to the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*, of the entire file maintained by the prosecutor concerning the concluded and unsuccessful criminal prosecution of the plaintiff after the defendant refused to disclose certain documents in the file on the ground that they were exempt from disclosure. The court, Lawrence M. Glazer, J., examined the disputed documents in camera after rejecting the plaintiff's discovery request for deposition of an assistant prosecutor who had participated in preparing the criminal case against the plaintiff. The court concluded that documents indicative of the deliberative process in the defendant's office were exempt from disclosure pursuant to the FOIA and ordered the disclosure of the rest of the documents. The court also awarded the plaintiff, as a party prevailing in part, half of his attorney fees. In calculating the award, the court accepted the plaintiff's counsel's itemized figures, except a claim of more than seventy-five billable hours for a motion to adjourn, which claim the court reduced to six hours. The plaintiff appealed with respect to the determination that certain documents were exempt from disclosure and with respect to the award of attorney fees. The defendant cross appealed with respect to the award of attorney fees.

The Court of Appeals *held*:

1. Even though it relied on the wrong FOIA disclosure exemption, the trial court nonetheless did not err in concluding that certain documents were exempt from disclosure pursuant to the FOIA. The trial court relied on the deliberative-process exemption, MCL 15.243(1)(n); MSA 4.1801(13)(1)(n), for its conclusion. The exemption that properly applies in this case is MCL 15.243(1)(i); MSA 4.1801(13)(1)(i), which covers information or records subject to privilege recognized by statute or court rule. The relevant privilege in this case is the attorney work-product privilege, which is recognized by MCR 2.302(B)(3)(a). Under the attorney work-product

privilege, as applied to an FOIA claim through MCL 15.243(1)(i); MSA 4.1801(13)(1)(i), a prosecutor's entire work product prepared in anticipation of litigation is exempt from disclosure.

2. The trial court was not obliged to permit deposition of the assistant prosecutor before deciding whether the disputed documents were exempt from disclosure pursuant to the FOIA. The deposition was sought in conjunction with an effort to show public interest in disclosure, which showing is necessary under the deliberative-process exemption. However, under the attorney work-product privilege that properly applies in this case, an assertion of such public interest cannot overcome the privilege. Furthermore, there are public policy imperatives that militate against requiring prosecutors to submit to oral discovery concerning their work on a particular case.

3. The trial court did not abuse its discretion in awarding attorney fees to the plaintiff when it reduced the claim for fees related to the motion to adjourn. The plaintiff demonstrated no unusual circumstances justifying the claim, and the trial court evidenced no perversity of will or defiance of judgment in disregarding the fanciful claim. The trial court, in accepting the rest of the claimed attorney fees, adequately assessed them by considering the number of documents whose disclosure was achieved, the experience and credentials of the attorneys and others who worked on the plaintiff's case, and the labor and difficulty involved in advancing the plaintiff's claim.

Affirmed.

JANSEN, P.J., dissenting, stated that this case should be decided on the basis of the deliberative-process exemption to disclosure pursuant to the FOIA, not on the basis of attorney work-product privilege, which was not considered by the trial court. The case should be remanded for a determination by the trial court of whether the prosecutor, as required under the deliberative-process exemption, has shown that the public interest in encouraging frank communications between officials and employees of the prosecutor's office outweighs the public interest in disclosure.

1. RECORDS — FREEDOM OF INFORMATION ACT — COUNTY PROSECUTORS — ATTORNEY WORK PRODUCT.

Documents in a file maintained by a county prosecutor concerning a concluded criminal prosecution are exempt from disclosure pursuant to the Freedom of Information Act where the documents were prepared in anticipation of litigation; such documents are subject to the attorney work-product privilege and are exempt from disclosure under subsection 13(1)(i) of the act, which covers information

or records that are subject to privilege recognized by statute or court rule (MCL 15.243 [1] [i]; MSA 4.1801 [13] [1] [i]; MCR 2.302 [B] [3] [a]).

2. RECORDS — FREEDOM OF INFORMATION ACT — ACTIONS — ATTORNEY FEES — APPEAL.

The Court of Appeals reviews for abuse of discretion an award of attorney fees to a plaintiff who prevails in an action under the Freedom of Information Act; an abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment (MCL 15.231 *et seq.*; MSA 4.1801[1] *et seq.*).

3. COURTS — ATTORNEY FEE AWARDS.

A trial court's award of attorney fees must be more searching than simply approving or disapproving the calculation of others; factors that bear on an inquiry include the professional standing and experience of the attorney, the skill, time, and labor reasonably involved, the amount in question and the results achieved, the difficulty of the case, the expenses incurred, and the nature and length of the professional relationship with the client.

Brookover & Fleischmann, P.C. (by *George Brookover* and *Diane S. Carr*), for the plaintiff.

Cohl, Stoker & Toskey, P.C. (by *John R. McGlinchey* and *Jeffrey M. Kaelin*), for the defendant.

Before: JANSEN, P.J., and MARKEY and O'CONNELL, JJ.

O'CONNELL, J. In this action based on Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*, plaintiff challenges the trial court's ruling that certain documents in defendant's custody were privileged against disclosure. Plaintiff further appeals, and defendant cross appeals, from the court's award of attorney fees to plaintiff as a partly prevailing party. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In a much publicized incident in 1994, plaintiff removed his prematurely born son from artificial life support, and the child died shortly thereafter. Defendant prosecuted plaintiff for manslaughter, but the jury returned a verdict of not guilty.[1] Plaintiff subsequently submitted a request under the FOIA for his entire criminal case file. Defendant complied in part, but refused to disclose many documents on the ground that they came under various statutory exemptions to the requirement to disclose. The trial court examined the disputed documents in camera and ordered the release of some, but concluded that many others, identified as "deliberative materials such as notes or drafts of pleadings or evaluations made by members of the prosecutor's staff," were exempt from disclosure.

Plaintiff had scheduled a deposition of an attorney who had personally participated in preparations for the prosecution of plaintiff, but the court reasoned that the additional discovery would not assist in its in camera review of the documents in question and so decided the case without allowing the deposition to take place.

Because plaintiff partially prevailed in obtaining additional disclosure under the FOIA, the trial court decided to award plaintiff half of his reasonable attorney fees. In calculating the award, the court accepted plaintiff's counsel's representation of fees as concerned most of the proceedings below, but reduced a

[1] The decision to prosecute was so persistently controversial that it became an issue in the next election for prosecutor, which defendant, the incumbent prosecutor, lost.

claim of more than seventy-five billable hours for a motion to adjourn to six hours.

Plaintiff argues on appeal that the trial court erred in ruling that all documents reflecting defendant's deliberative work product were exempt from disclosure under the FOIA, that the court erred in deciding the case before plaintiff had completed discovery, and that the court improperly adjusted downward plaintiff claim of attorney fees. Defendant argues on cross appeal that the trial court failed to assess independently the plaintiff's reasonable attorney fees attendant to the greater part of this litigation, but instead simply accepted plaintiff's representations in the matter.

II. THE ATTORNEY WORK-PRODUCT PRIVILEGE

Plaintiff argues that the trial court erred in ruling that certain documents were privileged against disclosure under the FOIA. Whether requested information qualifies for exemption from disclosure under the FOIA is a mixed question of fact and law. On appeal, the trial court's factual determinations are reviewed for clear error, but its legal conclusions are reviewed de novo. *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997).

A. ORIGINS OF THE DOCTRINE

The privilege from disclosure of attorney work product is most closely associated with the liberal discovery rules that attend to litigation in the state and federal courts in this country. "Under this rule any notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation, are protected from discovery." Black's Law

Dictionary (6th ed, 1990), p 1606, citing FR Civ P 26(b)(3). The common-law privilege in this state is the product of various decisions and court rules.

Our Supreme Court recognized the common-law privilege against discovery of attorney work product in *J A Utley Co v Saginaw Circuit Judge*, 372 Mich 367, 373; 126 NW2d 696 (1964), restricting the privilege to information arising from the work of a lawyer in furtherance of the "special and personal" attorney-client relationship that "the common law has always protected."

This Court subsequently developed the doctrine further, taking guidance from federal case law: " '[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.' " *Powers v City of Troy*, 28 Mich App 24, 29; 184 NW2d 340 (1970), quoting *Hickman v Taylor*, 329 US 495, 510; 67 S Ct 385; 91 L Ed 451 (1947). This Court recognized that, under federal and state principles of practice, the balancing of the policy favoring complete discovery and that favoring preserving attorney-client confidences weighed in favor of allowing a party seeking discovery of attorney work product to proceed only upon a showing of substantial need for the materials sought plus inability to obtain the information without undue hardship. *Powers*, *supra* at 32-33. This Court further recognized that the state and federal discovery rules have evolved to extend the privilege to include work product prepared by the party personally, or by the party's insurer, indemnitor, or agent. *Id.* at 32-34.

B. THE DISTINCTION BETWEEN FACTUAL AND DELIBERATIVE WORK PRODUCT

The work-product privilege is reflected by MCR 2.302(B)(3)(a). This rule of civil discovery limits access to an opposing party's work product prepared in anticipation of litigation, whether by the party or the party's attorney or other representative, to situations where the party seeking discovery demonstrates both a substantial need for the material plus a lack of other reasonable avenues for obtaining it. Where this need is adequately demonstrated, however, the rule nonetheless unconditionally directs that the court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* This rule is worded not as if to create the privilege for work product, but rather to recognize an existing privilege. Further, the rule's distinction between factual and deliberative work product comports with a tradition of guarding the latter more zealously than the former, as reflected in federal case law:

> To the extent that work product contains relevant, nonprivileged facts, the *Hickman* doctrine merely shifts the standard presumption in favor of discovery and requires the party seeking discovery to show "adequate reasons" why the work product should be subject to discovery. However, to the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification. [*In re Sealed Case*, 219 US App DC 195, 211-212; 676 F2d 793 (1982), citing *Hickman, supra* at 512.]

The rule guarding attorney work product from civil discovery applies equally to the prosecutor's work product, whether in conjunction with representing the people of the state in criminal proceedings, as chief legal representatives of their respective counties in all civil and criminal matters, Const 1963, art 7, § 4; MCL 49.153; MSA 5.751, or as the state's agent for effectuation of the obligations of *parens patriae* in matters concerning the custody or welfare of children, MCL 552.45; MSA 25.121, MCL 722.533; MSA 25.373. See *People v Gilmore*, 222 Mich App 442, 453; 564 NW2d 158 (1997).

C. APPLICABILITY OF THE PRIVILEGE UNDER THE FOIA

Citing various authorities, the court below ruled that the work-product privilege did not apply in the instant case, because the prosecution of plaintiff was concluded and the parties were involved in no actual or contemplated litigation other than the controversy over the FOIA. However, the court concluded that the lack of underlying litigation defeated the work-product exemption only insofar as it concerned factual matters, ruling that "the deliberative materials such as notes or drafts of pleadings or evaluations made by members of the prosecutor's staff are exempt."

The parties both indicate that the court below did not rely on the attorney work-product privilege for its ruling that certain documents were exempt from disclosure under the FOIA, stating that the court instead applied a common-law deliberative-process privilege. However, the court, observing that the parties were engaged in no litigation other than the instant controversy, stated that "it appears to me that . . . work

product exemption does not apply, at least not to the factual materials," but later added, "I feel that it is not clear that the deliberative materials are taken out of the exemption." These statements indicate that the trial court recognized both the work-product privilege and its distinction between factual and deliberative materials, then concluded that under the instant facts defendant's factual work product was subject to disclosure under the FOIA but defendant's deliberative work product remained privileged. We hold that a prosecutor's entire work product is privileged from disclosure under the FOIA.[2]

The FOIA is a mechanism through which the citizenry may examine and review the workings of government and its executive officials. The statute has in common with the state's liberal discovery rules that it came into existence as a manifestation of the trend to disclose information that previously had generally been kept secret. The FOIA embodies this state's strong public policy favoring public access to government information, recognizing the need that citizens be informed as they exercise their role in a democracy, and the need to hold public officials accountable for the manner in which they discharge their duties. MCL 15.231(2); MSA 4.1801(1)(2). However, in recognition that imperatives exist for keeping some information from public disclosure, § 13 of the act, MCL 15.243; MSA 4.1801(13), enumerates several exemptions to the duty to disclose. These exceptions

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[2] Because defendant did not choose to appeal the trial court's decision to order the release of defendant's factual work product, we do not disturb that aspect of the court's judgment. However, we caution against reading this opinion as stating that only deliberative materials are exempt from disclosure under the FOIA under the privilege for attorney work product.

are to be construed narrowly, in light of the public policy favoring disclosure. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 231-232; 507 NW2d 422 (1993). The enumerated exemptions cover materials subject to any "privilege recognized by statute or court rule," subsection 13(1)(i), attorney-client privilege, subsection 13(1)(h), deliberative-process privilege, subsection 13(1)(n), and a privilege applicable to investigating records compiled for purposes of law enforcement, subsection 13(1)(b).

When ruling whether exemptions within the FOIA prevent disclosure of particular documents, a trial court "must determine whether the government has met its burden of proving the claimed exemptions, and must give particularized findings of fact indicating why the claimed exemptions are appropriate." *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 218; 514 NW2d 213 (1994). In the instant case, the trial court concluded that defendant's deliberative work product was privileged under the FOIA, although it did not expressly indicate which statutory exemption or exemptions it applied in reaching that conclusion. However, the court's citation of *In re Subpoena Duces Tecum to the Wayne Co Prosecutor (On Remand)*, 205 Mich App 700; 518 NW2d 522 (1994), suggests that the court was applying subsection 13(1)(n), the only exemption at issue in that case. *Id.* at 705. That provision establishes the following exemption:

> Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public

> body shows that in the particular instance the public interest in encouraging communications between officials and employees of public bodies clearly outweighs the interest in disclosure. . . . [MCL 15.243(1)(n); MSA 4.1801(13)(1)(n).]

This portion of the statute provides a mechanism through which any public body may seek to avoid disclosure of its deliberative process. Although this provision may seem to bear on a prosecutor's right to avoid disclosure of deliberative work product under the FOIA, we do not rely on subsection 13(1)(n) to affirm the trial court's decision. When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning. See *Morosini v Citizens Ins Co of America*, 224 Mich App 70, 86; 568 NW2d 346 (1997); *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997). We conclude that the trial court properly withheld the disputed documents from disclosure, albeit under the wrong subsection of the FOIA.

We affirm the trial court's decision to permit nondisclosure of the documents at issue under the exemption articulated in subsection 13(1)(i), covering "information or records subject to . . . privilege recognized by statute or court rule."[3] As stated above, the attorney work-product privilege, although established principally by case law, is recognized by MCR

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[3] Where attorney work product is concerned, this exemption in fact wholly subsumes the deliberative process exemption of subsection 13(1)(n). Deliberative process is obviously a subset of work product. Although any documents that would come under subsection 13(1)(n) would necessarily come under subsection 13(1)(i) as well, the latter reaches more broadly, being neither restricted to deliberative materials nor subject to exception upon a sufficient showing of public need for disclosure.

2.302(B)(3)(a). That recognition of the privilege by court rule engenders application of that privilege in actions under the FOIA through subsection 13(1)(i). Accordingly, recognition by subsection 13(1)(i) of the privilege for work product prepared in anticipation of litigation places all such material beyond the reach of the FOIA.[4]

This conclusion follows from careful consideration of various doctrines. As noted, to obtain pretrial discovery of an opposing party's work product, the requesting party must demonstrate both substantial need and undue hardship, and even upon that showing the seeker may discover only factual, not deliberative, work product. MCR 2.302(B)(3)(a). However, where the issue is disclosure under the FOIA, generally neither the identity of the requester[5] nor the requester's need for the information is a relevant con-

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[4] We decline to follow the dicta in *In re Subpoena Duces Tecum*, *supra* at 706, n 2, suggesting that where the work-product privilege does not apply for purposes of discovery (where a litigant is seeking discovery of the work product of a nonlitigant), the privilege likewise does not apply to requests under the FOIA. The discovery rule, MCR 2.302(B)(3)(a), provides a limited means through which litigants may discover material that normally enjoys a presumption of confidentiality—attorney work product. The rule recognizes the traditional broad privilege for attorney work product, extends it to cover nonattorney work product prepared in anticipation of litigation, and provides only a qualified exception where persons facing trial show sufficient need and hardship. Thus, the rule's recognition of the attorney work-product privilege is incorporated into the FOIA through the latter's subsection 13(1)(i), but the rule's mechanism for allowing persons preparing for trial to overcome that privilege is inapplicable in the context of the FOIA.

[5] See *Central Michigan Univ Supervisory-Technical Ass'n MEA/NEA v Central Michigan Univ Bd of Trustees*, 223 Mich App 727, 730; 567 NW2d 696 (1997) ("The FOIA is . . . a mechanism for the public to gain access to information from public bodies regardless of whether there is a case, controversy, or pending litigation."). The exception in question, provided by statute, is where the requester under the FOIA is serving a sentence of imprisonment in a county, state, or federal correctional facility. MCL 15.232(c); MSA 4.1801(2)(c).

sideration. See *Kestenbaum v Michigan State Univ*, 97 Mich App 5, 20; 294 NW2d 228 (1980), aff'd by equal division 414 Mich 510; 327 NW2d 783 (1982). Thus, the FOIA is not an appropriate mechanism for addressing the issues of personal need or hardship.[6]

The attorney work-product privilege incorporated into the FOIA through subsection 13(1)(i) stands in contrast with the general governmental deliberative process privilege established by subsection 13(1)(n),[7] application of which by its own terms "requires the public body that possesses the records to show that the public interest in disclosure is outweighed by the public interest in encouraging frank communications between officials and the employees of public bodies." *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 296; 565 NW2d 650 (1997). That exception puts the resisting government agency or official to the test of establishing that the rationale underlying the privilege would be well served by recognizing the privilege under the particular circumstances. In contrast, once a privilege is validly established as applicable under subsection 13(1)(i), there is no obligation to determine, or purpose in exploring, whether the reasons for the privilege are being advanced by its invocation. The assertion of a valid

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[6] Where the issue of need does arise under the FOIA, such as for weighing the public interest in disclosure against the public interest in encouraging frank intraoffice communications, subsection 13(1)(n), or against some individual privacy interest, *Kestenbaum*, *supra* at 20, the requester's case must rest on the *public* interest in disclosure. A petitioner pursuing purely personal interests, such as preparing for litigation or seeking vindication of reputation, does not state a public need for purposes of the FOIA. See *id.* at 23.

[7] For the purposes of the FOIA, this privilege is statutory and may not be coextensive with the deliberative process privilege judicially established for civil litigation. *In re Subpoena Duces Tecum*, *supra* at 704-705.

and apposite privilege as authorized by subsection 13(1)(i) ends the inquiry under the FOIA.

For these reasons, we affirm the trial court's decision to allow defendant not to disclose the documents at issue, on the ground that those documents were privileged as attorney work product prepared in anticipation of litigation.[8]

D. DISCOVERY

Plaintiff argues that the trial court erred in deciding this case before plaintiff's scheduled deposition of an assistant prosecutor who had participated in preparing the criminal case against plaintiff. We review a trial court's decision to limit discovery for an abuse of discretion. *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996). Because an assertion of public interest in disclosure cannot overcome the work-product privilege incorporated into the FOIA through subsection 13(1)(i), the trial court was not obliged to permit deposition of the assistant prosecutor in the course of letting plaintiff develop his case for the public interest.

Further, public policy imperatives for ensuring the effective functioning of the prosecutor's office militate against requiring prosecutors to submit to oral

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[8] Our holding covers all documents at issue in this appeal. Because the trial court examined all documents in dispute and withheld from disclosure only those that reflected the prosecutor's deliberative process, and because plaintiff has not raised as an issue on appeal the question whether the trial court clearly erred in so identifying any of them, for purposes of this appeal there is no dispute that all documents at issue are attorney work product. However, we do not mean to imply that a prosecutor's *entire* file attendant to a case is presumptively exempt from the FOIA disclosure as attorney work product. To the extent that a prosecutor's file contains materials other than attorney work product prepared in anticipation of litigation, that file remains subject to disclosure under the FOIA, subject to the various other statutory exemptions.

discovery concerning their work on a particular case. See *Fitzpatrick v Secretary of State*, 176 Mich App 615, 617-618; 440 NW2d 45 (1989) ("Department heads and other similarly high-ranking officials should not be compelled to personally give testimony by deposition unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it."); *Sheffield Development Co v City of Troy*, 99 Mich App 527, 532-533; 298 NW2d 23 (1980) (separation-of-powers principles counsel against judicial inquiry into the individual motivations of officials acting within other branches of government). In this case, even if plaintiff were entitled to argue the public interest in disclosure of the documents at issue, because deposing the assistant prosecutor would have amounted to little more than a "fishing expedition" by plaintiff, the trial court would nonetheless have properly decided the case without allowing that deposition to take place. See *In re Hammond Estate*, *supra* at 386-387.

III. ATTORNEY FEES

A. AWARD OF FEES FOR MOTION TO ADJOURN

Plaintiff argues that the trial court erred in awarding him only a small portion of the attorney fees he claimed for his filing of a motion to adjourn a summary disposition hearing. We review an award of attorney fees to a prevailing plaintiff in an action under the FOIA for an abuse of discretion. *Michigan Tax Management Services Co v City of Warren*, 437 Mich 506, 507; 473 NW2d 263 (1991). An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *Shanafelt v Allstate Ins*

Co, 217 Mich App 625, 634; 552 NW2d 671 (1996). When determining the amount of attorney fees to award a party under the FOIA, the trial court must independently assess that party's reasonable fees. *Michigan Tax Management*, *supra* at 511-512.

The trial court awarded plaintiff six billable hours for preparation of the motion to adjourn despite plaintiff's assertion that the motion required 75.5 hours of work, finding plaintiff's claim unreasonable. Although a more particularized explanation might have been helpful, we are satisfied that the court assessed the matter reasonably in light of the circumstances. Any experienced jurist would properly be suspicious of a claim of over seventy-five hours on a motion to adjourn. Plaintiff's explanation for the generous claim of attorney's hours attendant to what is normally a simple motion consists of pointing to the complexity of the issues involved and the need to act aggressively for reasons of timing and strategy. However, the complexities inherent in this controversy did not arise anew at the moment plaintiff wished to adjourn, and a need to work aggressively on behalf of the client has more to do with efficiency and expediency than with piling up hours of service. Because plaintiff demonstrated no unusual circumstances to justify his lavish claim of attorney fees attendant to the motion to adjourn, the trial court evidenced no "perversity of will" or "defiance of judgment" in disregarding plaintiff's fanciful claim and substituting a figure based on ordinary courtroom experience.

B. AWARD OF FEES FOR ALL OTHER PROCEEDINGS

On cross appeal, defendant argues that the trial court erred in calculating the remainder of its attor-

ney fee award to plaintiff by accepting the exact amounts of fees that plaintiff claimed without conducting an independent review of the reasonableness of his claims. A trial court's assessment of reasonable attorney fees must be more searching than simply approving or disapproving the calculations of others. *Michigan Tax Management*, *supra* at 511-512. The following factors bear on the inquiry: " '(1) the professional standing and experience of the attorney; (2) the skill, time and labor [reasonably] involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.' " *Id.* at 509-510, quoting *Wood v DAIIE*, 413 Mich 573, 587-588; 321 NW2d 653 (1982).

In the instant case, the trial court considered the number of documents whose disclosure plaintiff had achieved through the litigation (factor 3), the experience and credentials of all the attorneys and others who worked on plaintiff's case (factor 1), and the labor and difficulty reasonably involved in advancing plaintiff's claim (factors 2 and 4). These indications, considered along with the court's reduction of plaintiff's claimed fees for the motion to adjourn, show that the trial court adequately examined plaintiff's claimed attorney fees when fashioning its award. Accordingly, we conclude that the court did not abuse its discretion in calculating the award.[9]

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[9] Defendant opted not to argue on cross appeal that, because all materials in dispute came under the attorney work-product privilege and therefore were exempt from disclosure pursuant to subsection 13(1)(i), the trial court should not have awarded any attorney fees at all. But for plaintiff having prevailed in part in the trial court, there would have been no occasion to award attorney fees at all. Subsection 10(6), MCL 15.240(6); MSA 4.1801(10)(6). Given that the propriety of awarding some attorney

IV. CONCLUSION

The privilege for attorney work product is recognized by court rule, MCR 2.302(B)(3)(a), and thus incorporated into the FOIA through the latter's subsection 13(1)(i). Accordingly, when material sought under the FOIA is identified as attorney work product, that material is not subject to disclosure, and questions of public interest or private need have no bearing on the question. Because all the documents at issue in this appeal fell under the attorney work-product privilege, the trial court properly withheld them from disclosure. Because defendant did not appeal the court's decision to compel disclosure of defendant's factual work product, we do not disturb that aspect of the judgment below, including the determination that plaintiff was entitled to an award of attorney fees as a partially prevailing party.

The court's manner of calculating plaintiff's award of attorney's fees did not constitute an abuse of discretion.

Affirmed.

MARKEY, J., concurred.

JANSEN, P.J. (*dissenting*). I respectfully dissent. In very broad terms, the majority declares that a prosecutor's entire work product is privileged from disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*, without any supporting authority that the work-product doctrine applies to a closed governmental file. I do not

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fees is not at issue in this appeal, we hold only that the manner in which the trial court arrived at its award did not constitute an abuse of discretion.

believe that this case should be decided under a work-product exemption because the trial court did not decide the case on this basis and the issue requires further factual development. Rather, I would remand to the trial court to consider whether the prosecutor has shown that the public interest in encouraging frank communications between officials and employees of the public body clearly outweighs the public interest in disclosure, as required under subsection 13(1)(n) of the FOIA.

After he was acquitted of manslaughter involving the death of his very prematurely born son, plaintiff, Gregory G. Messenger, M. D., sought to obtain under the FOIA the prosecutor's file concerning his case. Obviously, plaintiff was seeking a closed governmental file. The trial court ruled that the work-product privilege did not apply because there was no other litigation between these two parties, the investigation had been closed, and there was no contemplated prosecution. The trial court then ruled that the prosecutor was required to release all strictly factual materials, except those that were elicited from a person on an express prior promise of confidentiality, unless the person appeared on the witness list. The trial court also ruled that the deliberative materials, such as notes or drafts of pleadings or evaluations made by members of the prosecutor's staff, were exempt from disclosure.

Thus, the trial court did not decide this case on the basis of any work-product exemption to disclosure under the FOIA. Specifically, with regard to defendant's contention that the materials were exempted under the work-product doctrine, the trial court stated that the work-product exemption did not apply, "at least

not to the factual materials," because the criminal investigation was closed and there was no contemplated prosecution. Rather, the trial court found that the documents were exempt from disclosure under the "deliberative materials" exemption, or subsection 13(1)(n), of the FOIA. There is no factual finding by the trial court that the exempted materials were indeed work product, and this Court does not have the materials to review to determine whether they are work product. Moreover, the majority's assertion in footnote eight that there is no dispute that the materials all constitute attorney work product is not accurate. I find no such concession in plaintiff's brief. In fact, plaintiff rather forcefully argues that the work-product doctrine does not apply to this case[1] and points out that many of the materials that were ultimately disclosed were initially claimed by the prosecutor to be work product when they clearly were not.

The majority's attempt to get around the problem that there is no factual finding that the material at issue is indeed attorney work product is to declare that an attorney work-product exemption to disclosure wholly subsumes the deliberative-process exemption of subsection 13(1)(n). However, the court rule, MCR 2.302(B)(3)(a), is a rule of pretrial discovery in civil actions and its terms are not as broad as the majority applies them. MCR 2.302(B)(3)(a) per-

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[1] Plaintiff argues that the work-product doctrine does not apply for the following reasons: (1) there is no explicit provision in the FOIA exempting materials on the basis of the work-product doctrine as there is under the federal FOIA; (2) the work-product doctrine under MCR 2.302(B)(3)(a) provides only a limited and qualified protection against pretrial discovery of trial preparation materials by a party to the suit; (3) the work-product doctrine is limited with regard to a prosecutor because of other constitutional and ethical obligations of a prosecutor; and (4) the work-product doctrine may be waived like any other privilege.

mits the discovery of documents and tangible things prepared in anticipation of litigation or for trial or for another party or another party's representative only on a showing that the party seeking discovery has substantial need of the materials and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. The court rule requires a showing of substantial need and undue hardship on the party seeking discovery, but the majority ignores this dictate, instead concluding that the FOIA is not an appropriate mechanism for addressing the issue of personal need or hardship. Thus, the attorney work-product doctrine is given even broader application in the context of the FOIA under the majority's opinion. This application is in direct conflict with the purpose of the FOIA, which is a prodisclosure statute whose exemptions are to be narrowly construed. See *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 543-544; 475 NW2d 304 (1991), and MCL 15.231(2); MSA 4.1801(1)(2) ("It is the public policy of this state that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process."). Moreover, if subsection 13(1)(i) exempts from disclosure a privilege recognized by a court rule, the exemption being set forth in this case is not the one recognized by MCR 2.302(B)(3)(a). Finally, it should be emphasized that the majority cites no authority for the application of the attorney work-product doctrine to a closed governmental file.

Because this Court does not have the materials to review and because there is otherwise no factual finding by the trial court that the materials are indeed work product, I do not believe that this case can be resolved on the basis of whether the documents are exempt from disclosure under the work-product doctrine. Rather, the trial court ruled that the documents now challenged by plaintiff were exempt from disclosure because they were "deliberative materials."

The trial court did not cite which subsection of the FOIA it was relying on, but the parties indicate that the trial court relied on subsection 13(1)(n).[2] Under this subsection, the following record is exempt from disclosure:

> Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure. . . . [MCL 15.243(1)(n); MSA 4.1801(13)(1)(n).]

The trial court made no finding regarding whether, in this particular instance, the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the

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[2] Generally, the FOIA requires the disclosure of all public records, except to the extent that they fall within a statutory exemption. MCL 15.233(1); MSA 4.1801(3)(1). See *Swickard v Wayne Co Medical Examiner*, *supra* at 544. I emphasize this point because the trial court appeared to also apply a common-law deliberative-process exemption, relying on *In re Subpoena Duces Tecum to the Wayne Co Prosecutor*, 191 Mich App 90; 477 NW2d 412 (1991); however, that case did *not* involve a claim under the FOIA.

public interest in disclosure. This was error. When the court chooses to conduct an in camera review of the documents, the court must still determine whether the government has met its burden of proving the claimed exemptions and must give particularized findings of fact indicating why the claimed exemptions are appropriate. *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 218; 514 NW2d 213 (1994). Further, the public body must show that the public interest in encouraging frank communication clearly outweighs the public interest in disclosure and this cannot be done in conclusory, general terms. *Nicita v Detroit (After Remand)*, 216 Mich App 746, 754-755; 550 NW2d 269 (1996); *In re Subpoenana Duces Tecum to the Wayne Co Prosecutor (On Remand)*, 205 Mich App 700, 705-706; 518 NW2d 522 (1994).

I would vacate the trial court's order and remand for it to determine whether the prosecution has met its burden of showing that the public interest in encouraging frank communication clearly outweighs the public interest in disclosure in this case. For the reasons stated, I would not decide this case on the basis of any work-product exemption, and to that extent I disagree with the majority's decision to hold that the prosecutor's file is work product that is exempt from disclosure under subsection 13(1)(i). Such a finding requires additional factual information that is not now before this Court.

I would remand for further proceedings consistent with this opinion.

SECURA INSURANCE COMPANY v AUTO-OWNERS INSURANCE COMPANY

Docket No. 205256. Submitted June 3, 1998, at Grand Rapids. Decided November 20, 1998, at 9:40 A.M. Leave to appeal sought.

Secura Insurance Company, as a subrogee of an insured whose house sustained fire damage after electrical lines fell on the house when a utility pole was struck by a motorist, brought an action in the Jackson Circuit Court against Auto-Owners Insurance Company, the insurer of the motorist, seeking no-fault property protection insurance benefits. The court, Chad C. Schmucker, J., granted summary disposition for the defendant, ruling that the action was barred by the one-year period of limitation set by MCL 500.3145(2); MSA 24.13145(2) for actions to recover property protection benefits. The plaintiff appealed.

The Court of Appeals *held*:

1. Subsection 3145(2) provides that an action for recovery of property protection insurance benefits shall not be commenced later than one year after the accident. Contrary to the plaintiff's contention, the running of the period of limitation is not tolled when notice of a claim is given to a no-fault insurer or when parties enter into settlement negotiations.

2. The defendant is not equitably estopped from asserting the statute of limitations as a bar to the plaintiff's action. To prevail on its estoppel theory, the plaintiff had to establish that the defendant induced it to refrain from bringing an action within the limitation period. There is no indication that the defendant's conduct influenced the plaintiff's failure to bring its action before the expiration of the period of limitation.

Affirmed.

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

An action for recovery of property protection insurance benefits is subject to a one-year statute of limitations; the running of the period of limitation is not tolled when notice of a claim is given to

a no-fault insurer or when parties enter into settlement negotiations (MCL 500.3145[2]; MSA 24.13145[2]).

Foster, Swift, Collins & Smith, P.C. (by *Scott A. Storey* and *Stephen J. Rhodes*), for the plaintiff.

Potter & Girodat, LLP (by *George E. Potter*), for the defendant.

Before: MACKENZIE, P.J., and WHITBECK and G. S. ALLEN*, JJ.

MACKENZIE, P.J. This case involves a dispute between two insurance companies over a subrogation claim for property damage to a home owned by plaintiff's insureds. Plaintiff alleged that the home sustained fire damage as a result of a power surge caused by electric lines that fell on the home's service line when a motorist insured by defendant struck a utility pole. Plaintiff appeals as of right from an order granting summary disposition in favor of defendant on the ground that the claim was barred by the one-year statute of limitations under the no-fault property damage statute, MCL 500.3145(2); MSA 24.13145(2). We affirm.

The automobile accident and fire occurred on March 2, 1996. Plaintiff's general adjuster sent a notice of claim on May 3, 1996. Defendant acknowledged the notice, but in a letter dated June 4, noted that "the police accident report makes no mention of the fire which you are alleging our insureds started," and requested further information regarding the cause

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

of the fire. In a July 26, 1996, letter, defendant requested an estimated total claim. Plaintiff then forwarded an August 28, 1996, "cause and origin" report from an electrician and, in late January 1997, notified defendant of the total amount of the property damage. In a February 3, 1997, telephone conversation, defendant's adjuster told plaintiff's adjuster that plaintiff should file a lawsuit for the claim.

Plaintiff filed its complaint for damages on April 1, 1997, thirteen months after the accident and fire. Defendant moved for summary disposition based on subsection 3145(2) of the no-fault act, MCL 500.3145(2); MSA 24.13145(2), which provides that "[a]n action for recovery of property protection insurance benefits shall not be commenced later than 1 year after the accident." Plaintiff maintained that the statute was tolled by plaintiff's notice of claim and the parties' negotiations. The trial court rejected plaintiff's position, citing *United States Fidelity & Guaranty Co v Amerisure Ins Co*, 195 Mich App 1; 489 NW2d 115 (1992), and dismissed the case with prejudice.

In *USF&G*, p 6, this Court concluded that notice to a no-fault insurer of a claim for property protection benefits does not toll the one-year period of limitation set forth at MCL 500.3145(2); MSA 24.13145(2) during the parties' settlement negotiations. As recognized by the trial court, *USF&G* is binding precedent under Administrative Order No. 1994-4, 445 Mich xci [now MCR 7.215(H)], and compels the conclusion that plaintiff's complaint in this case was time-barred. Plaintiff seeks to avoid that result by arguing that the

USF&G panel's decision was mere dicta, not subject to the administrative order or court rule, and that a pre-Administrative Order case, *Preferred Risk Mut Ins Co v State Farm Mut Automobile Ins Co*, 123 Mich App 416; 333 NW2d 303 (1983), governs this case. We disagree. The controlling issue in both *USF&G* and *Preferred Risk* was whether the one-year statute of limitations contained in MCL 500.3145(2); MSA 24.13145(2) could be tolled by notice letters sent to a no-fault insurer. *USF&G* held that it could not, contrary to the decision of the *Preferred Risk* panel. The *USF&G* holding was no more "dicta" than was the *Preferred Risk* holding plaintiff seeks to have applied. The trial court properly concluded that *USF&G* is binding and that under that case plaintiff's complaint was time-barred. Furthermore, we are not persuaded that *USF&G* was wrongly decided or that we should adopt the conflicting holding of *Preferred Risk* under the procedure of MCR 7.215(H).

Relying on *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263; 562 NW2d 648 (1997), plaintiff contends that defendant should be equitably estopped from asserting the statute of limitations as a bar to plaintiff's action. As did the trial court, we conclude that *Cincinnati* is clearly distinguishable from this case.

In *Cincinnati*, a motorist insured by Citizens Insurance Company struck a medical building occupied by Cincinnati's insured in February 1992. Cincinnati notified Citizens of its subrogation claim the following month. Cincinnati apparently understood that the claim would be paid upon receipt of acceptable docu-

mentation of the loss. In January 1993, Cincinnati submitted documentation of property and contents losses to Citizens and requested payment. Cincinnati also advised Citizens that it was still in the process of adjusting its insured's business interruption claim and would forward documentation and request for payment upon documenting that claim. Approximately two weeks later, Citizens informed Cincinnati that it did not want to process the property damage part of the claim separately from the business loss claim. Cincinnati agreed to a deferred payment, and in May and June 1993, after the business loss claim was settled, it requested a check for the entire claim. In August 1993, Citizens refused to pay on the subrogation claim because Cincinnati had allowed the one-year statute of limitations, MCL 500.3145(2); MSA 24.13145(2), to expire. See *Cincinnati, supra*, pp 264-267.

On these facts, the Supreme Court concluded that it "would be unjust to allow Citizens to assert the statute of limitations where Cincinnati . . . acted in apparent good faith *and for the convenience of Citizens* to defer [its] demand for payment" until its insured's entire loss had been documented. *Id.*, p 271 (emphasis in the original). The Court further noted that the "record indicates that Cincinnati proceeded as it did *at the request of Citizens.*" *Id.*, pp 271-272 (emphasis in the original). Finding "ample evidence that Cincinnati . . . was justified in relying, and did rely, on the representations of Citizens . . . that the subrogation claim would be processed without difficulty, once all the documentation was complete," *id.*,

p 272, the Court concluded that Citizens was estopped from asserting the statute of limitations as a bar to Cincinnati's action. *Id.*, pp 272-273.

Unlike the situation in *Cincinnati*, in this case there is no evidence that defendant made assurances that payment would be made upon proper documentation, that the parties agreed to cooperate in the processing of the claim, or that defendant induced plaintiff to defer its request for payment beyond one year after the accident and fire. Instead, defendant informed plaintiff that it had questions concerning the cause of the fire, and, approximately one month before the expiration of the one-year period, informed plaintiff that it would not settle the case. Defendant's conduct could not have lulled plaintiff into believing that its claim would be honored after the statutory period as in *Cincinnati*, nor could it have left plaintiff with no alternative but to file its action after the statutory period.

To prevail on its estoppel theory, plaintiff had to establish that defendant induced it to refrain from bringing an action within the period fixed by statute. *Bohlinger v DAIIE*, 120 Mich App 269, 274-275; 327 NW2d 466 (1982). There is no indication that defendant's conduct influenced plaintiff's failure to bring its action before the expiration of the statutory period. Having given plaintiff a month in which to timely file suit, defendant was not estopped from raising the statute of limitations as a bar to plaintiff's cause of action.

Affirmed.

FARM CREDIT SERVICES OF MICHIGAN'S HEARTLAND, PCA v WELDON

Docket No. 183696. Submitted October 7, 1997, at Lansing. Decided November 24, 1998, at 9:00 A.M.

Farm Credit Services of Michigan's Heartland, P.C.A., brought an action in the Livingston Circuit Court against Major K. and Crystal C. Weldon, seeking a deficiency judgment and the recovery of collateral after foreclosing on various mortgages and secured loans owed by the defendants in connection with their farming operations. The defendants filed a multicount countercomplaint. With respect to the plaintiff's claim, a consent judgment awarding the plaintiff the deficiency with interest and ordering the defendants to surrender property pledged as collateral was entered. The counterclaims were tried before a jury. The court, Daniel A. Burress, J., granted the plaintiff's motions for a directed verdict regarding claims of invalid foreclosure (count V), tortious interference with contract (count VIII), and fraud (count X). The jury awarded the defendants damages with respect to their claims of bad-faith refusal to advance 1991 operating funds (count I), and bad-faith breach of contract and breach of fiduciary duty in refusing the defendants' request that the plaintiff apply a portion of a crop-proceeds check payable to the defendants and the plaintiff toward a mortgage held by the Federal Land Bank (counts II and VI). The jury also found for the defendants with regard to their claim that the plaintiff, by duress, had obtained a May 1990 mortgage on property known as the Partaka farm, but awarded no damages (count VII). The court set aside the verdict regarding count VII as inconsistent with the jury's award of damages for the loss of the same property. The jury found for the plaintiff with respect to the defendants' claims of bad-faith failure to lend funds for the completion of a grain-drying system (count III), bad-faith failure to lend funds for the completion of a grain storage barn (count IV), and tortious interference with contract (count IX). The court denied the plaintiff's motion for judgment notwithstanding the verdict with regard to counts I, II, VI, and VII. Pursuant to the parties' agreement, the court reduced the defendants' award for loss of real estate by deducting from it the amount of outstanding liens and encum-

brances on the property. The defendants appealed, and the plaintiff cross appealed.

The Court of Appeals *held:*

1. The trial court did not err in granting the plaintiff a directed verdict with regard to count V of the defendants' countercomplaint, which alleged that the plaintiff improperly foreclosed on the mortgage to property known as the Hudson farm because the mortgage covered only the original loan, not any future loans, and the original loan had already been paid. Although the trial court erred in not considering documents executed by the parties contemporaneously with the mortgage for purposes of determining whether the mortgage represented a complete integration of the parties' agreement, the error was harmless. None of the contemporaneously executed documents contradicted language in the mortgage document that the mortgage covered future loans.

2. The trial court erred in denying the plaintiff's motion for judgment notwithstanding the verdict with regard to count I of the defendants' countercomplaint, which alleged that the plaintiff, in bad faith, breached an agreement to lend operating funds for the 1991 growing season as a matter of law. The defendants presented insufficient evidence from which a jury could have found that the plaintiff, in bad faith, breached an agreement to finance the defendants' 1991 farming operations. The Basic Loan Agreement governing the parties' various supplemental loans and disbursements clearly authorized the plaintiff, in the event of the defendants' default, to refuse to lend or disburse additional money. Before and after the plaintiff's alleged promise to lend 1991 operating funds, the defendants were in default such that the plaintiff did not act in bad faith in refusing, as allowed under the Basic Loan Agreement, to lend additional money.

3. The trial court erred in denying the plaintiff's motion for judgment notwithstanding the verdict with regard to count II of the defendants' countercomplaint, which alleged that the plaintiff, in bad faith, refused to remit a portion of a crop-proceeds check, in which the plaintiff had a security interest, to the Federal Land Bank to satisfy a mortgage payment owed by the defendants. As a matter of law, the plaintiff's refusal to relinquish its bargained-for rights in collateral does not constitute bad faith.

4. Assuming, for purposes of argument, that the plaintiff, in bad faith, breached its obligation to lend (count I of the countercomplaint) and refused to relinquish collateral (count II of the countercomplaint), the defendants nevertheless failed, as a matter of law, to establish support for the amount of damages awarded by the jury. The plaintiff's alleged failure to lend did not proximately result

in defendants suffering any damages beyond whatever limited, incidental expense they incurred in securing alternative financing. The defendants failed to mitigate damages allegedly caused by the plaintiff's refusal to surrender collateral.

5. The trial court erred in denying the plaintiff's motion for judgment notwithstanding the verdict with regard to count VI of the defendants' countercomplaint, which alleged that the plaintiff owed a fiduciary duty to the defendants and breached that duty by refusing their request that it remit crop proceeds to the Federal Land Bank. A fiduciary relationship exists when there is a reposing of faith, confidence, and trust and the placing of reliance by one on the judgment and advice of another. In this case, the mere fact that the plaintiff maintained control over the terms of the defendants' loan repayment or participated in discussions regarding what crops to grow and how much money the defendants would need to borrow at various times are insufficient, as a matter of law, to establish a fiduciary relationship between the plaintiff and the defendants.

6. The trial court erred in denying the plaintiff's motion for judgment notwithstanding the verdict with regard to count VII of the defendants' countercomplaint, which alleged that the plaintiff, by duress, obtained a mortgage on one of the defendants' farms. To succeed with respect to a claim of duress, the defendants had to establish that they were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes. Fear of financial ruin alone is insufficient to establish economic duress; it must also be established that the person applying the coercion acted unlawfully. Because the defendants' did not allege that the plaintiff acted illegally, their claim of duress is meritless.

7. The trial court did not err in awarding attorney fees and costs to the plaintiff. The defendants stipulated an award of attorney fees when they consented to the judgment entered against them in the plaintiff's action.

Affirmed in part, reversed in part, and remanded for entry of judgment for the plaintiff with regard to counts I, II, VI, and VII of the countercomplaint.

JANSEN, P.J., concurring in part and dissenting in part, stated that the jury's verdict and the trial court's rulings should be affirmed in all respects. The majority is correct to the extent it decided that the defendants have not raised any issue requiring reversal. However, the trial court did not err in denying the plaintiff's motion for judgment notwithstanding the verdict with regard to counts I, II, VI, and VII of the countercomplaint, because there were factual questions for the jury to resolve and the counterclaim was not deficient

as a matter of law inasmuch as the defendants presented sufficient evidence to support each claim. The award of damages to the defendants falls within the range of the evidence and was not excessive or contrary to law.

1. MOTIONS AND ORDERS — DIRECTED VERDICTS — APPEAL.

The Court of Appeals, in reviewing a trial court's ruling regarding a motion for a directed verdict, examines the testimony and all legitimate inferences that may be drawn in the light most favorable to the nonmoving party; a directed verdict is appropriate only when no factual question exists with regard to which reasonable minds may differ.

2. EVIDENCE — PAROL EVIDENCE.

A finding that parties intended a written instrument to be a complete expression of their agreement with respect to matters covered is a prerequisite to the application of the parol evidence rule; extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on the threshold question whether the written instrument is such an integrated agreement.

3. MOTIONS AND ORDERS — JUDGMENT NOTWITHSTANDING THE VERDICT — APPEAL.

A motion for judgment notwithstanding the verdict may not be granted where reasonable minds can differ with regard to issues of fact; when deciding such a motion, a trial court must examine the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party; the Court of Appeals reviews a trial court's ruling regarding such a motion de novo.

4. CONTRACTS — LENDERS — GOOD FAITH.

The duty of good faith imposed upon contracting parties does not compel a lender to surrender rights that it has been given by statute or by the terms of its contract.

5. CONTRACTS — BREACH — DAMAGES.

Damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made.

6. BANKS AND BANKING — LENDERS — BORROWERS — FIDUCIARY RELATIONSHIPS.

A fiduciary relationship generally does not arise between lender and borrower but may exist when there is a reposing of faith, confidence, and trust and the placing of reliance by one on the judgment and advice of another.

7. WORDS AND PHRASES — DURESS.

A person claiming duress must establish that the person was illegally compelled or coerced to act by fear of serious injury to person, reputation, or fortune.

Learman, Peters, Sarow & McQuillan, P.L.C. (by *John J. McQuillan*), for the plaintiff.

Daniel L. Kraft, for the defendants.

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

GAGE, J. Defendants appeal as of right from a November 1994 trial court judgment awarding them $351,991.80. Defendants had filed a multiple-count counterclaim against plaintiff alleging misconduct relating to plaintiff's long-term relationship lending defendants money to support their farming operations. The jury found for defendants on several counts. Plaintiff cross appeals as of right from the November 1994 judgment.

Plaintiff is a federally created entity that makes loans to its borrowers/members for use in conducting agricultural activities. Defendants are farmers who, since the fall of 1980, have received numerous loans from plaintiff. From 1980 to 1990, plaintiff loaned defendants $839,805, of which defendants themselves received $460,000, with plaintiff, at defendants' direction, paying the difference to defendants' third-party suppliers and creditors. Although the parties agreed that their business relationship was initially very satisfactory, the relationship deteriorated from 1988 through 1990 because defendants became increasingly unable to repay their debt. Plaintiff eventually foreclosed on various mortgages and other security interests that it possessed in defendants' property and equipment.

Ultimately, plaintiff initiated the instant suit seeking a deficiency judgment against defendants and the recovery of plaintiff's remaining collateral. In response, defendants filed a ten-count counterclaim seeking recovery from plaintiff on theories ranging from bad-faith breach of contract and breach of fiduciary duty to tortious interference with contract and fraud.

Regarding plaintiff's complaint, the parties in July 1994 entered into a consent judgment for defendants' deficiency. The judgment awarded plaintiff $249,458.81 plus interest and ordered defendants to surrender various items of farm equipment pledged as collateral.

With respect to the counterclaim, the trial court granted plaintiff's motions for a directed verdict regarding several counts, including counts V (invalid foreclosure), VIII (tortious interference), and X (fraud). The remaining claims proceeded to verdict. The jury returned verdicts for defendants in the amounts of $315,000 on count I (bad-faith refusal to advance to defendants 1991 operating funds) and $500,000 on combined counts II and VI (plaintiff's bad-faith breach of contract and breach of fiduciary duty in refusing defendants' January 2, 1990, request that it apply a portion of a crop-proceeds check to a mortgage held by the Federal Land Bank [FLB], another creditor of defendants). The jury also found for defendants on count VII (plaintiff obtained May 1990 mortgage on a property known as the Partaka farm by duress), but awarded no damages on this count. However, the trial court set aside the jury's verdict for defendants with regard to this count as inconsistent with the jury's award of damages to defendants for the loss of the

same real estate. Regarding the remaining counts III (bad-faith failure to lend funds for completion of grain-drying system), IV (bad-faith failure to lend funds for completion of grain storage barn), and IX (tortious interference), the jury found for plaintiff.

Pursuant to the parties' agreement, the trial court reduced defendants' award for loss of real estate by deducting from it the amount of outstanding liens and encumbrances on defendants' property. Specifically, the trial court subtracted from defendants' award $513,599.28 in liens, encumbrances, and taxes, resulting in a preinterest net judgment of $301,400.72 for defendants.

Defendants first contend that the trial court erred in granting plaintiff a directed verdict with regard to count V of defendants' countercomplaint, which alleged that plaintiff did not have a valid mortgage on a property known as the Hudson farm, and therefore improperly foreclosed on this property. We review de novo the trial court's grant of a directed verdict. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In reviewing the trial court's ruling, we examine the testimony and all legitimate inferences that may be drawn in the light most favorable to the nonmoving party. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998). Directed verdicts are appropriate only when no factual question exists with regard to which reasonable minds may differ. *Meagher, supra.*

Defendants argue that the trial court improperly granted plaintiff a directed verdict when a question of fact existed regarding the interpretation of a clause in the mortgage plaintiff held on the Hudson farm. The trial court concluded that the mortgage contained a

clear and unambiguous future advance clause. Defendants insist that the trial court erred in refusing to entertain parol evidence, which, they allege, would have shown that the parties did not intend the mortgage document to represent the complete integration of their agreement, and which would have clarified that the parties intended the mortgage to secure repayment of only the original mortgage principal amount, not any future advances. Defendants alleged that they had satisfied the original mortgage principal amount and therefore plaintiff's foreclosure on the Hudson farm was invalid if the mortgage did not also cover its subsequent loans to defendants.

While the trial court erred in neglecting to consider the documents executed by the parties contemporaneously with the mortgage for the purpose of determining whether the mortgage represented a complete integration of the parties' agreement, this error was harmless. A finding that the parties intended a written instrument to be a complete expression of their agreement concerning the matters covered is a prerequisite to the application of the parol evidence rule. *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407, 410; 285 NW2d 770 (1979). Extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question whether the written instrument is such an integrated agreement. *Id.* In this case, the mortgage itself refers to supplementary documents evidencing plaintiff's September 1982 $15,000 loan to defendants:

> IN CONSIDERATION of the loan(s) by [plaintiff] to [defendants], and to secure the repayment of the loan(s) made by [plaintiff] to [defendants] in the aggregate *principal sum of*

> *$15,000.00*, together with interest thereon, *evidenced by a Basic Loan Agreement between the parties or Promissory Note dated 9-3-82*[1] *and any Supplementary Loan Agreements or Promissory Notes (the Basic Loan Agreement, the Supplementary Loan Agreements and Promissory Notes are hereinafter collectively called "Loan Agreement"), and any renewals, extensions or modifications thereof, together with all other additional or future loans, advances or readvances heretofore or hereafter made by [plaintiff] to [defendants], together with interest thereon,* and to secure the performance and observance by [defendants] of each and every term, covenant, agreement and condition contained herein or in the Loan Agreement, [defendants] do[] hereby mortgage, warrant, grant, convey and assign unto [plaintiff] . . . the following described real estate. . . . [Emphasis added.]

Defendants thus correctly suggest that the trial court erred to the extent that it declined to review a loan application, two supplementary loan agreements, and a notice of defendants' right of rescission of the mortgage, executed together with the mortgage, to determine to what extent the parties intended the mortgage's terms to govern their agreement.

However, the trial court did not err in granting plaintiff's motion for a directed verdict because none of the contemporaneously executed documents cited by defendants contradicted the mortgage's language regarding future advances. The supplementary loan agreements executed with the mortgage address only various loan disbursement and repayment terms and

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[1] The parties executed and recorded on June 20, 1985, a document entitled "Affidavit Correcting Mortgage." This affidavit provided that the September 3, 1982, date of the Basic Loan Agreement referenced in the mortgage was inaccurate and that the date should read April 30, 1984. This correction reflects the parties' execution of a new Basic Loan Agreement on April 30, 1984, but does not affect our instant analysis.

conditions. The notice of rescission acknowledges the mortgage transaction "dated September 3, 1982, in the amount of $15,050.00 between [plaintiff] and [defendants]," and informs defendants that they may rescind the mortgage within three business days. The loan application simply indicates that defendants wanted $15,000 in exchange for a mortgage, and proposes a repayment plan. While defendants claim that plaintiff's failure to check a box on the loan application marked "Open End" indicates that the parties did not intend the mortgage to secure future advances, absolutely nothing in either the loan application or the other contemporaneously executed documents referenced by defendants suggests the parties intended other than that the mortgage would secure future advances. The mortgage's language securing future advances is clear, unambiguous, and uncontradicted by these other documents. Therefore, we conclude that the trial court properly interpreted the language as a matter of law, *Meagher*, *supra* at 721, and properly granted plaintiff's motion for a directed verdict. *Id.* at 708 (directed verdict appropriate when no factual question exists).

Next, defendants raise several challenges to the trial court's setoffs against their damages awards. Plaintiff's cross appeal asserts that the trial court erred in denying its motions for judgment notwithstanding the verdict (JNOV) regarding the jury's verdicts for defendants. Because plaintiff's cross appeal raises issues dispositive of defendants' remaining arguments on appeal, we consider plaintiff's arguments first.

Plaintiff contends that the trial court erred in denying its motion for JNOV with regard to count I of

defendants' countercomplaint, which alleged that plaintiff, in bad faith, breached an agreement to lend defendants operating funds for the 1991 growing season. A motion for JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997), lv gtd in part 457 Mich 870 (1998). JNOV is improper where reasonable minds could differ with regard to issues of fact. *Michigan Microtech, Inc v Federated Publications, Inc*, 187 Mich App 178, 186; 466 NW2d 717 (1991). When deciding a motion for JNOV, a trial court must examine the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party. *McLemore v Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 395; 493 NW2d 441 (1992). This Court reviews de novo the trial court's ruling on a motion for JNOV. *Meagher, supra.*

As a matter of law, defendants presented insufficient evidence from which a jury could have found that plaintiff, in bad faith, breached an agreement between the parties that it would finance defendants' 1991 farming operations. In October 1990, loan officers of plaintiff visited defendants' farm to contemplate restructuring defendants' outstanding debt. Conflicting testimony was presented at trial concerning the specificity and definiteness of plaintiff's alleged promise to lend 1991 operating funds. While lenders and borrowers frequently enter into preliminary discussions of whether a loan will be refinanced or further credit will be extended, neither general discussions of extending credit nor past renewals of credit should lead a borrower to reasonably believe

that credit will be extended or renewed again and again. *State Bank of Standish v Curry*, 442 Mich 76, 87; 500 NW2d 104 (1993) ("Nor does a course of past dealing where there has been a pattern of renewal in itself amount to sufficient assent to continue dealing or that renewal will be indefinite."). However, because in the context of reviewing plaintiff's motion for JNOV we must examine the evidence and all its legitimate inferences in defendants' favor, *McLemore, supra*, we conclude that defendants' testimony that plaintiff in October 1990 promised to lend 1991 operating funds to the defaulted defendants on the condition that defendants hold an equipment auction that raised at least $40,000 created an issue of fact for the jury regarding the existence of an agreement to lend. Although defendants did not state that the parties had agreed at the October 1990 meeting to any of the material terms required for the formation of a valid contract, including the amount of the loan, the interest rate, the method of repayment, or the collateral securing the loan, *id.* at 88, we will assume that the jury derived these terms from the parties' controlling Basic Loan Agreement and prior course of dealing, and, in the context of this motion for JNOV, we will defer to the jury's conclusions regarding these matters.

However, even assuming that the essential terms of the alleged agreement could be substantiated from the parties' Basic Loan Agreement and course of dealing or lending history, defendants' claim that plaintiff, in bad faith, refused to advance 1991 operating funds must still fail as a matter of law. The Basic Loan Agreement governing the parties' various supplemental loans and disbursements, dated November 20,

1986, clearly authorizes plaintiff, in the event of defendants' default, to refuse to lend or disburse additional money.

3.4 *Conditions for Loans and Disbursements*

Each of the following provisions shall condition the obligation of [plaintiff] to make loans and Loan Disbursements hereunder:

A. [Plaintiff] has the right to review the loan eligibility and credit worthiness of [defendants] before each loan and Loan Disbursement requested. If as the result of such review [plaintiff] deems itself insecure, or if it would become insecure by such loan or Loan Disbursement, then in [plaintiff]'s sole discretion, it need not make any further loan or Loan Disbursement hereunder.

* * *

6.0 *Default*

The occurrence of any of the following shall constitute a default by [defendants] in all loans outstanding hereunder which shall authorize and permit [Plaintiff] to (a) demand immediate payment of all Indebtedness hereunder, (b) refuse further loans and/or Loan Disbursements . . . .

A. Failure of [defendants] to comply with or perform any of the terms and conditions contained herein or in any mortgage, pledge, security agreement, SUPPLEMENTARY LOAN AGREEMENT or other written document executed by [defendants] in connection herewith . . . .

* * *

C. If [defendants] fail[] to pay all Indebtedness as and when demanded by [plaintiff] . . . .

D. If [defendants] [are] in default in any Indebtedness to [plaintiff] under any loan not otherwise governed by the terms hereof.

* * *

F. If [plaintiff] should at any time in good faith deem itself insecure.

Our review of the record indicates that by 1990 and 1991 defendants had undisputedly defaulted on outstanding loans, having missed payments on separate loan obligations despite several repayment extensions granted by plaintiff. Defendants had outstanding debt in October 1990, at the time plaintiff allegedly promised to supply defendants' 1991 operating funds. According to the parties' supplementary loan agreements of record, by the beginning of 1991 defendants owed $79,692.50 plus interest on loan #10003. Defendants also owed by the beginning of 1991 approximately $200,000 on loan #20001, the entirety of which had come due earlier in 1990 when defendants defaulted on an outstanding installment. In November 1990, plaintiff had granted defendants extensions on the repayments of loans #10003 and #20001, requiring payments of $89,440.88 on loan #10003 and $75,060.81 on loan #20001 by February 1, 1991. Defendants failed to make these payments. Thus, whatever the agreement regarding operating funds plaintiff may have made with defendants in October 1990, plaintiff's refusal to lend or disburse 1991 operating funds was a proper exercise of a bargained-for right under the parties' Basic Loan Agreement, ¶ 6.0. No applicable law would obligate plaintiff to advance defendants further operating funds despite defendants' repeated breaches of their repayment obligations, breaches occurring both before and after plaintiff's alleged promise to lend 1991 operating funds. In our view, plaintiff has not assumed a duty to continually and endlessly fund defendants' operations. To perpetually

bind a lender to the borrower in this manner, despite the lender's clear denial of the assumption of such a responsibility, would certainly discourage the practice of financing, and we decline to impose this perpetual obligation on plaintiff when the parties' contract clearly provides that they intended otherwise. Thus, because defendants had undisputedly defaulted on outstanding loans, the clear and unambiguous terms of the parties' agreement relieved plaintiff of any obligation to lend defendants further operating funds for 1991.

Additionally, given defendants' extreme debt and default, plaintiff's 1991 refusal to provide further operating funds cannot as a matter of law constitute bad faith. See *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 136-137; 393 NW2d 161 (1986) (Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith. Further, claims of bad faith cannot be based on negligence or bad judgment, as long as the actions were made honestly and without concealment. Bad faith is reflected by conduct that is arbitrary, reckless, indifferent, or that intentionally disregards the interests of the person to whom a duty is owed.). In light of defendants' growing debt and missed repayments, plaintiff's denial to advance more funds cannot be considered arbitrary. Because plaintiff's refusal to loan further funds does not constitute bad faith as a matter of law, the jury should not have been permitted to address count I of defendants' countercomplaint.

Plaintiff next argues that the trial court erred in denying its motion for JNOV regarding count II of defendants' countercomplaint, which alleged that

plaintiff, in bad faith, refused to remit a portion of a crop-proceeds check, in which plaintiff held a security interest, to the Federal Land Bank to satisfy a mortgage payment owed by defendants. Plaintiff applied $71,191.54 of the $83,000 crop-proceeds check, which was made payable to plaintiff and defendants jointly, as repayment of the entire principal and interest balance on defendants' 1989 operating loan, for which loan the crop proceeds constituted collateral. As a matter of law, plaintiff's refusal to relinquish its bargained-for rights in collateral does not qualify as bad faith.

> The duty of good faith imposed upon contracting parties does not compel a lender to surrender rights which it has been given by statute or by the terms of its contract. Similarly, it cannot be said that a lender has violated a duty of good faith merely because it has negotiated terms of a loan which are favorable to itself. As such, a lender generally is not liable for harm caused to a borrower by refusing to advance additional funds, release collateral, or assist in obtaining additional loans from third persons. [*Creeger Brick & Building Supply, Inc v Mid-State Bank & Trust Co*, 385 Pa Super 30, 36-37; 560 A2d 151 (1989).]

See also *Van Arnem Co v Manufacturers Hanover Leasing Corp*, 776 F Supp 1220, 1223 (ED Mich, 1991) (A line of credit lender is not by definition "the borrower's fiduciary. The lender remains entitled to advance its own interests by enforcement of contract terms, and is not required to forego enforcement of contract terms to put the borrower's interests ahead of its own."); *Price v Wells Fargo Bank*, 213 Cal App 3d 465, 479; 261 Cal Rptr 735 (1989) (Where the appellants argued "that the bank owed them a duty of reasonable forbearance in enforcing its creditor's

remedies," the court found no authority supporting the appellants' argument and explained that "[c]ontracts are enforceable at law according to their terms. The covenant of good faith . . . does not impose any affirmative duty of moderation in the enforcement of legal rights."). Thus, we conclude that the trial court erred in denying plaintiff's motion for JNOV with regard to count II of defendants' counterclaim.[2]

Assuming arguendo that a valid contract to lend 1991 operating funds existed, that plaintiff, in bad faith, breached its obligation to lend, and that plaintiff, in bad faith, refused to relinquish collateral, we agree with plaintiff that defendants absolutely failed as a matter of law to establish support for the jury's awards of damages resulting from plaintiff's actions. The parties agreed at trial that defendants' claims of breach of good faith were contractual in nature. Damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the con-

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[2] The record contains an April 14, 1989, supplementary loan agreement covering a $50,532.50 operating loan (denominated as loan #2) disbursement that requires this amount plus interest be repaid by February 1, 1990. However, a December 31, 1989, statement of defendants' accounts reflects a balance for loan #2 of $66,246.50, indicating that defendants borrowed more operational funds for 1989 than reflected in the April 14 supplementary loan agreement. Although the record was unclear regarding on what specific date loan #2's balance above $50,532.50 plus interest was due, as discussed above, we find that plaintiff did not act in bad faith in utilizing its collateral to satisfy in its entirety defendants' 1989 operating loan. Furthermore, a November 30, 1989, supplementary loan agreement shows that defendants also owed as of January 1, 1990, a $20,000 plus interest payment on the $195,188.65 balance of their capital loan (loan #20001). Therefore, because the $83,000 crop-proceeds check was insufficient to satisfy all of defendants' loan obligations, plaintiff exercised sound lending practice in refusing to advance $10,000 to the Federal Land Bank.

tract was made. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50 (1980). Application of this principle in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it. *Id.* at 414-415.

Regarding plaintiff's alleged failure to lend, defendants did not establish that this failure resulted in damages amounting to the $315,000 that the jury awarded. A party to a contract who is injured by another's breach of the contract is entitled to recover from the latter damages for only such injuries as are the direct, natural, and proximate result of the breach. *Stewart v Rudner*, 349 Mich 459, 468-469; 84 NW2d 816 (1957). Defendants admitted that they obtained alternate financing for their 1991 farming operations from a neighbor. Therefore, plaintiff's alleged failure to lend did not proximately result in defendants suffering any damages beyond whatever limited, incidental expense they incurred in securing the alternate financing, and certainly no damages remotely approaching the $315,000 awarded by the jury.

Regarding plaintiff's alleged bad-faith refusal to surrender its collateral to the Federal Land Bank, defendants also failed to introduce support for the jury's verdict awarding them damages of $500,000 on this count. The Federal Land Bank extended until February 1, 1991, the due dates of both defendants' January 1, 1990, and January 1, 1991, mortgage payments, but defendants still failed to make the payments. Thus, where defendants' own inaction intervened, no legal causation exists between plaintiff's refusal and the eventual foreclosure on defendants' property. Furthermore, defendants admitted that they

could have borrowed money and paid the Federal Land Bank themselves. Therefore, defendants' failure to mitigate any damages allegedly caused by plaintiff's refusal also precludes the jury's $500,000 award of damages. See *M & V Barocas v THC, Inc*, 216 Mich App 447, 449; 549 NW2d 86 (1996) (It has long been recognized that the law should encourage a potential plaintiff to take reasonable actions to minimize the extent of damages arising from the wrongful breach of a contract.). As the Michigan Supreme Court long ago explained, "The law is well settled that a case should not be submitted to the jury where a verdict must rest upon a conjecture or guess." *Scott v Boyne City, G & A R Co*, 169 Mich 265, 272; 135 NW 110 (1912). Because the jury was permitted in the instant case to speculate regarding the existence of a contract, whether plaintiff acted in bad faith or illegally, and regarding the amount of damages defendants allegedly suffered, we conclude that the trial court erred in denying plaintiff's motions for JNOV regarding counts I and II of defendants' countercomplaint.

Plaintiff further challenges the trial court's denial of its motion for JNOV regarding count VI of defendants' countercomplaint alleging that plaintiff owed defendants a fiduciary duty and breached it by refusing defendants' request that it remit crop proceeds to the Federal Land Bank. A fiduciary relationship, which generally does not arise within the lender-borrower context, exists when there is a reposing of faith, confidence, and trust and the placing of reliance by one on the judgment and advice of another. *Ulrich v Federal Land Bank of St Paul*, 192 Mich App 194, 196-197; 480 NW2d 910 (1991); *Smith v Saginaw Savings & Loan Ass'n*, 94 Mich App 263, 274; 288 NW2d 613

(1979). The mere facts that plaintiff as the lender maintained control over the terms of defendants' loan repayment or participated in discussions regarding what crops to grow and how much money defendants would need to borrow at various times are insufficient as a matter of law to establish a fiduciary relationship between plaintiff lender and defendant borrowers. See *Ulrich*, *supra* (The borrower's allegations of inexperience and reliance on the lender are insufficient to establish a fiduciary relationship.). The testimony of plaintiff's former loan officer and defendants revealed that defendants exercised ultimate control over the operation of their farm, including determining what land to rent and purchase, what equipment to purchase, in what land to plant crops, the nature and amount of each crop to grow, when and to whom to sell the crops, and other business-related decisions, and that no profit-sharing occurred between defendants and plaintiff. Because the record reflects no evidence supporting the existence of a fiduciary relationship between plaintiff and defendants beyond the ordinary lender-borrower relationship, the trial court should have granted plaintiff's motion for JNOV regarding this claim.

Plaintiff finally claims that the trial court should have additionally granted its motion for JNOV regarding defendants' claim that plaintiff by duress obtained a mortgage on one of defendants' farms. This Court has explained that

> [t]o succeed with respect to a claim of duress, [defendants] must establish that they were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes. "Fear of financial ruin alone is insufficient to establish economic duress; it must also be established that

> the person applying the coercion acted unlawfully." [*Enzymes of America, Inc v Deloitte, Haskins & Sells*, 207 Mich App 28, 35; 523 NW2d 810 (1994), rev'd in part on other grounds 450 Mich 889 (1995) (citations omitted).]

Because defendants have not alleged that plaintiff acted illegally, their claim of duress is meritless, and we conclude that the trial court erred in allowing it to proceed to the jury.

Given our conclusion affirming the trial court's grant of plaintiff's motion for a directed verdict regarding count V of defendants' countercomplaint, and our conclusions reversing the trial court's denials of plaintiff's motions for a directed verdict regarding counts I, II, VI, and VII of defendants' countercomplaint, we need not reach defendants' various remaining allegations that the trial court erred in calculating setoffs to their jury awards. We simply note the following in response to defendants' argument that the trial court erred in determining that a breach of contract by plaintiff lender that caused defendants to lose certain property would entitle defendants to recover only the amount of their loss of equity in the property—the property's market value on the foreclosure date less expenses saved because of foreclosure. *United California Bank v Prudential Ins Co of America*, 140 Ariz 238, 295-296, 308-309; 681 P2d 390 (1983). While "[t]he traditional measure of damages for breach of a contract to loan money is the additional interest required for a replacement loan. . . . [T]his measure has been broadened to include loss of equity if the breach of the loan agreement caused the borrower to lose ownership of its assets." *Id.* at 295-296.

> It is only "the actual loss" in the given case that can be recovered by the landowner. That measures the amount of his damages. Where there is a lien indebtedness against the land the indebtedness must be taken into consideration in determining the amount of "actual loss" the landowner sustained at the time the title was lost. The landowner, owing such lien indebtedness, must pay it, and is bound to pay it. He is not legally relieved of its final payment by the mere act of the party defaulting in lending the money to discharge the lien indebtedness. Consequently, in such cases, the measure of liability is the difference in the lien indebtedness, principal and interest, and the value of the land at the time it is lost by reason of foreclosure of such lien. It is the landowner's interest in the land, represented by the value of his equity, that he would be entitled to as compensation. For legally the value of the equity is his only "actual loss." [*FB Collins Inv Co v Sallas*, 260 SW 261, 265 (Tex App, 1924).]

See also *Lincor Contractors, Ltd v Hyskell*, 39 Wash App 317, 321-322; 692 P2d 903 (1984) (financing company's refusal to lend entitled property owner to recover value of its equity in building); *St Paul at Chase Corp v Manufacturers Life Ins Co*, 262 Md 192, 241-244; 278 A2d 12 (1971) (breaching party's refusal to finance entitled property owner to recover for loss of equity, but because owner had no equity it could recover no damages for loss of building).

Defendants additionally challenge the trial court's decision to award plaintiff attorney fees and costs, alleging that plaintiff should not be entitled to fees and costs when it breached its contractual duties. However, in light of our conclusions reversing the jury's verdicts for defendants, defendants' argument is without merit. Furthermore, in stipulating judgment for plaintiff on its complaint, defendants on the record agreed that plaintiff would receive attorney

fees in an amount to be later determined by the trial court. Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendants have waived our review of this issue. *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

Finally, defendants argue that several rulings of the trial court illustrate that it was biased against them. Our review of these various, brief contentions, however, reveals no improper actions taken by the trial court, and no unfair prejudice suffered by defendants.

Affirmed in part, reversed in part, and remanded for entry of judgment for plaintiff regarding counts I, II, VI, and VII of defendants' countercomplaint. We do not retain jurisdiction.

DOCTOROFF, J., concurred.

JANSEN, P.J. (*concurring in part and dissenting in part*). I respectfully dissent from the majority's decision to reverse with regard to counts I, II, VI, and VII of defendants' countercomplaint and remand for entry of judgment in favor of plaintiff regarding those claims. I would affirm the jury's verdict and the trial court's rulings in all respects.

I agree with the majority with respect to defendants' issues on appeal to the extent that defendants have not raised any issue requiring reversal. Regarding the issue of setoff, I would find no error because the parties agreed on the record that the jury would be instructed that the trial court would set off any real estate liens on defendants' property from any award, and at the posttrial hearing, the trial court noted that the amount of the setoff represented supe-

rior or senior liens that would become plaintiff's liability.

With respect to the cross appeal, I respectfully dissent. I would hold that the trial court did not err in denying plaintiff's motion for judgment notwithstanding the verdict (JNOV) regarding count I (bad-faith breach of contract for failure of plaintiff to loan 1991 operating funds to defendants), count II (bad-faith breach of contract when plaintiff refused to surrender collateral proceeds to pay other of defendants' creditors), count VI (breach of fiduciary duty by plaintiff in failing to release collateral proceeds to tender payment on Federal Land Bank's mortgage), and count VII (duress by plaintiff in procuring the May 1990 mortgage on the Partaka farm) because there were factual questions for the jury to resolve. I do not believe that defendants' counterclaim is deficient as a matter of law as the majority apparently holds.

The standard of review for JNOV requires review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995). Only if the evidence so viewed fails to establish a claim as a matter of law, should a motion for JNOV be granted. *Id.* at 558. I would find that defendants presented sufficient evidence to support each claim and that the majority is simply, and improperly, substituting its own judgment for that of the jury. See *McLemore v Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 395; 493 NW2d 441 (1992).

With regard to count I, defendants alleged a bad-faith breach of an agreement to loan defendants operating funds for 1991. There was evidence that loan officers of plaintiff's office went to defendants' farm

in October 1990 and that the loan officers promised to grant a loan in the spring of 1991 if defendants agreed to hold an equipment auction and pay plaintiff $40,000. Defendants, in December 1990, sold certain machinery and paid plaintiff over $50,000 from the proceeds. Further, it was defendants' contention that the promise to loan additional money in the spring of 1991 falls within the Basic Loan Agreement. The terms of the Basic Loan Agreement clearly contemplate additional loans made in the future and specifically states that all loan applications and loans made in the future are covered by the terms of the Basic Loan Agreement. Therefore, the essential terms of the agreement to loan money for the spring of 1991 are covered by the Basic Loan Agreement. Additionally, defendants applied for an operating loan in 1990, which plaintiff approved and extended repayment dates on all outstanding debt.[1] Finally, even if the terms of the Basic Loan Agreement relieved plaintiff of any obligation to lend further operating funds in 1991, there was evidence that plaintiff had agreed to do so, even if not obliged to do so.

Accordingly, the jury could find that plaintiff, in bad faith, breached an agreement to loan defendants operating funds for 1991.

With respect to count II, defendants alleged a bad-faith breach of contract when plaintiff refused to surrender its collateral proceeds to pay other creditors of defendants. There was evidence that, in January 1990, Crystal Weldon instructed one of plaintiff's employees to apply $10,000 of a total check amount

[1] Even this fact is conceded in plaintiff's brief, as cross-appellant, at page six.

of $83,000 to a mortgage payment owed by defendants to the Federal Land Bank. The majority holds that plaintiff's refusal to relinquish its bargained-for rights in collateral does not qualify as bad faith. However, the critical fact here is that the contract (the April 19, 1989, supplementary loan agreement) required a payment of $50,532 principal on the operating note, and plaintiff applied $66,246.50 to pay the principal on that note. Thus, the check for $83,000 covered the amount that defendants owed on the contract to plaintiff, and covered the additional $10,000 that defendants asked be applied to the mortgage with the Federal Land Bank. Moreover, defendants did not discover until several months after instructing plaintiff to apply $10,000 toward the mortgage that plaintiff did not do so. Accordingly, the jury could find that plaintiff, in bad faith, breached a contract when it failed to apply $10,000 toward the mortgage as instructed by defendants.

Further, there was sufficient evidence presented to find that the failure to apply the $10,000 toward the mortgage with the Federal Land Bank caused damages in the amount the jury awarded, $500,000. Because the $10,000 was not applied toward the mortgage, the mortgage was foreclosed and the Caskey farm was later sold to a third party. The loss of the Caskey farm included the loss of crop income derived from the farm as testified to by Major Weldon. Thus, there is evidence supporting the jury's finding of causation between the breach and defendants' damages.

With respect to count VI, defendants alleged breach of a fiduciary duty by plaintiff in failing to release its collateral proceeds (the $10,000) toward the mortgage with the Federal Land Bank. Defendants note that

there is a power of attorney, dated July 6, 1988, in which the Farm Credit Bank of St. Paul granted agent and attorney-in-fact status to plaintiff. Other evidence in this regard is that paragraph 3.1 of the Basic Loan Agreement states that plaintiff "is unwilling and unable to lend money without retaining ultimate control of the repayment requirements." There was other testimony from Crystal Weldon that she, her husband, and Per Peterson (plaintiff's loan officer) decided together what crops would be grown, as well as other financial decisions. Peterson, as well, testified that he and defendants would mutually decide how much money would be needed for operations and machinery, and admitted that defendants were relying on him to sit down with them and discuss what was happening and bring any problems to their attention.

Under these circumstances, I would hold that the jury could properly determine that there was a fiduciary relationship because there was a reposing of faith, confidence, and trust and a placing of reliance by defendants on the judgment and advice of plaintiff.

With respect to count VII, there is no need to address this issue because the trial court set aside the jury's verdict for defendants in the judgment, finding that the relief sought by defendants in this count was inconsistent with the relief defendants sought and the verdict rendered by the jury. Further, contrary to defendants' argument, it was not error for the trial court to set aside the jury's verdict regarding count VII because this effectively validated plaintiff's mortgage on the Partaka farm and its purchase price of the premises at the foreclosure sale, thus reducing defendants' debt.

As its final argument, plaintiff contends that the damages awarded defendants are excessive, contrary to contract law, and against the great weight of the evidence. I disagree. Once injury is proved, recovery is not precluded simply because proof of the amount of damages is not mathematically precise. *Godwin v Ace Iron & Metal Co*, 376 Mich 360, 368; 137 NW2d 151 (1965). Further, where reasonable minds could differ regarding the level of certainty to which damages have been proved, this Court is careful not to invade the fact finding of the jury and substitute its own judgment. *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995). Finally, where, the award "falls reasonably within the range of evidence and within the limits of what reasonable minds would deem just compensation for the injury sustained, the award should not be disturbed." *Frohman v Detroit*, 181 Mich App 400, 415; 450 NW2d 59 (1989). Here, the award falls within the range of evidence, is not excessive, and is not contrary to contract law.

I would affirm the trial court's final judgment in all respects.

In re DAWSON

Docket No. 210641. Submitted October 6, 1998, at Grand Rapids. Decided November 24, 1998, at 9:05 A.M.

Christine Dawson filed in the Ottawa Circuit Court, Family Court Division, a petition for a hearing to terminate Robert Emerson's parental rights to a child the parties conceived while dating. The parties had ended their relationship, in part, as a result of a difference of opinion regarding Dawson's desire to have an abortion. Dawson then decided that she would place the child for adoption and falsely told Emerson that he was not the father. When the adoption agency notified Emerson that Dawson had named him as the father, Emerson responded by filing a notice of intent to claim paternity. When the baby was born, it was turned over to the prospective adoptive parents, but Emerson was not informed of the birth by Dawson. Dawson then filed her petition, conditioning the release of her parental rights on the termination of Emerson's parental rights. The court, Wesley J. Nykamp, J., denied the petition to terminate Emerson's parental rights, finding that Emerson's filing of the notice of intent to claim paternity constituted support or care for purposes of MCL 710.39(2); MSA 27.3178(555.39)(2) and that, even if Emerson did not fall within subsection 39(2), pursuant to MCL 710.39(1); MSA 27.3178(555.39)(1), Emerson was fit and able to properly care for the child and it was in the best interests of the child to grant custody to Emerson. Dawson appealed.

The Court of Appeals *held*:

1. The court erred in ruling that a putative father's filing of a notice of intent to claim paternity constitutes the provision of support or care for the purpose of subsection 39(2). The error was harmless, however, because the court found that, even if Emerson did not fall within subsection 39(2), he was fit and able to properly care for the child and it was in the child's best interests to grant custody to Emerson.

2. The court properly examined Emerson's circumstances alone in evaluating the best interests of the child under subsection 39(1). The statute regarding the factors to be considered in determining the child's best interests, MCL 710.22(f); MSA 27.3178(555.22)(f), does not provide that the putative father's circumstances are to be

compared to the prospective adoptive individuals' circumstances when evaluating the best interests of the child under § 39.

Affirmed.

1. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — ADOPTION — PUTATIVE FATHERS — WORDS AND PHRASES — SUPPORT OR CARE.

A putative father's filing of a notice of intent to claim paternity under MCL 710.33; MSA 27.3178(555.33) does not constitute the provision of "support or care" for purposes of determining under MCL 710.39(2); MSA 27.3178(555.39)(2) whether the putative father has provided support or care.

2. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — ADOPTION — PUTATIVE FATHERS.

A court that finds that a putative father does not fall within the provisions of MCL 710.39(2); MSA 27.3178(555.39)(2) must inquire into the putative father's fitness and ability to properly care for his child and determine under MCL 710.22(f); MSA 27.3178(555.22)(f) whether the best interests of the child will be served by granting custody to him; the putative father's circumstances must be examined alone, without comparison to prospective adoptive parents' circumstances, when determining the best interests of the child under § 39 (MCL 710.39[1]; MSA 27.3178[555.39][1]).

Wesseling & Brackmann, P.C. (by *Douglas J. Brackmann*), for Christine Dawson.

Kristine J. Guthrie, for Robert Emerson.

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

DOCTOROFF, J. Petitioner appeals as of right from an order of the Ottawa Circuit Court, Family Court Division, denying her petition to terminate respondent's parental rights pursuant to § 39 of the Adoption Code, MCL 710.39; MSA 27.3178(555.39). We affirm.

Petitioner and respondent began a dating relationship in March or April 1997. They planned to live together and began looking for a house. Soon thereafter, petitioner learned that she was pregnant. They discussed abortion, but decided to have, and raise,

the child. In August 1997, respondent applied for a mortgage, which was later approved. However, just before they were to close on the house, petitioner decided to have an abortion. By this time, respondent opposed the abortion and wanted petitioner to have the baby. In part, because of this difference of opinion, petitioner ended the relationship. As a result, respondent decided not to purchase the house. In September 1997, petitioner decided to place the baby for adoption. She falsely told respondent that he was not the father. In December 1997, the adoption agency notified respondent that petitioner had named him as the father. In January 1998, respondent filed a notice of intent to claim paternity. The baby was born on February 6, 1998, and was immediately turned over to the prospective adoptive parents. Petitioner did not inform respondent that the baby had been born.

Petitioner then filed a petition for a hearing to terminate respondent's parental rights, conditioning the release of her parental rights on the termination of respondent's parental rights. The hearing was held on February 27, 1998. The trial court found that, under the circumstances of this case, respondent's filing of the notice of intent to claim paternity constituted "support or care" for the purposes of subsection 39(2). The trial court went on to find that, even if respondent did not fall within subsection 39(2), pursuant to subsection 39(1), he was fit and able to properly care for his child, and it was in the best interests of the child to grant custody to him. Accordingly, the trial court denied the petition to terminate respondent's parental rights.

Petitioner first argues that the trial court erred in ruling that a putative father's filing of a notice of intent to claim paternity constitutes the provision of "support or care" for the purpose of MCL 710.39(2); MSA 27.3178(555.39)(2). We agree, but conclude that the error was harmless. This issue presents a question of law, which we review de novo on appeal. *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997).

MCL 710.39; MSA 27.3178(555.39) provides, in part:

> (1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.
>
> (2) If the putative father has established a custodial relationship with the child or has provided support or care for the mother during the pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA.

As the Court stated in *In re Barlow*, 404 Mich 216, 229; 273 NW2d 35 (1978):

> Section 39 of the code creates two categories of putative fathers and provides different standards for termination of the rights of each. Putative fathers who have established no custodial relationship with the child, and who have provided no support for the mother or child prior to the notice of hearing, may have their parental rights terminated if the

> court finds, after examining the father's fitness and ability to properly care for the child, "that it would not be in the best interests of the child to grant custody" to him. The parental rights of the second group, those who have established some kind of custodial or support relationship prior to the notice of hearing, are subject to termination only by proceedings under the general jurisdictional provisions of chapter 12A of the Probate Code.

The test to determine whether a putative father has provided "support or care" for the mother or child is whether the father provided reasonable care under the circumstances of the case. *In re Gaipa*, 219 Mich App 80, 86; 555 NW2d 867 (1996). In determining whether the father has provided reasonable care under the circumstances, the court should consider factors such as the father's ability to provide support or care, the needs of the mother, the kind of support or care provided, the duration of the support, whether the mother impeded the father's efforts to provide her with support, and any other significant factors. *Id.* The support or care must be "more than an incidental, fleeting, or inconsequential offer of support or care," but need not rise to the level of "regular and substantial" support in all cases. *Id.* at 85.

The trial court determined that

> [g]iven these unusual facts where the mother tells the father he is not the father and then names him as the father in the Notice to Putative Father and Custody Statement [MCL 710.37; MSA 27.3178(555.37)], and he responds by filing the Section 33 [MCL 710.33; MSA 27.3178(555.33)] Notice of Intent to Claim Paternity, we hold that the father comes within Subsection (2) of MCL 710.39 [MSA 27.3178(555.39)] as construed by *Gaipa*, *supra*.

The filing of a notice of intent to claim paternity is not "support or care" for the purposes of MCL 710.39(2); MSA 27.3178(555.39)(2). A notice of intent to claim paternity merely creates a rebuttable presumption of paternity for the purposes of the Paternity Act[1] and dependency or neglect proceedings under MCL 712A.1 *et seq.*; MSA 27.3178(598.1) *et seq.* MCL 710.33(2); MSA 27.3178(555.33)(2). Nothing in § 33 or § 39 reflects that the Legislature intended the filing of a notice of intent to claim paternity to constitute support or care for the purposes of subsection 39(2).

Although the trial court erred in determining that respondent's filing of the notice of intent to claim paternity was sufficient evidence of "support or care" to satisfy subsection 39(2), the error was harmless because the trial court further found that, even if respondent did not fall within subsection 39(2), pursuant to subsection 39(1), respondent was fit and able to properly care for the child, and that it was in the child's best interests to grant custody to respondent.

Nevertheless, we feel compelled to express our concern that § 39 treats a putative father unfairly where, as in the instant case, the mother's actions prevent the putative father from providing support or care for the mother during the pregnancy or establishing a custodial relationship with the child. Here, petitioner told respondent that she planned to abort the child, later told him that he was not the father of the child, and then did not inform him when she gave birth to the child. In such a situation, we do not believe the putative father should be placed in the

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[1] MCL 722.711; MSA 25.491 through MCL 722.730; MSA 25.510.

category of putative fathers who fall within subsection 39(1). However, because § 39, as written, does not account for such a situation, we must conclude in the instant case that respondent did not satisfy subsection 39(2).

Petitioner next argues that the trial court erred in ruling that, when determining the best interests of the child under subsection 39(1), the court should only examine the circumstances of the putative father, and should not compare the putative father to the prospective adoptive parents. We disagree. The interpretation of a statute is a question of law, which we review de novo on appeal. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995).

The primary goal of judicial interpretation of statutes is to ascertain the intent of the Legislature. *Id.* at 309. The first criterion in determining intent is the specific language of the statute. *Id.* at 310. The Legislature is presumed to have intended the meaning it plainly expressed, and when the language of a statute is clear and unambiguous, judicial construction is neither required nor permitted. *Id.* However, if a statute is ambiguous and reasonable minds can differ with regard to the meaning of the statute, judicial construction is permitted. *Id.* at 311. When construing a statute, the court must use common sense and should construe the statute so as to avoid unreasonable consequences. *Gaipa*, *supra* at 84-85. Because the Adoption Code is in derogation of the common law, it must be strictly construed. *Schnell*, *supra* at 310.

Subsection 39(1) clearly indicates that, when a putative father does not fall within the provisions of subsection 39(2), the court must "inquire into *his* fitness and *his* ability to properly care for the child

. . . ." Subsection 39(1) further provides that the court must determine whether it is in the best interests of the child to grant custody to the putative father. According to subsection 22(f) of the Adoption Code:

> "Best interests of the adoptee" or "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:
>
> (i) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under section 39 of this chapter, the putative father and the adoptee.
>
> (ii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.
>
> (iii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (iv) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (v) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39 of this chapter, the home of the putative father.
>
> (vi) The moral fitness of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father.
>
> (vii) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under sec-

tion 39 of this chapter, of the putative father, and of the adoptee.

(viii) The home, school, and community record of the adoptee.

(ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.

(x) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.

(xi) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody. [MCL 710.22(f); MSA 27.3178(555.22)(f).]

Before subsection 22(f) (formerly subsection 22[b]) was amended by 1994 PA 222, it did not mention § 39. The amendment's addition of the language "or, in the case of a hearing under section 39 of this chapter," clarified the apparent legislative intent, that the putative father's circumstances be examined alone, without comparison to the prospective adoptive parents' circumstances, when determining the best interests of the child under § 39. The factors containing the language referring to § 39 indicate that the court is to consider those factors with respect to the adopting individual or individuals, "*or*, in the case of a hearing under section 39 of this chapter," the court is to consider the factors with respect to the putative father. The references in subsection 22(f) to the adopting individual or individuals are only relevant when the "best interests of the adoptee" are being considered for purposes other than § 39. Nothing in the language of § 39 or subsection 22(f) indicates that the putative father is to be compared to the prospective adopting individual or individuals when evaluating the best interests of the child under § 39. If the Legislature

had intended such a comparison it could have easily stated that the putative father is to be compared with the prospective adoptive parents. We also note that the interpretation urged by petitioner cannot be applied in cases where adoptive parents have not yet been found.

Moreover, to require a comparison between the putative father and the prospective adoptive parents would be unfair and unreasonable. Where a putative father appears in court desiring custody of his child and is found to be fit and able to properly care for his child, he should not be required to compete with individuals who wish to adopt his child. Specifically, in the instant case, where it was petitioner's conduct that kept respondent from his child, we do not believe that respondent should have to compete with the prospective adoptive parents. Accordingly, we conclude that if the court determines that the father is fit and able to raise his child, the court should then determine, by considering the father's situation alone, whether the best interests of the child are satisfied by placing the child with the father or by terminating the father's parental rights and placing the child for adoption.

Petitioner relies on *In re Ballard*, 219 Mich App 329, 336-337; 556 NW2d 196 (1996), in which this Court stated that subsection 22(f) directs a court to compare the putative father with the adopting person or persons to determine the best interests of the child under § 39. The relevant issue in *Ballard* was whether a putative father's provision of custody and care by relatives while he was in prison could be considered under § 39 and § 22 of the Adoption Code. *Ballard*, *supra* at 336. In *Ballard*, the hearing to terminate the

respondent's parental rights was held before the effective date of the amendment of § 22 by 1994 PA 222, and the probate court's decision specifically referred to the statute as it existed before the amendment. *Ballard, supra* at 330. Therefore, the current version of subsection 22(f) was not before this Court. Although this Court referred to subsection 22(f) in its opinion, it was actually the current subsection 22(f)'s predecessor, the former subsection 22(b), that was before this Court in *Ballard*. Accordingly, we are not bound to follow *Ballard*.

Affirmed.

ADAMS v CITY OF DETROIT

Docket No. 201927. Submitted October 6, 1998, at Detroit. Decided November 24, 1998, at 9:10 A.M. Leave to appeal sought.

Earlene Adams and other former employees of the city of Detroit, who retired in 1983 or earlier pursuant to an early retirement plan, brought an action in the Wayne Circuit Court against the city, alleging a breach of contract as a result of the city's failure to pay the retirees' health insurance premiums. The court, Kirsten Frank Kelly, J., granted summary disposition in favor of the city on the ground that the plaintiffs' claim was barred by the applicable statute of limitations. Some of the plaintiffs appealed.

The Court of Appeals *held*:

1. The court erred in ruling that the date of the breach of contract with regard to each plaintiff was the date upon which each began receiving retirement benefits that did not include medical coverage. Pension benefits are similar to installment contracts and the period of limitation runs from the date each installment is due. The plaintiffs may seek all benefits withheld up to six years, the period of limitation, before the commencement of their action.

2. All the elements of each plaintiff's claim of breach existed from the moment that the city began providing incomplete retirement benefits. The fact that the plaintiffs did not appreciate their rights until the Court of Appeals decided *Clexton v Detroit*, 179 Mich App 209 (1989), which held that the retirees under the same early retirement plan are entitled to health insurance benefits, does not require that the limitation period applicable to the plaintiffs' action should begin to run from the date that *Clexton* was decided.

3. A memorandum from the city's agent to the staff of the city's retirement system that addressed the health insurance benefits issue in light of the *Clexton* decision did not revive any time-barred claims under MCL 600.5866; MSA 27A.5866. The memorandum contained conditional language and constituted neither a direct admission of an existing debt nor an unqualified statement of intention to pay.

4. The city did not conceal the plaintiffs' cause of action, misrepresent the applicable period of limitation, or attempt to dissuade the plaintiffs from commencing their action at an earlier time. The

city's pre-*Clexton* representations to the plaintiffs were not intentional misrepresentations. The city is not equitably estopped from raising the statute of limitations in defense of the plaintiffs' claims.

Reversed and remanded.

1. LIMITATION OF ACTIONS — ACCRUAL OF ACTIONS — CONTRACTS — PENSION BENEFITS.

The period of limitation applicable to an action for breach of contract with regard to alleged deficient pension benefit payments begins to run from the date each payment is due; every periodic payment made that is alleged to be less than the amount due constitutes a continuing breach of contract and the limitation period runs from the date of each payment.

2. CONTRACTS — ACCRUAL OF ACTIONS.

A breach of contract claim accrues on the date of the breach, not on the date the breach is discovered.

3. CONTRACTS — ACCRUAL OF ACTIONS — KNOWLEDGE.

A plaintiff need not know of the invasion of a legal right in order for a claim thereon to accrue and may not delay action regarding violated legal rights until a subsequent appellate court decision inspires action.

4. LIMITATION OF ACTIONS — REVIVAL OF TIME-BARRED CLAIMS — ACKNOWLEDGMENTS.

An acknowledgment of a contractual obligation must contain an unqualified and direct admission of a present subsisting debt that the party is liable and willing to pay and must be unaccompanied by any circumstances or declarations that repel the presumption of a promise or intention to pay in order for the acknowledgment to revive a contract claim that is otherwise time-barred (MCL 600.5866; MSA 27A.5866).

5. EQUITY — LIMITATION OF ACTIONS — CONTRACTS.

Equitable estoppel arises when one party has knowingly concealed or falsely represented a material fact, while inducing another's reasonable reliance on that misrepresentation, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position; although the doctrine may bar the use of a statute of limitation as a defense to a contract claim, the Supreme Court has been reluctant to recognize an estoppel in the absence of conduct clearly designed to induce the plaintiff to refrain from bringing the action within the period fixed by statute.

Foster, Meadows & Ballard, P.C. (by *Michael J. Liddane, Camille A. Raffa-Dietz*, and *Charles R. Hrdlicka*), for the plaintiffs.

Before: HOEKSTRA, P.J., and CAVANAGH and O'CONNELL, JJ.

O'CONNELL, J. Plaintiffs-appellants (hereinafter plaintiffs), former employees of defendant city of Detroit, appeal as of right from an order granting summary disposition to defendant under MCR 2.116(C)(7), on the ground that their claim was barred by the applicable statute of limitations. We reverse and remand for further proceedings.

Plaintiffs voluntarily left their employment with defendant pursuant to an early retirement plan available to employees who were at least forty years old and who had been employed with defendant for at least eight years. In 1974 and 1977, defendant's city counsel passed resolutions obligating defendant to pay health insurance premiums for retirees. Defendant initially regarded those resolutions as applying to only conventional retirees, not those taking advantage of the "40 & 8" early retirement plan. Defendant explained to plaintiffs, all of whom retired in 1983 or earlier, that payment of health insurance premiums would not be part of their retirement packages.

In 1989, this Court rendered *Clexton v Detroit*, 179 Mich App 209; 445 NW2d 201 (1989), holding that retirees under the "40 & 8" plan are fully entitled to health insurance benefits. *Id.* at 215. In 1994, plaintiffs sued defendant for unprovided health insurance benefits. Defendant moved to dismiss, contending that the applicable statute of limitations, MCL 600.5807(8);

MSA 27A.5807(8), barred their claims. The trial court agreed and granted the motion.

Plaintiffs argue that the trial court erred in holding that plaintiffs' claims were wholly time barred. The period of limitation for actions over breaches of contract is six years. MCL 600.5807(8); MSA 27A.5807(8). The period of limitation generally begins to run on the date of the breach. *Harris v Allen Park*, 193 Mich App 103, 106; 483 NW2d 434 (1992). The trial court ruled that the date of breach for each plaintiff was the date upon which each began receiving retirement benefits that did not include medical coverage, this in each instance being more than six years before this action was commenced. Plaintiffs posit four alternative bases for avoiding the bar of the statute of limitations, which we will address in turn.[1] We review these issues de novo, as questions of law. *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996) (summary disposition); *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994) (questions of law).

I. "INSTALLMENT CONTRACT"

Plaintiffs argued before the trial court that their retirement benefits should be likened to obligations under installment contracts, each deficient periodic payment constituting a separate breach of contract

[1] We wish to express our displeasure with defendant city of Detroit for its failure to participate meaningfully in this appeal, having neither submitted a brief nor appeared for oral argument. This particularly concerns us in that the present and future consequences of the instant case implicate large sums of public money for which defendant is responsible. We are disappointed not only by defendant's failure to defend the public treasury, but also by defendant's failure to assist this Court in resolving this important case.

actionable for the following six years. The trial court rejected this argument, ruling that "medical and hospitalization were a one time benefit."

Plaintiffs rely on *Harris*, *supra* at 107, where, under facts similar to those of the instant case, this Court ruled as follows:

> [N]ot all individuals who retired from the system more than six years before this action was filed should have their claims barred. Pension benefits are similar to installment contracts and the period of limitation runs from the date each installment is due. Therefore, every periodic payment made that is alleged to be less than the amount due plaintiffs . . . constitutes a continuing breach of contract and the limitation period runs from the due date of each payment.

The trial court distinguished the instant case from *Harris* in that *Harris* concerned periodic payments of a monetary benefit, whereas the instant case concerned premiums to be paid directly to an insurance carrier. We agree with plaintiffs that *Harris* is applicable to this case, the incidental factual distinction notwithstanding. There is no meaningful difference, for purposes of likening a retirement plan to an installment contract, between benefits paid directly to the retiree and benefits paid to a third party for services to be rendered to the retiree.

Accordingly, we conclude that the trial court erred in ruling that plaintiffs' claims were entirely barred by the statute of limitations. We hold that each plaintiff is entitled to proceed against defendant for all benefits withheld up to six years before commencement of this cause of action.

II. *CLEXTON* AS ESTABLISHING THE DATE OF ACCRUAL

Plaintiffs argue that because they did not understand that they had a claim against defendant until this Court published its decision in *Clexton, supra*, the accrual date of their claims should be that of *Clexton*'s release. We disagree.

"A plaintiff need not know of the invasion of a legal right in order for the claim to accrue." *Harris, supra* at 106; see also *Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367, 372, n 1; 494 NW2d 1 (1992) ("A breach of contract claim accrues on the date of the breach, not the date the breach is discovered."). Further, a plaintiff may not "sleep on his rights until a subsequent appellate court decision rouse[s] him to action." *Lothian v Detroit*, 414 Mich 160, 175; 324 NW2d 9 (1982). Plaintiffs are not exempted from these principles because of their failure to appreciate their rights before *Clexton* was issued. All the elements of each plaintiff's claim of breach existed from the moment that defendant began providing incomplete retirement benefits. Further, at least some retirees, obviously including the plaintiff in *Clexton*, recognized that a breach had taken place. For these reasons, plaintiffs' argument that the limitation period should begin with the release of *Clexton* must fail. Plaintiffs may not use *Clexton* as a means of attaching a later date to claims that otherwise fall outside the six-year period of limitation.

III. REVIVAL OF CLAIMS UNDER MCL 600.5866; MSA 27A.5866

In November 1991, defendant's agent issued a memorandum addressed to the staff of defendant's retirement system announcing that, in light of *Clexton*,

defendant's policy was that vested retirees "who resigned prior to July 1, 1983 and began collection prior to August 8, 1989 are all eligible for benefits provided they made a written request within six (6) years of their receipt of their first retirement check." Plaintiffs, citing the revival statute, MCL 600.5866; MSA 27A.5866, argue that this memorandum revived their claims in the face of any running of the period of limitation. We disagree.

MCL 600.5866; MSA 27A.5866 provides as follows:

> Express or implied contracts which have been barred by the running of the period of limitation shall be revived by the acknowledgment or promise of the party to be charged. But no acknowledgment or promise shall be recognized as effective to bar the running of the period of limitations or revive the claim unless the acknowledgment is made by or the promise is contained in some writing signed by the party to be charged by the action.

Our Supreme Court, in ancient cases that nonetheless comport with the current statute and guide our reading of it, stated that for an acknowledgment of a contractual obligation to revive a contract claim that is otherwise time barred, the acknowledgment must contain " 'an unqualified and direct admission of a present subsisting debt which the party is liable and willing to pay and be unaccompanied by any circumstances or declarations which repel the presumption of a promise or intention to pay.' " *Throop v Russell*, 145 Mich 482, 486; 108 NW 1013 (1906), quoting *Ten Eyck v Wing*, 1 Mich 40, 47 (1848).

In the instant case, the memorandum to which plaintiffs point, given its conditional language, constitutes neither a direct admission of an existing debt

nor an unqualified statement of intention to pay. Accordingly, we agree with the trial court that the memorandum did not revive any time-barred claims.

IV. ESTOPPEL

Plaintiffs argue that defendant should be equitably estopped from asserting the statute of limitations as a defense to plaintiffs' claims. We disagree.

Equitable estoppel arises where one party has knowingly concealed or falsely represented a material fact, while inducing another's reasonable reliance on that misapprehension, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position. See *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997); *Moore v First Security Casualty Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997). Although the doctrine can operate to bar use of the statute of limitations as a defense to a contract claim, our Supreme Court has been "reluctant to recognize an estoppel in the absence of conduct clearly designed to induce the plaintiff to refrain from bringing action within the period fixed by statute." *Lothian*, *supra* at 177 (internal quotation marks and citation omitted).

In the instant case, defendant did not conceal plaintiffs' cause of action, misrepresent the applicable period of limitation, or otherwise attempt to dissuade plaintiffs from commencing action at an earlier time. See *Attorney General v Consumers Power Co (On Rehearing)*, 202 Mich App 74, 81; 508 NW2d 901 (1993). Defendant's pre-*Clexton* representations to plaintiffs that they were not entitled to health insurance benefits was an honest reflection of policy pur-

suant to a reasonable, though incorrect, interpretation of defendant's obligations. Because there was no intentional misrepresentation at the time, defendant is not equitably estopped from raising the statute of limitations in defense of plaintiffs' claims.

Plaintiffs further argue that defendant was their retirement plan fiduciary and that defendant accordingly had an affirmative duty to inform them of the *Clexton* result. However, plaintiffs never properly brought this assertion before the court below, and did not otherwise challenge defendant's claim that defendant was not a plan fiduciary. For these reasons, for purposes of this appeal we decline to charge defendant with the special duties of a plan fiduciary.

V. CONCLUSION

The trial court erred in treating defendant's failure to pay health insurance premiums for each plaintiff as one-time occurrences, dating each from the moment each plaintiff began receiving benefits for purposes of applying the statute of limitations. On remand, the court should liken plaintiffs' retirement benefits to installment contracts, each deficient payment of benefits marking the time from which a separate claim accrues. Accordingly, plaintiffs may pursue their claims for any unprovided benefits dating from the six years before plaintiffs filed suit. Defendant is free to raise the statute of limitations as a defense to any earlier claims.

The release of this Court's ruling in *Clexton*, *supra*, has no bearing on the accrual date of any claim, nor does defendant's agent's memorandum of November 1991 revive any claim that falls outside the six-year limitation period as described above.

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

FMB-FIRST MICHIGAN BANK v BAILEY

Docket No. 200958. Submitted September 9, 1998, at Grand Rapids. Decided November 24, 1998, at 9:15 A.M.

FMB-First Michigan Bank brought an action in the Kent Circuit Court against attorney Donald M. Bailey, seeking payment of that portion of a loan from FMB to the law firm of Bailey & Koetje, P.C., that Bailey personally guaranteed. Bailey & Koetje, P.C., had as its partners Bailey, James L. Koetje, and Donald R. France and had, by the time of FMB's action, been dissolved following arbitration of an action brought by Koetje in the Kent Circuit Court. Asserting various common-law claims, Bailey brought a third-party action against Koetje; France; Bailey & Koetje, P.C.; two other law firms; and Thomas P. Jeakle, an attorney who acted as a special master in the action for dissolution of Bailey & Koetje, P.C. Bailey moved for the disqualification of Dennis C. Kolenda, J., arguing bias based on the judge's involvement in the action for dissolution of Bailey & Koetje, P.C. The court, James H. Fisher, J., denied the motion for disqualification. The court, Dennis C. Kolenda, J., granted summary disposition for the third-party defendants and FMB and imposed sanctions under MCR 2.114 against Bailey and in favor of the third-party defendants. Bailey appealed.

The Court of Appeals *held*:

1. Bailey failed to adequately brief, and therefore failed to preserve for appeal, claims that he stated a valid defense and raised a genuine issue of material fact so as to make the trial court's grant of summary disposition for FMB pursuant to MCR 2.116(C)(9) and (10) erroneous, and that Koetje and Bailey & Koetje, P.C., were erroneously granted summary disposition. By raising it for the first time on appeal and by failing to adequately brief it, Bailey also failed to preserve for appeal the claim that Jeakle violated MCR 2.603(A)(3) by continuing to defend the action after a default had been entered against him.

2. The trial court's order awarding sanctions to the third-party defendants pursuant to MCR 2.114 is vacated to the extent that it awards attorney fees to pro se litigants, including attorneys. Pro se litigants are not eligible for attorney fee awards under MCR 2.114 because the court rule speaks in terms of reasonable expenses

incurred and pro se litigants, including attorneys, do not incur expenses related to having others represent them as attorneys. The matter must be remanded for findings regarding whether the remaining sanctions are awardable under MCR 2.114(E) or (F). If sanctions are awardable under subrule E, the trial court may fashion an appropriate sanction within the discretion afforded by that subrule. If awardable under subrule F, sanctions are limited to the terms of MCL 600.2591; MSA 27A.2591.

3. The motion for disqualification of Judge Kolenda was properly denied. Bailey failed to overcome the heavy presumption of judicial impartiality with any evidence of bias or prejudice.

Orders of summary disposition affirmed; orders of sanctions vacated to the extent they award attorney fees to pro se litigants; case remanded for further consideration of sanctions.

1. PLEADING — FRIVOLOUS CLAIMS AND DEFENSES — SANCTIONS — ATTORNEY FEES — PRO SE LITIGANTS.

Attorney fees as sanctions for pleadings signed in violation of the court rule providing that signatures on pleadings certify that the signers have read the pleadings, that the pleadings are well grounded in fact and warranted by law, and that the pleadings are not interposed for any improper purpose, or as sanctions for frivolous claims or defenses, are not awardable to pro se litigants, including attorneys; attorney fees may be awarded pursuant to the court rule to only those litigants who incur expenses related to having attorneys other than themselves represent them (MCR 2.114[E],[F], 2.625[A][2]; MCL 600.2591[1]; MSA 27A.2591[1]).

2. MOTIONS AND ORDERS — DISQUALIFICATION OF JUDGES — BIAS OR PREJUDICE — APPEAL.

The Court of Appeals, when reviewing a trial court's decision regarding a motion to disqualify a judge, reviews findings of fact for abuse of discretion and the applicability of facts to relevant law de novo; disqualification for bias or prejudice is warranted only on a showing of bias or prejudice that is both personal and extrajudicial (MCR 2.003[B][1]).

Cunningham Dalman, P.C. (by *Andrew J. Mulder* and *Gregory J. McCoy*), for FMB-First Bank of Michigan.

Donald M. Bailey, for Donald M. Bailey.

James L. Koetje, for James L. Koetje and Bailey and Koetje, P.C.

Smith, Haughey, Rice & Roegge (by *L. Roland Roegge* and *Matthew L. Meyer*), for Wardrop & Wardrop, P.C.

Schenk, Boncher & Prasher (by *Gregory G. Prasher*), for Schenk, Boncher & Prasher.

Law, Weathers & Richardson, P.C. (by *Robert A. Buchanan*), for Thomas P. Jeakle.

Before: SMOLENSKI, P.J., and MCDONALD and SAAD, JJ.

SAAD, J.

I

NATURE OF THE CASE

This appeal is the most recent chapter in the tangled legal and financial affairs of the law firm Bailey & Koetje, P.C. (B & K). Before the firm's dissolution, each of the three partners personally guaranteed a portion of a loan made by plaintiff to B & K. Following the firm's dissolution, plaintiff attempted to collect the guaranteed amount. Although his two partners paid their share of the loan as required by the guarantee, defendant/third-party plaintiff, Donald M. Bailey (defendant) refused to pay, and plaintiff sued. Defendant sued the third-party defendants on a variety of common-law theories. On October 8, 1996, the trial court dismissed the third-party defendants on summary disposition. On January 14, 1997, the trial court ordered summary disposition in plaintiff's favor against defendant. Defendant now appeals as of right from both summary disposition orders, and also from

an order awarding attorney fees to the third-party defendants under MCR 2.114(E) or (F). Because defendant Bailey's defense to the loan is wholly frivolous, as are his claims against third-party defendants, we affirm the summary disposition orders. The question of first impression raised by the sanctions assessed against defendant is whether a pro se litigant may be awarded attorney fees. We answer no because a pro se litigant has not *incurred attorney fees* as these terms are used in the relevant court rules and statute. However, we remand with instructions to the trial court to use its discretion under MCR 2.114(E) to formulate an appropriate sanction against defendant for frivolous litigation.[1]

II

FACTS AND PROCEEDINGS

Defendant and third-party defendants James L. Koetje and Donald R. France were partners in the law firm Bailey & Koetje, P.C. On August 17, 1994, plaintiff, a bank, extended credit to B & K, documented by an unsecured demand note for $100,000. In connection with the loan, defendant, Koetje, and France each signed a guarantee that limited each signatory's liability to thirty percent of the total debt.

Koetje subsequently commenced a dissolution action against B & K. In the dissolution action, third-party defendant Wardrop & Wardrop, P.C. (W & W)

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[1] Our decision addresses attorney fee sanctions under MCR 2.114(E) (violations of the signature rule provided by MCR 2.114[D] and MCR 2.114(F) (frivolous claims and defenses under MCR 2.625[A][2] and MCL 600.2591; MSA 27A.2591). We read both of these rules as having the purpose of deterring frivolous legal claims and defenses, and hereafter we will refer to defendant Bailey's third-party claims as frivolous.

represented B & K, and third-party defendant Schenk, Boncher & Prasher, P.C. (S, B & P) represented Koetje. In the dissolution action, the trial court appointed third-party defendant Thomas P. Jeakle as a special master to wind down B & K's affairs.[2] B & K has also been involved in bankruptcy proceedings in late 1995 and early 1996. On May 12, 1995, the trial court entered an order dissolving the corporation in accordance with an arbitration the court conducted at the parties' request.

On December 21, 1995, plaintiff demanded from B & K's partners payment of the amount each had guaranteed, including $23,189.32 from defendant. Koetje and France satisfied the obligation, but defendant refused to pay. Plaintiff commenced this lawsuit on January 11, 1996. Defendant filed a third-party complaint, which we can only characterize as rambling and incomprehensible. Defendant alleged that Koetje and B & K fraudulently induced him to guarantee the loan by misrepresenting that Koetje was an officer of B & K. (Defendant has not explained how he could not have known whether Koetje was an officer of B & K, or how such a misrepresentation would have induced him to sign the documents.) Defendant also alleged "wrongful constructive execution [sic]" or "intentional or reckless infliction of severe mental distress" against Koetje. Defendant also sought relief from the corporate dissolution order on the grounds of "mistake, neglect, fraud, misrepresentation, misconduct and/or other reasons." Finally, defendant alleged that

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[2] Defendant previously filed two appeals relating to the dissolution action. This Court dismissed both of these appeals for lack of jurisdiction.

the third-party defendants conspired to deprive him of assets to Koetje's benefit.[3]

Koetje and B & K moved for summary disposition pursuant to MCR 2.116(C)(6) (prior action), (C)(7) (prior judgment), and (C)(8) (failure to state claim on which relief can be granted). They argued that defendant's third-party claims reiterated issues raised and resolved in the prior dissolution and bankruptcy actions, and that res judicata, collateral estoppel, or judicial estoppel precluded these claims. Defendant did not file a formal response to the summary disposition motion and did not appear at the motion hearing. He did, however, file an affidavit that did not coherently address the summary disposition motions. Because defendant failed to meaningfully respond to any of the persuasive arguments the third-party defendants raised, the trial court granted summary disposition for all the third-party defendants. The trial court also awarded sanctions, including attorney fees, to third-party defendants under MCR 2.114. Koetje and S, B & P, who represented themselves in the litigation, were awarded attorney fees.

On December 2, 1996, plaintiff moved for summary disposition, apparently under MCR 2.116(C)(9) (failure to state valid defense) and (C)(10) (no genuine issue of material fact). Again, defendant filed an incomprehensible affidavit instead of a formal response, and failed to appear at the hearing. The trial court ruled in plaintiff's favor, and entered an order granting judgment for plaintiff in the amount of

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[3] Defendant does not appeal the dismissal of third-party defendants W & W, S, B & P, France, or Jeakle. Accordingly, we will limit our discussion to the allegations against Koetje and B & K and to Koetje's and B & K's response.

$35,835.85 (the principal of the debt plus the accrued interest, attorney fees, and costs).

III

ANALYSIS

A. SUMMARY DISPOSITION

Defendant argues that the trial court erred in granting plaintiff's motion for summary disposition. We deem that this issue is abandoned because it is not adequately briefed. *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996). Defendant has asserted that summary disposition under MCR 2.116(C)(9) was improper because the answer stated a valid defense. However, defendant has presented no argument whatsoever regarding what factual allegation in the answer states a valid defense, nor has defendant offered any explanation regarding why or how his answer constitutes a legally valid defense. Similarly, defendant argues that summary disposition under MCR 2.116(C)(10) was improper because his affidavit, as well as Koetje's interrogatory answer in the bankruptcy action (asserting that a bona fide dispute existed regarding the debt), required denial of the motion. However, defendant has offered no argument or explanation regarding how or why the affidavit and interrogatory answer created a genuine issue of material fact with respect to defendant's obligation to pay plaintiff under the terms of the note and guarantee. A party may not merely announce a position and leave it to this Court to discover and rationalize a basis for the claim. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). We therefore decline to address this issue.

Defendant also challenges the order dismissing Koetje and B & K as third-party defendants. Again, we deem this issue to be abandoned because it is not adequately argued in defendant's brief. *Dresden, supra.* Indeed, we are unable to discern the content or meaning of defendant's argument. Defendant seems to argue that Koetje misrepresented facts pertaining to the prior dissolution and bankruptcy proceedings, but he offers no explanation regarding why these arguments are relevant to this issue. We reiterate that defendant may not merely announce a position and leave it to this Court to rationalize a basis for the claim. *Joerger, supra.*

Defendant also argues that Jeakle violated MCR 2.603(A)(3) by continuing to defend the action after a default had been entered against him. Defendant raises this issue for the first time on appeal. Therefore, we need not address this issue, because it is not preserved for appellate review. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996). Furthermore, this issue has not been adequately briefed. *Dresden, supra.* Defendant has not argued that the outcome of these proceedings would have been different but for the alleged error. We also decline to address defendant's argument that Jeakle was deficient in his performance of his duties as a special master in the dissolution action, because it has not been briefed, and because it is not included in the statement of questions presented. *Weiss v Hodge*

(After Remand), 223 Mich App 620, 634; 567 NW2d 468 (1997).[4]

B. ATTORNEY FEES FOR PRO SE LITIGANTS

Defendant argues that the trial court improperly awarded attorney fees under MCR 2.114 to third-party defendants Koetje and S, B & P because attorney fees may not be awarded to pro se litigants. This raises a question of law, which is reviewed de novo on appeal. *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997). We conclude that pro se parties are not eligible for attorney fee sanctions under MCR 2.114, and we vacate the order to the extent that it awards pro se litigants attorney fees. However, we also conclude that the language of MCR 2.114(E) affords the court sufficient discretion to design an appropriate sanction, and we remand for further consideration of the sanction issue consistent with this opinion.

Our Supreme Court and our Legislature have sought to deter attorneys and parties from advancing frivolous legal claims, defenses, and documents, without stifling their good-faith efforts at pursuing novel or arguable legal theories.[5] To achieve this balance,

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[4] Defendant also argues that the trial court erroneously prohibited discovery after June 10, 1996. This issue is not preserved for appellate review because it was not raised and addressed below. *Auto Club*, *supra*, 421.

[5] MCR 2.114 and MCL 600.2591; MSA 27A.2591 are modeled after FR Civ P 11 (Rule 11). Advisory Committee Notes to Rule 11 state that the rule "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." In the words of another commentator,

> Rule 11 sets minimum levels for the legal and factual sufficiency of every pleading and motion presented to the court. Rule 11 thus acts as a filter throughout the course of every federal lawsuit. . . . Yet Rule 11 must achieve these ends without discouraging attempts to challenge precedent, chilling attorneys' vigorous defense of client

the Supreme Court has adopted MCR 2.114, and the Legislature has enacted MCL 600.2591; MSA 27A.2591. MCR 2.114(D) 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
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

MCR 2.114(E) imposes a sanction for violations of this rule:

> If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

In addition to the sanctions in subparagraph E, MCR 2.114(F) provides that "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." The latter rule states that costs shall be awarded under MCL 600.2591; MSA 27A.2591

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interests, or generating burdensome satellite litigation. [1996 Ann Surv Am L 665, 666-668.]

if the court finds on the motion of a party that a claim or defense is frivolous. This statute's definition of "frivolous" parallels the provisions of MCR 2.114(D) (improper purpose, or no reasonable basis to believe the facts underlying the party's legal position, or legal position was devoid of arguable legal merit).[6] The statute further provides the following sanction for frivolous actions or defenses:

> (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. [MCL 600.2591(1); MSA 27A.2591(1).]

The trial court did not say if it awarded sanctions under MCR 2.114(E) or (F). As we said, the question—is a pro se party eligible for attorney fees under either of these rules—is one of first impression in Michigan.

Although our courts have not ruled on this precise issue, we have ruled in similar situations that pro se litigants are not entitled to attorney fees. This Court has already held that pro se parties, including attorneys representing themselves, may not obtain attorney fees under the Michigan Freedom of Information Act (FOIA),[7] *Laracey v Financial Institutions Bureau*,

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[6] MCL 600.2591(3)(a); MSA 27A.2591(3)(a).

[7] MCL 15.234; MSA 4.1801(4).

163 Mich App 437, 442; 414 NW2d 909 (1987), or under the mediation rule,[8] *Watkins v Manchester*, 220 Mich App 337, 341-345; 559 NW2d 81 (1996). The *Watkins* holding was based in part upon *Kay v Ehrler*, 499 US 432; 111 S Ct 1435; 113 L Ed 2d 486 (1991), in which the United States Supreme Court held that an attorney who represented himself in a civil rights action was not entitled to an attorney fee award under the federal civil rights statute, 42 USC 1988. In *Kay*, the Court reasoned that the purpose of the attorney fee provision in the civil rights legislation was to encourage litigants to seek the assistance of counsel, and that this purpose would not be served if pro se litigants were eligible for attorney fees. *Id.*, 437. Relying on the reasoning in *Kay*, this Court in *Watkins* concluded that the purpose of the mediation sanction rule—to encourage settlement by imposing litigation costs on the party who rejected an appropriate mediation award—would be better served by encouraging parties to hire objective attorneys. *Watkins*, 344-345. This Court also stated that "to allow litigant-attorneys to recover compensation for time spent in their own behalf, while not extending such a rule to nonattorneys would most likely contribute to the widespread public perception that the courts exist primarily for the benefit of the legal profession." *Id.* This Court rejected the argument that attorney pro se litigants should be compensated for the resources that might otherwise have been used for productive business, noting that "[p]ro se litigants who are not attorneys also may suffer lost income or lost business

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[8] MCR 2.403(O).

opportunities as the result of their time spent in litigation." *Watkins*, 345.

Although instructive, *Watkins* and *Kay* are not dispositive. The Courts in *Watkins* and *Kay* emphasized, respectively, that the mediation rule, and the attorney fee provision of the civil rights statute, were intended to encourage parties to seek legal counsel. We see no such purpose in MCR 2.114(E) or (F). Rather, the apparent objective of MCR 2.114(E) and (F) is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose. Clearly then, the question of sanctions to discourage frivolous litigation under MCR 2.114(E) and (F) is different from the questions and interests addressed in *Kay*, *supra*, and *Watkins*, *supra*.

This distinction was salient in *Prewitt v Alexander*, 173 FRD 438 (ND Miss, 1996). There, the pro se plaintiff filed a civil rights claim against the pro se defendants.[9] The court deemed this claim to be frivolous. The court noted that under *Kay*, *supra*, the defendants were not entitled to attorney fees under § 1988. However, the court held that the defendants were entitled to attorney fees under 28 USC 1927, which allowed sanctions against attorneys who "unreasonably and vexatiously" multiply proceedings, and under FR Civ P 11, the federal counterpart of

[9] The pro se parties in *Prewitt* were attorneys. However, like the *Watkins* Court, we make no distinction between attorney or nonattorney pro se litigants.

MCR 2.114(E).[10] The court explained why *Kay* was distinguishable:

> The policy grounds underlying the award of attorney's fees under Rule 11 (and 28 USC § 1927) are different from those underlying 42 USC § 1988. Fee shifting statutes such as 42 USC § 1988 are governed by such specific considerations as enabling victims of civil rights violations to secure legal representation and ensuring the effective prosecution of meritorious claims. . . . Providing fees to pro se litigants under 42 USC § 1988 serves as a disincentive to retaining independent counsel, who will likely be the most effective representative of the plaintiff. . . . *However, sanctions awarded under Rule 11 (and 28 USC § 1927) are essentially deterrent in nature, imposed in an effort to discourage dilatory tactics and the maintenance of untenable positions. . . . The purpose of the rule would therefore not be frustrated by awarding attorney's fees to pro se defendants.* [*Id.*, 440-441 (emphasis supplied; citations omitted).]

Additionally, at least two of our sister states have distinguished *Kay* and permitted attorney fees to pro se litigants as sanctions for frivolous claims. *Harkleroad v Stringer*, 231 Ga App 464, 468; 499 SE2d 379 (1998), and *Ziobron v Crawford*, 667 NE2d 202 (Ind App, 1996).

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[10] Under FR Civ P 11, like under MCR 2.114(D), an attorney's or party's signature on a document constitutes a certificate that the signer has made a reasonable inquiry that the document is well grounded in fact and law, and is not interposed for an improper purpose. With regard to violations of this rule, Rule 11 provides that

> the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

We agree with the reasoning stated in *Prewitt.* There is no disharmony between the deterrent purpose of MCR 2.114 and attorney fees for pro se litigants. On the contrary, we might actually diminish the deterrent effect by limiting the sanctions for pro se litigants. As one court asked: "Why should the prosecutor of a frivolous [litigation] claim be let off the hook simply because the victim of the litigation represented himself? How is the purpose of deterrence less served by compelling the offending party to make payment to a pro se party?" *Harkleroad, supra* 468. Finding no policy reason against an attorney fee sanction for pro se litigants under MCR 2.114 or MCL 600.2591; MSA 27A.2591, we consider whether this sanction is authorized by the plain language of the court rule and statute.

> The interpretation of a court rule is subject to the same principles that govern statutory construction. All words and phrases are to be construed and understood according to the common and approved usage of the language. Reference to a dictionary is appropriate to ascertain the ordinary meaning of a word. [*Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 490-491; 566 NW2d 671 (1997).]

MCR 2.114(E) provides that sanctions may include "the amount of the reasonable expenses *incurred* because of the filing of the document, including reasonable attorney fees." Similarly, MCL 600.2591(2); MSA 27A.2591(2) provides that "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." To incur means "[t]o have liabilities cast upon one by act

or operation of law, as distinguished from contract, where the party acts affirmatively." Black's Law Dictionary (rev 4th ed). An attorney is "an agent or substitute, or one who is appointed and authorized to act in the place or stead of another." *Id.*

One who represents himself cannot be said to have had a liability cast on himself. A person cannot impose a liability for attorney fees on oneself. Thus, Koetje and S, B & P did not "incur" attorney fees, because they represented themselves. Similarly, the definition of "attorney" seems to preclude the possibility of incurring attorney fees unless someone is represented by a separate individual. Because an attorney is an agent or substitute who acts in the stead of another, a party acting in propria persona cannot truly be said to be an attorney for himself. It is thus impossible to incur attorney fees when one is not represented by an attorney, i.e., someone other than the actual party. See *Committe v Dennis Reimer Co, LPA*, 150 FRD 495 (D Vt, 1993) (no attorney fees for pro se litigants under FR Civ P 11 because pro se parties do not "incur" attorney fees within the meaning of the court rule).[11]

However, our analysis does not end here. MCR 2.114(E) says that if a document is signed in violation of the signature rule, "the court . . . shall impose upon the person who signed it . . . an *appropriate sanction, which may include* . . . the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." Therefore, MCR 2.114(E) does not restrict the sanction to expenses or costs incurred. Rather, it gives the

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[11] The *Prewitt* Court apparently did not reach this issue.

trial court discretion to fashion another appropriate sanction. In contrast, MCL 600.2591; MSA 27A.2591, incorporated by reference in MCR 2.114(F), provides that the trial court "shall award to the prevailing party the costs and fees incurred," without giving the trial court discretion to fashion another appropriate sanction.

Because any sanction awarded under MCR 2.114(F) is restricted to the costs and fees as described in MCL 600.2591(2); MSA 27A.2591(2), we hold that attorney fee sanctions are not available under MCR 2.114(F). In contrast, MCR 2.114(E) grants the trial court discretion to fashion an "appropriate sanction," which may include, but is not limited to, an order to pay the opposing party the reasonable expenses incurred (including attorney fees).[12] Of course, the "appropriate sanction" may not include punitive damages under either subparagraph. MCR 2.114(E).

We therefore vacate those portions of the sanctions orders awarding attorney fees to in propria persona third-party defendants Koetje and S, B & P. Because the record does not indicate what amount of the sanctions awards constitute the reasonable attorney fees, we remand the case to the trial court to recalculate the sanctions awarded to Koetje and S, B & P after deducting the attorney fee awards. We also remand for findings regarding whether the trial court's sanctions were awarded under MCR 2.114(E) or (F). If the sanctions were awarded under subrule E, the trial court may fashion an "appropriate sanction" within

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[12] Properly utilized, this discretion should deter attorneys and parties from filing frivolous documents without sacrificing zealous representation by the sanctioned party. FR Civ P 11, Advisory Notes.

the discretion afforded by that subrule. If, however, sanctions were awarded under subparagraph F, the trial court's sanction is limited to the terms of MCL 600.2591; MSA 27A.2591.

We vacate the sanction order to the extent that it awards attorney fees to pro se litigants. We remand for further consideration of sanctions in accordance with this opinion. We retain jurisdiction.

C. DEFENDANT'S MOTION TO DISQUALIFY JUDGE

Defendant contends that the trial judge was biased because of his involvement with the prior arbitration and should have been disqualified. When we review a decision on a motion to disqualify a judge, we review the trial court's findings of fact for an abuse of discretion. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996). However, we review de novo the applicability of facts to relevant law. *Id.*, 503, n 38.

In accordance with MCR 2.003(C)(3), the state court administrator assigned the disqualification motion to Barry Circuit Judge James H. Fisher. Judge Fisher concluded that defendant had presented no facts to establish that Judge Dennis C. Kolenda was biased or should be disqualified. We find no error in Judge Fisher's conclusion. Under MCR 2.003(B)(1), a judge may be disqualified on a showing of actual personal bias or prejudice. *Cain*, *supra*, 495; *In re Hamlet*, *supra*, 524. Disqualification is warranted only when "the bias or prejudice is both personal and extrajudicial." *Cain*, *supra*, 495. The party claiming bias "must overcome a heavy presumption of judicial impartiality." *In re Hamlet*, *supra*, 524.

Here, defendant has failed to overcome the heavy presumption of judicial impartiality. There is no

record evidence of actual personal bias or prejudice on the part of Judge Kolenda. Defendant's argument that Judge Kolenda failed to equitably distribute the assets in the prior corporate dissolution action merely indicates that defendant was unhappy with Judge Kolenda's resolution of the prior proceeding, but does not establish actual bias or prejudice. Assuming, *arguendo*, that the prior rulings were erroneous, this would not warrant disqualification. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995). Additionally, there is no record basis for believing that Judge Kolenda, either in the prior action or in the instant case, displayed "a deep-seated favoritism or antagonism that would make fair judgment impossible." *In re Hamlet*, *supra*, 505. Moreover, despite defendant's assertion to the contrary, there is no evidence that Judge Kolenda "has personal knowledge of disputed evidentiary facts concerning the proceeding," MCR 2.003(B)(2), other than matters learned in the course of the judicial proceedings. Judge Fisher properly denied the disqualification motion.

CONCLUSION

We affirm summary judgment for plaintiff and for third-party defendants. We vacate the sanction order to the extent that it awards attorney fees to pro se litigants. We remand for further consideration of sanctions in accordance with this opinion. We retain jurisdiction.

NEAL v DEPARTMENT OF CORRECTIONS (ON REHEARING)

Docket No. 198616. Submitted September 4, 1997, at Grand Rapids. Decided June 5, 1998, at 9:15 A.M. Submitted on rehearing September 23, 1998. Decided on rehearing November 24, 1998, at 9:20 A.M. Leave to appeal sought.

Tracy Neal, Helen Gibbs, and other female prisoners housed in facilities operated by the Michigan Department of Corrections (MDOC) brought a class action in the Washtenaw Circuit Court against the MDOC, its director, and several wardens, deputy wardens, and corrections officers, alleging that male corrections personnel have systematically engaged in gender-based discriminatory conduct, sexual harassment, and retaliation for reporting gender-based misconduct in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and seeking injunctive and declaratory relief and monetary and compensatory damages. The court, Timothy P. Connors, J., entered orders dismissing the request for monetary damages and denying the defendants' motion for summary disposition that had been based on several grounds. The court held, in part, that the MDOC is a "public service" agency that is prohibited from engaging in gender-based discrimination or harassment under subsection 302(a) of the act, MCL 37.2302(a); MSA 3.548(302)(a), and that the act does not exclude prisoners from its coverage. Most of the defendants were granted leave to appeal from the order denying their motion, but leave was limited to their claims concerning application of the Civil Rights Act and the court's subject-matter jurisdiction. The Court of Appeals, O'CONNELL, P.J., and GAGE, J., affirming in part, reversing in part, and remanding for further proceedings, held that a prison is not a "place of public accommodation" or a "public service" as those terms are used in article 3 of the Civil Rights Act, that article 3 of the Civil Rights Act does not apply to a prison's dealings with prisoners, and that the circuit court, rather than the Court of Claims, had jurisdiction to consider the remaining equitable claims against the defendants. MACKENZIE, J., concurring in part and dissenting in part, stated that the case should be remanded for further proceedings but that the trial court did not err in finding that the plaintiffs had stated a valid cause of action under the Civil Rights Act, because the MDOC falls within the

broad definition of a "public service" as defined in subsection 301(b) of the Civil Rights Act, MCL 37.2301(b); MSA 3.548(301)(b), and there is not any indication that the Legislature intended that prisoners be precluded from the application of the act's protections by reason of their status as inmates. 230 Mich App 202 (1998). The Court of Appeals granted the plaintiffs' motion for rehearing.

On rehearing, the Court of Appeals *held*:

1. The decision of the United States Supreme Court in *Pennsylvania Dep't of Corrections v Yeskey*, 524 US ___; 118 S Ct 1952; 141 L Ed 2d 215 (1998), in which it held that the term "public entity" as used and defined in the Americans with Disabilities Act of 1990, 42 USC 12131 *et seq.* includes within its coverage state prisons and prisoners, compels the conclusion that the similarly defined term "public service" found in the Civil Rights Act includes prisons within its definition and that the protections of the Civil Rights Act were intended to be extended to prisoners.

2. Prisons do not fall within the "private club" exception of § 303 of the Civil Rights Act, MCL 37.2303; MSA 3.548(303), and, accordingly, the defendants are not relieved of compliance with the mandate of subsection 302(a) of the Civil Rights Act.

3. There is nothing in the language of the Civil Rights Act or in its legislative history to indicate that the Legislature intended to bar prisoners from seeking relief under the provisions of the Civil Rights Act.

4. Because the protections of subsection 302(a) of the Civil Rights Act are intended to be coextensive with the protections of the Equal Protection and Antidiscrimination Clauses of the Michigan Constitution and because prisoners do not lose those constitutional protections as a result of their inmate status, it follows that the application of the provisions of subsection 302(a) to prisoners will not unacceptably impair the defendants' efforts to discharge their responsibilities.

5. Because the plaintiffs' claims for damages had already been dismissed and only relief under the claims seeking declaratory and equitable relief continued to be pursued, the circuit court, rather than the Court of Claims, had jurisdiction to consider those remaining claims, including the claims brought under the Civil Rights Act. Further, the defendant guards and wardens were not state officers who may be sued in the Court of Claims.

Affirmed.

O'CONNELL, P.J., dissenting, indicated continued adherence to views expressed in the prior majority decision in this matter, 230 Mich App 202 (1998), and stated that the holding of the United

States Supreme Court in *Pennsylvania Dep't of Corrections v Yeskey*, 524 US ___; 118 St Ct 1952; 141 L Ed 2d 215 (1998), is inapposite in this case because the provision of the Americans with Disability Act of 1990 there considered defined "public entity" as "any department, agency, special purpose district, or other instrumentality of a State or States or local government," but the Civil Rights Act defines "public service" so as to include only entities that "provide service to the public." Accordingly, because prisoners are not part of the general public to whom any otherwise public service proffered by the Department of Corrections can be provided, prisoners should not be able to bring an action under the provisions of subsection 302(a) of the Civil Rights Act, MCL 37.2302(a); MSA 3.548(302)(a).

CIVIL RIGHTS — PRISONS AND PRISONERS — CIVIL RIGHTS ACT.

A prison is a "public service" within the meaning of that term as used in article 3 of the Civil Rights Act; accordingly, prisoners may bring an action to enforce the provisions of that article of the Civil Rights Act (MCL 37.2301[b], 37.2302[a]; MSA 3.548[301][b], 3.548[302][a]).

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

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

ON REHEARING

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

MACKENZIE, J. This is a class-action suit brought, in relevant part, under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, by female prisoners housed in facilities operated by the Michigan Department of Corrections (MDOC). Defendants are the department, its director, and several wardens, deputy wardens, and corrections officers employed by the

MDOC. Defendants appeal by leave granted from a circuit court order denying their motion for summary disposition pursuant to MCR 2.116(C)(4), (7), and (8). We affirm.

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

tory relief, their initial claim for monetary damages having been ordered dismissed.

I

The purpose of the Civil Rights Act is to prevent discrimination directed against a person because of that person's membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. *Noecker v Dep't of Corrections*, 203 Mich App 43, 46; 512 NW2d 44 (1993). The act is remedial and must be liberally construed to effectuate its ends. *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 15; 506 NW2d 231 (1993).

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

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

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

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

> (a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities,

> privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. . . .
>
> (b) "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political division, or an agency thereof, or a tax exempt private agency established to provide service to the public. [MCL 37.2301; MSA 3.548(301)].

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

> This article shall not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the private club or establishment are made available to the customers or patrons of another establishment that is a place of public accommodation or is licensed by the state. . . . [MCL 37.2303; MSA 3.548(303)].

In denying defendants' motion for summary disposition with respect to plaintiffs' Civil Rights Act claim, the trial court ruled that the MDOC is a "public service" agency prohibited from engaging in gender-based discrimination or harassment under subsection 302(a) of the act. The court further noted that the act does not specifically exclude prisoners from its coverage and declined to read such an exclusion into the act.

II

The narrow issue before us is whether the MDOC correctional facilities are places of "public service" in which discrimination against inmates, based on sex, is prohibited. The United States Supreme Court's recent decision in *Pennsylvania Dep't of Corrections v Yeskey*, 524 US ___; 118 S Ct 1952; 141 L Ed 2d 215

(1998), leads us to conclude that the MDOC facilities are places of "public service" within the meaning of subsection 301(b).

The question in *Yeskey* was whether a state prisoner could maintain a claim against a state department of corrections under another civil rights statute, the Americans with Disabilities Act of 1990 (ADA), title II of which prohibits discrimination by a "public entity" against individuals with a disability. 42 USC 12132. The statutory definition of "public entity" at issue in *Yeskey* is similar to the definition of "public service" set forth in subsection 301(b): "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 USC 12131(1)(B). Writing for a unanimous Supreme Court, Justice Scalia held that "the statute's language unmistakably includes State prisons and prisoners within its coverage." 118 S Ct 1954. Emphasizing the broad statutory language, the Court stated that "the ADA plainly covers state institutions without any exception that could cast the coverage of prisons into doubt." *Id.* The Court therefore concluded that "[s]tate prisons fall squarely within the statutory definition of 'public entity'. . . ." *Id.*

The Supreme Court's reasoning in *Yeskey* applies equally to this case. Under subsection 301(b), a "public service" includes "a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state . . . ." The MDOC is a state agency, and this state's correctional facilities are operated by it. Any "exception that could cast the coverage of prisons into doubt," 118 S Ct 1954, is conspicuously absent from the unambiguous statutory language of the Civil Rights Act. Thus, under the

plain language of subsection 301(b), the MDOC clearly falls within the broad statutory definition of a "public service." Defendants essentially concede as much.

Defendants argue that even if the MDOC is a "public service," its prisons are nevertheless not required to comply with subsection 302(a) of the Civil Rights Act because they fall within the § 303 exemption for "private club[s], or other establishment[s] not in fact open to the public." We reject this argument. The fact that the MDOC operates buildings that are not fully open to the public does not mean that the MDOC itself is a "private club or other establishment" not open to the public. There is a distinction between a state agency and the buildings that house that state agency. There are presumably many departments of state government (this Court included) that operate facilities that members of the public may not enter at their will. This, however, does not mean that those departments themselves are private establishments not open to the public; it merely means that the *physical structures* used by those departments are not fully accessible to the public.

Moreover, "[r]esident inmates are obviously members of the public in a general sense." *Martin v Dep't of Corrections*, 424 Mich 553, 565; 384 NW2d 392 (1986) (CAVANAGH, J., dissenting). Our Supreme Court has held that prisoners are members of the public for purposes of the governmental tort liability act, MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.* *Green v Dep't of Corrections*, 386 Mich 459, 464; 192 NW2d 491 (1971). The Supreme Court has also held that prisoners are members of the public for purposes of the Administrative Procedures Act, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* *Martin*, *supra*, p 555.

Civil rights acts are to be liberally construed to provide the broadest possible remedy. *Reed, supra.* Only by reading "private club, or other establishment not in fact open to the public" in its most restrictive, literal sense, may a correctional facility be deemed to be "not open to the public." We therefore conclude that the § 303 exemption does not relieve defendants of the obligation to act in conformity with subsection 302(a) of the Civil Rights Act.

III

Defendants contend that even if the § 303 exemption does not apply to state-run correctional facilities, subsection 302(a) of the Civil Rights Act was not intended to protect prisoners. Again, we disagree.

We begin by reviewing the legislative purpose of the Civil Rights Act in general and subsection 302(a) in particular. Const 1963, art 1, § 2 states:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

The Civil Rights Act was enacted as 1976 PA 453. Its purpose was two-fold. First, it was intended to centralize and make uniform the patchwork of then-existing civil rights statutes applying to the private sector, such as the Fair Housing Act, the Fair Employment Practices Act, and the Public Accommodations Act. See *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 187-188; 387 NW2d 821 (1986). Second, it was

intended to broaden the scope of the then-existing civil rights statutes to include governmental action:

> [T]he Legislature's addition of "public service" to [subsection] 302(a), thereby including state action violations that amount to constitutional deprivation with private sector, non-state action legislative violations, can be explained by the fact that article 1, § 2 of the Michigan Constitution provides: "the legislature *shall* implement this section by appropriate legislation." It is the only provision of the Declaration of Rights to provide so. [*Id.*, p 188 (emphasis in the original).]

Thus, insofar as subsection 302(a) of the Civil Rights Act governs "public service," it is essentially a codification of the constitution's Equal Protection and Antidiscrimination Clauses, broadened to include categories not covered under the constitution, such as age, sex, and marital status. See *Dep't of Civil Rights*, pp 188-189.

The constitutional equal protection guarantee applies to prisoners. As explained in *Jackson v Bishop*, 404 F2d 571, 576 (CA 8, 1968):

> Lawful incarceration may properly operate to deprive the convict of certain rights which would otherwise be his to enjoy. A classic example is [the] denial to the felon of the right to vote. . . .
>
> * * *
>
> On the other hand, a prisoner of the state does not lose all his civil rights during and because of his incarceration. In particular, he continues to be protected by the due process and equal protection clauses which follow him through the prison doors. [Citations omitted.]

Because, as our Supreme Court has stated, the protections of subsection 302(a) of the Civil Rights Act

were intended to be coextensive with the Equal Protection and Antidiscrimination Clauses of the Michigan Constitution, and because prisoners do not lose their right to equal protection by virtue of their status as inmates, we can only conclude that the Legislature also intended all persons—including inmates—to be protected under subsection 302(a).

Further, as noted by the trial court, nowhere does the language of the Civil Rights Act purport to preclude its application because of a person's status as a prisoner or inmate. Compare *Walters v Dep't of Treasury*, 148 Mich App 809, 819; 385 NW2d 695 (1986); *Marsh v Dep't of Civil Service*, 142 Mich App 557, 569; 370 NW2d 613 (1985). When the Legislature has seen fit to exclude prisoners from the provisions of a statute, it has specifically done so. See, e.g., MCL 15.231(2); MSA 4.1801(1)(2), excluding "those persons incarcerated in state or local correctional facilities" from provisions of the Freedom of Information Act. A court must not judicially legislate by adding into a statute provisions that the Legislature did not include. *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 421; 565 NW2d 844 (1997). Accordingly, we decline to read into the Civil Rights Act an exclusion barring prisoners from bringing an action under subsection 302(a).

IV

Defendants suggest that any holding that the Civil Rights Act applies to prisoners will unacceptably impair the MDOC's corrections responsibilities. Their fear is unwarranted. At least to the extent that a state agency's conduct is at issue, the protections of subsection 302(a) of the Civil Rights Act were intended

to be coextensive with those of the Antidiscrimination and Equal Protection Clauses of the constitution. *Dep't of Civil Rights*, *supra*, p 188. As our Supreme Court stated in *Dep't of Civil Rights*, *supra*, p 189:

> Discrimination, in constitutional terms, refers to baseless and irrational line drawing. . . . When there is a sufficiently important governmental interest and the classification is adequately related to that interest, it does not amount to discrimination to draw legislative lines on the basis of those classifications.
>
> It would be anomalous at best and contradictory at worst to attempt to rid the state of discriminatory practices by the use of an arbitrary standard that would prohibit, in effect, any line drawn between the genders, regardless of its relevance to the purpose of the regulation, unless the Legislature, in its wisdom and its own good time, countervails it.

Thus, even though we hold that subsection 302(a) prohibits the MDOC from engaging in discriminatory practices in the operation of its correctional facilities, the MDOC may still treat prisoners differently on the basis of gender, provided that the gender-based treatment can pass constitutional muster. As the Court acknowledged in *Dep't of Civil Rights*, merely because the state engages in a practice that treats men and women differently, it does not necessarily mean that it engages in unlawful gender discrimination. Rather, the test is whether the gender-based treatment serves a sufficiently important governmental interest and is substantially related to the achievement of that interest. *Dep't of Civil Rights*, *supra*, p 189. The MDOC may therefore treat prisoners differently on the basis of gender without violating subsection 302(a), as long as the gender-based treatment

serves important penological interests and is substantially related to the achievement of those interests.

This approach to state sex discrimination claims by inmates mirrors not only the analysis employed in equal protection cases, but also the analyses typically employed by federal courts in 42 USC 1983 actions. See anno: *Sex discrimination in treatment of jail or prison inmates*, 12 ALR4th 1219. Because the MDOC admits that prisoners may bring equal protection claims under § 1983, our holding that prisoners are not excluded from the protections of subsection 302(a) of the Civil Rights Act should impose upon defendants no stricter standards than those to which they must presently adhere in order to survive either a constitutional or § 1983 challenge.

V

Finally, defendants argue that the Court of Claims, not the circuit court, had subject-matter jurisdiction over plaintiffs' case. While it is generally true that the Court of Claims has exclusive jurisdiction over "all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state" or any of its agencies, MCL 600.6419(1)(a); MSA 27A.6419(1)(a), that exclusivity does not extend to Civil Rights Act claims. MCL 37.2801(1); MSA 3.548(801)(1); *Rangel v Univ of Michigan*, 157 Mich App 563, 564-565; 403 NW2d 836 (1987). Moreover, a complaint against the state seeking only equitable or declaratory relief must be filed in the circuit court. *Watson v Bureau of State Lottery*, 224 Mich App 639, 643; 569 NW2d 878 (1997), *Silverman v Univ of Michigan Bd of Regents*, 445 Mich 209, 217; 516 NW2d 54 (1994). Because plaintiffs no longer are seeking money damages, the circuit

court, rather than the Court of Claims, had jurisdiction to consider the Civil Rights Act claims, as well as the remaining equitable and declaratory claims against the MDOC and defendant McGinnis in his official capacity as the director of the MDOC.

The circuit court also had jurisdiction over plaintiffs' Civil Rights Act claims against the remaining individual defendants. MCL 600.6419(1)(a); MSA 27A.6419(1)(a). Moreover, the defendant guards and wardens are not state officers who may be sued in the Court of Claims. *Lowery v Dep't of Corrections*, 146 Mich App 342, 349; 380 NW2d 99 (1985); *Burnett v Moore*, 111 Mich App 646, 648-649; 314 NW2d 458 (1981); *Bandfield v Wood*, 104 Mich App 279, 282; 304 NW2d 551 (1981). Accordingly, we find no error in the circuit court's ruling that it had jurisdiction to hearing plaintiffs' claims.

Affirmed.

GAGE, J., concurred.

O'CONNELL, P.J. (*dissenting.*) My views with respect to the legal issues here presented have already been published at length in what was then a majority opinion, *Neal v Dep't of Corrections*, 230 Mich App 202; 583 NW2d 249 (1998), and I readopt that opinion without repeating it. All that needs now to be added is comment concerning the application to this case of the decision in *Pennsylvania Dep't of Corrections v Yeskey*, 524 US ___; 118 S Ct 1952; 141 L Ed 2d 215 (1998).

In *Yeskey*, the United States Supreme Court was faced with determining, under the federal jurisprudential standards for statutory construction of legislation affecting states' rights, whether title II of the Ameri-

cans with Disabilities Act of 1990 (ADA), 42 USC 12131 *et seq.*, applies to state correctional facilities. The language used by Congress embraced within the ambit of the ADA "the services, programs, or activities of a public entity," 42 USC 12132, with "public entity" being defined as including "any department, agency, special purpose district, or other instrumentality of a State or States or local government," 42 USC 12131(1)(B).

The facts in *Yeskey* involved a Pennsylvania program, the motivational boot camp, that offered the plaintiff inmate the opportunity, if successfully undertaken, of reducing his minimum incarceration before parole from eighteen months to six months. 118 S Ct 1953. Because Yeskey was hypertensive, the Pennsylvania Department of Corrections concluded that his participation in the boot camp program was medically contraindicated, and it refused to admit him to the program. Yeskey then claimed that this was discrimination proscribed by the ADA. The Supreme Court held that the statutory definition of a "qualified individual with a disability," 42 USC 12131(2), does not exclude prisoners, rejecting the contention that the terms "eligibility" and "participation" necessarily imply a prerequisite voluntariness that is inherently lacking in the case of persons confined against their will.

In contrast to the ADA, the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, defines "public service" so as to include only entities that "provide service to the public." MCL 37.2301(b); MSA

3.548(301)(b).[1] State prisoners, by definition, are not part of the general public to whom any otherwise public service proffered by the Michigan Department of Corrections can be provided. This limitation of the definition of "public service" is conspicuously absent from the definition of "public entity" found in the ADA, which has no corresponding language of limitation.[2] The MDOC is subject to the CRA, as we held in the original majority opinion, to the extent that it opens the doors of any place of confinement under its jurisdiction to visitors, employees, officials, or other persons voluntarily seeking admittance. 230 Mich App 209. Indeed, with respect to employees of the Department of Corrections, the CRA applies by virtue of article 2, which extends the CRA's prohibition of the statutorily enumerated forms of discrimination to the employment relationship, *McCallum v Dep't of Corrections*, 197 Mich App 589; 496 NW2d 361 (1992), rather than article 3, which covers places of public accommoda-

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[1] One of the goals of the CRA is to prevent discrimination in public accommodations and public services. MCL 37.2102(1); MSA 3.548(102)(1). In my opinion, references to "public accommodation" and "public service" within the CRA are not intended to include establishments that are not open to the general public or that do not provide a service to the public at large. I note that even for purposes of the Civil Rights Act of 1964, "public accommodations" were originally understood to include only such public gathering places as restaurants and theaters. See Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (New York: The Free Press, 1997), p 50. It should be clear that our Legislature similarly envisioned only entities serving the general public when bringing the CRA to bear on public accommodations and public services.

[2] Section 303 of the CRA provides that "[t]his article shall not apply to . . . establishment[s] not in fact open to the public . . . ." Not only are prisons not open to the general public, but their very mission—forcibly keeping felons away from the public—renders them the very antithesis of those public accommodations that offer services to the public. 230 Mich App 214. Even if I were to agree with the majority's liberal definition of the term "public service," I would nonetheless conclude that § 303 created an exemption for prisons.

tion and public services. The majority's current expansion of the CRA's reach conflates all these crucial distinctions.[3] I am unable to subscribe to the notion that the decision in *Yeskey*, which involved a different statute, significantly different statutory language, different facts, and different jurisprudential principles of statutory construction, somehow controls the present case or even usefully informs our analysis and decision.

It bears reiteration that, if article 3 of the CRA applies generally to prisons and prisoners, the MDOC may find that it cannot legally maintain separate facil-

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[3] Plaintiffs advocate a liberal interpretation of the terms "place of public accommodation" and "public service." For the reasons stated in my prior opinion, I believe that a liberal reading of these terms, or any specific term, is inappropriate and dangerous. Defining specific terms in a liberal fashion leads to a slippery slope of absurd results. This Court should not be in the business of adding a liberal meaning to a specific and well-recognized term. An example regarding the term "place of public accommodation" may clarify my concern:

In their brief, plaintiffs allege that prisons are also places of public accommodation as defined by CRA, "because prisons house members of the general public at taxpayers expense." A liberal interpretation of the term "place of public accommodation" would on the surface seem to support their position. However, once this Court adopts plaintiffs' definition, it will not be long before another plaintiff argues that some private residences are also "places of public accommodation." I anticipate the argument would be that because we allow members of the public (our friends, neighbors, and relatives) to spend nights at our homes, and in some cases the government either pays or subsidizes the rent, our private homes are now transformed into places of public accommodation, because they house "members of the public at taxpayers' expense." This slippery slope logic is untenable and, as I have previously stated, inappropriate and dangerous. 230 Mich App 213.

Appropriately, the majority has not adopted plaintiffs' definition of "place of public accommodation." However, the majority has adopted plaintiffs' definition of "public service," even though prisons in no way perform a service to the general public. Prisons are not situated similarly to some of our other establishments that do perform a "public service," such as a court, a hospital, or an office of the Secretary of State, all of which were established to provide, and do provide, services to the general public. *Id.* at 214.

ities for men and women[4] and that it may no longer segregate young from old, even though the inevitable result of this judicial stampede toward political correctness will be a penological conflict. The female prisoners will, in general, be terrorized by the male prisoners, who are normally physically larger, stronger, and more aggressive, and likewise the juvenile and geriatric prisoners will be subjected to the predations of the more vigorous adult population. Perhaps these prospects ought to caution plaintiffs to bear in mind the adage to be careful what they wish for, because it may come to pass.

Nothing in the prior majority opinion suggests that any correctional program that may further a prisoner's rehabilitation, or enhance the prospect of pardon, commutation, or parole, may be made available on a basis that discriminates because of gender, race, religion, national origin, or on any other invidious basis. Although that issue is not properly before us, and whatever we say with respect to that issue is obiter dictum, any such programmatic discrimination would appear to fall well within prohibitory penumbra of the federal Civil Rights Act of 1964 concerning

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[4] The majority states that "the MDOC may still treat prisoners differently on the basis of gender, provided that the gender-based treatment can pass constitutional muster." *Ante* at 741. I suspect that drawing of the line that delineates what "pass[es] constitutional muster" will be no simple task for trial courts; however I suspect that an explosion of prisoner litigation will give the trial courts an ample array of cases to assist them in drawing this line. But I further suspect that the "line" will be anything but clear cut, tending to move in the varied directions of the sensitivities of judges and the objectives of such high-stakes litigation. For these reasons, I choose to draw the line on the basis of the commonly understood meaning of "public service," which I would define to include only entities that are open to the general public or that provide a service to the public at large. This commonsense definition does not embrace the relationship between state prisons and their inmates.

race, religion, gender, or national origin, 42 USC 2000a(d), 2000d-4a(1)(A), *United States v Wyandotte Co*, 343 F Supp 1189 (D Kan, 1972), rev'd on other grounds 480 F2d 969 (CA 10, 1973), and of the ADA relative to disabilities, *Yeskey*, *supra* (assuming that either federal enactment may constitutionally be applied to the states at all, an issue reserved for later decision in *Yeskey*, 118 S Ct 1956). However, MDOC programs do not admit of participation by non-prisoners, that is, by any members of the public (in the sense of making the program available *to* the public, although members of the public may well participate *in* a correctional program as leaders, instructors, facilitators, and so forth.). To the extent that outside agencies offer public programs that the MDOC permits prisoners to have access to, those outside agencies, of course, remain precluded by the CRA from discriminating against prisoners by virtue of gender, race, and so forth (but are not limited in discriminating against prisoners as a class per se, as the status of being a prisoner is not covered by the CRA, or by the Civil Rights Act of 1964, *Rosado Maysonet v Solis*, 409 F Supp 576 [D PR, 1975]).

The present plaintiffs do not allege gender discrimination in prison employment, educational opportunities, or housing, so we need not determine whether other articles of the CRA protect prisoners from discrimination in such contexts. All we face today is a claim of gender discrimination concerning public services under Article 3.[5] Inasmuch as prisons are not,

[5] The major flaw in the majority opinion is the treatment of a statutory right as coextensive with a constitutional right. A state statute is by design an entity distinct from a constitutional provision. The majority fails to provide support for its inaccurate conclusion. In fact, there exists a sig-

with respect to prisoners, "public services" as defined by the CRA, I would adhere to our initial decision holding that plaintiffs' claim under the CRA should be dismissed pursuant to MCR 2.116(C)(8) for failure to state a claim on which relief may be granted.

I therefore respectfully dissent.

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nificant difference between a cause of action alleging a violation of the Equal Protection Clause and a cause of action alleging sex discrimination under the CRA. A party proceeding under constitutional equal protection doctrine must prove intentional or purposeful discrimination. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 306; 553 NW2d 377 (1996). In contrast, a party proceeding under the CRA need show only disparate treatment, the prima facie case requiring legally admissible and sufficient evidence that "she was a member of a class deserving of protection under the statute, and that, for the same conduct, she was treated differently [from] a man." *Schellenberg v Rochester, Michigan, Lodge No 2225 of Order of Elks*, 228 Mich App 20, 33; 577 NW2d 163 (1998).

The majority's failure to recognize the distinctions between these two bases for litigation is the vehicle through which the majority reaches a result not intended by the drafters of the CRA. The majority posits that "because prisoners do not lose their right to equal protection by virtue of their status as inmates, we can only conclude that the Legislature also intended all persons—including inmates—to be protected under subsection 302(a)." *Ante* at 739-740. I agree that inmates do not lose *all* of their constitutional rights by virtue of their status as inmates. However, this conclusion by no logical path leads to the corollary that a state statute is intended to apply to prisoners. This holds especially in light of § 303's exclusion of "establishments not in fact open to the public," plus the majority's observation that the CRA's protection against sex discrimination exceeds the expressed scope of our state constitution.

Special Orders

SPECIAL ORDERS

Order Entered November 9, 1998:

PEOPLE v NEAL, Docket No. 209603. The Court orders that a special panel shall be convened pursuant to MCR 7.215(H) to resolve the conflict between this case and *People v Gaines*, 223 Mich App 230; 566 NW2d 35 (1997).

The Court further orders that the opinion in this case released October 30, 1998, is hereby vacated.

The appellant may file a supplemental brief within 28 days of the clerk's certification of this order. Appellee may file a supplemental brief within 21 days of service of appellant's brief. Nine copies must be filed with the Clerk of the Court.

PEOPLE v NEAL

Docket No. 209603. Released October 30, 1998, at 9:05 A.M.; vacated November 9, 1998.

Before: CORRIGAN, C.J., and MACKENZIE and R. P. GRIFFIN*, JJ.

CORRIGAN, C.J. The prosecution appeals by right the order vacating defendant's convictions of three counts of assaulting an employee of a place of confinement, MCL 750.197c; MSA 28.394(3), because, although proving that defendant was a prison inmate, the prosecution failed to prove that he was "lawfully" imprisoned. In *People v Gaines*, 223 Mich App 230; 566 NW2d 35 (1997), this Court held that, for purposes of the instant offense, a rational trier of fact could not find beyond a reasonable doubt that an inmate was lawfully imprisoned on the basis of evidence that he was incarcerated in a state prison. We therefore affirm under *Gaines*. But for our obligation under MCR 7.215(H)(1) to follow *Gaines*, however, we would vacate the trial court's order and reinstate defendant's convictions.

I

This case arises from an altercation between inmates and guards at the Gus Harrison Correctional Facility, a state prison located in Adrian. The prosecution charged defendant with three counts of assault with intent to do great bodily harm less than murder (AGBH), MCL 750.84; MSA 28.279, for his role in the melee. At the close of evidence, the prosecutor requested an additional instruction on the offense of assault of an

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

employee of a place of confinement. The trial court granted the request. The jury acquitted defendant of AGBH, but found him guilty of three counts of assaulting an employee of a place of confinement. The trial court enhanced defendant's sentences as a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, and sentenced him to a term of imprisonment of five to fifteen years for each conviction.

Defendant subsequently moved to set aside his convictions and dismiss the charges because of insufficient evidence. The trial court granted the motion, reasoning as follows:

> The prosecution, at trial, proved that defendant was a prison inmate at the time the offense occurred but it did not offer a copy of his Judgment of Setence [sic] or any other evidence to establish that such imprisonment was lawful. On April 25, 1997, the court decided *People v Gains* [sic], 223 Mich App 230, 566 NW2d 35 (1997), which was released for publication on July 16, 1997. In that case, a divided panel of the Michigan Court of Appeals by 2 to 1 vote, decided that the legislature specifically chose to require the prosecution to prove that the defendant was lawfully confined in prison in order to sustain a conviction. The Court of Appeals ruled that their proof that he was an inmate was insufficient.
>
> The prosecutor proved defendant, Dashone Neal, was a prison inmate, but did not prove he was lawfully imprisoned.
>
> Defendant's conviction [sic] shall be vacated and the defendant discharged as to these charges.

II

The prosecution argues that the trial court erred in granting defendant's motion because evidence that defendant was a prison inmate at the time he assaulted the prison guards was sufficient to prove that he was lawfully imprisoned. We agree, but are required to hold otherwise by MCR 7.215(H)(1).

In reviewing the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). To support a conviction of assault of an employee of a place of confinement, the prosecution must prove that the defendant: (1) was lawfully imprisoned in a place of confinement; (2) used violence, threats of violence, or dangerous weapons to assault an employee of the place of confinement or other custodian; and (3) knew that the victim was an employee or custodian. MCL 750.197c; MSA 28.394(3); *People v Williams*, 173 Mich App 312, 318; 433 NW2d 356 (1988); *People v Norwood*, 123 Mich App 287, 294-295; 333 NW2d 255 (1983).

In *Gaines*, *supra* at 234, this Court, after concluding that lawful imprisonment was an element of the offense of assault of an employee of a place of confinement, determined that evidence of the defendant's incar-

ceration in a state prison was insufficient to prove the lawfulness element because a rational trier of fact could not infer lawfulness from the imprisonment itself. *Gaines* further noted that the prosecution could have easily satisfied its burden by introducing the defendant's judgment of sentence for the crime for which he was imprisoned.

Judge D. A. BURRESS concurred in the majority opinion, but wrote separately to expound on the underlying facts. Judge BURRESS emphasized that the prosecution did not produce evidence of the defendant's prior convictions and sentences until the habitual offender phase of the trial. He rejected the prosecution's argument that the jury could infer lawfulness from the incarceration itself and observed as follows:

> The prosecution has available to it many avenues by which it may prove that an individual has been lawfully incarcerated. Some are more cumbersome to navigate than others. For instance, it may elect to bring forward witnesses who were present at the time a sentence was imposed, or those who were present when an individual was otherwise confined by lawful authority. Others may take the more convenient route of simply producing a certified record of the sentence or other commitment. [*Id.* at 238-239.]

Judge SAWYER dissented from the majority opinion in *Gaines*. Viewing the evidence in a light most favorable to the prosecution, Judge SAWYER concluded at 240:

> In the case at bar, I am satisfied that a rational trier of fact could conclude that defendant was lawfully imprisoned on the basis of the fact of his imprisonment and that none of the evidence suggested that the imprisonment was unlawful. Cf. *People v Williams* [*supra*]. While unlawful incarceration may occur, it is certainly a rare occurrence. In the absence of any suggestion to the contrary, a rational trier of fact could reasonably infer that an incarceration is lawful.

In this case, as in *Gaines*, the prosecution presented no evidence beyond the incarceration itself to establish that defendant was lawfully imprisoned. Accordingly, under *Gaines*, the prosecution failed to present sufficient evidence to support the convictions. Thus, the trial court properly vacated the convictions.

III

If we were not obligated under MCR 7.215(H)(1) to follow *Gaines*, we would vacate the trial court's order and reinstate defendant's convictions because the prosecution presented sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant was lawfully imprisoned. We would follow the reasoning of Judge SAWYER's dissent and conclude that a rational trier of fact could find that defendant was lawfully imprisoned on the basis of evidence that he was, in fact, incarcerated in a state prison when he assaulted the prison guards.

We initially agree with *Gaines* that the prosecution must establish the lawfulness of the imprisonment as part of its prima facie case of assault of an employee of a place of confinement. MCL 750.197c; MSA 28.394(3) expressly so provides:

> A person lawfully imprisoned in a jail, other place of confinement established by law for any term, or lawfully imprisoned for any purpose at any other place, including but not limited to hospitals and other health care facilities or awaiting examination, trial, arraignment, sentence, or after sentence awaiting or during transfer to or from a prison, for a crime or offense, or charged with a crime or offense who, without being discharged from the place of confinement, or other lawful imprisonment by due process of law, through the use of violence, threats of violence or dangerous weapons, assaults an employee of the place of confinement or other custodian knowing the person to be an employee or custodian or breaks the place of confinement and escapes, or breaks the place of confinement although an escape is not actually made, is guilty of a felony.

Both Michigan courts and courts of other jurisdictions have historically construed statutes requiring "lawful" imprisonment, detention, or commitment as providing that lawfulness is an element of the prosecution's prima facie case. See *People v Hamaker*, 92 Mich 11, 16; 52 NW 82 (1892); see, generally, Perkins, Criminal Law (2d ed), ch 5, § 3a, pp 502-503; 4 Torcia, Wharton's Criminal Law (15th ed), § 640, pp 451-453. Further, when the Legislature amended the prison escape statute, MCL 750.193; MSA 28.390, to eliminate the lawfulness element,[1] the Legislature did not similarly amend MCL 750.197c; MSA 28.394(3). Thus, lawfulness remains an element of the prosecution's prima facie case in prosecutions under MCL 750.197c; MSA 28.394(3).

We disagree, however, with *Gaines*' determination regarding the quantum of evidence necessary to prove lawfulness when the defendant is incarcerated in a state prison. Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of an offense. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Were we to consider this issue as a matter of first impression, we would conclude that a jury could reasonably infer lawful imprisonment from evidence that the defendant was incarcerated in a state prison.

MCL 750.197c; MSA 28.394(3) applies to persons "lawfully imprisoned in a jail, other place of confinement established by law for any term, or lawfully imprisoned for any purpose at any other place . . . ." Thus, the statute applies to persons incarcerated in both jails and state prisons, which are places "of confinement established by law for any term." *People v*

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[1] This Court has held that unlawful imprisonment remains an affirmative defense to a charge of prison escape. *People v Hurst*, 59 Mich App 441, 443-446; 229 NW2d 492 (1975).

Wingo, 95 Mich App 101, 104; 290 NW2d 93 (1980). State prisons are, however, far more selective in their admission criteria than jails. The jury may rely on its common knowledge that a person must have been convicted of a crime to attain prison inmate status.[2] *People v Schmidt*, 196 Mich App 104, 108; 492 NW2d 509 (1992); CJI2d 3.5(9). Thus, the jury may reasonably infer that a defendant was lawfully imprisoned from evidence that he was incarcerated in a state prison.[3] Cf. *Wright v Mississippi*, 162 Miss 494, 499-500; 139 So 869 (1932).

This Court apparently recognized the reasonableness of this inference in *People v Williams*, *supra*. In *Williams*, *supra* at 318, this Court held that the prosecution presented sufficient evidence to support convictions of assaulting an employee of a place of confinement and of being an inmate in possession of a weapon, MCL 800.283(4); MSA 28.1623(4). It reasoned:

> The prosecution's evidence indicated that defendant was an inmate at the state prison in Marquette, that he struck prison employee Edward Humphrey on the forehead with a rolled-up magazine with a ball point pen inserted in one end sticking out two to three inches and bound with a piece of cloth, and that defendant was familiar with Humphrey as a resident unit officer responsible for prisoners in the block in which defendant was housed. Humphrey's wound left him dazed and required three stitches near his hairline. Additionally, he sustained a laceration one inch long over his left eye. The pen and magazine implement was ultimately recovered from the area of defendant's cell. In light of these proofs, the jury's verdict was well supported by the evidence.

We recognize, as Judge BURRESS notes in his concurrence in *Gaines*, that a person's incarceration in a state prison may be unlawful. See *Hamaker*, *supra*, *Cross v Dep't of Corrections*, 103 Mich App 409; 303

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[2] Michigan statutes provide that those incarcerated in a state prison must have been convicted of a crime and sentenced to a maximum term of at least a year and a day. MCL 769.28; MSA 28.1097(1); *People v Blythe*, 417 Mich 430, 437; 339 NW2d 399 (1983). When a defendant is sentenced to confinement in prison, the sheriff must not only convey the defendant from jail to prison and deliver him to the warden, MCL 800.48; MSA 28.1417, but also deliver a certified copy of the sentence prepared by the clerk of the court. MCL 800.50; MSA 28.1419, MCL 769.17; MSA 28.1087.

[3] We respectfully disagree with those courts in other jurisdictions that have reached contrary results. *Harding v Arkansas*, 248 Ark 1240; 455 SW2d 695 (1970); *Fulford v Florida*, 113 So 2d 572 (Fla App, 1959). We express no opinion regarding those decisions rejecting an inference of lawfulness from evidence of incarceration in a county jail. *Louisiana v Thompson*, 597 So 2d 26 (La App, 1992); *Maggard v Florida*, 226 So 2d 32 (Fla App, 1969), overruled on other grounds in *Florida v Williams*, 444 So 2d 13 (Fla, 1984) (holding that unlawfulness of confinement was an affirmative defense, not an element of the crime of escape).

NW2d 218 (1981), and *People v Alexander*, 39 Mich App 607; 197 NW2d 831 (1972). The prosecution need not, however, negate every theory of innocence to establish a prima facie case. See *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996). Unlawful imprisonment[4] is certainly a rare occurrence. Further, that the prosecution could proffer additional evidence, such as a judgment of conviction, to strengthen its case is of no consequence. MCL 750.197c; MSA 28.394(3) does not require a defendant to be in custody by virtue of a conviction. Compare 18 USC 751(a); *United States v Richardson*, 687 F2d 952, 966-967 (CA 7, 1982). Thus, the prosecution may, but need not, proffer a judgment of conviction or other additional evidence to prove the lawfulness of the imprisonment. The prosecution may instead simply elect to rely on a reasonable inference drawn from the defendant's incarceration in a state prison. The jury, not this Court, should weigh the evidence presented. See *People v Lemmon*, 456 Mich 625, 638; 576 NW2d 129 (1998). Accordingly, if we were not obligated to follow *Gaines*, we would hold that a reasonable jury could find on the basis of the evidence in this case that defendant was lawfully imprisoned.

Affirmed.

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[4] Imprisonment is not rendered unlawful because the conviction leading thereto is subsequently reversed or otherwise infirm. See *People v Mullreed*, 15 Mich App 538, 539; 166 NW2d 820 (1969); see, generally, Torcia, *supra*, §§ 640, 643, pp 451-454, 463-464.

INDEX-DIGEST

INDEX-DIGEST

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COURT OF CLAIMS

1. An action brought in the Court of Claims, by statute, may be joined with an action brought in a circuit court for the purpose of speedy and efficient resolution where the two actions arise out of the same transaction or series of transactions; however, the circuit court with jurisdiction over the circuit court action with which the Court of Claims action is joined may not exercise original subject-matter jurisdiction over any third-party claims filed against the state in the circuit court (MCL 600.6421; MSA 27A.6421). *Todd v Dep't of Corrections*, 232 Mich App 623.

FILING FEES

2. A trial court that has previously granted a waiver or suspension of a petitioner's obligation to pay filing fees but that has reserved the right to reinstate the obligation at the end of the case may, after investigating the petitioner's then-existing financial status at the end of the case, revoke the initial filing fee waiver and reinstate the obligation to pay the fees where it finds that the reason for the waiver no longer exists; the court may require the petitioner to

ACTIONS—Cont'd

supply any relevant financial information to aid its determination; the reinstated obligation to pay the fees may provide for the payment of the fees in installments where the court finds that the petitioner has the present or future ability to pay the fees in installments (MCR 2.002). *Lewis v Dep't of Corrections*, 232 Mich App 575.

RES JUDICATA

3. Res judicata bars relitigation of claims actually litigated and those claims arising out of the same transaction that could have been litigated; the test for determining whether two claims are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the claim. *Huggett v Dep't of Natural Resources*, 232 Mich App 188.

ADMINISTRATIVE LAW

See, also, STATUTES 1

ADMINISTRATIVE PROCEDURES ACT

1. A "rule" for purposes of the rule-promulgation requirements of the Administrative Procedures Act does not include a form with instructions, an interpretive statement, a guideline, an informal pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory; an agency policy that does not have the force and effect of law but merely interprets or explains a statute or rule need not be promulgated as a rule even if it has substantial effect on the rights of a class of people (MCL 24.207[h]; MSA 3.560[107][h]). *Faircloth v Family Independence Agency*, 232 Mich App 391.

2. Requirements in the Administrative Procedures Act for approval by the Legislature's Joint Committee on Administrative Rules of proposed administrative rules of executive agencies are invalid because they violate the separation of powers principle established in the constitution and enable the Legislature to avoid adherence to the constitutional requirements that it legislate only by bills approved by majorities of both the Senate and the House of Representatives and that all bills passed by the Legislature must be first presented to the Governor for approval before becoming law (Const 1963, arts 3, 4; MCL 24.245, 24.246; MSA 3.560[145], 3.560[146]). *Michigan State Employees Ass'n v Liquor Control Comm No 2*, 232 Mich App 456.

ADMINISTRATIVE LAW—Cont'd
JUDICIAL REVIEW
3. Exhaustion of administrative remedies is not an inflexible condition precedent to judicial consideration and may not be required where the question presented is one of law and does not call for extensive findings of fact or technical expertise. *Huggett v Dep't of Natural Resources*, 232 Mich App 188.
4. A circuit court and the Court of Appeals both review a ruling of a hearing officer in the same manner and determine whether the ruling was authorized by law or rule and if it was supported by competent, material, and substantial evidence on the whole record (MCL 791.255[4]; MSA 28.2320[55][4]). *Lewis v Dep't of Corrections*, 232 Mich App 575.

ADMINISTRATIVE PROCEDURES ACT—*See*
ADMINISTRATIVE LAW 1
STATUTES 2

ADOPTION—*See*
PARENT AND CHILD 1, 2

ADVERSE INFERENCE INSTRUCTION—*See*
SEARCHES AND SEIZURES 1, 2

AFFIDAVITS OF MERIT—*See*
LIMITATION OF ACTIONS 3

AFFIRMATIVE DEFENSES—*See*
CRIMINAL LAW 5-9, 15, 16, 19

AGENCY'S CONSTRUCTION OF STATUTES—*See*
STATUTES 1

AGENCY
FIDUCIARY'S DUTY
1. A fiduciary owes the principal a duty of good faith and may not act for personal benefit at the principal's expense during the course of the agency; all profits made in the execution of a fiduciary's agency belong to the principal; a fiduciary is accountable to the principal for any profit the fiduciary makes when the fiduciary personally acquires any pecuniary advantage from third parties by means of being

AGENCY—Cont'd
the fiduciary. *Central Cartage v Fewless*, 232 Mich App 517.

AGGRAVATING CIRCUMSTANCES—*See*
RAPE 1

AGREEMENTS CONCERNING CHILD SUPPORT—*See*
CHILDREN BORN OUT OF WEDLOCK 1, 2

ALLOCATION OF LIABILITY—*See*
INSURANCE 2, 3, 8

APPEAL
See, also, COURTS 3
CRIMINAL LAW 5-9, 10, 14, 15, 16, 19, 20
MOTIONS AND ORDERS 1, 3
PLEADING 2
RECORDS 1, 2
MOTIONS AND ORDERS
1. The Court of Appeals reviews the denial of a motion for judgment notwithstanding the verdict by viewing the evidence and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party; the jury verdict must stand if reasonable jurors could honestly have reached different conclusions. *Central Cartage v Fewless*, 232 Mich App 517.

APPROVAL BY JOINT COMMITTEE ON ADMINISTRATIVE RULES—*See*
ADMINISTRATIVE LAW 2

ARBITRATION
CONSTITUTIONAL LAW
1. The Federal Arbitration Act governs actions in both federal and state courts arising out of contracts involving interstate commerce; state courts are bound under the Supremacy Clause to enforce the substantive provisions of the act; the exclusionary clause of the act contained in 9 USC 1 that excludes application of the act to certain employees is limited to employees directly engaged in the movement of goods in interstate commerce (US Const, art

ARBITRATION—Cont'd

VI, cl 2; 9 USC 1-15). *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492.

2. The Federal Arbitration Act preempts any state law or policy that specifically invalidates arbitration agreements governed by the act; an arbitration clause in an agreement is enforceable under the act, regardless of whether a plaintiff is specifically aware of the scope of the clause, unless the plaintiff can show grounds for revocation (US Const, art VI, cl 2; 9 USC 2). *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492.

CONTRACTS

3. The parties to an arbitration agreement may provide in the agreement that certain issues are to be determined by a court instead of an arbitrator; courts should ordinarily apply basic state-law principles that govern the formation of contracts in determining whether the parties agreed to arbitrate a certain matter; any ambiguity concerning whether a specific issue falls within the scope of arbitration, such as whether a claim is timely, must be resolved in favor of submitting the question to the arbitrator for resolution; because the parties to a contract that provides for the arbitration of some issues likely gave some thought to the scope of arbitration, the law insists upon clarity before concluding that the parties did not want to arbitrate a related matter. *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226.

4. A court, to ascertain the arbitrability of an issue, must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract; any doubts about the arbitrability of an issue should be resolved in favor of arbitration. *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492.

CONTRACTUAL ARBITRATION

5. An arbitrator who conducts arbitration by agreement of the parties involved has authority to subpoena witnesses and documents to the extent provided under the parties' agreement. *Michigan State Employees Ass'n v Liquor Control Comm No 1*, 232 Mich App 66.

ARBITRATION—Cont'd
FEDERAL ARBITRATION ACT
6. The Federal Arbitration Act applies to disputes that arise out of contracts involving interstate commerce; the Supremacy Clause of the United States Constitution requires state courts to enforce the substantive provisions of the Federal Arbitration Act (US Const, art VI, cl 2; 9 USC 1 *et seq.*). *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226.
PROCEDURAL QUESTIONS
7. Under federal law, procedural questions, such as the timeliness of a claim, that grow out of a dispute and bear on its final disposition should be left to the arbitrator once it is determined that the parties are obligated to submit the subject matter of a dispute to arbitration; Michigan's strong policy favoring arbitration is in accord with federal precedent; federal and Michigan law also provides that arbitrators, rather than courts, should decide the application of such potential defenses to arbitration as contractual limitation periods, statutes of limitation, and the doctrine of laches. *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226.

ASSAULTS—*See*
INSURANCE 4

ATTORNEY FEES—*See*
PLEADING 1
RECORDS 1, 2

ATTORNEY WORK PRODUCT—*See*
RECORDS 1, 2

ATTRIBUTIONS OF DELAY—*See*
CRIMINAL LAW 5-9, 15, 16, 19

AUTHORIZED DISTRIBUTION AGENTS—*See*
INTOXICATING LIQUORS 1

BANKS AND BANKING
LENDERS
1. A fiduciary relationship generally does not arise between lender and borrower but may exist when there is a reposing of faith, confidence, and trust and the placing of reli-

BANKS AND BANKING—Cont'd
ance by one on the judgment and advice of another. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662.

BENEFITS—*See*
SOCIAL SERVICES 1

BIAS OR PREJUDICE—*See*
MOTIONS AND ORDERS 2

BORROWERS—*See*
BANKS AND BANKING 1

BREACH—*See*
CONTRACTS 3, 4

BREAKING AND ENTERING WITH INTENT TO COMMIT A FELONY—*See*
CONSTITUTIONAL LAW 1, 2

CAUSES OF ACTION—*See*
TORTS 1

CHANGES OF DECISION—*See*
DECEDENT'S ESTATES 1

CHILD SUPPORT—*See*
CHILDREN BORN OUT OF WEDLOCK 1, 2

CHILDREN BORN OUT OF WEDLOCK
CHILD SUPPORT
1. Children born outside marriage who were not the subject of a filiation order were statutorily denied the right to seek modification of support orders entered pursuant to the provisions of the now-repealed § 3 of the Paternity Act where the underlying agreement between the mother or child and the father concerning the support and education of the child did not provide for modification of the level of support (MCL 722.713; MSA 25.493). *Crego v Coleman*, 232 Mich App 285.

EQUAL PROTECTION
2. There was no substantially related state interest that would sustain the disparate treatment of children born

CHILDREN BORN OUT OF WEDLOCK—Cont'd

outside marriage who were not subject to a filiation order caused by the provisions of the now-repealed § 3 of the Paternity Act that foreclosed modification of child support orders entered pursuant to the provisions of that section; the statutory foreclosure of modification of child support orders entered pursuant to the provisions of the now-repealed § 3 of the Paternity Act with respect to children born outside marriage who were not subject to a filiation order violates the constitutional rights of equal protection of the law of those children; the provisions of the now-repealed § 3 of the Paternity Act are unconstitutional (US Const, Am XIV; Const 1963, art 1, § 2; MCL 722.713; MSA 25.493). *Crego v Coleman*, 232 Mich App 285.

CIRCUIT COURTS—*See*

ACTIONS 1

CIVIL RIGHTS ACT—*See*

CIVIL RIGHTS 1

CIVIL RIGHTS

CIVIL RIGHTS ACT

1. An action under the Civil Rights Act or the Handicappers' Civil Rights Act may be brought and maintained only by those whose rights under either act are violated; an infant who claims injury only from discriminatory conduct directed at its mother while pregnant with the infant cannot maintain an action under either act (MCL 37.1101 *et seq.*, 37.2101 *et seq.*; MSA 3.550[101] *et seq.*, 3.548[101] *et seq.*). *Burchett v Rx Optical*, 232 Mich App 174.
2. A damage remedy for violations of the state constitution may be inferred from the constitution in certain cases; no inferred remedy applies to claims of employment discrimination based on age, race, or gender or to claims of retaliation for opposing discriminatory employment practices or policies in view of remedies available under the Civil Rights Act (Const 1963, art 1, § 2; MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*). *Cremonte v Michigan State Police*, 232 Mich App 241.

PRISONS AND PRISONERS

3. A prison is a "public service" within the meaning of that term as used in article 3 of the Civil Rights Act; accordingly, prisoners may bring an action to enforce the provi-

CIVIL RIGHTS—Cont'd
sions of that article of the Civil Rights Act (MCL 37.2301[b], 37.2302[a]; MSA 3.548[301][b], 3.548[302][a]). *Neal v Dep't of Corrections (On Rehearing)*, 232 Mich App 730.

SEXUAL HARASSMENT

4. An employer is subject to vicarious liability to a victimized employee for a hostile work environment created by a supervisor; when no tangible employment action is taken against the employee, the employer may raise an affirmative defense to liability or damages by showing that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise; no affirmative defense is available when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*). *Chambers v Trettco, Inc*, 232 Mich App 560.

CLAIMS AGAINST ESTATES—*See*
DECEDENT'S ESTATES 1

COMMENCEMENT OF ACTIONS—*See*
LIMITATION OF ACTIONS 3

COMPENSATION—*See*
CONSTITUTIONAL LAW 10-12

CONDITIONS PRECEDENT—*See*
INSURANCE 1

CONSTITUTIONAL LAW
See, also, ADMINISTRATIVE LAW 2
ARBITRATION 1, 2, 4

DOUBLE JEOPARDY

1. The constitutional protection against double jeopardy on the basis of multiple punishments for the same offense is a restriction on a court's ability to impose punishment in excess of that intended by the Legislature, not a restriction on the Legislature's power to establish punishment (US

CONSTITUTIONAL LAW—Cont'd

Const, Am V; Const 1963, art 1, § 15). *People v Fox (After Remand)*, 232 Mich App 541.

2. The conviction both of the offense of jail escape and of the offense of breaking and entering with intent to commit a felony, where the predicate offense of the breaking and entering charge is the jail escape, does not violate the constitutional prohibition against double jeopardy; there is no indication that the Legislature did not intend that these two offenses should not be considered to be separate and distinct and subject to separate conviction and punishment (US Const, Am V; Const 1963, art 1, § 15; MCL 750.110, 750.197[2]; MSA 28.305, 28.394[2]). *People v Fox (After Remand)*, 232 Mich App 541.

DUE PROCESS

3. A criminal defendant has a due process right of access to evidence in the possession of the prosecution that might lead a jury to entertain a reasonable doubt about the defendant's guilt; this right of access extends to evidence that would materially affect the credibility of a prosecution witness. *People v Lester*, 232 Mich App 263.
4. A criminal defendant who claims a due process right of access to evidence in the possession of the prosecution must prove that the state possessed evidence favorable to the defendant, that the defendant did not possess the evidence and could not have obtained it with any reasonable diligence, that the prosecution suppressed the favorable evidence, and that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 263.
5. The failure of a prosecutor to provide a defendant with access to evidence that would impeach a prosecution witness, which access is required under the constitutional guarantee of due process, will warrant a new trial if the undisclosed evidence is material; such undisclosed evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *People v Lester*, 232 Mich App 263.
6. A prosecutor has an obligation under the Due Process Clause of the Fourteenth Amendment to report to a defendant and to a trial court perjury by a prosecution witness in proceedings against the defendant, including per-

CONSTITUTIONAL LAW—Cont'd

jured testimony relating to the witness' credibility; a prosecutor's failure to correct perjured testimony by a prosecution witness at a jury trial will require a new trial if the false testimony could in any reasonable likelihood have affected the judgment of the jury (US Const, Am XIV). *People v Lester*, 232 Mich App 263.

EQUAL PROTECTION

7. The rational basis test is employed by courts when considering an equal protection claim raised by one who is not a member of a protected class or does not allege a violation of a fundamental right (US Const, Am XIV; Const 1963, art 1, § 2). *Saginaw Co v People's Garbage Disposal, Inc*, 232 Mich App 202.

8. A constitutional challenge to a statute on equal protection grounds on the basis that the statute utilizes a classification scheme based on whether a child is legitimate or illegitimate is subject to the heightened scrutiny of the substantial relationship test, under which a statutory classification will be struck down as unconstitutional unless it is substantially related to the achievement of an important governmental objective (US Const, Am XIV; Const 1963, art 1, § 2). *Crego v Coleman*, 232 Mich App 285.

HEADLEE AMENDMENT

9. The amount of a regulatory fee must be reasonably related to the value of the service or benefit conferred, and a regulatory fee will be deemed to be a tax for which voter approval is required by the Headlee Amendment where the revenue generated by the regulation exceeds the cost of the regulation (Const 1963, art 9, § 31). *Saginaw Co v People's Garbage Disposal, Inc*, 232 Mich App 202.

MUNICIPAL CORPORATIONS

10. A taking may be found where a land use regulation denies an owner economically viable use of the land; a taking for which compensation is due will be recognized where a land use regulation goes too far in regulating an owner's use of real property, even if the regulation is enacted pursuant to legislative authority and has a valid police power purpose. *Adams Outdoor Advertising v East Lansing*, 232 Mich App 587.

11. Enforcement of a municipal sign code that provides that any existing signs on the effective date of the code or any amendment thereto that does not at that time comply with

CONSTITUTIONAL LAW—Cont'd
all the code provisions or amendments thereto shall not be placed, maintained, or displayed after a certain future date may result in a taking for which compensation may be due even though the code gives the sign owner a reasonable period to comply with the ordinance and recover a substantial return on the owner's investment. *Adams Outdoor Advertising v East Lansing*, 232 Mich App 587.

12. The government may effectively "take" a person's property by overburdening it with regulations; land use regulations effectuate a taking in two general situations: where the regulation does not substantially advance a legitimate state interest or where it denies an owner economically viable use of the land; the latter situation is further subdivided into categorical takings, where the owner is deprived of all economically beneficial or productive use of the land and should automatically recover for the taking, or a taking recognized on the basis of the traditional balancing test whereby a reviewing court must engage in an ad hoc, factual inquiry centering on three factors: the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct investment-backed expectations; although there is no set formula for determining when a taking has occurred under the balancing test, the question whether the regulation denies the owner economically viable use of the land requires at least a comparison of the value removed with the value that remains. *Adams Outdoor Advertising v East Lansing*, 232 Mich App 587.

CONTAMINATION OF GROUNDWATER—*See*
INSURANCE 2, 3, 8

CONTRACTORS' LIENS—*See*
EQUITY 2

CONTRACTS—*See*
ARBITRATION 3, 6, 7
EQUITY 3
LIMITATION OF ACTIONS 1, 4

CONTRACTS

ACCRUAL OF ACTIONS

1. A plaintiff need not know of the invasion of a legal right in order for a claim thereon to accrue and may not delay action regarding violated legal rights until a subsequent appellate court decision inspires action. *Adams v City of Detroit*, 232 Mich App 701.
2. A breach of contract claim accrues on the date of the breach, not on the date the breach is discovered. *Adams v City of Detroit*, 232 Mich App 701.

BREACH

3. Damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662.

LENDERS

4. The duty of good faith imposed upon contracting parties does not compel a lender to surrender rights that it has been given by statute or by the terms of its contract. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662.

CONTRACTUAL ARBITRATION—*See*

ARBITRATION 5

COUNTIES

ORDINANCES

1. A county board of commissioners is statutorily empowered to pass ordinances that relate to county affairs and do not contravene the general law of the state or interfere with the local affairs of a township, city, or village within the limits of the county; such authority is liberally construed to include powers fairly implied and not prohibited by the state constitution (Const 1963, art 7, § 34; MCL 46.11[m]; MSA 5.331[m]). *Saginaw Co v People's Garbage Disposal, Inc*, 232 Mich App 202.

TAX OR FEE COLLECTION

2. A county does not improperly delegate legislative authority to private entities in requiring them to collect a tax or fee as required under an ordinance where the ordinance merely imposes a ministerial duty of collection and does not provide the private entities with discretion to decide

COUNTIES—Cont'd
how much to collect and from whom. *Saginaw Co v People's Garbage Disposal, Inc*, 232 Mich App 202.

COUNTY COMMISSIONERS—*See*
ELECTIONS 1

COUNTY PROSECUTORS—*See*
RECORDS 1, 2

COURT OF CLAIMS—*See*
ACTIONS 1
COURTS 2, 4

COURT RULES—*See*
PLEADINGS 1

COURTS
ATTORNEY FEE AWARDS
1. A trial court's award of attorney fees must be more searching than simply approving or disapproving the calculation of others; factors that bear on an inquiry include the professional standing and experience of the attorney, the skill, time, and labor reasonably involved, the amount in question and the results achieved, the difficulty of the case, the expenses incurred, and the nature and length of the professional relationship with the client. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633.

COURT OF CLAIMS
2. The Court of Claims has exclusive jurisdiction over claims made against the state, including third-party claims against the state; a complaint seeking from the state either damages alone or damages and equitable relief must be filed in the Court of Claims (MCL 600.6419; MSA 27A.6419). *Todd v Dep't of Corrections*, 232 Mich App 623.

JURISDICTION
3. The Court of Appeals has jurisdiction in an appeal as of right from a trial court's final order disposing of all the claims in a case to consider a party's challenge to a prior order in the case granting partial summary disposition that was not a final order; an order granting partial summary disposition is not a final order if it provides that the trial court will conduct further proceedings to determine whether further relief should be granted with regard to the

COURTS—Cont'd
claims for which summary disposition is being granted. *Faircloth v Family Independence Agency*, 232 Mich App 391.
4. Lack of subject-matter jurisdiction may be raised at any time; when a court is without jurisdiction of the subject matter, any action with respect to a cause, other than dismissal of the cause, is absolutely void. *Todd v Dep't of Corrections*, 232 Mich App 623.

CRIMINAL LAW
See, also, CONSTITUTIONAL LAW 1, 2
EVIDENCE 1, 2
LIMITATION OF ACTIONS 2
SEARCHES AND SEIZURES 1, 2
DESTRUCTION OF POLICE PROPERTY
1. The wilful and malicious destruction of a jail window will not support a conviction of the felony of destruction of personal property of a police department, a jail window being real property rather than personal property and the statute specifically limiting its scope to the destruction of personal property (MCL 750.337b; MSA 28.609[2]). *People v Fox (After Remand)*, 232 Mich App 541.
DUE PROCESS
2. A defendant must first demonstrate prejudice in order to establish a due process violation in the context of prearrest delay; the prosecution then bears the burden of persuading the court that the reason for the delay was sufficient to justify the resulting prejudice; the court evaluating the reason for the delay may consider the explanation for the delay, whether it was deliberate, and whether undue prejudice attached to the defendant. *People v McIntire*, 232 Mich App 71.
3. A prosecutor does not violate due process by refusing to seek an indictment until satisfied that guilt beyond a reasonable doubt can be established; investigative delay, as opposed to delay that is intended to gain a tactical advantage over a defendant, generally does not violate due process. *People v McIntire*, 232 Mich App 71.
ENTRAPMENT
4. Entrapment will be found where the police engage in impermissible conduct that would induce a law-abiding person to commit a crime or where the police engage in

CRIMINAL LAW—Cont'd

conduct so reprehensible that it cannot be tolerated; reprehensible and intolerable conduct by the police includes the commission by the police of criminal, dangerous, or immoral acts in an effort to furnish a target with the opportunity to commit an offense. *People v Connolly*, 232 Mich App 425.

INEFFECTIVE ASSISTANCE OF COUNSEL

5. Ineffective assistance of counsel cannot be found without evidence of prejudice to the defendant. *People v Crawford*, 232 Mich App 608.

INMATES

6. A trial court's attributions of delay in the prosecution of an outstanding charge against a person incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison is reviewed on appeal for clear error (MCL 780.131; MSA 28.969[1]; MCR 6.004[D][1]). *People v Crawford*, 232 Mich App 608.

7. Delay greater than the 180 days allowed by statute in the prosecution of an outstanding charge against a person incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison may not violate the 180-day rule where the prosecutor has taken good-faith action to promptly ready the case for trial (MCL 780.131; MSA 28.969[1]; MCR 6.004[D][1]). *People v Crawford*, 232 Mich App 608.

8. Among the delays in the prosecution of an outstanding charge against a person incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison that may be attributed to the defendant are delay stemming from adjournment requested by the defendant and delay caused by stipulated adjournment (MCL 780.131; MSA 28.969[1]; MCR 6.004[D][1]). *People v Crawford*, 232 Mich App 608.

JURY INSTRUCTIONS

9. A defendant asserting an affirmative defense must produce some evidence regarding all elements of the defense before the trial court is required to instruct the jury with regard to the affirmative defense. *People v Crawford*, 232 Mich App 608.

NEW TRIAL

10. The Court of Appeals, when reviewing a trial court's ruling on a motion for a new trial on the asserted ground that

CRIMINAL LAW—Cont'd

the verdict was against the great weight of the evidence, may not attempt to resolve anew questions involving the credibility of trial witnesses. *People v Gadomski*, 232 Mich App 24.

11. The Court of Appeals reviews for abuse of discretion a trial court's grant or denial of a defendant's motion for a new trial based on newly discovered evidence. *People v Lester*, 232 Mich App 263.

12. A motion for a new trial based on newly discovered evidence may be granted upon a showing that the evidence itself, not merely its materiality, is newly discovered, that the evidence is not merely cumulative, that the evidence is such as to render a different result probable on retrial, and that the defendant could not with reasonable diligence have produced it at trial. *People v Lester*, 232 Mich App 263.

PREARREST DELAY

13. A defendant's claim that prearrest delay prejudiced the defendant's right to a fair trial such that a motion to dismiss the charge should be granted is evaluated under a two-part test: first, the defendant must demonstrate actual and substantial prejudice to the right to a fair trial and, second, if actual and substantial prejudice is shown, the prosecution must persuade the trial court that the reason for the delay is sufficient to justify whatever prejudice resulted; prejudice must not be merely speculative and must meaningfully impair the defendant's ability to defend against the charge; delay caused by the need for further investigation justifies resultant prejudice, while delay for tactical advantage over the defendant does not. *People v Adams*, 232 Mich App 128.

RES GESTAE WITNESSES

14. The res gestae witness statute requires the prosecution to notify defendants of the existence of known res gestae witnesses and to provide defendants with assistance in locating such witnesses; the statute does not require the prosecution to exercise due diligence to discover the names of witnesses (MCL 767.40a; MSA 28.980[1]). *People v Gadomski*, 232 Mich App 24.

SOLICITATION OF MURDER

15. Renunciation is an affirmative defense to solicitation of murder and is established with a preponderance of the evi-

CRIMINAL LAW—Cont'd

dence indicating that the defendant, under circumstances manifesting a voluntary and complete renunciation of criminal purpose, notified the solicitee of the defendant's intent to renounce and either warned and cooperated with law enforcement officials or engaged in other substantial efforts to prevent the solicited event from occurring (MCL 750.157b[4]; MSA 28.354[2][4]). *People v Crawford*, 232 Mich App 608.

16. Solicitation to commit murder occurs when the solicitor purposely seeks to have someone killed and tries to engage someone to do the killing (MCL 750.157b; MSA 28.354[2]). *People v Crawford*, 232 Mich App 608.

STATUTORY IMMUNITY

17. One who claims statutory immunity from prosecution must come within the terms of the statute, including both those terms that are express in the statute and those that are necessarily implied from the purpose and context of the statute. *People v McIntire*, 232 Mich App 71.

TRIAL

18. A defendant in a criminal trial is entitled to a neutral and detached magistrate; the test is whether partiality could have influenced the jury to the detriment of the defendant's case; judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases generally do not support a challenge for partiality; expressions of impatience, dissatisfaction, annoyance, or anger that are within the bounds of what imperfect people sometimes display does not establish partiality. *People v McIntire*, 232 Mich App 71.

19. The Court of Appeals, in reviewing a trial court's decision regarding a motion for a directed verdict, views the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt; circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Crawford*, 232 Mich App 608.

WITNESSES

20. A trial court's decision to allow the late endorsement of a witness is reviewed for abuse of discretion; an abuse of

CRIMINAL LAW—Cont'd
discretion exists when the trial court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Gadomski*, 232 Mich App 24.

CRIMINAL PROSECUTIONS—*See*
CONSTITUTIONAL LAW 3-6

DAMAGES—*See*
CIVIL RIGHTS 2
CONTRACTS 3, 4

DECEDENT'S ESTATES
CLAIMS AGAINST ESTATES
1. A claim against a decedent's estate that has been deemed allowed as a consequence of the personal representative's failure to disallow it within the statutory period for delivering or mailing notice of action on the claim may be disallowed subsequently by the personal representative, who must notify the claimant of the change in decision; the claimant then has a right to an adjudication of the claim upon a timely request filed in the probate court; an untimely notice of disallowance operates as a proper notice of change of decision by a personal representative with regard to a claim deemed allowed as a result of an untimely notice of disallowance (MCL 700.717[1]; MSA 27.5717[1]). *In re Gaytan Estate*, 232 Mich App 332.

DELEGATION OF POWERS—*See*
COUNTIES 1, 2

DESTRUCTION OF POLICE PROPERTY—*See*
CRIMINAL LAW 1

DIRECTED VERDICTS—*See*
CRIMINAL LAW 5-9, 15, 16, 19
MOTIONS AND ORDERS 1, 3

DISABILITY ASSISTANCE PROGRAM—*See*
SOCIAL SERVICES 1

DISCOVERY BY DEFENDANTS—*See*
CONSTITUTIONAL LAW 3-6

DISMISSAL OF ACTIONS—*See*
PRETRIAL PROCEDURE 2

DISMISSAL WITH PREJUDICE—*See*
INSURANCE 1

DISMISSAL WITHOUT PREJUDICE—*See*
INSURANCE 1

DISQUALIFICATION OF JUDGES—*See*
MOTIONS AND ORDERS 2

DOUBLE JEOPARDY—*See*
CONSTITUTIONAL LAW 1, 2

DUE PROCESS—*See*
CONSTITUTIONAL LAW 3-6
CRIMINAL LAW 2, 3, 17, 18

ELECTIONS
COUNTY COMMISSIONERS
1. A candidate for the office of county commissioner must be a resident and registered voter of the district the candidate seeks to represent as of the date the candidate files an affidavit of identification with the county clerk's office (MCL 46.411; MSA 5.359[11]). *Gallagher v Keefe*, 232 Mich App 364.

ELIGIBILITY—*See*
SOCIAL SERVICES 1

EMPLOYER LIABILITY—*See*
CIVIL RIGHTS 4

EMPLOYMENT DISCRIMINATION—*See*
CIVIL RIGHTS 2

ENVIRONMENT
SOLID WASTE MANAGEMENT ACT
1. The solid waste management act preempts only those local regulations that attempt to regulate landfill location

ENVIRONMENT—Cont'd
and development (MCL 324.11538; MSA 13A.11538). *Saginaw Co v People's Garbage Disposal, Inc*, 232 Mich App 202.

WETLAND PROTECTION ACT
2. The farming exemption from the permit requirements of the wetland protection act applies only to wetlands already in agricultural use and therefore does not apply to wetlands for which a not yet existing agricultural use is proposed (MCL 324.30305[2][e]; MSA 13A.30305[2][e]). *Huggett v Dep't of Natural Resources*, 232 Mich App 188.

ENVIRONMENTAL POLLUTION—*See*
INSURANCE 2, 3, 8

EQUAL PROTECTION—*See*
CHILDREN BORN OUT OF WEDLOCK 1, 2
CONSTITUTIONAL LAW 7, 9

EQUITABLE CLAIMS—*See*
EQUITY 2

EQUITY
LACHES
1. Laches, as a defense to an action for quo warranto, involves a determination whether the action was commenced within a reasonable time, taking into account the excuse for delay, the probable harm to the defendant, and the detriment to the public, *Gallagher v Keefe*, 232 Mich App 364.

LICENSES
2. The provision of the residential builder's licensing act that prevents an unlicensed builder from bringing suit for a money judgment does not bar such a builder from seeking that a plaintiff that has brought an equitable action do equity before any relief is granted; accordingly, a court, before granting a plaintiff the equitable relief of an order granting the plaintiff title clear of a builder's construction lien filed by an unlicensed residential builder, must determine whether equity requires that the plaintiff first do equity by compensating the unlicensed builder for any improvements made to the property (MCL 339.2412; MSA 18.425[2412]). *Republic Bank v Modular One LLC*, 232 Mich App 444.

EQUITY—Cont'd

LIMITATION OF ACTIONS

3. Equitable estoppel arises when one party has knowingly concealed or falsely represented a material fact, while inducing another's reasonable reliance on that misrepresentation, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position; although the doctrine may bar the use of a statute of limitation as a defense to a contract claim, the Supreme Court has been reluctant to recognize an estoppel in the absence of conduct clearly designed to induce the plaintiff to refrain from bringing the action within the period fixed by statute. *Adams v City of Detroit*, 232 Mich App 701.

EVIDENCE

See, also, SEARCHES AND SEIZURES 1, 2

CRIMINAL LAW

1. A defendant is entitled to have disclosed to the jury a testifying accomplice's guilty plea to a reduced charge or receipt of a grant of immunity, but reasonable limits may be imposed on cross-examination regarding those issues. *People v McIntire*, 232 Mich App 71.

2. Rebuttal evidence is admissible to contradict, repel, explain, or disprove evidence produced by the other party and tending directly to weaken or impeach it; whether rebuttal is proper depends on what proofs the defendant introduced and not merely on what the defendant testified about on cross-examination; the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant; as long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. *People v McIntire*, 232 Mich App 71.

PAROL EVIDENCE

3. A finding that parties intended a written instrument to be a complete expression of their agreement with respect to matters covered is a prerequisite to the application of the parol evidence rule; extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on the threshold question whether the written instru-

EVIDENCE—Cont'd
ment is such an integrated agreement. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662.

EXAMINATIONS UNDER OATH—*See*
INSURANCE 1

EXCLUSIONS—*See*
INSURANCE 2, 3, 8

EXHAUSTION OF ADMINISTRATIVE REMEDIES—*See*
ADMINISTRATIVE LAW 3

FALSE TESTIMONY BY PROSECUTION WITNESSES—*See*
CONSTITUTIONAL LAW 3-6

FARMING EXEMPTION—*See*
ENVIRONMENT 2

FEDERAL ARBITRATION ACT—*See*
ARBITRATION 1, 2, 4

FEES—*See*
PRISONS AND PRISONERS 1

FIDUCIARY RELATIONSHIPS—*See*
BANKS AND BANKING 1

FILING FEES—*See*
ACTIONS 2

FINDINGS OF FACT—*See*
WORKER'S COMPENSATION 1

FIRST-DEGREE CRIMINAL SEXUAL CONDUCT—*See*
RAPE 1

FREEDOM OF INFORMATION ACT—*See*
RECORDS 1, 2

FRIVOLOUS CLAIMS AND DEFENSES—*See*
PLEADING 1

GENERAL PROPERTY TAX ACT—*See*
TAXATION 1-4

GOOD FAITH—*See*
CONTRACTS 3

GRAND JURY
WITNESSES
1. An objective of the statute regarding the granting of immunity to a witness compelled to testify before a one-man grand jury is to assist in the discovery of crime; therefore, a necessary component of the induced testimony is that it be truthful; the reference in the statute to a witness' obligation to provide an "answer" in exchange for immunity does not mean any utterance of words in reply, but refers to a truthful answer; an immunity agreement is void where the witness does not give truthful answers during immunized testimony (MCL 767.6; MSA 28.946). *People v McIntire*, 232 Mich App 71.

HABITUAL OFFENDERS—*See*
SENTENCES 2

HANDICAPPERS' CIVIL RIGHTS ACT—*See*
CIVIL RIGHTS 1

HEADLEE AMENDMENT—*See*
CONSTITUTIONAL LAW 7, 9

HOSTILE WORK ENVIRONMENT—*See*
CIVIL RIGHTS 4

ILLEGITIMACY—*See*
CONSTITUTIONAL LAW 8

IMMUNITY—*See*
GRAND JURY 1

IMPEACHMENT EVIDENCE—*See*
CONSTITUTIONAL LAW 3-6

INDICTMENTS—*See*
CRIMINAL LAW 2, 3, 17, 18

INFANTS—*See*
CIVIL RIGHTS 1
MASTER AND SERVANT 1

INJUNCTIONS
See, also, TORTS 1
DISCRETIONARY RELIEF
1. Injunctive relief is an extraordinary remedy that is issued at the discretion of a trial court and only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. *Kernen v Homestead Development Co*, 232 Mich App 503.
FACTORS
2. Factors considered in determining the propriety of issuing an injunction include the nature of the interest to be protected, the relative adequacy to the plaintiff of injunction and of other remedies, any unreasonable delay by the plaintiff in bringing suit, any related misconduct on the part of the plaintiff, the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, the interests of third persons and of the public, and the practicability of framing and enforcing the order or judgment. *Kernen v Homestead Development Co*, 232 Mich App 503.

INMATES—*See*
CRIMINAL LAW 5-9, 15, 16, 19

INSTALLMENT PAYMENTS—*See*
PRETRIAL PROCEDURE 1

INSURANCE BENEFITS—*See*
INSURANCE 2, 3, 8

INSURANCE
ACTIONS
1. Language in a homeowner's insurance policy that clearly establishes that, when requested by the insurer, an examination of the insured under oath is a condition precedent that must be satisfied before the insured has a right to bring an action against the insurer is generally valid and enforceable; an action against an insurer brought by an insured who has failed or refused to submit to an examina-

INSURANCE—Cont'd

tion under oath requested by the insurer must be dismissed; dismissal must be with prejudice where the noncompliance was wilful and without prejudice where the noncompliance was not wilful; wilful noncompliance is a failure or refusal to submit to an examination under oath or otherwise cooperate with an insurer in regard to contractual provisions allowing an insurer to investigate a claim that is part of a deliberate effort to withhold material information or a pattern of noncompliance with the insurer; the burden is on the insured to demonstrate that the insured has not deliberately withheld material information, as opposed to a knowing failure to submit to an examination under oath, or engaged in a pattern of noncooperation. *Thomson v State Farm Ins Co*, 232 Mich App 38.

EXCLUSIONS

2. A provision in an insurance policy excluding coverage for damage to property owned by or within the care, custody, or control of an insured does not exclude coverage for damages arising out of the contamination of the groundwater underlying the insured's property and does not prevent the recovery of the costs of the remediation of conditions on an insured property that may lead to contamination of the groundwater. *Arco Industries Corp v American Motorists Ins Co (On Second Remand)*, 232 Mich App 146.

LIABILITY INSURANCE

3. The proper method of allocation of liability for costs related to the remediation of environmental pollution among multiple insurers who issued successive comprehensive general liability policies during the period that the events that resulted in the pollution occurred is the "time-on-the-risk" method of allocation, which makes each insurer responsible for that portion of the underlying injury that occurred during the period that its policy or policies were in effect and holds an insurer liable for that percentage of the total covered damages that its periods of coverage bears to the total period during which the damages occurred. *Arco Industries Corp v American Motorists Ins Co (On Second Remand)*, 232 Mich App 146.

NO-FAULT

4. Whether an injury arises out of the use of a motor vehicle as a motor vehicle so as to be compensable pursuant to the no-fault act turns on whether the injury is closely

INSURANCE—Cont'd

related to the transportational function of motor vehicles; injury sustained by a motorist when assaulted while inspecting damage to the motorist's vehicle following an accident and exchanging information with another motorist involved in the accident is injury that is closely related to the transportational function of motor vehicles and thus is compensable under the no-fault act (MCL 257.618, 257.619, 500.3105[1]; MSA 9.2318, 9.2319, 24.13105[1]). *Morosini v Citizens Ins Co of America (On Remand)*, 232 Mich App 260.

5. A written notice by a no-fault insurer to an insured of cancellation of the policy must include a statement that the insured shall not operate or permit the operation of the vehicle for which the notice of cancellation is given, or operate any other vehicle unless the vehicle is insured as required by law; failure to include such statement in the notice of cancellation renders the cancellation notice ineffective (MCL 500.3020[5]; MSA 24.13020[5], now MCL 500.3020[6]; MSA 24.13020[6]). *Depyper v Safeco Ins Co of America*, 232 Mich App 433.

6. An action for recovery of property protection insurance benefits is subject to a one-year statute of limitations; the running of the period of limitation is not tolled when notice of a claim is given to a no-fault insurer or when parties enter into settlement negotiations (MCL 500.3145[2]; MSA 24.13145[2]). *Secura Ins Co v Auto-Owners Ins Co*, 232 Mich App 656.

POLICY LANGUAGE

7. Unambiguous contracts of insurance must be enforced as written, even if certain provisions are rendered meaningless by a plain reading of the language. *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378.

PREJUDGMENT INTEREST

8. Prejudgment interest on an award of money damages in an action by an insured to recover insurance benefits that were wrongfully denied by the insurer is, with respect to a claim of benefits that was denied by the insurer after the filing of the complaint, awarded from the date the claim was denied rather than from the date of the filing of the complaint (MCL 600.6013; MSA 27A.6013). *Arco Industries Corp v American Motorists Ins Co (On Second Remand)*, 232 Mich App 146.

INTERPRETIVE STATEMENTS—*See*
ADMINISTRATIVE LAW 1

INTOXICATING LIQUORS
See, also, SEARCHES AND SEIZURES 1, 2
LIQUOR CONTROL ACT
1. The provisions of the Liquor Control Act added by 1996 PA 440 do not require the Liquor Control Commission to promulgate new rules before selecting and appointing authorized distribution agents to operate the privatized liquor warehousing and distribution system provided for by 1996 PA 440; 1996 PA 440 requires that one seeking appointment as an authorized distribution agent under a privatized system satisfy already existing and applicable licensure qualifications created by the commission pursuant to MCL 436.7; MSA 18.977. *Michigan State Employees Ass'n v Liquor Control Comm No 2,* 232 Mich App 456.

JAIL ESCAPE—*See*
CONSTITUTIONAL LAW 1, 2

JAIL WINDOWS—*See*
CRIMINAL LAW 1

JOINDER—*See*
ACTIONS 1

JUDGMENT NOTWITHSTANDING THE VERDICT—*See*
APPEAL 1
MOTIONS AND ORDERS 1, 3

JUDICIAL CONSTRUCTION—*See*
INSURANCE 7

JUDICIAL MISCONDUCT—*See*
CRIMINAL LAW 2, 3, 17, 18

JUDICIAL REVIEW—*See*
ADMINISTRATIVE LAW 3

JURISDICTION—*See*
COURTS 2, 3, 4

JURY INSTRUCTIONS—*See*
CRIMINAL LAW 5-9, 15, 16, 19

JURY UNANIMITY—*See*
RAPE 1

KNOWLEDGE OF ARBITRATION AGREEMENT—*See*
ARBITRATION 1, 2, 4

KNOWLEDGE—*See*
CONTRACTS 1, 2

LACHES—*See*
EQUITY 1

LAND USE REGULATIONS—*See*
CONSTITUTIONAL LAW 10-12

LATE ENDORSEMENT—*See*
CRIMINAL LAW 10, 14, 20

LEGISLATIVE INTENT—*See*
TAXATION 1-4

LENDERS—*See*
BANKS AND BANKING 1
CONTRACTS 3, 4

LIABILITY INSURANCE—*See*
INSURANCE 2, 3, 8

LICENSED RECREATIONAL CAMPGROUNDS—*See*
TAXATION 1-4

LICENSED TRAILER COACH PARKS—*See*
TAXATION 1-4

LICENSES—*See*
EQUITY 2

LIMITATION OF ACTIONS
See, also, ARBITRATION 3, 6, 7
EQUITY 3
INSURANCE 6

LIMITATION OF ACTIONS—Cont'd

ACCRUAL OF ACTIONS

1. The period of limitation applicable to an action for breach of contract with regard to alleged deficient pension benefit payments begins to run from the date each payment is due; every periodic payment made that is alleged to be less than the amount due constitutes a continuing breach of contract and the limitation period runs from the date of each payment. *Adams v City of Detroit*, 232 Mich App 701.

CRIMINAL LAW

2. MCL 767.24(1); MSA 28.964(1) plainly expresses the Legislature's intent to exclude from the six-year limitation period provided therein any period during which the party charged did not usually and publicly reside within this state; the provision does not limit the tolling of the running of the period only to instances where the nonresident suspect was not amenable to process or had absconded. *People v McIntire*, 232 Mich App 71.

PLEADING

3. A civil action generally is commenced and the period of limitation applicable to the action is tolled when the complaint is filed; to commence a medical malpractice action, however, the plaintiff must also file an affidavit of merit with the complaint, because the mere tendering of a complaint without the affidavit is insufficient to commence the medical malpractice lawsuit for purposes of tolling the period of limitation; a medical malpractice complaint that was filed without an affidavit of merit before the expiration of the period of limitation may not be amended by appending an affidavit of merit to the complaint after the period of limitation has expired and have such amendment relate back to make timely the newly filed complaint (MCR 2.101[B], 2.112[L], 2.118[D]; MCL 600.2912d[1], 600.5856; MSA 27A.2912[4][1], 27A.5856). *Scarsella v Pollak*, 232 Mich App 61.

REVIVAL OF TIME-BARRED CLAIMS

4. An acknowledgment of a contractual obligation must contain an unqualified and direct admission of a present subsisting debt that the party is liable and willing to pay and must be unaccompanied by any circumstances or declarations that repel the presumption of a promise or intention to pay in order for the acknowledgment to revive a contract claim that is otherwise time-barred (MCL 600.5866;

LIMITATION OF ACTIONS—Cont'd
MSA 27A.5866). *Adams v City of Detroit*, 232 Mich App 701.

LIQUOR CONTROL ACT—*See*
INTOXICATING LIQUORS 1

LOSS OF EVIDENCE—*See*
SEARCHES AND SEIZURES 1, 2

MASTER AND SERVANT
WHISTLEBLOWERS' PROTECTION ACT
1. An action under the Whistleblowers' Protection Act may be brought and maintained only by those employees who report violations or suspected violations of law by their employers; an infant who claims injury only from retaliatory conduct directed at its mother while pregnant with the infant cannot maintain an action under the act (MCL 15.361 *et seq.*; MSA 17.428[1] *et seq.*). *Burchett v Rx Optical*, 232 Mich App 174.

MEDICAL MALPRACTICE—*See*
LIMITATION OF ACTIONS 3
NEGLIGENCE 1

MICHIGAN CONSTITUTION—*See*
CIVIL RIGHTS 2

MIDTRIAL AMENDMENT OF PLEADINGS—*See*
PLEADINGS 1

MOBILE HOMES—*See*
TAXATION 1-4

MODIFICATION OF CHILD SUPPORT AWARDS—*See*
CHILDREN BORN OUT OF WEDLOCK 1, 2

MOTION FOR DISMISSAL—*See*
CRIMINAL LAW 13

MOTIONS AND ORDERS
See, also, APPEAL 1
COURTS 3

MOTIONS AND ORDERS—Cont'd

DIRECTED VERDICTS

1. The Court of Appeals, in reviewing a trial court's ruling regarding a motion for a directed verdict, examines the testimony and all legitimate inferences that may be drawn in the light most favorable to the nonmoving party; a directed verdict is appropriate only when no factual question exists with regard to which reasonable minds may differ. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662.

DISQUALIFICATION OF JUDGES

2. The Court of Appeals, when reviewing a trial court's decision regarding a motion to disqualify a judge, reviews findings of fact for abuse of discretion and the applicability of facts to relevant law de novo; disqualification for bias or prejudice is warranted only on a showing of bias or prejudice that is both personal and extrajudicial (MCR 2.003[B][1]). *FMB-First Michigan Bank v Bailey*, 232 Mich App 711.

JUDGMENT NOTWITHSTANDING THE VERDICT

3. A motion for judgment notwithstanding the verdict may not be granted where reasonable minds can differ with regard to issues of fact; when deciding such a motion, a trial court must examine the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party; the Court of Appeals reviews a trial court's ruling regarding such a motion de novo. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662.

MOTIONS—*See*

PLEADING 2

MULTIPLE INSURERS—*See*

INSURANCE 2, 3, 8

MUNICIPAL CORPORATIONS—*See*

CONSTITUTIONAL LAW 10-12

NEGLIGENCE

MEDICAL MALPRACTICE

1. A notice of intent to sue a health professional or health facility must strictly comply with the requirements of the

NEGLIGENCE—Cont'd
statute requiring such notice in order for the two-year statute of limitations to be tolled during the presuit notice period (MCL 600.5805[4], 600.2912b[4], 600.5856[d]; MSA 27A.5805[4], 27A.2912[2][4], 27A.5856[d]). *Rheaume v Vandenberg*, 232 Mich App 417.

NEW TRIAL—*See*
CONSTITUTIONAL LAW 3-6
CRIMINAL LAW 10, 14, 20

NEWLY DISCOVERED EVIDENCE—*See*
CRIMINAL LAW 11, 12

NO-FAULT—*See*
INSURANCE 4

NONRESIDENTS—*See*
LIMITATION OF ACTIONS 2

NOTICE OF ACTION ON CLAIMS—*See*
DECEDENT'S ESTATES 1

NOTICE OF INTENT TO SUE—*See*
NEGLIGENCE 1

NOTICES OF CANCELLATION—*See*
INSURANCE 5

OFFERS OF JUDGMENT—*See*
PRETRIAL PROCEDURE 1

180-DAY RULE—*See*
CRIMINAL LAW 5-9, 15, 16, 19

PARENT AND CHILD
TERMINATION OF PARENTAL RIGHTS
1. A putative father's filing of a notice of intent to claim paternity under MCL 710.33; MSA 27.3178(555.33) does not constitute the provision of "support or care" for purposes of determining under MCL 710.39(2); MSA 27.3178(555.39)(2) whether the putative father has provided support or care. *In re Dawson*, 232 Mich App 690.

PARENT AND CHILD—Cont'd

2. A court that finds that a putative father does not fall within the provisions of MCL 710.39 (2); MSA 27.3178 (555.39) (2) must inquire into the putative father's fitness and ability to properly care for his child and determine under MCL 710.22(f); MSA 27.3178(555.22)(f) whether the best interests of the child will be served by granting custody to him; the putative father's circumstances must be examined alone, without comparison to prospective adoptive parents' circumstances, when determining the best interests of the child under § 39 (MCL 710.39[1]; MSA 27.3178[555.39][1]). *In re Dawson*, 232 Mich App 690.

PAROLE BOARD—*See*
PAROLE 1-3

PAROLE REVOCATION PROCEEDINGS—*See*
PAROLE 4

PAROLE

PAROLE BOARD

1. The Parole Board, after denying a prisoner parole, may order a continuance of more than twelve months before the prisoner is reconsidered for parole; no statute requires parole consideration at twelve-month intervals or limits the board's discretion to determine when it will reconsider a prisoner's eligibility for parole. *In re Parole of Lee*, 232 Mich App 254.
2. A Department of Corrections rule providing that when a prisoner is denied parole the next parole hearing date for that prisoner shall be no more than twelve months thereafter, 1979 AC, R 791.7710, was superseded and implicitly rescinded by 1988 AACS, R 791.7710, which provides that the next parole consideration date is to be determined by the Parole Board; the scheduling of subsequent parole hearings is discretionary under the 1988 rule. *In re Parole of Lee*, 232 Mich App 254.
3. The Parole Board must provide a prisoner denied parole a written explanation of the reason for denial; the explanation must contain sufficient detail to allow meaningful appellate review of the board's decision; the board's decision regarding parole is reviewed for an abuse of discretion (MCR 7.104[D][5][b]; MCL 791.234[7], 791.235[12]; MSA

PAROLE—Cont'd
28.2304[7], 28.2305[12]). *In re Parole of Lee*, 232 Mich App 254.

PAROLE REVOCATION PROCEEDINGS

4. No statute or administrative rule confers on a county prosecutor the right to participate or intervene in a parole revocation proceeding against a reoffending parolee; however, the Parole Board, at its discretion, may allow such intervention (MCL 791.238 *et seq.*; MSA 28.2308 *et seq.*). *In re Wayne Co Prosecutor*, 232 Mich App 482.

PARTIALITY—*See*
CRIMINAL LAW 2, 3, 17, 18

PARTICIPATION BY COUNTY PROSECUTORS—*See*
PAROLE 4

PARTIES' FAILURE TO ATTEND—*See*
PRETRIAL PROCEDURE 2

PENSION BENEFITS—*See*
LIMITATION OF ACTIONS 1, 4

PERJURY

EVIDENCE

1. Each of the elements of perjury, including the element that the defendant made a false statement, must be proved in order to obtain a conviction; that the defendant made a false statement is proved by establishing the truth of the contradiction; the prosecution must present evidence of circumstances bringing strong corroboration of the contradiction and does not satisfy its burden simply by contradicting the defendant's sworn statement. *People v McIntire*, 232 Mich App 71.

PERMITS—*See*
ENVIRONMENT 2

PLEADING

See, also, LIMITATION OF ACTIONS 3

FRIVOLOUS CLAIMS AND DEFENSES

1. Attorney fees as sanctions for pleadings signed in violation of the court rule providing that signatures on pleadings certify that the signers have read the pleadings, that the

PLEADING—Cont'd

pleadings are well grounded in fact and warranted by law, and that the pleadings are not interposed for any improper purpose, or as sanctions for frivolous claims or defenses, are not awardable to pro se litigants, including attorneys; attorney fees may be awarded pursuant to the court rule to only those litigants who incur expenses related to having attorneys other than themselves represent them (MCR 2.114 [E], [F], 2.625 [A] [2]; MCL600.2591 [1]; MSA 27A.2591 [1]). *FMB-First Michigan Bank v Bailey*, 232 Mich App 711.

MOTIONS

2. A defendant generally must serve and file an answer or take other action permitted by law or the Michigan Court Rules within twenty-one days after being served with a summons and a copy of the complaint in Michigan; if, before filing a responsive pleading, the defendant brings a motion for summary disposition under MCR 2.116 and the motion is denied, the defendant must serve and file a responsive pleading within twenty-one days after notice of the denial; if the defendant files an application for leave to appeal within twenty-one days after notice of the denial, the time for filing the responsive pleading is extended until twenty-one days after the denial of the application unless the appellate court orders otherwise (MCR 2.108[A][1],[C][1]). *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492.

PLEADINGS

MIDTRIAL AMENDMENT OF PLEADINGS

1. A party whose evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings is not allowed to amend its pleadings to conform the pleadings to the evidence unless the party satisfies the trial court that the amendment and the admission of the evidence will not prejudice the objecting party in its action or defense (MCR 2.118[C][2]). *Cremonte v Michigan State Police*, 232 Mich App 241.

POLICY LANGUAGE—*See*
INSURANCE 7

PREARREST DELAY—*See*
CRIMINAL LAW 2, 3, 17, 18

PREEMPTION OF LOCAL LANDFILL REGULATION—*See*
ENVIRONMENT 1

PREJUDGMENT INTEREST—*See*
INSURANCE 2, 3, 8

PRETRIAL PROCEDURE
OFFERS OF JUDGMENT
1. A written offer to stipulate the entry of a judgment that is unequivocal and for a specific amount and a specific rate of interest is a "sum certain" for purposes of MCR 2.405; the fact that a proposed judgment for a sum certain is to be payable in installments does not render the proposed judgment invalid or not for a sum certain. *Central Cartage v Fewless*, 232 Mich App 517.

SETTLEMENT CONFERENCES
2. A trial court has discretionary power to dismiss an action as a sanction for the plaintiff's failure to attend a scheduled settlement conference; dismissal must be on the motion of the defendant, and not on the court's own motion; dismissal is a harsh sanction that should be reserved for the most egregious violations (MCR 2.401[G][1], 2.504[B]). *Schell v Baker Furniture Co*, 232 Mich App 470.

PRISONS AND PRISONERS
See, also, CIVIL RIGHTS 3
ACTIONS
1. The reference to "public assistance" in the court rule providing for the suspension of court fees and costs with regard to a party that is receiving any form of public assistance does not include a person's receipt of shelter and subsistence benefits that are afforded to the person by the Department of Corrections while the person is a prisoner (MCR 2.002[C]). *Lewis v Dep't of Corrections*, 232 Mich App 575.

PRIVATE ENTITIES—*See*
COUNTIES 1, 2

PRO SE LITIGANTS—*See*
PLEADING 1

PROCEDURAL QUESTIONS—*See*
ARBITRATION 3, 6, 7

PROPERTY OWNED BY THE INSURED—*See*
INSURANCE 2, 3, 8

PROPERTY PROTECTION INSURANCE BENEFITS—*See*
INSURANCE 6

PROPORTIONALITY—*See*
SENTENCES 2

PROSECUTION'S OBLIGATIONS—*See*
CRIMINAL LAW 10, 14, 20

PUBLIC ASSISTANCE—*See*
PRISONS AND PRISONERS 1

PUTATIVE FATHERS—*See*
PARENT AND CHILD 1, 2

QUO WARRANTO—*See*
EQUITY 1

RAPE
FIRST-DEGREE CRIMINAL SEXUAL CONDUCT
1. The jury in a first-degree criminal sexual conduct trial need not decide unanimously which of several aggravating circumstances supported by the facts serves as the basis for conviction of the defendant (MCL 750.520b; MSA 28.788[2]). *People v Gadomski*, 232 Mich App 24.

RATIONAL BASIS—*See*
CONSTITUTIONAL LAW 7, 9

REAL PROPERTY—*See*
CONSTITUTIONAL LAW 10-12

REBUTTAL EVIDENCE—*See*
EVIDENCE 1, 2

RECONSIDERATION OF DENIAL OF PAROLE—*See*
PAROLE 1-3

RECORDS

FREEDOM OF INFORMATION ACT

1. Documents in a file maintained by a county prosecutor concerning a concluded criminal prosecution are exempt from disclosure pursuant to the Freedom of Information Act where the documents were prepared in anticipation of litigation; such documents are subject to the attorney work-product privilege and are exempt from disclosure under subsection 13(1)(i) of the act, which covers information or records that are subject to privilege recognized by statute or court rule (MCL 15.243[1][i]; MSA 4.1801[13][1][i]; MCR 2.302[B][3][a]). *Messenger v Ingham Co Prosecutor*, 232 Mich App 633.
2. The Court of Appeals reviews for abuse of discretion an award of attorney fees to a plaintiff who prevails in an action under the Freedom of Information Act; an abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment (MCL 15.231 *et seq.*; MSA 4.1801[1] *et seq.*). *Messenger v Ingham Co Prosecutor*, 232 Mich App 633.

REFUSAL OF BREATHALYZER TEST—*See*
SEARCHES AND SEIZURES 1, 2

REGULATORY FEES—*See*
CONSTITUTIONAL LAW 7, 9

REINSTATEMENT—*See*
ACTIONS 2

RENUNCIATION—*See*
CRIMINAL LAW 5-9, 15, 16, 19

RES GESTAE WITNESSES—*See*
CRIMINAL LAW 10, 14, 20

RESIDENCY—*See*
ELECTIONS 1

RESIDENTIAL BUILDER'S LICENSING ACT—*See*
EQUITY 2

REVIVAL OF TIME-BARRED CLAIMS—*See*
LIMITATION OF ACTIONS 1, 4

RIGHT TO FAIR TRIAL—*See*
CRIMINAL LAW 13

RULES—*See*
ADMINISTRATIVE LAW 1, 2

SANCTIONS—*See*
PLEADING 1

SCOPE OF AGREEMENT TO ARBITRATE—*See*
ARBITRATION 3, 6, 7

SEARCH WARRANTS—*See*
SEARCHES AND SEIZURES 1, 2

SEARCHES AND SEIZURES

EVIDENCE

1. A violation of MCL 780.655; MSA 28.1259(5) that results in the loss of relevant evidence in a criminal proceeding may warrant instructing the factfinder that it may infer that the evidence unpreserved because of the violation of the statute would have favored the defendant; to warrant an adverse inference instruction, the defendant must articulate how the loss prejudiced the defendant's case by explaining how the lost evidence might be expected to play a significant role in the defendant's defense. *People v Jagotka*, 232 Mich App 347.

INTOXICATING LIQUORS

2. The search warrant procedures provided in MCL 780.655; MSA 28.1259(5), not the procedures provided in the implied consent statute, MCL 257.625a; MSA 9.2325(1), apply to a blood sample obtained pursuant to a search warrant from a person arrested for allegedly operating a motor vehicle while under the influence of intoxicating liquor who refused to submit to a Breathalyzer test (MCL 257.625; MSA 9.2325). *People v Jagotka*, 232 Mich App 347.

SENTENCES

EVIDENCE

1. A trial court may consider the evidence admitted at trial as an aggravating factor in determining an appropriate sen-

SENTENCES—Cont'd
tence; a court may not make an independent finding of guilt and then sentence the defendant on the basis of that finding. *People v McIntire*, 232 Mich App 71.

HABITUAL OFFENDERS

2. Review by the Court of Appeals of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality without reference to the Sentencing Guidelines. *People v Crawford*, 232 Mich App 608.

SETTLEMENT CONFERENCES—*See*
PRETRIAL PROCEDURE 2

SEXUAL HARASSMENT—*See*
CIVIL RIGHTS 4

SIGN CODES—*See*
CONSTITUTIONAL LAW 10-12

SOCIAL SERVICES

DISABILITY ASSISTANCE PROGRAM

1. The Legislature's use of the terms "incapacitated," "unavailable," and "work" in the subsection of the social services appropriations acts for fiscal years 1991-92 and 1992-93 that states that a "person who is medically diagnosed as incapacitated and unavailable for work for at least 90 days" is eligible for state disability assistance program benefits indicates that factors such as age, education, and previous work experience are not to be considered under the subsection and that an applicant's capacity to work is not to be measured by the minimum number of hours that the applicant is able to sustain work activity or a minimum remunerative standard; the subsection requires an applicant to be unable to perform any remunerative work in order to be eligible for the benefits (1991 PA 111, subsection 805[1][b], 1992 PA 168, subsection 805[1][b]). *Faircloth v Family Independence Agency*, 232 Mich App 391.

SOLICITATION OF MURDER—*See*
CRIMINAL LAW 5-9, 15, 16, 19

SOLID WASTE MANAGEMENT ACT—*See*
ENVIRONMENT 1

STATUTES

ADMINISTRATIVE LAW

1. The Legislature is presumed to know of an agency's construction of a statute and adopts that construction when it reenacts the language so construed. *Faircloth v Family Independence Agency*, 232 Mich App 391.
2. The Legislature enacted the Administrative Procedures Act to provide procedural protection where a personal right, duty, or privilege is at stake; the remainder of the act is enforceable when a court finds portions of the act to be invalid where procedural protections still exist within the act in the absence of the invalid provisions (MCL 24.201 *et seq.*; MSA 3.560[101] *et seq.*). *Michigan State Employees Ass'n v Liquor Control Comm No 2*, 232 Mich App 456.

JUDICIAL CONSTRUCTION

3. A statute must be enforced as it is written if the statutory language is clear; if the statutory language is susceptible to more than one interpretation, a court must determine what the Legislature meant by the language; when the meaning of statutory language is questioned, a reasonable construction must be given by looking to the purpose subserved thereby, and the meaning must be derived from the statutory context within which the language is used; provisions of a statute must be construed in light of the other provisions of the statute in such a manner as to carry out the apparent purpose of the Legislature; statutory language should not be construed in an isolated or noncontextual manner, especially where such construction would render any statutory language surplusage, nugatory, absurd, or illogical. *People v McIntire*, 232 Mich App 71.

SUBJECT-MATTER JURISDICTION—*See*
COURTS 3

SUBPOENAS—*See*
ARBITRATION 5

SUBSTANTIAL RELATIONSHIP TEST—*See*
CONSTITUTIONAL LAW 8

SUM CERTAIN—*See*
PRETRIAL PROCEDURE 1

SUPERVISORS—*See*
CIVIL RIGHTS 4

SUPPORT OR CARE—*See*
PARENT AND CHILD 1, 2

TAKINGS—*See*
CONSTITUTIONAL LAW 10-12

TAX OR FEE COLLECTION—*See*
COUNTIES 1, 2

TAXATION

GENERAL PROPERTY TAX ACT

1. The Legislature did not intend the provisions of the mobile home exemption of subsection 2a(1) of the General Property Tax Act to be governed by the provisions of The Mobile Home Commission Act (MCL 211.2a[1]; MSA 7.2[1][1]; 1987 PA 96, MCL 125.2301 *et seq.*; MSA 19.855[101] *et seq.*). *Sandy Pines Wilderness Trails, Inc v Salem Twp*, 232 Mich App 1.
2. A dwelling or vehicle that is a trailer coach within the meaning of § 41 of 1959 PA 243, that is located within a licensed recreational campground, and that is not owned by the campgrounds is subject to the specific tax of § 41 of 1959 PA 243 and falls within the mobile home exemption of subsection 2a(1) of the General Property Tax Act (MCL 125.1041, 211.2a[1]; MSA 5.278[71], 7.2[1][1]). *Sandy Pines Wilderness Trails, Inc v Salem Twp*, 232 Mich App 1.

LICENSED TRAILER COACH PARKS

3. A licensed recreational campground is a licensed trailer coach park for the purpose of the provisions of § 41 of 1959 PA 243 (MCL 125.1041; MSA 5.278[71]). *Sandy Pines Wilderness Trails, Inc v Salem Twp*, 232 Mich App 1.

TRAILER COACHES

4. A dwelling or vehicle that is of less than four hundred square feet, that is designed as temporary living quarters for recreational, camp, seasonal, or travel use, that is built on a single chassis, is mounted on wheels, and is drawn by another vehicle, and that can be titled and registered as a

TAXATION—Cont'd
trailer coach under the Michigan Vehicle Code but can be licensed for over-the-road travel only with a special permit is an occupied trailer coach for the purpose of the provisions of § 41 of 1959 PA 243 (MCL 125.1041; MSA 5.278[71]). *Sandy Pines Wilderness Trails, Inc v Salem Twp*, 232 Mich App 1.

TAXES—*See*
CONSTITUTIONAL LAW 7, 9

TERMINATION OF PARENTAL RIGHTS—*See*
PARENT AND CHILD 1, 2

THE MOBILE HOME COMMISSION ACT—*See*
TAXATION 1-4

THIRD-PARTY CLAIMS—*See*
ACTIONS 1
COURTS 2, 4

THREATENED TORTS—*See*
TORTS 1

TORTS
THREATENED TORTS
1. An injunction may lie when a tort is merely threatened, but a cause of action for damages will not. *Kernen v Homestead Development Co*, 232 Mich App 503.

TRAILER COACHES—*See*
TAXATION 1-4

TRIAL—*See*
CRIMINAL LAW 2, 3, 17, 18

VOTER REGISTRATION—*See*
ELECTIONS 1

WAIVER—*See*
ACTIONS 2
PRISONS AND PRISONERS 1

WARNING AGAINST OPERATING UNINSURED VEHICLES—*See*
INSURANCE 5

WETLAND PROTECTION ACT—*See*
ENVIRONMENT 2

WHISTLEBLOWERS' PROTECTION ACT—*See*
MASTER AND SERVANT 1

WILFUL NONCOMPLIANCE—*See*
INSURANCE 1

WITNESS CREDIBILITY—*See*
CRIMINAL LAW 10, 14, 20

WITNESS' MOTIVATION FOR TESTIFYING—*See*
EVIDENCE 1, 2

WITNESSES—*See*
CRIMINAL LAW 10, 14, 20
GRAND JURY 1

WORDS AND PHRASES
See, also, PARENT AND CHILD 1, 2
PRETRIAL PROCEDURE 1
PRISONS AND PRISONERS 1
DURESS
1. A person claiming duress must establish that the person was illegally compelled or coerced to act by fear of serious injury to person, reputation, or fortune. *Farm Credit Services of Michigan's Heartland, PCA v Weldon,* 232 Mich App 662.

WORKER'S COMPENSATION APPELLATE COMMISSION—*See*
WORKER'S COMPENSATION 1

WORKER'S COMPENSATION MAGISTRATES—*See*
WORKER'S COMPENSATION 1

WORKER'S COMPENSATION

WORKER'S COMPENSATION MAGISTRATES

1. Findings of fact by a worker's compensation magistrate are to be considered conclusive by the Worker's Compensation Appellate Commission if they are supported by competent, material, and substantial evidence on the record. *Angel v Jahm, Inc*, 232 Mich App 341.

WRITTEN EXPLANATION FOR DENIALS OF PAROLE—

See

PAROLE 1-3